No. 04-37

In The
Supreme Court of the United States

MICHAEL CLINGMAN, GLO HENLEY, KENNETH MONROE, THOMAS PRINCE AND THE OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER, FLOYD TURNER, MINELLE L. BATSON, MARY V. BURNETT, MICHAEL L. SEYMOUR, TERRY L. BEAVER, ROBERT T. MURPHY, SHARON LYNN ATHERTON, ROGER BLOXHAM, STEVE GALPIN, RICHARD P. PRAWDZIENSKI, MICHAEL CLEM, WHITNEY L. BONTIN, JR., CHRISTOPHER S. POWELL, CHARLES A. BURRIS AND THE LIBERTARIAN PARTY OF OKLAHOMA A/K/A LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS ON THE MERITS

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REPLY BRIEF

RESPONDENTS HAVE FAILED TO SHOW THAT THE STATE OF OKLAHOMA'S SEMI-CLOSED PRIMARY IS AN IMPERMISSIBLE INFRINGEMENT ON RESPONDENTS' ASSOCIATIONAL RIGHTS.

Respondents are incorrect in their assertion that the burdens imposed on the voters and the Libertarian Political Organization ("LPO") by the State of Oklahoma's semi-closed election system are severe and that, as such, any state interests asserted must meet a compelling state interest. The burdens imposed on all of the Respondents are not severe but are important regulatory interests subject to a lesser standard. Under this appropriate standard, the semi-closed primary election system of the State of Oklahoma is constitutional and is not an improper infringement, under any standard, of any of the Respondents' First Amendment rights of political association.

A. LIKE THE TENTH CIRCUIT, RESPONDENTS HAVE FAILED TO PROVIDE A SUFFICIENT BASIS FOR OVERTURNING THE DISTRICT COURT'S FINDING THAT THE OKLAHOMA SEMI-CLOSED PRIMARY SYSTEM DOES NOT IMPOSE A SEVERE BURDEN ON RESPONDENTS' RIGHTS OF POLITICAL ASSOCIATION.

Respondents admit in their brief that neither *Jones* or *Tashjian* compel a finding that the Oklahoma semi-closed primary election statutes are severe or that the statutes must meet compelling state interests. Yet, in their response, Respondents assume that any burden upon the right to vote amounts to a severe burden subject to strict scrutiny and requiring compelling State interests for those restrictions. The Court of Appeals had already adopted that same position, basing its opinion on its reading of *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). Pet. App. 12, 15. That assumption erroneously ignores the language of such post-*Tashjian* cases such as

Burdick v. Takushi, 504 U.S. 428 (1992) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

1. While the right to vote is a fundamental right, the "right to vote in any manner and the right to associate for political purposes through the ballot" are not absolute. *Id*. at 433 (*citing Munro v. Socialist Workers' Party*, 479 U.S. 189, 193 (1986)). As *Storer v. Brown*, 415 U.S. 724, 730 (1974) allowed, there must be substantial regulation of the election process if those elections are to be honest, fair and orderly within the democratic process. With that regulation, it is inevitable that some burden will necessarily be imposed upon each individual voter, his right to vote and his right to associate with others for political ends. *Burdick*, 540 U.S. at 433; *Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983). Thus, "to subject every voting regulation to strict scrutiny and to require that regulation be narrowly tailored to advance a compelling State interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Merely because a State's election system creates barriers to the voter which might limit the field of candidates from which the voter might choose "does not of itself compel strict scrutiny." *Bullock v. Carter*, 405 U.S. 134 (1972). When an election law imposes only reasonably non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, "the States' important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434, *citing Anderson v. Celebreeze*, 460 U.S. at 788. As the restrictions in this case are not severe but are "reasonable, non-discriminatory restrictions," the State's important regulatory interests are sufficient to uphold the statutory provisions and the accompanying restrictions. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

The district court reviewed the impositions imposed on the Respondents, both the individuals and the LPO, and correctly determined that the burdens imposed by the statutes were not severe. And while the Respondents have argued otherwise, neither the Respondents nor the Court of Appeals have provided sufficient basis to conclude that

the burdens imposed are severe burdens on Respondents' rights of association.

