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October 6, 2011

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Office of the Clerk
James R. Browning Courthouse
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Washington State Republican Party, et al. v. Washington State Grange, et al.*
Docket No. 11-35122 (No.11-35124 and No. 11-35125 consolidated with the foregoing)
Supplemental Authorities FRAP 28(j) and Circuit Rule 28-6

Dear Office of the Clerk:

On behalf of all appellants, and pursuant to FRAP 28(j) and Circuit Rule 28-6, I am submitting this Statement of Supplemental Authorities. Accompanying this letter is a copy of "The Very Partisan Nonpartisan Top-Two Primary: Understanding What Voters Don't Understand," by Professor Mathew Manweller, *Election Law Journal*, September 2011, 10(3), p. 255-271. This is the as-published version of Professor Manweller's report, and was referenced in the Republican Party's Reply Brief at page 16, fn. 6.

If you have any questions, please contact me.

Very truly yours,

LIVENGOOD, FITZGERALD,
& ALSKOG, PLLC

s/John J. White, Jr.

John J. White, Jr.
Counsel for Washington State Republican Party

JJW/lw
Enclosure: a/s

cc: All Parties of Record (via ECF)

The Very Partisan Nonpartisan Top-Two Primary: Understanding What Voters Don't Understand

Mathew Manweller

ABSTRACT

In 2008, following a series of legal battles, Washington State adopted an open nonpartisan “Top-Two” primary system in which only the top two vote earners, regardless of party affiliation, advance to the general election—the same system California adopted via a 2010 ballot measure. The new primary system is described as a nonpartisan primary but allows candidates to describe their “political party preference.” The state allows candidates to place on the ballot “Prefers Republican Party” or “Prefers Democratic Party” next to their name while arguing that the primary is nonpartisan. Upon adoption, both political parties objected, arguing that they were being forced to associate with candidates they did not select. The state countered that the winners of the Top-Two primary are not “nominees” because the new election is not a primary but a “winnowing election” for the purposes of producing a general election ballot.

After the Top-Two primary was struck down on its face by the U.S. Ninth Circuit Court of Appeals, the U.S. Supreme Court, in *Grange v. Republican Party* (2008), reversed the decision arguing that the new system may be unconstitutional as applied but only if the parties could demonstrate the new primary caused “voter confusion.” This article measures the extent of voter confusion caused by the Top-Two primary system.

The findings are based on a series of cognitive experiments run on Washington State voters. Participants were asked to read and answer questions about one of three mock ballots modeled off of Washington State’s traditional partisan ballots and newer Top-Two ballots. The questions were designed to determine if voters could distinguish between the older partisan primary where the winning candidate was the “nominee” of the party and the newer Top-Two system in which the winner is not the “nominee” of the party.

Results indicate that voters are highly confused in terms of a perceived relationship between parties and candidates, but less confused about their status as an official nominee of the party.

EVER SINCE THE MCGOVERN-FRASER COMMISSION of 1968 started the process of making primary elections more open and transparent, elec-

ted officials, party managers, and political scientists have paid increasing attention to state primary systems. In the decades that followed, state legislatures across the United States passed a multitude of laws trying to limit the influence political parties have over their primaries. In almost every instance, political parties challenged the reforms on the grounds that they violate the

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First Amendment's right to association.¹ A political party's right to association rests on the notion that private groups are permitted to determine their own leadership and internal procedures, as well as with whom they will or will not associate. The attempt by legislatures to decouple political parties from their own nomination processes has led to numerous federal court battles.

The success of such litigation has been mixed. In 1986, the Connecticut Republican Party successfully challenged a state statute preventing them from inviting independent voters to participate in their primary.² A few years later, the San Francisco Democratic Party successfully challenged a California statute that prevented parties from making endorsements in primary elections.³ In 1999, both parties in California successfully invalidated the state's "blanket primary" which allowed voters from competitor parties to select the other party's nominee.⁴ While winning some legal battles, the political parties also faced setbacks. In Minnesota, the courts upheld the state's "anti-fusion" law that barred a party from nominating another party's nominee as their own.⁵ In 2005, the courts upheld an Oklahoma statute that prevented the Libertarian Party from inviting Republicans and Democrats to participate in their primary elections.⁶ The Court has sent mixed signals, but parties prevail often enough that they continue to seek the Court's protection from citizens and legislatures that want to interfere with their internal procedures.

The U.S. Supreme Court typically assesses the constitutionality of a state's regulation of primaries with a single-pronged test. Absent a compelling state interest (the Court's highest standard of review), a statute is invalidated if the law burdens the associational rights of political parties and their members. In 2007, however, the Court issued a ruling in *Washington State Grange v. Washington State Republican Party*⁷ that suggested an additional standard for determining the legality of state interference in primary elections—"voter confusion." The Court held that if a state crafts a primary ballot that confuses voters, particularly in terms of whether or not they are selecting or voting for a party's official nominee, the statute may be invalid.

The voter confusion standard is, in part, a response to the increasing popularity of nonpartisan primaries, especially nonpartisan primaries that allow the use of partisan labels (Republican or

Democrat) on the ballot. In 2004, Washington State voters approved Initiative 872, creating a non-partisan primary called the "Top-Two" primary system.⁸ The system, modeled on Louisiana's Cajun primary system, purports to create a non-partisan process for electing partisan offices. Under the Top-Two primary, any registered voter may "cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate" (Wash. Rev. Code § 29A.04.127). Such a system lumps all candidates for a particular office into a single primary and allows all voters to participate.⁹

After its adoption, but before its implementation, the major parties in Washington State filed suit in federal district court seeking to enjoin the state from using the new system, which they argued would violate their First Amendment associational rights. The parties prevailed in both the District Court and Ninth Circuit Court of Appeals, and the Top-Two primary was held invalid. The U.S. Supreme Court, however, reversed the lower courts, holding that it was unclear if the Top-Two primary was unconstitutional. The Supreme Court asserted that the constitutionality of the primary depended on whether the Top-Two system created "voter confusion." The Court reasoned that if voters of Washington mistakenly thought they were selecting or electing the *nominees* of political parties, the

¹First established in *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court held that "for the advancement of beliefs and ideas" (*Id.* at 460), the First Amendment protected "lawful private interests privately and to associate freely with others" (*Id.* at 466). Since then, private political parties have sought the same protections granted the NAACP and successfully defended their rights to determine who they will and will not associate with.

