

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WASHINGTON STATE GRANGE, :

4 Petitioner :

5 v. : No. 06-713

6 WASHINGTON STATE :

7 REPUBLICAN PARTY, ET AL. ; :

8 and :

9 WASHINGTON, ET AL., :

10 Petitioners :

11 v. : No. 06-730

12 WASHINGTON STATE :

13 REPUBLICAN PARTY, ET AL. :

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15 Washington, D.C.

16 Monday, October 1, 2007

17

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United States
20 at 10:02 a.m.

21 APPEARANCES:

22 ROBERT M. McKENNA ESQ., Attorney General, Olympia,
23 Wash.; on behalf of Petitioners.

24 JOHN J. WHITE, JR., ESQ., Kirkland, Wash.; on
25 behalf of Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ROBERT M. McKENNA, ESQ.,	
4	On behalf of Petitioners	3
5	ORAL ARGUMENT OF	
6	JOHN J. WHITE, JR., ESQ.	
7	On behalf of Respondents	28
8	REBUTTAL ARGUMENT OF	
9	ROBERT M. McKENNA, ESQ.	
10	On behalf of Petitioners	47
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in case 06-713, Washington State Grange v. Washington State Republican Party et al., consolidated with 06-730, Washington v. Washington State Republican Party et al.

General McKenna.

ORAL ARGUMENT OF ROBERT M. MCKENNA

ON BEHALF OF THE PETITIONERS

MR. MCKENNA: Mr. Chief Justice, and may it please the Court:

In adopting Initiative 872, Washington's voters followed this Court's guidance in California Democratic Party v. Jones. They adopted a top-two election system. By so doing the voters eliminated the crucial constitutional defect of a partisan blanket primary because in the top-two system the voters are no longer selecting the party's nominees for the November election. The Ninth Circuit nonetheless ruled that Initiative 872 is unconstitutional, holding that allowing each candidate to state his or her personal party preference on the ballot would create the appearance of association between a political party and candidate.

1 The Ninth Circuit is wrong for at least two
2 reasons. First, the Ninth Circuit's appearance-
3 of-association conclusion assumes that top-two ballots
4 will look the same as ballots under a party nominating
5 election system. They will not. The top-two ballot --

6 CHIEF JUSTICE ROBERTS: Can you give us
7 assurance that they will not? I take it we don't -- we
8 haven't had an election under this system, so we don't
9 know what the ballots are going to look like.

10 MR. McKENNA: Yes, Your Honor. That's
11 correct. We have not had an election, and the secretary
12 of state was enjoined by the district court before
13 having the opportunity to promulgate the regulations
14 governing the ballot after 872's adoption.

15 However, Your Honor, we may look to the
16 declaration of candidacy form, which the secretary of
17 state did have the opportunity to promulgate, which
18 appears in the corrected joint appendix at pages
19 592-593. And what we see there, Your Honor, Mr. Chief
20 Justice, is that, unlike the old declaration of
21 candidacy form, we have the candidates declaring
22 themselves as a candidate for the office of blank, and
23 instead of saying that they're a candidate of a party,
24 they say -- that you have an opportunity to check off
25 the box that my party preference is blank or I'm -- I am

1 an independent candidate; or, under Initiative 872, if
2 they check neither box, that will be left blank on the
3 ballot.

4 JUSTICE ALITO: But you say that the purpose
5 of allowing a candidate to declare a preference is
6 simply to convey useful information to voters, but once
7 you decided, once the State decided, that the ballot was
8 not going to indicate party affiliation, why do you
9 limit candidates to the names of parties? Why don't you
10 allow them to pick some other phrase that better
11 expresses their point of view? Somebody may want to
12 say, I'm the pro-environment candidate, or I'm the
13 no-new-taxes candidate. Why do you limit them to saying
14 Democrat, Republican, Libertarian, et cetera?

15 MR. McKENNA: Your Honor, the voters could
16 have chosen to allow candidates to include other
17 information. In fact, in the State's earliest days
18 candidates were given five words they could use for
19 whatever expression they wished. But the voters chose
20 to allow an expression of party preference, which the
21 State is allowed to do. The State is not required to
22 allow the ballot to be a form -- forum for political
23 expression, but the State is allowed to do so and has
24 chosen to do in this way.

25 JUSTICE ALITO: What is that and wasn't the

1 purpose that was offered by the proponent of the
2 initiative to try to get around the decision in Jones,
3 to change the system as little as possible?