Respondents assert that the disaffiliation statutes serve no legitimate State interest and even if they do serve an interest, the burden imposed is severe requiring a compelling State interest, a burden the State cannot overcome. However, the requirement that a voter not be a registered member of another political party if he wishes to vote in a primary has never been considered to be a "severe" burden.

As a preliminary matter, it is far from clear that a party has any protectable associational interest in its relationships with members of *other* parties that it simply wishes to invite to vote in its primary. *See Tashjian*, 479 U.S. at 234-35 (Scalia, J., dissenting). The statutes at issue here do not attempt to regulate the LPO's relationship with its own members. Nor do they even regulate the LPO's efforts to recruit new members. Instead, they simply regulate the LPO's ability to form transitory "associations" with registered members of other parties, for the limited purpose of having those voters abandon their own parties' primaries and vote instead in the LPO's primary. Absent a showing that the First Amendment protects such transitory "associations" and the LPO has made no such showing here, the Oklahoma statutes cannot be deemed to burden protected associational rights at all.

But even if the First Amendment protects such limited associations, the Oklahoma statutes place no severe burdens on Respondents' associational rights. On this point, *Timmons* is instructive. There, the court made a specific point to review an alleged infringement on the Twin Cities Area New Party political party, which the Court reviewed under a standard less than strict scrutiny. Yet, the Tenth Circuit Court concluded here that, because the alleged burden was imposed on a political party, *Jones* and *Tashjian* required a finding that the restrictions were severe and that the statutes must be reviewed under a "compelling state interest" standard.

Likewise, the amicus brief offered on behalf of the Respondents incorrectly asserts that any interference with

a political party's determinations regarding who may cast a vote is a severe burden requiring a compelling state interest. Brief of *amicus curiae,* p. 12. This assertion ignores the explicit holdings in *Timmons* and *Burdick*, each of which applied a lesser standard of scrutiny in review of the burdens placed on the potential parties and voters by the election restrictions.

More importantly, the Oklahoma primary election scheme is not a regulation of the internal decisions or workings of the political party. The statutes simply are regulations requiring that a person be registered as a member of a party, or as an independent, before the person can vote in that party's primary elections. The requiring of registration of party members has never been considered an internal regulation. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973). It follows *a fortiori* that a regulation that does not even require registration with the party at issue – but merely disaffiliation from any other parties – cannot be considered an internal regulation either.

Instead, the semi-closed primary and accompanying voter affiliation (or non-affiliation) requirement is a question external to the political party's own activities. In fact, the registration requirement does not limit the party's ability to elect whomever they choose. It simply requires that an individual register with that party, or register as an independent, before he may vote in that party's primary.

Even the court in *Rosario* refused to apply strict scrutiny or require a "compelling State interest" in its consideration of the New York disaffiliation statutes. To be sure, the Supreme Court did not specifically state a standard of review in considering New York's imposition of a time limit for enrollment in a political party. But the terminology and analysis used by the Court reflects the use of the "rational basis" test. The use of that test was specifically noted by Justice Powell in his dissent. *Id*. at 767. In *Rosario*, this Court found that although the time limit burdened the associational rights of the individuals seeking to vote in a party's primary, the registration/ disaffiliation statute was constitutional because it served a

"legitimate purpose and [was] in no sense insidious or arbitrary." *Id*. at 762. This Court specifically noted that New York's statutes did not prohibit persons from voting or from association with the party of their choice but "merely imposed a legitimate time limitation" on the voter's registration. *Id*. at 762. Even Justice Powell, in his dissent, agreed that a voter registration cutoff date of less than eleven months "say 30 to 60 days" would be a reasonable restriction on voter registration. *Id*. at 771.

Respondents try to support the idea of a severe burden by focusing on the fact that under Oklahoma law a party member wishing to vote in another party's primary must change her registration (either to the new party or to independent status) seven weeks prior to the primary.