²See *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

³See *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989).

⁴See *California Democratic Party v. Jones*, 530 U.S. 567 (2000). Following the Court's ruling in *Jones*, both Washington State political parties utilized the ruling to invalidate the blanket primary that was being used in Washington State.

⁵See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

⁶See *Clingman v. Beaver*, 544 U.S. 581 (2005).

⁷*Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

⁸The Top-Two primary system is sometimes referred to as the "Louisiana primary" or a "non-partisan winnowing election."

⁹Except presidential and vice presidential primaries which are governed by federal law.

initiative would be unconstitutional. Since the Top-Two primary had never been used, however, the Court noted that they had no way of determining if such a system created voter confusion, and until they did, the State of Washington had to be given an opportunity to craft a ballot that would avoid such confusion. The Court left the door open to the political parties noting that if Washington State created a confusing ballot, the political parties could re-litigate their case.

Since the Supreme Court's ruling in *Grange*, Washington State crafted Top-Two primary and general election ballots and used them in the 2008 elections. Did those ballots confuse Washington voters? If the ballot design created "widespread voter confusion" (*Grange*, 552 U.S. at 457) that led Washington voters to believe they were selecting party nominees, the Supreme Court's reasoning suggests that the primary (or at least the primary ballots) is unconstitutional. If, however, Washington voters understood that they were simply narrowing down many primary candidates to two general election candidates and that those candidates were not nominated or necessarily affiliated with the political parties, the system should survive legal scrutiny.

Answering that question is the purpose of this article. In the *Grange* case, Chief Justice Roberts' concurring opinion notes that "[n]othing in my analysis requires the parties to produce studies regarding voter perceptions on this score [voter confusion], but I would wait to see what the ballot says before deciding whether it is unconstitutional" (*Id.* at 461–62 Roberts concurring in judgment). Until this article, no one has taken Justice Roberts up on his suggestion. Now that we can "see what the ballot says" and study the voters who have used it, we can determine if those voters were confused.

It is important to assess the level of voter confusion caused by nonpartisan ballots. The spread of nonpartisan open primaries would profoundly affect the electoral process in the United States. In the past decade, both California and Oregon have proposed or implemented primary systems similar to the Top-Two primary.¹⁰ With "anti-party" sentiments on the rise (van Heerde and Bowler, 2007; Gaines and Tam Cho, 2002), other states may want to strip political parties of their control over primary elections and their nomination power in particular. Just as the Populist and Progressive era reforms brought us private ballots,

direct election of Senators, the referendum and recall process, and women's suffrage—much of it initiated on anti-party sentiments (Ware, 2002)—a new round of reforms generated from similar sentiments could significantly alter the way we select our candidates.

Two effects are immediately apparent. Political parties, in addition to nominating candidates, spend considerable resources creating a "brand" for themselves. Research has shown that partisan brands are the single most powerful information cue voters have when they cast their ballots (Conover, 1981; Rahn, 1993; Dalton, 2007). In nonpartisan primaries, voters would have less information and have more difficulty identifying candidates who hold similar values. Additionally, some have argued that nonpartisan elections open the possibility of strategic or crossover voting by political opponents, but empirical research by Alvarez and Nagler (2002) suggests such occurrences are rare. The proliferation of a top-two primary system could ultimately result in the rise of "stealth candidates" so common in other types of nonpartisan elections (Barnhizer, 2001; Deckman, 2004). Additionally, the type of primary a state uses goes a long way in determining the "ideological purity" or extremism of candidates (Oak, 2006). Open primaries tend to nominate more moderate candidates while closed primaries tend to nominate candidates more in line with the values of a particular party (Southwell and Manweller, 2003; Gerber, 2002). One mechanism that states may adopt for the purpose of electing more moderate candidates is Washington's scheme of the nonpartisan open primary. Before states begin to move in that direction by decoupling political parties from the nomination process, they must first know which "rules of the game" are acceptable to the federal courts. Ultimately, it will fall to the courts to flesh out the holding in the *Grange* case and provide more detailed criteria to the ambiguous notion of "voter confusion." Social scientists can assist such a process because the concept of voter confusion is as much an empirical question as it is a legal question.

¹⁰California followed Washington's lead and adopted a Blanket Primary in 1999 and followed Washington again in 2010 with the adoption of Proposition 14. Oregon voters, via initiative in 2008, submitted a primary system almost identical to Washington's Top-Two but it failed to pass.

THE LEGAL AND POLITICAL HISTORY OF THE TOP-TWO PRIMARY

In 1935, Washington State adopted a “blanket primary.” In a blanket primary, voters are given a ballot that presents the partisan primary elections of both parties. Voters are allowed to cast a vote for only one candidate for each office, but can choose either party’s primary in which to participate. Unlike other primary systems, voters can move back and forth between parties as they move down the ballot and vote on various races. Therefore, one can vote in the Democratic primary for governor but the Republican primary for state representative.

Following the ruling in *California Democratic Party v. Jones* (2000) which invalidated California’s blanket primary, both political parties in Washington successfully challenged Washington State’s version of the blanket primary.¹¹ That legal decision necessitated that Washington use, for the first time since 1934, a partisan primary in 2006. Voters expressed extreme distaste for the partisan primary, and following numerous court battles and legislative maneuvering, Washington State adopted a Top-Two primary system as a replacement for the blanket primary.

The Top-Two primary is slightly different than a blanket primary and an open primary. Like an open primary, any voter may participate regardless of political affiliation. Candidates, however, are not identified with the traditional “D” or “R” next to their name. Instead, candidates can place the language “prefers Republican Party” or “prefers Democratic Party” next to their name on the ballot.¹² Additionally, all candidates, whether they “prefer” the Republican Party or “prefer” the Democratic Party are lumped into a single election (as opposed to having one Republican primary and one Democratic primary). Instead of electing one Republican top vote-getter and one Democratic top vote-getter, the top two vote earners move on to the general election regardless of party preference. It is possible to have a general election with two candidates who “prefer” the same party.

It is the use of the term “prefers” that generates the constitutional questions regarding the Top-Two primary. Supporters of the process argue that the Top-Two primary does not technically identify Republican or Democratic candidates; it simply notes which party each candidate prefers. The win-

ners of the primary, they assert, are therefore not official nominees of any political party. In fact, the language of I-872 refers to their primary election as a “winnowing election” not a nominating election. If the winners are not nominees of the party, then neither political party can claim that their associational rights have been violated.