4 MR. McKENNA: No, Your Honor, because there
5 is an immense difference between the top-two system and
6 the system that replaces the old blanket nominating
7 primary. The immense difference is of course that the
8 first stage of this two-stage general election process
9 is no longer being used to select the nominees of the
10 parties, which was identified as the one characteristic
11 in Jones --

12 JUSTICE STEVENS: Justice Alito can defend
13 his own question, but he asked whether or not the Grange
14 stated that this was the purpose.

15 MR. McKENNA: Well, the Grange was --

16 JUSTICE STEVENS: And then you -- you didn't
17 quite answer that question. You said, oh no, and you
18 gave an explanation. But just as a matter of the
19 historical record --

20 MR. McKENNA: Yes.

21 JUSTICE STEVENS: -- Justice Alito's
22 question was accurate with respect to the proponent's
23 position, was it not?

24 MR. McKENNA: Yes, Your Honor, but the
25 Grange also said in the voters' pamphlet statement,

1 quote, "This system has all the characteristics of a
2 partisan blanket primary save the constitutionally
3 crucial one: Primary voters are not choosing a
4 primary's nominee." That's Joint Appendix 79.

5 So, yes, they were campaigning for it, but I
6 believe that the relevant State purpose or regulatory
7 interest in allowing an expression of party preference
8 is the same as we see referenced in Tashjian and in
9 Anderson v. Celebrezze.

10 JUSTICE KENNEDY: Well, if it's your
11 position that the parties are not really injured or
12 affected by this, and the parties' position is that they
13 are, who should we believe? I mean, it's hard for you
14 to tell the parties that they don't know what's in their
15 best interest.

16 MR. MCKENNA: Your Honor, this is a facial
17 challenge. All the major cases underlying this one were
18 as-applied challenges. The parties were able to bring
19 in, in all those cases, evidence. There is no evidence
20 in the record that the parties will be harmed by the
21 expression of party preference.

22 JUSTICE SCALIA: We know what -- what it's
23 going to be like. We don't know the exact phrasing on
24 the ballot, but we do know that a candidate is allowed
25 to associate himself with a party, but a party is not

1 allowed to disassociate itself from the candidate.

2 I am less concerned about the fact that the
3 candidate can't say I'm the -- I'm the no-taxes
4 candidate, than I am about the fact that he can
5 associate himself with the Republican Party or the
6 Democratic Party on the ballot and that party has no
7 opportunity on the ballot to say, we have nothing to do
8 with this person. That it seems to me is a great
9 disadvantage to the parties.

10 MR. McKENNA: Justice Scalia, there may be
11 an association in the dictionary sense, in the same way
12 that a candidate who expressed a preference for one
13 public policy versus another may be associated. But in
14 the constitutional sense, this Court has found that
15 there is a forced association only when the objecting
16 party is compelled to speak it or when the objecting
17 party is --

18 JUSTICE SCALIA: I'm not talking about a
19 First Amendment forced association. I'm talking about
20 an association for purposes of making this a fair
21 election at which the parties have an opportunity to
22 nominate and support their own candidates. And what
23 this system creates is a ballot in which an individual
24 can associate himself with the Republican Party, but on
25 the ballot the Republican Party is unable to dissociate

1 itself from that candidate.

2 MR. McKENNA: Your Honor, I would refer the
3 Justices to pages 2 and 3 of the Grange yellow brief
4 where two sample ballots are laid out that incorporate
5 the language from the declaration of candidacy
6 regulations.

7 CHIEF JUSTICE ROBERTS: Are you telling us
8 that that's what the ballots are going to look like?

9 MR. McKENNA: Yes, Your Honor. I believe
10 this is what the ballots will look like. And -- and
11 until the --

12 JUSTICE GINSBURG: You have two choices and
13 I think there's another one on page 12, is there not?
14 So are you representing, General McKenna, that one of
15 these will be what the State of Washington ballot will
16 look like?

17 MR. McKENNA: Justice Ginsburg, these are
18 two examples of what the ballot is likely to look like,
19 although it's frankly also likely to have even more
20 information stating the difference between expressing a
21 preference and expressing a formal association.

22 JUSTICE SCALIA: Will, will it say whether
23 the party that is preferred likes this candidate?

24 MR. McKENNA: It will say, Your Honor, if
25 you would look to the sample --

1 JUSTICE SCALIA: I think you can say yes or
2 no to that. Will it say whether the party for which he
3 expresses a preference claims or disclaims him?