Although Respondents are correct that *changes* of party affiliation are governed by § 4-119 of the Oklahoma election statute (rather than § 4-110.1, which deals with registration of previously unregistered voters), the State's restrictions on such changes are minimal. As noted in Petitioners' Brief, Okla. Stat. tit. 26, § 4-119 permits a voter to change political affiliation up to a time approximately seven weeks prior to the primary election. As the district court found, this short pre-primary registration deadline does not create a severe burden on the Libertarian Party Organization nor does it improperly restrict any voter's or party's right to political association. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973).

No voter is locked into an undesirable or unwanted political affiliation. No voter is prevented from affiliating with whichever party he desires. (Such affiliation can be shown through but not limited to the joining of the party, supporting the candidates or party through monetary, vocal or in-kind support, attending party functions or rallies, etc.) No voter is prevented from voting in whichever primary he chooses so long as he follows the minimum requirements of party affiliation set out by the State.

The real problem with the Court of Appeals opinion and the Respondents' position is that neither wish to consider the close proximity of time between when a voter

must change his affiliation and the primary elections. In fact, the Court of Appeals opinion does not even address the time restrictions. The Court of Appeals found, and the Respondents argue, that any time restriction is an impermissible burden. The conclusion that any period of time is not just a burden but a severe burden on a voter's or party's associational rights, no matter the length of time between party affiliation and voting in that party's primary, is directly in conflict with a number of precedents from this court including *Rosario*.

2. Respondents' argument that Oklahoma's semi-closed primary imposes "severe" burden on their associational rights is also refuted by comparing the burdens alleged by Respondents with those at issue in this Court's prior decisions. In fact, contrary to Respondents' suggestions, the burdens imposed by a semi-closed system are smaller than the burdens imposed by any of the regulations at issue in this Court's decisions in this area over the past three decades. A comparison of the burdens upheld in this Court's prior decisions with those alleged by the Respondents in this case further refutes their contention that Oklahoma's semi-closed primary imposes a "severe" burden on their associational rights. Contrary to the Respondents' assertions, the burdens imposed by the semi-open primary at issue here are smaller than the burdens imposed by any of the regulations challenged in the Court's post-1970 decisions in this area.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), the Court upheld a New York law requiring that citizens register as a member of a political party eight to eleven months prior to the primary election. In contrast, Oklahoma's semi-closed primary simply requires that a voter disaffiliate from his or her prior political party seven weeks before the primary. The Court in *Rosario* explicitly refused to apply strict scrutiny to the challenged regulations. *See* 410 U.S. at 757; *cf.* 410 U.S. at 767 (Powell, J. dissenting) ("The Court's formulation . . . resembles the traditional equal protection 'rational basis' test.").

Two years later, in *Storer v. Brown*, 415 U.S. 724 (1974), this Court upheld California's requirement that

independent candidates disaffiliate with a political party at least one year prior to the primary election. Oklahoma's seven-week deadline is miniscule compared to the one-year deadline at issue in *Storer.* Additionally, a candidate who is seeking to serve as the party's standard bearer forms a more significant associational tie with a party than does the voter that simply votes in a primary. Yet in *Storer*, this Court upheld a law that was even more burdensome than either the law at issue in *Rosario* or the regulation it now considers as "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot." *Id.* at 733.

Storer is not the only case where the Court has upheld burdens on *candidates* far in excess of the burden that Oklahoma places on *voters*. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), this Court upheld a Minnesota law banning candidates from appearing on more than one ballot. The law placed a burden not only on the candidates' speech, but also on the speech of the parties. Nevertheless, the Court explicitly held that this law did not "severely burden" associational rights. *Id*. at 360. In contrast, the Oklahoma law does not place any categorical restrictions on participation in the primary process, but merely requires a timely filing of disaffiliation.

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court upheld Hawaii's blanket prohibition on write-in candidates. The Court noted that candidates could gain access to the ballot either through the partisan nomination process or through the "designated non-partisan ballot." All of these options required that a candidate and his supporters gather numerous signatures and file papers with the state well in advance of the election. The Court, however, explicitly declined to find a "severe" burden, writing that "[r]easonable regulations of elections *does* require [voters] to act in a timely fashion if they wish to express their views in the voting booth." *Id*. at 438. The Oklahoma law, in contrast, places no petition requirements and allows voter disaffiliation much closer to the election than did the laws upheld in *Burdick*.