Political parties contend that the Top-Two primary “forces the Party to be associated publicly with candidates who have not been nominated by the Party, who will alter the political message and agenda the Party seeks to advance, and who will confuse the voting public with respect to what the Party and its adherents stand for” (*Republican Party v. Logan*, 377 F. Supp. 2d 907, 909 (W.D. Wash 2005)). In essence, voters will believe that candidates with “prefers Democratic Party” next to their name are the nominee of the Democratic Party, when in fact they are not. The Washington State Democratic Party also contends that the Top-Two primary “permit[s] non-affiliates of the Democratic Party to participate in its nomination process...[and] allows crossover voting in violation of the Party’s associational rights” (*Id.*). In essence, people who are not members of the party get to select the nominee of the party.

Immediately following the adoption of the Top-Two primary, both political parties sought an injunction to prevent its use. The United States District Court for Western Washington granted that injunction and invalidated the measure, noting that “in all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated” (*Id.* at 924) and that “[a]n individual has no right to associate with a political party that is an ‘unwilling partner’” (*Id.* at 922). Upon review, the District Court’s ruling was upheld by the Ninth Circuit Court of Appeals which noted that the addition of the term “prefers” in front of a candidates party identification are “distinctions without a difference” (*Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003)).

The U.S. Supreme Court took a more cautious approach. The political parties challenged the

¹¹See *Democratic Party of Washington State v. Reed*, 343 F. 3d 1198 (9th Cir. 2003).

¹²Candidates can use up to 17 letters and may identify any party. For example, in the 2008 election some candidates identified themselves “prefers GOP party,” “prefers Green Party,” and “no party preference.”

Top-Two primary “on its face” which is a legal standard that asserts that the Court, absent any empirical evidence, can strike down laws based on the simple language of the statute. The Court however, preferred an “as applied” standard that demands that the law actually be implemented and its effects be assessed before determining its constitutionality. Although the Court rejected the facial challenge, it left open the possibility of future as-applied challenges. As has been noted (Metzger, 2009), the Court is increasingly demanding petitioners meet the higher standard of an as-applied challenge when asserting their constitutional rights have been violated. Metzger demonstrates that some justices believe that facial challenges should succeed only where a challenged measure is “unconstitutional in all of its applications” (*Id.* at 1). Otherwise, the Court is increasingly rejecting facial challenges before them due to a lack of evidence that the challenged measures actually burden a constitutional right. As Justice Clarence Thomas wrote in *Grange*, “The State has had no opportunity to implement I-872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions” (*Grange*, 552 U.S. at 450). Persily and Rosenberg (2010) highlight that such a standard gives the state greater lawmaking deference and more opportunity to tinker with laws to avoid judicial rejection. Writing for the majority, Justice Thomas also noted “a plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid’” (*Grange*, 552 U.S. at 449) but “the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment” (*Id.* at 456). Thomas concluded “it is possible that voters will misinterpret the candidates’ party-preference designations as reflecting endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion” (*Id.* at 455). Justices Roberts and Alito concurred, writing “because respondents brought this challenge before the State of Washington had printed ballots for use under the new primary regime, we have no idea what those ballots will look like” (*Grange*, 552 U.S. at 460). The heart of the Supreme Court’s reversal is the belief that political parties

must show the Court that voters were actually confused by ballots developed by the state before they will rule the Top-Two unconstitutional.

BALLOT EXPERIMENT—METHODS AND INSTRUMENT

Subsequent to the *Grange* decision, Washington State developed ballots for the Top-Two system that were used during the 2008 primary and general elections. By doing so, they provided a unique opportunity to test the hypotheticals posed in the *Grange* case. Using a series of cognitive experiments based on voter perceptions of hypothetical ballots, I was able to test whether the new Top-Two ballots cause voter confusion.

Participants in the experiment were asked to look at one and only one sample ballot and then respond to a battery of questions. The experiments utilized three different ballot types—a traditional partisan general election ballot, a Top-Two general election ballot, and a Top-Two primary election ballot. The traditional *partisan* ballot mimics the exact design Washington State employed when Washington used a partisan election process in 2006. Candidates’ names are identified with the traditional “D” or “R” or “I” next to their names. The Top-Two *general* election ballot also mimics the exact design Washington State used in 2008 and employs the new “prefers Republican Party” (or Democratic Party) designation next to candidates’ names. The Top-Two *primary* ballot models the state ballot as well, with the noticeable difference from the Top-Two General ballot that there is more than one candidate with the same party preference. When the state developed Top-Two ballots, they obviously anticipated that voters would suffer some confusion with the new language about parties and party preferences. In order to alleviate that confusion they added disclaimer language noting that candidates were not nominated, endorsed by, or associated with parties.¹³ That exact language adopted by the state was added to the Top-Two ballots (primary

¹³The language reads “VOTER-PLEASE READ: Each candidate for partisan office may state a political party the he or she prefers. A candidate’s preference does not imply that the candidate is nominated or endorsed by the party of that the party approves of or associates with that candidate.”

and general) utilized in the experiment. See Appendix A for the three ballot designs.

Participants were allowed to examine only one of the three ballots designs and then asked to respond to eight questions.¹⁴ Participants were asked if, after reading the ballot and accompanying ballot instructions, whether they believed various candidates were nominees of, affiliated with, representatives of, or associated with a particular political party. See Appendix B for the slate of questions.¹⁵

The experiment was conducted on three separate purposeful samples of Washington citizens. Research shows that not all citizens have the same level of political knowledge (Verba, Scholzman and Brady, 1995; Delli Carpini and Keeter, 1996). Newer voters or voters with little civic participation exhibit lower levels of political knowledge than voters who participate in some type of civic activity or who have participated in the political process for a longer period of time (Neuman, 1986; Luskin, 1987; Zaller, 1990). As is accepted practice in experimental designs, three purposeful samples were recruited to participate in the experiment (See Poteete et al., 2010; Morton and Williams, 2008, Shocket et al., 1992, Severance and Loftus, 1982). To determine how different types of voters responded to the experiment, the experiment was conducted on a population of newer or first time voters, a general group of registered voters, and a group of politically active voters. Using the group of registered voters as a baseline, the expectation is that if voter confusion manifests itself, newer voters will exhibit the most voter confusion, highly politically active voters will demonstrate the least voter confusion, and the general population of registered voters will be somewhere in the middle.