4 MR. McKENNA: It will stay that it is not a
5 statement by the political party identifying that
6 candidate.

7 JUSTICE SCALIA: Please answer yes or no.
8 Will it say whether the party for which he has expressed
9 a preference claims or disavows him?

10 MR. McKENNA: It will not, Your Honor.

11 JUSTICE SCALIA: All right.

12 JUSTICE SOUTER: General, as I understand it
13 the parties are now free to come up with any scheme they
14 want to for selecting an official candidate.

15 MR. McKENNA: Yes, Your Honor.

16 JUSTICE SOUTER: Let's assume the Democratic
17 Party decides to have a State convention. If the law in
18 Washington provided that the nominee selected by that
19 convention could state on the ballot not merely a
20 preference for Democrats, but a statement that, I am the
21 nominee of the Democratic Party, your position in this
22 case I take it would be exactly the same.

23 MR. McKENNA: Yes, Your Honor, it would.

24 JUSTICE SOUTER: Okay.

25 JUSTICE STEVENS: Let me ask this question.

1 Is there anything in the State law that would prevent
2 you from requiring a candidate to be a member of the
3 party whose preference he states?

4 MR. MCKENNA: There would not be, Justice
5 Stevens, no.

6 JUSTICE STEVENS: And under the -- under the
7 court's, holding it would be equally unconstitutional if
8 he did that, I suppose.

9 MR. MCKENNA: Your Honor, it would be
10 equally constitutional if we prevented someone, yes,
11 sir, from expressing a party preference or affiliation.

12 JUSTICE STEVENS: Indeed, there's -- I'm
13 sorry. Go ahead.

14 JUSTICE ALITO: Will the ballots necessarily
15 be the same in every county?

16 MR. MCKENNA: Yes, Your Honor, because they
17 will be promulgated under regulations established by the
18 State secretary of state.

19 JUSTICE ALITO: Some of the counties have
20 paper ballots, some of the counties have -- is that
21 correct?

22 MR. MCKENNA: Yes, Your Honor. But in
23 Washington State nearly all voters vote by mail now. So
24 they -- over 90 percent of voters and eventually nearly
25 100 percent of voters will be voting by mail and will

1 receive the same ballot form, with the same ballot
2 instructions and explanations as in the samples that
3 I've showed you.

4 JUSTICE SCALIA: Is -- Is there any, what
5 should I say, truth investigation by the State of
6 Washington? Suppose a candidate who has been a Democrat
7 all his life, has run for office as a Democrat, agrees
8 with all the positions of the Democratic Party, chooses
9 to state on the ballot: I prefer the Republican Party.
10 That's okay?

11 MR. McKENNA: Yes, Your Honor. I would
12 refer you, Justice Scalia to JA-415. Section 9.5(5) of
13 Initiative 872 requires the candidate to sign a
14 notarized declaration, quote, "stating that the
15 information provided on the form is true." So they are
16 signing declarations -- a declaration which is notarized
17 saying that everything that they have put on the form is
18 true.

19 JUSTICE SCALIA: I guess -- how can you say
20 it's false?

21 MR. McKENNA: That's correct, Your Honor.

22 JUSTICE SCALIA: If he thinks he prefers it,
23 I guess he prefers it, even though it's contrary to his
24 entire life.

25 MR. McKENNA: Yes, Justice Scalia, it is

1 expression of preference. It is a subjective
2 expression. It would be difficult to disprove.
3 However, if a candidate were to -- let's say the
4 chairman of the State Republican Party filed a
5 declaration of candidacy and said, I prefer the
6 Democratic Party. The Democratic Party would have many
7 opportunities to object. And you know, the ballot is
8 not even the most important source of information that
9 voters have, as this Court has recognized in Tashjian
10 and Celebrezze. So there would be many opportunities.

11 If there is a concern about false
12 statements, Your Honor, it seems to me the correct
13 approach is to provide for more speech, not to limit the
14 speech of all the candidates by refusing to permit them
15 to express their preferences.

16 JUSTICE STEVENS: Is there any evidence, any
17 historical evidence, that any candidate has ever done
18 what Justice Scalia suggests?