Furthermore, those post-1970s cases in which the Court has struck down laws regulating primary and general elections present burdens on associational rights that far exceed the one presented by the Oklahoma law at issue here. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court found that an Ohio law requiring that any candidate for president of vice-president register the March before the election placed "a significant state-imposed restriction on a nationwide election." *Id*. at 796. The Court placed special emphasis, however, on the fact that presidential elections had a uniquely national element, *see id.*, and that an effective presidential race places special burdens on candidates, *see id.* at 791. None of these elements are present in the Oklahoma law, since it allows voter disaffiliation much closer to the date of the election.

In *Eu v. San Francisco County Democratic Central Election Committee*, 489 U.S. 214 (1989), this Court struck down the extraordinary California regulation that sought to prohibit both primary endorsements by political parties as well as extensive regulations on the "organization and composition of official governing bodies" for the political parties. *Id.* at 229. Both of the provisions at issue in *Eu* sought to dictate the internal governance of a political party, regulating even the means by which the party would choose a state-wide leader. *Id*. at 230 (noting that the California regulations required that the state party chair could not be from the northern portion of California for two succeeding terms). Yet, even in *Eu*, this Court acknowledged that a "State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest." *Id*. at 231. Here, however, Oklahoma seeks only to limit those who may vote in a particular primary. It in no way attempts to govern the internal structure of the party.

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court struck down California's blanket primary system that required political parties to throw their elections open to all voters, regardless of even whether or not those voters were simultaneously participating in the primaries of other political parties. This regime robbed the parties of any means by which they could exert control

over who would become the standard bearer of its ideas. Further it removed a party's ability to exclude individuals from voting in its primary voters who had already registered as a member of another party. In stark contrast, the Oklahoma law does not deprive political parties of control over their own processes. Rather, it requires a simple administrative step (disaffiliation) before voters may accept a party's invitation to participate in its primary.

Finally, the burden presented by the Oklahoma law is significantly smaller than that presented by the law struck down in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). In *Tashjian*, the challenged law required that parties persuade voters to positively affiliate themselves with the party before participating in its primary. In contrast, the Oklahoma law requires only that the voters disaffiliate themselves from any other political party prior to casting their vote. Given the fact that these voters do not feel sufficient loyalty to the party that they are currently registered with to vote in that party's primary, persuading them to disaffiliate does not constitute a severe burden.

3. In their brief and for the first time in this action, Respondents challenge the Oklahoma statutes covering the recognition of political parties and the securing of ballot access as amounting to an unconstitutional infringement on their right to political association. Res. Br. 14-24. Respondents allege that those statutes, either individually or taken as a whole, make it impossible for a new or minor political party to gain or retain ballot access and incur growth and support. Respondents now allege that those statutes are the reason for the LPO's need for a semi-open primary. Respondents have thus asked the Supreme Court to look at Oklahoma's elections statutes as a whole and determine the constitutionality of not only Oklahoma's semi-closed primary but of the entire election system.

As a general rule, this Court does not decide in the first instance issues not decided below. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577, 585 (2004) (*citing Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001)). To be sure, that rule is not inflexible, particularly where the

District Court and Court of Appeals acknowledged the issues and ruled on or made the factual findings necessary to resolve the question and where the Supreme Court has ordered those issues briefed and addressed. *See Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984). At the same time, "[o]nly in the most exceptional circumstances" does this Court deviate from the general rule. *Cooper Industries, Inc.*, 125 S.Ct. at 585 (*citing United States v. Mendenhall*, 446 U.S. 544, 551-52, n. 5 (1980)). No such exceptional circumstances exist in this case. *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) (*citing Yee v. Escondido*, 503 U.S. 519, 535 (1992))