The purposeful sample of newer voters was drawn from the student population at Central Washington University.¹⁶ Hypothetical ballots were disseminated in person to 183 students ranging between 18 and 24 years old. Given the age range, these students could have voted anywhere between zero and two times. Students were handed a ballot, asked to read the instructions and answer the accompanying questions. The proctors answered no follow-up questions.

The purposeful sample of registered voters was drawn from a population of Washington State voters who had elected to register to vote online. The Washington State Secretary of State's office recently created an online mechanism for register-

ing to vote and provided 1,500 voter contacts. Hypothetical ballots were disseminated via an online survey research company to all 1,500 registered voters in the sample. Respondents were contacted via e-mail (with three follow-ups) and asked to participate in an experiment. They were directed to a link that allowed them to view the sample ballot and respond to the questions.

The purposeful sample for the highly active voters was drawn from a population of voters who had elected to receive e-mails from and/or had donated to one of the two major political parties in Washington State. Both the Washington State Republican and Democratic parties made 3,000 e-mails available (for a total of 6,000 contacts) drawn from their membership databases. Hypothetical ballots were disseminated per the same procedure as the registered voter population.

LIMITATIONS

As with all experimental designs, there will be concerns about internal and external validity. Internal validity is assured when subjects in the experiment are randomly assigned stimuli. External validity is preserved when subjects for the experiment are randomly selected from the general population or the population the researcher wishes to generalize his findings towards.

¹⁴Participants were limited to examining only one type of ballot to prevent "leaning" during the course of the experiment. If participants were allowed to examine all three ballot types, it would be easy to identify the differences between the ballots and then conclude that the same eight questions to three different ballot types necessarily elicited three different answers.

¹⁵The language "Would you consider the candidate John Smith the nominee..." was used for a variety of reasons. The main goal of the experiment is to gain an understanding of the subjects' perception of the relationship between the candidate and the political party. Using the language "Is the candidate John Smith the nominee..." requires the inclusion of the options "I don't know" or "Not sure." The use of the term "consider" simply gets at their personal perception and eliminates the need for a third answer that would add little to our understanding of the subjects' perception of the relationship between the voter and the party.

¹⁶Professors at Central Washington University were asked to volunteer their classes to participate in the experiment. Responses appear to be completely random and include students from many different disciplines (music, business, accounting, health education, political science, anthropology, and film and video studies). Students were randomly assigned one of three ballot types insuring internal validity.

There are no concerns about internal validity with this study. In all three purposeful samples, subjects were randomly assigned one of three ballot types. As with many experimental designs, however, external validity can be problematic. Because experiments often require voluntary participation, have to be conducted in artificial settings, and often suffer from low response rates, external validity is not a primary concern in such designs (Kinder and Palfrey, 1993). Nevertheless, quasi-experimental designs with purposeful samples have a long history in social science and are widely accepted as a legitimate means of investigating social phenomenon (Kinder and Palfrey, 1993). The true test of external validity in an experimental setting is whether the researcher replicated results over a variety of datasets (Morton and Williams, 2008)—a process employed in this study. Even so, there are limitations. Foremost are concerns about generalizability. This experiment examines three distinct subsets of Washington State’s voting population—newer voters, generic registered voters, and highly active voters. Whereas my findings will illuminate and generalize how each of these three populations understand the new Top-Two election system, there will be less agreement among social scientists as to the level of confidence one can generalize from the findings to the Washington State voter population as a whole.

In some cases, sample size is a concern. Although there is no established standard for experimental designs (unlike polling protocols), a certain number is needed to establish robust statistical findings. The sample sizes for newer voters and active voters are sufficiently large (N=183 and N=549 respectively), but in the case of the registered voters sample, the N is only 102 subjects. Sample size is further reduced because each purposeful sample was divided into three categories (one for each ballot type).

Finally, there are concerns about response rates. In the case of the registered voters and active voters’ samples, response rates were very low. Only 102 of 1,500 registered voters responded to the experiment (7%) and only 549 of 6,000 (9%) active voters responded to the experiment. These response rates of this study are below those recently documented in survey research (Keeter et al., 2006). Keeter and colleagues suggest that low response rates do not bias a sample, and that studies with low response rates are producing the same results as sur-

veys taken years earlier when response rates were higher (Keeter et al., 2006). Low response rates can be a concern if one has reason to believe that the non-responders were not normally distributed throughout the sample population. Such a phenomenon biases the sample. A review of demographic data from this experiment shows that the sample was skewed towards older voters and those with more education than the general population.¹⁷ What that data suggests is that our findings are *understated*. Since research shows that older and more educated voters would better understand political practices such as a primary or electoral system (Verba, Scholzman and Brady, 1995; Delli Carpini and Keeter, 1996), the voter confusion within the public at-large would probably be higher than the confusion rates exhibited by this study which over-sampled those subjects who have the skills that would be better in the experiment conducted.

FINDINGS AND ANALYSIS

This research asks three questions. First, do voters mistakenly believe that unaffiliated candidates in a nonpartisan Top-Two election are the official nominees of a particular political party? Second, in a nonpartisan Top-Two election, do voters mistakenly perceive a relationship, other than that as nominee, between unaffiliated candidates and political parties? Third, if the answer to the first two questions is yes, how much confusion is caused by the new ballot structure?

Unaffiliated candidates or party nominees?

The most important question is the legal issue of “voter confusion.” Of interest to the courts is whether voters mistakenly believe that candidates in nonpartisan elections are perceived as the official nominees of political parties. The data from the

¹⁷A review of the demographic data collected on the subjects reveals that 9% were between the ages 18–30, 9% between the ages 31–40, 16% between the ages 41–50, 22% between the ages 51–60 and 42% were over the age of 61. Likewise, 15% of subjects had a high school diploma, 13% had an associate’s degree, 38% had a Bachelor’s of Arts or Science, 23% had a Master’s degree and 6% had a Ph.D. Because we had such a low response rate for subjects under the age of 30, it was essential that a separate experiment was run solely for younger voters.

ballot experiment indicates that voter confusion exists at differing levels, depending on ballot type and voter demographics.

