

1 let's take the ones that I'm -- I have spent most of my time,
2 available time between last week and today getting ready for
3 and that is the constitutional.

4 And what I would like to do is I would first like to
5 talk to you, even before we get to the standard of scrutiny --
6 I'd like to talk to you about the right itself. Of course, the
7 Supreme Court came down with the Marion case last month or
8 maybe at the end of June, and that seemed to me to be a
9 franchise case. That did not seem to be what the plaintiffs
10 were raising here. They're raising a First Amendment right. I
11 want to make sure that that is the situation, that that's --
12 that you're asking for relief and finding of a violation of
13 First Amendment rights, it's not the franchise right that was
14 at issue in the Marion case.

15 MR. BOYD: Yes, Your Honor.

16 THE COURT: Talk to me a little bit about what you
17 are claiming. And let me give you some impressions here.
18 Doesn't your argument somewhat come down to the fact that
19 you're asking for a constitutional right to be found to
20 third-party registration? Let me spin that out some.

21 Let's say the state of New Mexico or some other
22 state -- we don't seem to have a great deal of knowledge of
23 other states, but let's say some states said you can't have
24 third-party registration at all, you've got to come to the
25 county clerk's office and register with the clerk. Would there

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1 be anything unconstitutional about that?

2 MR. BOYD: Probably not. I think that there might be
3 an argument that if you had a history of longstanding and a
4 tradition in the state of third-party voter registrations and
5 they cut it off and said, "We're not going to have that
6 anymore," even though there had been no problems, no
7 allegations of fraud, no nothing, and that you could argue that
8 the reason, the motive for cutting it off was to cut down on
9 registrations, then I suppose you could come up with a First
10 Amendment argument.

11 I think that --

12 THE COURT: It might be a franchise argument, that
13 you're unduly infringing the right to vote because the lines
14 are too long and too burdensome and that sort of thing?

15 MR. BOYD: Perhaps. What I think -- I think the key
16 to --

17 THE COURT: Let's just take your plaintiffs. Would
18 they be able to mount a First Amendment challenge to a law that
19 said you've got to come down to the clerk's office?

20 MR. BOYD: That just said you've got to go to the
21 clerk's office?

22 THE COURT: We're going to make the government do it.

23 MR. BOYD: I think it would be more of a franchise
24 challenge and less of an amendment challenge. I'm not saying
25 we couldn't articulate that as a First Amendment challenge, but

1 I don't think any Court has ever recognized some sort of -- has
2 never identified a constitutional right under the First
3 Amendment or any other amendment to --

4 THE COURT: A third-party registration?

5 MR. BOYD: -- to engage in third-party registration.

6 THE COURT: That being the case, if you would lose
7 all your First Amendment rights, all your ability to discuss
8 with other people under that scenario, why does not the greater
9 include the lesser? Why -- If the state could eliminate
10 entirely third-party registration and not affect your First
11 Amendment rights, why, then, when it puts restrictions does it
12 impact your First Amendment rights?

13 MR. BOYD: Well, Your Honor, I think the reason for
14 that is because, as courts have recognized, as the courts in
15 League of Women Voters and Project Vote have recognized,
16 that -- and have used Supreme Court cases in analogous
17 circumstances to arrive at this position, what they've
18 recognized is that voter-registration drives involve --
19 necessarily involve core political speech. It is inextricably
20 intertwined with core political speech.

21 THE COURT: But if the state of New Mexico could
22 totally eliminate that speech by saying, come to the
23 courthouse, why, then, can they not put various restrictions
24 and hurdles almost at will if they could eliminate it entirely?
25 I mean, if I understand what's occurring, is that the

1 organizations are using it -- the plaintiffs are using the
2 voter registration somewhat as a pickup line or an introductory
3 line or something to introduce the political discussion that is
4 the core political discussion. But would you agree that
5 there's no constitutional right to be able to offer a
6 registration form, there's no First Amendment content to that?

7 MR. BOYD: Isolating that by itself, you're probably
8 right, Your Honor, but I don't think that really answers the
9 question. I don't think it's as simple as saying, Well,
10 there's no constitutional right to do this, so the state can
11 place any restrictions it wants to on it.

12 THE COURT: But you wouldn't have that opportunity if
13 they said come down to the courthouse? You would have --

14 MR. BOYD: No, you wouldn't.

15 THE COURT: You would have to have another pickup
16 line or introductory line or something to talk to that person?

17 MR. BOYD: No. But if we take this case as an
18 example. For example, Mr. Rogers has been here and he has said
19 that the Republican Party engages in voter-registration drives
20 and it has no trouble complying with this law and it does that
21 happily and it goes ahead and does that. Well, it may be or
22 may -- Obviously, I take Mr. Rogers at his word. I assume
23 that's the case.

24 We also know that ACORN, which is not a party to this
25 case and the state has made much of it, is actively out there