19 MR. McKENNA: No, Your Honor. I'm not
20 aware of any specific instance.

21 CHIEF JUSTICE ROBERTS: There just hasn't
22 been an election under this, under this law, right?

23 MR. McKENNA: Correct Mr. Chief Justice. We
24 have not had a chance to even hold an election.

25 JUSTICE KENNEDY: Well, there is evidence

1 that, in other States, those who preached racial hatred
2 have tried to associate themselves with a particular
3 party, much to the concern of that party, and I see
4 nothing in your position that would prevent that.

5 MR. McKENNA: Justice Kennedy, the
6 candidates will be expressing a preference, this is true
7 if they wish to. But there will be many -- first of
8 all, that is not compelled speech by the party; and
9 secondly, it is not compelling the party to accept that
10 person as a member, as a member. As the emergency rules
11 for the declaration and as a sample ballot show, we'll
12 be very explicit in explaining to the voters that
13 someone claiming a preference, it's not a statement by
14 the party that they're claiming the person as a member
15 or a formal association.

16 JUSTICE KENNEDY: And is the remedy for the
17 party, you said, to have more speech for the party, to
18 say that this is not their candidate, etcetera?

19 MR. McKENNA: Yes, Your Honor, that is
20 exactly what --

21 JUSTICE KENNEDY: But this Court has said
22 that parties could be strictly limited in the amount of
23 moneys they spend to endorse a particular candidate.

24 MR. McKENNA: But there will be many
25 opportunities --

1 JUSTICE KENNEDY: I don't think the law can
2 have it both ways.

3 MR. McKENNA: Your Honor, if I can use an
4 example that might help illustrate our point. Imagine
5 that Mr. Dale from the Boy Scouts v. Dale case moved to
6 Washington State and wanted to run for office, and
7 imagine that, instead of saying party preference, the
8 voters had said, well, you can choose to list any
9 organization for which you have a preference, a
10 political organization or another; and that Mr. Dale
11 decided to express a preference for the Boy Scouts.
12 Mr. Dale would be exercising his own speech, but that
13 would not be the same thing as compelling speech by the
14 Boy Scouts. Nor would he be compelling --

15 CHIEF JUSTICE ROBERTS: Nobody is voting for
16 Mr. Dale perhaps on the misimpression that he is
17 affiliated with the Boy Scouts, and that's what
18 undermines the Boy Scouts' associational rights. People
19 are going to think he's associated with the Boy Scouts
20 even though they may want to disassociate themselves
21 with him.

22 MR. McKENNA: Allowing -- Mr. Chief Justice,
23 allowing Mr. Dale to say he has a preference for the Boy
24 Scouts I don't think can reasonably be confused with him
25 claiming that he is a member, particularly when as

1 applied --

2 CHIEF JUSTICE ROBERTS: Do you agree that if
3 it were that way, in other words if the ballot looked
4 like the ballot on page 1 of the Grange reply brief,
5 that that would be unconstitutional?

6 MR. McKENNA: Yes, Your Honor, it would be
7 harder to argue from our side. But Your Honor, the
8 Ninth Circuit only assumed that the ballot would look
9 like the ballot on page 1 of the Grange yellow brief.
10 They assumed that the ballot would look exactly like the
11 ballot in a nominating primary, and our point here is
12 that it will not.

13 CHIEF JUSTICE ROBERTS: Do these preference
14 statements continue under the general election?

15 MR. McKENNA: Yes, Your Honor, they do.

16 CHIEF JUSTICE ROBERTS: Can you change
17 between the primary and the general election? Can you
18 say my preferred party is the Republican Party, so you
19 get more Republican votes to get you over the hump so
20 you are one of the two, and then in the general election
21 say, my preference is the Democratic Party, because
22 there are more Democratic voters?

23 MR. McKENNA: No, Mr. Chief Justice. State
24 law would not permit that.

25 JUSTICE ALITO: Well, why can't you do that,

1 if the purpose is to provide accurate information about
2 a candidate's position. Suppose the candidate prefers
3 one party at the time of the primary and then something
4 happens. The issues change. The person -- the
5 candidate says: Well, now my preference is really for
6 the other party. I was close before and I've swung over
7 to the other side. If that's accurate information about
8 where the candidate stands at the time of the general
9 election, why can't that be put on the ballot, unless
10 you're trying to indicate affiliation rather than really
11 preference?

12 MR. McKENNA: Justice Alito, the State could
13 have chosen to allow people to change their preference
14 expression. But the State did not and the State is not
15 required to do so.