Each of the three hypothetical ballots contains a candidate named “John Smith.” On the partisan ballot, he is identified with a (D). On the nonpartisan ballots (Top-Two), he is identified with “prefers Democratic Party.” Each ballot also contains a candidate named “Mark Allen.”¹⁸ On the partisan ballot, he is identified with an (R). On the nonpartisan (Top-Two) ballots, he is identified with a “prefers Republican Party.” In each case, respondents were asked if they believed that Mr. Smith was the Democratic nominee and whether they believed Mr. Allen was the Republican nominee.

Voter confusion was tested by measuring how often respondents incorrectly answered questions about the hypothetical candidates’ status as the official nominee of a political party. From the Court’s perspective, respondents are “confused” if they identify candidates on the Top-Two ballots as official party nominees. Under the legal framework established by the nonpartisan Top-Two primary, candidates are not nominees nor even affiliated with political parties. Table 1 summarizes the error rates for all three experimental groups and compares error rates between the partisan general election and the Top-Two general election ballots.

General election ballots

The two general election ballots allow the most direct assessment of how changes in ballot language affected voter confusion. One third of respondents were asked to examine a traditional partisan ballot where candidates were identified with a D or R next to their names. With these ballots, as with all ballots, respondents were asked if they believed the candidates were the nominee of a political party. The correct answer with partisan ballots is “yes” since candidates in traditional party elections *are* the official nominees of the political parties. Therefore, voter confusion on the traditional partisan ballot was assessed by measuring how many respondents incorrectly answered “no” when asked if candidates were the nominees of a political party. Although the Court did not express interest in measuring voter confusion caused by traditional partisan ballots, it is important to include that data to establish a baseline. When examining voter confusion caused by Top-Two ballots, there are two

measurements being considered. The first measures the aggregate level of voter confusion found when using a Top-Two ballot. That number, however, does not tell us whether the Top-Two general election ballot was *more confusing* than a traditional partisan ballot. It is inaccurate to assume that there is no voter confusion on a traditional ballot and, in fact, the data show just that. By first assessing the level of voter confusion on traditional partisan ballots, we can compare those results with the level of voter confusion on the Top-Two general election ballots to determine if the Top-Two ballots cause more or less confusion.

Because experiment subjects were asked the exact same battery of questions about both the Democratic candidate and the Republican candidate, there are three possible ways in which they could have responded. They could have correctly identified both the Republican and Democratic candidate as the nominee (or not), could have incorrectly identified both candidates as the nominee (or not), or they could have correctly identified one candidate and misidentified the other candidate. Essentially, they could have answered both questions right, both questions wrong, and one question wrong. Table 1 disaggregates the data in that fashion but then combines the incorrect answers in the last column.¹⁹

The data in Table 1 indicate that voter confusion with traditional partisan ballots, based on subjects who answered one or both nominee questions incorrectly, ranges from a low of 22% to a high of 28%—meaning approximately 1 in 5 voters do not believe candidates on a partisan ballot are the nominees of the parties when in fact they are. New and registered

¹⁸Both hypothetical names were male and not overtly ethnic names in order to eliminate gender and ethnicity as a possible factor in explaining different response rates.

¹⁹Interpreting voters who responded consistently to both candidates, regardless of party (both right or both wrong), does not present any methodological or operationalization issues. Interpreting the responses of voters who correctly identified a candidate of one party but not the other party is more problematic. One approach was to suggest they are “less confused” because they answered at least one question correctly. The other approach is to suggest that these voters are “more confused” because they, for some inexplicable reason, believe that a candidate who puts “prefers Republican party” is a nominee but a candidate who puts “prefers Democratic party” is not the nominee (or vice versa). For the purposes of the fourth column in Table 1 and Chi Square tests of significance, subjects who offered a split assessment were categorized as “confused.”

TABLE 1. VOTER CONFUSION RATES BY BALLOT TYPE

	<i>Partisan General</i>					<i>Top-Two General</i>				
	<i>Both Right</i>	<i>Both Wrong</i>	<i>One Wrong</i>	<i>(Comb Wrongs)</i>	<i>Total N</i>	<i>Both Right</i>	<i>Both Wrong</i>	<i>One Wrong</i>	<i>(Comb Wrongs)</i>	<i>Total N</i>
New Voters*										
N	46	9	4	13	59	23	31	6	37	60
%	0.78	0.15	0.07	0.22		0.38	0.52	0.10	0.62	
Registered Voters										
N	24	5	2	7	31	21	9	0	9	30
%	0.77	0.16	0.06	0.23		0.70	0.30	0.00	0.30	
Active Voters**										
N	128	46	4	50	178	145	76	10	86	231
%	0.72	0.26	0.02	0.28		0.63	0.33	0.04	0.37	

*Significant at $P < .0001$.**Significant at $P = .05$.

voters responded to the Partisan general ballot in the exact same way—77% correctly identified the candidate as the nominee, about 15% misidentified both candidates, and 6% misidentified one candidate. At first glance, it appears surprising, given their higher levels of education, age, and participation, that active voters had a higher error rate than the first two subject groups. It should be remembered, however, that this group of subjects was receiving continual updates from party staff as to the fact that the new Top-Two primary did not identify official nominees on the ballot. That information may have confused them when looking at the older, traditional partisan ballot.

It is the difference in voter confusion rates between the traditional general election partisan ballot and the Top-Two general election ballot that tells an interesting story. Only 38% of newer voters understood that neither candidate on the ballot was the nominee of a political party. 52% incorrectly thought both candidates were the nominees and another 10% thought one of the candidates was an official nominee. Registered voters fared better with 70% understanding the candidates were not nominees of the party and 30% incorrectly believing both candidates were nominees. Active voters mistakenly believed both candidates were nominees 33% of the time with an additional 4% thinking one of the candidates was a nominee. Looking at the aggregated wrong answers, newer voters mistakenly identified candidates with the “prefers Republican/Democratic party” language as the nominee of the party a staggeringly high 62% of the time. Registered voters made the same mistake 30% of the time and active voters misidentified candidates 37% of the time. Taken together, the data in Table

1 suggests that approximately one in three voters fail to understand that candidates on nonpartisan ballots are not the political party’s partisan nominees. The differences in error rates are statistically significant for newer and active voters, but the small N associated with registered voters limits our ability to conclude the same about registered voters. That the error rates are generally higher on the Top-Two general election ballot suggests that the state’s use of language indicating a candidate’s party preference on an official state ballot leads many voters to believe that those candidates are the official nominees of the political parties.