In the question presented to this Court, Petitioners asked whether the Oklahoma statute limiting primary voters to registered members and independents was constitutional. The original issue raised before the district court was whether that very same semi-closed primary election scheme, specifically Okla. Stat. tit. 26, § 1-104(A) and § 1-104(B)(4), violated the First Amendment rights of political association of the individual Respondents and the entity known as the LPO. Neither the district court nor the Tenth Circuit was asked by any party to pass on the constitutionality of any other Oklahoma election statute including the ballot access/party recognition statutes, either as individual statutes, as an entire scheme or as related specifically to § 1-104(A) or § 1-104(B)(4). Specifically, Respondents sought relief "declaring that . . . Okla. Stat. tit. 26, § 1-104(A) and § 1-104(B)(4) are illegal and unconstitutional, . . . in that they are in violation of the First and Fourteenth Amendments to the United States Constitution . . ." J. A. 22. That those sections are the only statutory provisions being challenged in this case by Respondents is reiterated elsewhere in their First Amended Complaint. J. A. 17-18. Nothing in that First Amended Complaint challenges the method or manner in which a political party becomes recognized nor does any opinion of the lower courts allege or find that the statutory provisions inhibit any First Amendment right.

Those issues were, likewise, not raised in Respondents' appeal to the Tenth Circuit Court of Appeals. Yet, Respondents are now asking this Court to pass judgment on all of

Oklahoma's political party recognition, ballot access laws asserting that those restrictions, along with the semi-closed primary system, improperly restrict Respondents' ability to exercise their First Amendment right to political association. It appears that Respondents are asking this Court to affirm the Tenth Circuit Court's opinion on grounds that were never raised or considered. That request is not proper at this stage.

The opinion of the Court of Appeals addressed only Okla. Stat. tit. 26, § 1-104 and whether a semi-closed primary violated Respondents' First Amendment rights. There was no review of any of the Oklahoma election statutes or any discussion of how § 1-104 was impacted by other election statutes or the LPO's past performance in Oklahoma elections. Of course, at the time the case was originally filed, the LPO was a recognized political party under Oklahoma statutes. Moreover, there has been no prior consideration in this case of Oklahoma's ballot access requirements whether it be by voter support or petition signatures. The Court of Appeals looked only at the semi-closed primary statute by itself and rendered an opinion without passing upon the other election statutes and the restrictions imposed by them.

Indeed, the restrictions purportedly caused by the remaining ballot access/election statutes may be a significant issue in each statute's own right and should only be considered where the statutes have been properly addressed by the lower courts and the parties. Whether those statutes, individually or as a whole, are an unconstitutional infringement on the rights of Respondents, has not been put before the lower courts by any party nor have those courts considered those issues on their own accord. The validity and constitutionality of those statutes was not any part of the questions presented by the Petitioners' Petition for Certiorari.[1] The validity of Oklahoma's ballot

[1] In fact, the constitutionality of those statutes has previously been affirmed by the Tenth Circuit Court of Appeals. For a detailed analysis of the Oklahoma ballot retention access requirements and the opinion finding the Oklahoma ballot retention scheme to be constitutional, *see*

(Continued on following page)

access/party recognition statutes should be addressed in a separate action. The only issue presented here is whether Oklahoma's semi-closed primary system causes an improper infringement on a political party's right of political association if that political party wishes to conduct a different type of primary. Those other questions, if any, remain for another case on another day in another court.[2]

As part of the basis requesting this Court to review the entirety of the Oklahoma elections statutes, Respondents, relying on *Jenness v. Fortson*, 403 U.S. 431 (1971), now ask this Court to treat them as individuals and as the LPO differently due to its inability to gather sufficient support from Oklahoma over the past 24 years.[3] However, at the time this lawsuit was filed in 2000, the LPO was not dissimilar to

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Coalition for Free and Open Elections v. McElderry, 48 F.3d 493, 495-97 (10th Cir. 1995).