Primary election ballot

In the absence of any experimental data on how voters interpret the traditional partisan primary ballot, it is impossible to offer a direct juxtaposition with the data collected on the Top-Two primary ballot. The data is, however, illuminating in other ways. It is important to remember that the experiments were primarily measuring the ability of voters to comprehend the relationship between the candidate and the party in a variety of different electoral settings. The experiments in this project measure that concept in three different settings—a partisan general election, a Top-Two general election, and a Top-Two primary election. Despite the inability to present a direct comparison between a partisan and Top-Two primary ballot, we can still measure the extent of the confusion that appears when voters use a Top-Two primary ballot. Table 2 summarizes that data.

Of the newer voters, 19% misidentified both candidates as official nominees and an additional 14% misidentified one candidate, meaning that about

TABLE 2. VOTER CONFUSION RATES IN TOP-TWO PRIMARY

	<i>Both Right</i>	<i>Both Wrong</i>	<i>One Wrong</i>	<i>(Comb Wrongs)</i>	<i>Total N</i>
New Voters					
N	43	12	9	21	64
%	0.67	0.19	0.14	0.33	
Registered Voters					
N	27	11	1	12	39
%	0.69	0.28	0.03	0.31	
Active Voters					
N	104	23	3	26	130
%	0.80	0.18	0.02	0.20	

33% of newer voters exhibit some confusion with respect to the Top-Two primary ballot. Registered voters only fared slightly better with 28% misidentifying both candidates and 2% misidentifying one candidate, creating an overall error rate of 31%. As expected, active voters did much better with 18% misidentifying both candidates and 2% misidentifying one candidate, with an overall error rate of 20%.

The error rates for the Top-Two primary ballot were generally lower than the error rates for the Top-Two general election ballot. The difference in error rates merits examination. The obvious question is why are voters more confused by the general election ballot than by the primary ballot when both ballots use the exact same language? A simple answer emerges. On the Top-Two primary ballot, there are multiple candidates with the same party identification language. Therefore, respondents to the experiment look at ballots where there is more than one candidate who “prefers [the] Democratic Party” and more than one candidate who “prefers [the] Republican Party.” Given that respondents are examining a ballot that has two candidates with the exact same identifying language, logic, as much as any political knowledge, suggests that both candidates cannot be the (singular) nominees of a party. In contrast, when respondents examine a Top-Two general election ballot, they have a ballot with only one candidate who “prefers [the] Democratic Party” and only one candidate who “prefers [the] Republican Party.” It is much more likely that in such an environment, voters will assume that candidates are officially affiliated with the respective parties.

One interesting observation apparent from the data is that voters are more confused by the *results* of the Top-Two primary than the primary itself. A large majority of voters seem to understand that candidates on the Top-Two primary ballot are not the

nominees of particular political parties. When they look at the Top-Two general ballot, however, a ballot that *results* from a Top-Two primary election, they shift their assessment and begin to assume that the winners of the Top-Two nonpartisan primary that move onto the Top-Two general ballot are partisan nominees. One possible interpretation of the data is that voters believe a nonpartisan primary pits nonpartisan candidates against each other, but the winner of the election becomes a partisan nominee.

Perceived relationship between candidates and political parties

The term “nominee” has a specific legal and political meaning. Not all voters may be cognizant of the term’s narrow definition. Given the partisan labels attached to the nonpartisan state ballot, voters may perceive a relationship between candidates and parties that cannot be captured by the term “nominee.” To better understand the manner in which respondents perceive a relationship between candidates on a nonpartisan ballot and political parties, they were also asked a battery of questions that assesses that relationship in more abstract or general terms. Subjects of the experiment were also asked if they believed candidates were “the Representative of,” “affiliated,” or “associated” with a political party. Figures 1 through 3 summarize their perceptions.²⁰

For comparative purposes, the data in Tables 1 and 2 measuring respondents’ belief that candidates are the nominees of a political party are reproduced in Figures 1 through 3. When that data is compared with voter perceptions of the relationship between candidates and political parties, as measured by the other three questions, the data clearly indicate that a far greater percentage of voters perceive some type of official relationship between candidates and

²⁰As noted earlier, subjects were queried about affiliation, association, and representativeness for both a hypothetical Republican and Democratic candidate. In a very limited number of cases, subjects were inconsistent in their answers and, for example, identified the Democratic candidate as “associated” with the party but not the Republican candidate (or vice versa). Such responses result in percentages for the Democratic candidate being slightly different than that of the Republican candidate. In order to avoid disaggregating the data and thus creating 72 unique data points (3 ballot types × 3 demographic groups × 4 questions × 2 parties) the percentages between the Republican and Democratic candidate were averaged. The percentages between groups were so close that nothing in terms of accuracy or robustness was lost due to the averaging process.

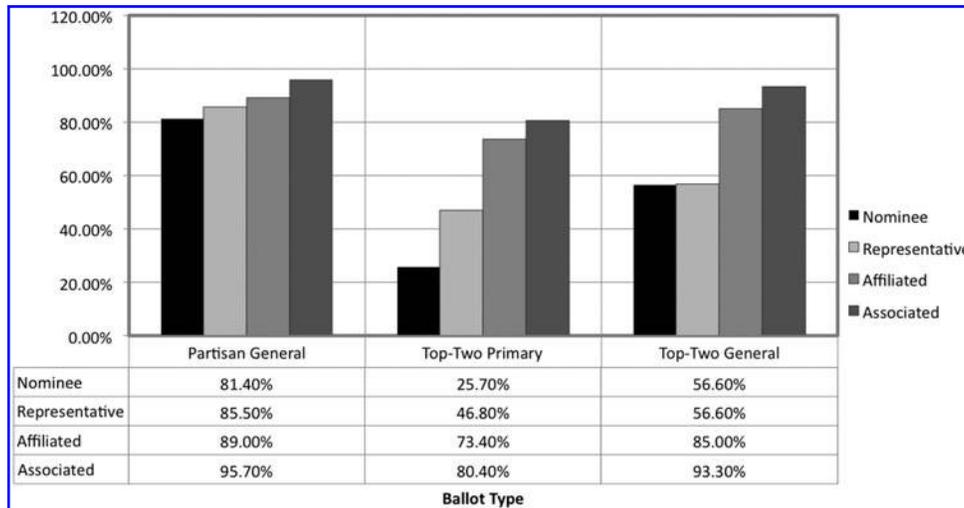


FIG. 1. New voters—perceived relationship of candidate to party.

political parties. As indicated in Figure 1, newer voters examining a nonpartisan Top-Two primary ballot identified candidates as “representatives” of one of the two political parties 47% of the time. A higher percentage of subjects identified a relationship between the party and the candidate when they were asked if they believed candidates were “affiliated” or “associated” with a political party. The data show respondents identified a relationship 73% and 80% of the time respectively.

The perception of a relationship between party and candidate increases across the board when respondents examine the nonpartisan general election ballot. Almost 57% of respondents identify candidates as the “representative” of the party.

Eighty-five percent felt the candidates were “affiliated” with a political party and 93% of voters believed the candidates were “associated” with a political party. Interestingly, the perceptions voters hold about candidates on the nonpartisan Top-Two general election ballot are surprisingly similar to the perceptions they hold about candidates on the partisan general election ballot. It is surprising in that the entire purpose of the nonpartisan ballot is to separate candidates from partisan attachments. The data here indicate that the state has failed in its goal because 93% of voters continue to see, at least at some level, a partnership between candidate and party.

As indicated in Figure 2, registered voters fared slightly better than newer voters. Registered voters

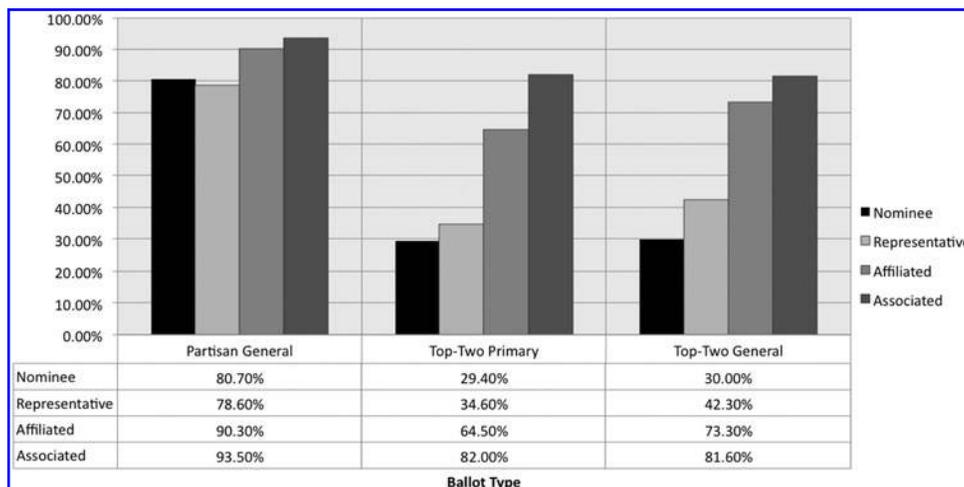


FIG. 2. Registered voters—perceived relationship of candidate to party.

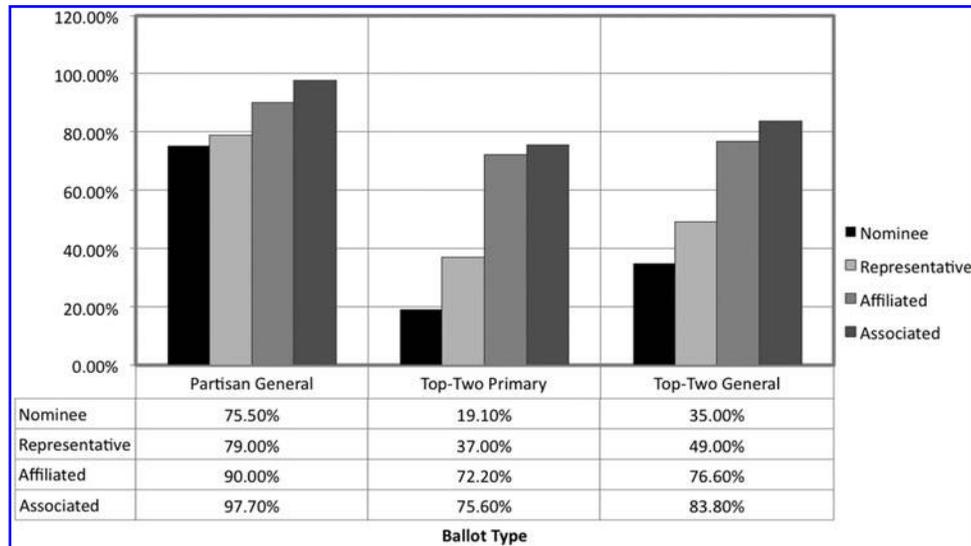


FIG. 3. Active voters—perceived relationship of candidate to party.

examining the nonpartisan Top-Two primary ballot identified candidates as the “representative of” the party 35% of the time. The assumption of a relationship between party and candidate rose to 64% and 82% when asked about candidates “affiliation” and “association.” As with newer voters, percentages increased across the board when respondents examined the Top-Two general election ballot. Forty-two percent felt candidates were the party’s representatives and 73% and 82% voters indicated that candidates had an affiliation and association with a party. Although these assumptions of a relationship are not as high as those manifested by newer voters, they are still high enough to suggest that the state has not severed the cognitive link that voters have between candidates and political parties. By allowing candidates to place partisan labels next to their name on a state ballot, voters continue to perceive a relationship between candidate and party regardless of disclaimer language on the ballot.

Figure 3 indicates that active voters, presumably those voters who have more political knowledge than others, have essentially the same perceptions as registered voters. Active voters assume candidates are the representatives of the party between 37% and 49% of the time, depending on ballot type. The affiliation and association questions range between 70% and 80%. Regardless of how one parses the data, a clear picture emerges. Voters, whether new voters, registered voters, or highly active voters, exhibit far more voter confusion when interpreting the new non-

partisan Top-Two ballots than when examining the traditional partisan ballot.