[2] Even if this Court were to consider Oklahoma's ballot access laws, the Oklahoma statutory scheme including the semi-open primary system would be constitutional. Respondent party as well as other new or minor political parties have repeatedly been successful in gaining recognized party status and securing ballot access when attempted including Respondent party in every presidential election between 1980-2000. Even more restrictive requirements requiring a modicum of support have met with approval in *Jenness v. Fortson*, 403 U.S. 431, 438 (1971). Both the Oklahoma petition requirements and filing deadline have been specifically approved in *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740, 747 (10th Cir. 1988). *See also*, *Populist Party v. Herschler*, 746 F.2d 656 (10th Cir. 1984). None of the ballot access statutes pose an impermissible burden on Respondents and do not, directly or indirectly, affect the Respondent party's primary elections or the issues raised in this case. *See also*, footnote 2.

[3] As evidence of the State's purportedly burdensome restriction on minor parties, Respondents cite the statutory scheme which provides that after a party, in this case the Libertarian Party, loses recognized political party status, the group becomes a legal entity known as a political organization. Okla. Stat. tit. 26 §§ 1-109 and 4-112. As a political organization, voters may register as a member of that political organization but the entity may not conduct primary elections and members may not vote in any other party's primary. That statutory scheme is the result of relief granted by the federal district court based on a request of five of these same Respondents who sued at that time as members of the Libertarian Party, seeking that specific relief. *Atherton v. Ward*, 22 F.Supp.2d 1265 (W.D. Okl. 1998).

the Republican or Democratic parties under the Oklahoma statutes. All three political parties were recognized political parties which had gained ballot access and which were authorized to conduct primary elections, when necessary. Each party, under the semi-closed primary system, was entitled to choose whether to allow independent voters to vote in its primary or whether to allow only party members to vote. Furthermore, each of the parties could retain ballot access with sufficient voter support.

In the present case, the Oklahoma statutes treat each recognized political party the same as any other recognized political party. When the LPO is recognized as political party with ballot access it is treated no different than any other recognized party and no other political party is given any advantage by the Oklahoma statutes as either written or applied.

The issue before this Court can be decided without review or passing judgment on the remaining election statutes. Any difficulty the LPO may have in securing or maintaining recognized political party status under those statutes is not relevant to this inquiry as the fact remains that the LPO has been able to repeatedly gain ballot access under the Oklahoma statutes as shown by Respondents own brief and by the fact that the LPO was a recognized political party at the time of the filing of the original lawsuit. The question before this Court is whether the State of Oklahoma's semi-closed primary system, in particular Okla. Stat. tit. 26, § 4-104, violates the Respondents' right to political association. The Court need not, and should not, pass on the appropriateness of any other Oklahoma election statute at this time.

B. LIKE THE TENTH CIRCUIT, RESPONDENTS HAVE FAILED TO PROVIDE A SUFFICIENT BASIS FOR OVERTURNING THE DISTRICT COURT'S FINDING THAT THE OKLAHOMA SEMI-CLOSED PRIMARY SYSTEM IS SUPPORTED BY IMPORTANT REGULATORY INTERESTS.

The State of Oklahoma presented sufficient legitimate State interests to support the challenged statutory provision.

At trial, in both evidence and written pleadings, the Petitioners offered a number of State interests to support the semi-closed primary election scheme.

Those interests included maintaining the integrity of the political process and the integrity of the political parties by preventing party splintering and factionalism; maintaining the integrity of the election process and minimizing administrative concerns. Each of those interests amount to important regulatory interests of the State of Oklahoma.

1. Respondents admit that regulatory interests were set forth by the State of Oklahoma but assert that the State failed to produce sufficient, specific evidence to support the State regulatory interests. Respondents simply state that the potential for the problems raised by the State are nothing more than speculation and/or conjecture. Petitioners do not, and the District Court did not, agree with Respondents' contention. What the district court did find was that those interests submitted were sufficient to find important regulatory interests on behalf of the State. In any event, a "particularized showing of the existence" of the problems which the State regulations are intended to minimize is not generally required. *See Munro v. Socialist Workers' Party*, 479 U.S. 189, 194-95 (1986). The same day as *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), this Court in *Munro*, determined that a State's political or electoral system need not sustain actual harm or damage before acting to prevent, or at least minimize, the perceived or potential harm. The perception of a problem may be sufficient to sustain a State's important regulatory interests:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State' s political system sustain some level of damage before the legislature could take corrective action. Legislatures,

> we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro, 479 U.S. at 195-96.