Experiments versus the “real world”

Experiments are designed to isolate a single variable and then test how variations of that variable affect outcomes. By isolating a single variable (in this case ballot language) the experiment controls for other possible variables that might affect voter understanding of the relationship, or lack thereof, between candidate and party. In the real world however, the state, political parties, and the candidates themselves might take multiple actions to alleviate the voter misperceptions identified in this article. The state might develop stronger disclaimer language than that currently used. Political parties may expend considerable resources to protect their brand and inform the public which candidates are or are not recognized by the party.²¹ Candidates may spend their own resources to indicate if they have received endorsements by political parties—

²¹This hypothetical raises issues beyond the scope of this article. Primarily the question of whether the state can employ practices which require political parties, or anyone, to expend resources to defend or exercise their constitutional rights. For the state to suggest that a political party’s constitutional associational rights are not burdened because the party can expend resources to disassociate with undesirable candidates raises thorny legal issues—primarily the concern that one can only exercise the constitutional rights one can financially afford.

local or statewide. Justice Thomas makes such a suggestion in his majority opinion in *Grange* noting “the State could decide to educate the public about the new primary ballots through advertising or explanatory materials mailed to voters along with their ballots (*Grange*, 522 U.S. at 13–14).”

Furthermore, experiments are single-shot games. The subject participates once. In real world elections, the experience is iterated. As voters see multiple ballots over time with the same disclaimer language, there may appear a learning effect. What is misunderstood in the first vote may be more understood by the second or third vote.

CONCLUSION

Looking at all the data together suggests a number of conclusions. Regarding the all important legal question concerning whether voters mistakenly believe candidates on a nonpartisan ballot are the nominees of political parties, the data implies that between one-fifth to one-third of the voters misinterpret primary ballots and between one-third to one-half misinterpret general election ballots. Whether these error rates are enough to represent “widespread voter confusion” will ultimately fall to the courts to decide. On the second question looking at whether voters perceive an official relationship between candidates on a nonpartisan ballot and political parties, the evidence is stronger. Across all voter types, 80%–90% of respondents expressed a belief that candidates were affiliated or associated with a political party despite clear disclaimer language on the ballot informing voters no such relationship exists. Given these numbers, there can be no doubt that voters using the new Top-Two system are suffering a significant level of voter confusion. Again, however, it will fall to the courts to decide if misperceiving a relationship between candidate and party, but not necessarily identifying candidates as official nominees of a party, meets Justice Thomas’ standard of widespread voter confusion.

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(Appendix follows →)

TOP-TWO PRIMARY

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APPENDIX A

Partisan general election ballot

Directions: Examine the sample ballot below and pretend that you will be participating in an election to select one of the candidates below. After reading the ballot carefully, answer the questions on the other side of the page.

KITTITAS COUNTY BALLOT
General Election November 5th, 2008

STATE PARTISAN OFFICES

Marking your ballot:

Please use a black or blue INK PEN to mark your ballot. To vote for your choice in each contest, completely fill in the box provided to the left of your choice. To vote for a person whose name does not appear on the ballot, completely fill in the box next to the words "write-in" and write in the candidate's name on the line provided.

Governor**4 year term Vote for ONE**

- John Smith (D)
 Mark Allen (R)
 Kirk Freeman (I)
 Write-in

LEGISLATIVE PARTISAN OFFICES

State Representative**Legislative District 1, Pos. 1**

- Jane Miller (R)
 Mary Johnson (D)
 Kate Bell (I)
 Write-in

Nonpartisan Top-Two primary ballot

Directions: Examine the sample ballot below and pretend that you will be participating in an election to select one of the candidates below. After reading the ballot carefully, answer the questions on the other side of the page.

KITTITAS COUNTY BALLOT
Primary Election August 25th, 2008

STATE PARTISAN OFFICES

Marking your ballot:

Please use a black or blue INK PEN to mark your ballot. To vote for your choice in each contest, completely fill in the box provided to the left of your choice. To vote for a person whose name does not appear on the ballot, completely fill in the box next to the words "write-in" and write in the candidate's name on the line provided.

Governor**4 year term Vote for ONE**

- John Smith
(Prefers Democratic Party)
 George Marker
(Prefers Republican Party)
 Mark Allen
(Prefers Republican Party)
 Joe Keen
(Prefers Democratic Party)
 Kirk Freeman
(States No Party Preference)
 Write-in

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MANWELLER

LEGISLATIVE PARTISAN OFFICES

VOTER-PLEASE READ:

Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party or that the party approves of or associates with that candidate.

**State Representative
Legislative District 1, Pos. 1**
 Jane Miller
(Prefers Republican Party)
 Mary Johnson
(Prefers Democratic Party)
 Kate Bell
(States No Party Preference)
 Write-in

Nonpartisan Top-Two general election ballot

Directions: Examine the sample ballot below and pretend that you will be participating in an election to select one of the candidates below. After reading the ballot carefully, answer the questions on the other side of the page.

KITITITAS COUNTY BALLOT General Election November 5th, 2008

STATE PARTISAN OFFICES

Marking your ballot:

Please use a black or blue INK PEN to mark your ballot. To vote for your choice in each contest, completely fill in the box provided to the left of your choice. To vote for a person whose name does not appear on the ballot, completely fill in the box next to the words "write-in" and write in the candidate's name on the line provided.

**Governor
4 year term Vote for ONE**
 John Smith
(Prefers Democratic Party)
 Mark Allen
(Prefers Republican Party)
 Write-in

LEGISLATIVE PARTISAN OFFICES

VOTER-PLEASE READ:

Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party or that the party approves of or associates with that candidate.

**State Representative
Legislative District 1, Pos. 1**
 Jane Miller
(Prefers Republican Party)
 Mary Johnson
(Prefers Democratic Party)
 Write-in

APPENDIX B

Based on the information presented in the sample ballot above, in the Governor's race,

1. Would you consider Candidate John Smith the **nominee** of the Democratic Party?
 - a) Yes
 - b) No
2. Would you consider Candidate John Smith **affiliated** with the Democratic Party?
 - a) Yes
 - b) No
3. Would you consider Candidate John Smith a **representative** of the Democratic Party?
 - a) Yes
 - b) No
4. Would you consider Candidate John Smith **associated** with the Democratic Party?
 - a) Yes
 - b) No

TOP-TWO PRIMARY

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5. Would you consider Candidate Mark Allen a **nominee** of the Republican Party?
 - a) Yes
 - b) No
6. Would you consider Candidate Mark Allen **affiliated** with the Republican Party?
 - a) Yes
 - b) No
7. Would you consider Candidate Mark Allen a **representative** of the Republican Party?
 - a) Yes
 - b) No
8. Would you consider Candidate Mark Allen **associated** with the Republican Party?
 - a) Yes
 - b) No