While this Court later modified that stance in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 226-27 (1989), this Court has only gone so far as to require particularized proof when the Court has found the burden to be severe subject to strict scrutiny and requiring a "compelling State interest."

As noted, only where a burden on the right of political association is severe, must the State show a "compelling state interest" for its statutory restrictions. And while this Court has never defined what restrictions amount to a severe burden, the restrictions imposed in this case, as demonstrated above, do not amount to any significant, much less, severe burden on the associational rights of any of the Respondents.

Respondents further assert that the Petitioners have failed to show any actual harm to the State's interests and assert that the potential harm is speculative at best. This assertion relies on the holding of the Court of Appeals in which the court "acknowledge[d] that the district court's hypothetical" changed primary election results and adverse effects on the Oklahoma electoral process and interest in political stability "might come to fruition" but found, incorrectly, that none of those problems had yet occurred. Pet. App. 20. Of course, none of Oklahoma's concerns have yet come to fruition. There has been no Oklahoma election in which a "party-option" open primary has been conducted.

But both the Respondents and the Court of Appeals have requested and required more of the Petitioners than legally mandated requiring the State to prove these harming events will actually occur. *Munro* does not require this burden of proof. *Munro* specifically permits a State to use foresight in anticipation of harm or damage to

a State's political system. The only requirement is that the measures adopted by the State be reasonable and not "significantly impinge" on the voter's constitutional rights. *Munro*, 479 U.S. at 195-96.

2. There can be no doubt that the interests asserted by Oklahoma and found by the district court are substantial. Even *amici* for the Respondents recognize the important State interests in regulating elections and even maintaining the integrity of the political process which a State may accomplish through a semi-closed primary election system. For example, the Respondents' *amici* note the importance of closed and semi-closed primaries to maintaining the integrity and message of a political party:

> Candidate nomination systems that form clarity of program and ideology, such as closed and semi-closed primary systems, serve First Amendment purposes by giving the public greater control over the explicit policy choices and course of government.

Brief of *amici curiae* "Coalition" 6-7.

Thus, in the eyes of the *amici*, both open and semi-closed primaries have their place of importance in the American electoral system. If that is so, it must be left to the State to determine which primary scheme best serves the interests and needs of that State's electorate.

Elsewhere, *amici* for the Respondents, citing *Tashjian*, 497 U.S. at 216 and *Eu*, 489 U.S. at 224, provide support for yet another important State interest:

> Because the moment of choosing the party's nominee is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community, freedom of association must mean a political party has a right to select a standard bearer who best represents the party's ideologies and preferences.

Brief of *amicus curiae* "Coalition," 11 (internal citations and quotations omitted).

But this broad statement also suggests that a political party has a right to have the best candidate selected without the interference of another party. In other words, if other political parties are allowed to poach a party's voters, that party may not "select a standard bearer who best represents the party's ideologies and preferences." The selection may be made instead by a skewed subset of the party, thereby unintentionally and perhaps detrimentally changing the party's message. Preventing this damage to the integrity of the political party, in this case the Democratic or Republican party, and ensuring a strong two party system, are significant, if not compelling, state interests. *See Timmons*, 520 U.S. at 367 ("The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system."). This protection of the integrity of the election process and the interest in maintaining party integrity while preventing party splintering and unrestrained factionalism, which the Oklahoma statutes are designed to do, are clearly important if not compelling state interests.[4]

3. In any event, the evidence presented to the trial court was more than sufficient to show important regulatory interests for the State of Oklahoma in its statutory scheme. At the district court, the trial court conducted an extensive non-jury trial and received extensive testimony and documentary evidence, including testimony and reports from expert witnesses for both Petitioners and Respondents addressing Oklahoma's important regulatory interests and how the statutes were designed to promote those interests. Through evidence presented at the trial by the Petitioners' witnesses, including the expert witness, Dr. Bob Darcy, as well as Lance Ward and Michael Clingman, the past and current Oklahoma State Election Board

[4] In addition to promoting party integrity and cohesion, and the other benefits found by the district court, the semi-closed primary facilitates the parties' voter turnout efforts by fostering greater accuracy in registration rolls. *See* Brief of *Amici* States at 20-22.

Secretary, respectively, the State set forth an extensive list of interests served by the semi-closed primary system. The district court found that the expert witnesses "were well-qualified to address the matters which they addressed as expert witnesses." Pet. App. 45.

The district court found, among other interests, that the semi-closed primary furthers the State's legitimate interests in preventing the poaching of a party's members. The district court found, as a matter of fact, that a party-option primary, as sought by Respondents, would adversely affect the outcome of some primary elections of the other political parties in a way not permitted or intended by the current semi-closed primary system. Pet. App. 49. The district court also found, as a matter of fact, that a semi-closed primary system, particularly Oklahoma's primary scheme, promoted party loyalty. The district court rejected, as a matter of fact, the Respondent's contention that the proposed State interests were nothing more than a pretext for promoting the interests of a particular party.[5]

Both the Tenth Circuit and the Respondents disagreed with the findings of fact by the district court. The Court of Appeals used their disagreement to overturn the district court's decision. However, neither the Tenth Circuit Court of Appeals nor the Respondents have provided sufficient basis under the applicable standard of review for overturning the district court's factual findings.

Fed.R.Civ.P. 52(a) sets forth the standard governing appellate review of a district court's findings of fact stating "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

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[5] Respondents have also raised this argument in challenging the *Amici* States interest in this case. It should be pointed out to the Court that the State Legislatures of *Amici* States are almost evenly divided between those dominated by Republicans and those dominated by Democrats.

This Court has expounded on the "clearly erroneous" standard. In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), this Court stated that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), the Court warned that the appellate court must remember that its function, in applying the clearly erroneous standard, is not to redecide the factual issues *de novo*. If the district court's findings of fact are plausible when reviewed in the light of the entire record, the appellate court is to treat the findings with deference and may not reverse even though that court may have reached a different conclusion. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

In discussing its review of the evidence, the Court of Appeals paid homage to the "clearly erroneous" standard and noted how it was to be applied. When the Court of Appeals wanted to affirm a district court's finding that certain state interests had not been sufficiently shown, the Court would cite to that standard. However, no language in the opinion indicates that the Court of Appeals, upon disagreeing with the district court's findings of fact, applied the "clearly erroneous" standard. In fact, the opinion of the Court of Appeals reveals that the "clearly erroneous" standard was not applied by the Court.

In reviewing the concerns and facts relating to the detrimental effect of the draining of voters from the other political parties on the other parties as well as important regulatory interests of the State, the district court made extensive findings that the requested primary scheme would improperly affect the State's important regulatory interests and set forth manners in which those problems could or would occur. Pet. App. 47-49, 59. The Court of Appeals then purportedly found those findings of fact to be erroneous even though the Court of Appeals found that the problems which the district court believed would happen and which were based on the district court's factual findings "might come to fruition." Pet. App. 20. Clearly, if

the Court of Appeals found that the problems based on the district court's factual findings were possible, the Court of Appeals could not disagree with the district court's findings, much less find them to be "clearly erroneous." Since the Court of Appeals did not find that the facts upon which the district court based its decision were "clearly erroneous," the Court of Appeals decision to disregard those factual findings and render its decision based on the opinion that the facts were not sufficient to uphold the district court's opinion, the Court of Appeals decision must be reversed.

Neither the Tenth Circuit nor the Respondents have provided any legal basis for finding that the district court's findings of fact and conclusions extending therefrom were "clearly erroneous."

CONCLUSION

The district court was correct; the semi-closed primary system as operational in Oklahoma is not a severe burden on any voter's or political party's rights and is reasonably calculated to maintain important regulatory interests. The decision of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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