16 CHIEF JUSTICE ROBERTS: You're saying --
17 your argument is that they have a First Amendment right
18 to put their preference on the ballot, but somehow when
19 the general election comes along that First Amendment
20 right evaporates.

21 MR. McKENNA: There is also -- Mr. Chief
22 Justice, there is also an important practical
23 consideration here. And the Court has recognized the
24 State has regulatory practical interests --

25 JUSTICE GINSBURG: General McKenna, may I

1 ask you at that point --

2 MR. McKENNA: Yes.

3 JUSTICE GINSBURG: -- if that's a correct
4 statement of your position.

5 I didn't understand you to take the position
6 that a candidate has a constitutional right to state on
7 the ballot. The State of Washington has chosen to give
8 the candidate that option, but is -- I have not read
9 anything in your brief that suggests that a candidate
10 has a right to do so.

11 MR. McKENNA: You're correct, Justice
12 Ginsburg. I did not mean to suggest that candidates
13 have a constitutional right to have any information on
14 the ballot like an expression of party preference. And
15 I was about to say, there is a very important practical
16 reason to require candidates to decide what their
17 preference will be listed as and to keep it the same.
18 The reason is that we have to have time to print the
19 ballots and produce the ballots in time to send out 3
20 weeks before the election, when over 90 percent of
21 voters begin voting by mail.

22 JUSTICE GINSBURG: But you did say that it
23 is unlikely voters will be mistaken, that they will
24 mistakenly consider a statement of party preference to
25 be the equivalent of a party endorsement. You did say

1 that, and on what basis are you predicting that the
2 statement of preference will not be confused with a
3 statement of endorsement?

4 MR. MCKENNA: On two bases, Justice
5 Ginsburg. The first basis is that, as we've shown with
6 the sample ballots from the Grange brief, the State will
7 be extremely explicit in stating that the candidate's
8 claim of preference or statement of preference is not
9 the party's statement that the candidate is a member,
10 endorsee, nominee, or what have you.

11 The second basis is I think just the general
12 basis this Court has recognized in Tasjian and in
13 Anderson v. Cellebreze, where the Court expressed a
14 greater faith in the ability of individual voters to
15 inform themselves beyond just the balance. There are so
16 many other sources of information.

17 JUSTICE SCALIA: I don't think it's enough
18 that -- that there's no claim of party endorsement.
19 There is a claim of associating himself with the party,
20 and if he associates himself with the party it seems to
21 me the party should be able to disassociate itself from
22 him. And I think it harms the party not to permit that.

23 MR. MCKENNA: No, Justice Scalia, I
24 respectfully disagree. This is not an association in
25 the constitutional sense. It is merely an expression of

1 preference, which we -- which Initiative 872 in its open
2 language and which the ballot will carefully distinguish
3 from claiming a formal association.

4 JUSTICE SOUTER: Do you know any Democrats
5 who go around saying I prefer the Democratic Party who
6 do not regard themselves and register themselves as
7 Democrats? I mean, in the real world I don't know
8 that -- I don't know whether this is fatal to your case,
9 but in the real world, it seems to me the distinction
10 you're drawing is simply not drawn.

11 MR. McKENNA: Your Honor, I think it's
12 helpful to think of the expression of party preference
13 as a subset of party affiliation. In other words,
14 someone might be a party affiliate --

15 JUSTICE SOUTER: It's helpful to your case,
16 but, going back to my question, do you know any people
17 who go around saying, well, you know, I really prefer
18 the Democrats; I'm a Republican myself? I mean that,
19 that doesn't happen.

20 MR. McKENNA: Well, the example of Senator
21 Lieberman comes to mind, where he said I really prefer
22 the Democrats and I'm running as an independent.

23 (Laughter.)

24 JUSTICE SOUTER: There's always one.

25 But seriously, as a systemic matter, do you

1 really think that's -- that's a distinction that anyone
2 would recognize?

3 MR. McKENNA: I think that we are permitted
4 to allow people to express their preference. Many of
5 these people who do so would be independents, I think.

6 JUSTICE SOUTER: No, but that isn't
7 responsive to my question. Do you really think that
8 that distinction is a distinction which is accepted as a
9 working way of thinking in this world?

10 MR. McKENNA: Yes. Yes, I do, Justice
11 Souter.

12 JUSTICE SOUTER: You really do?

13 MR. McKENNA: In Washington State over 40
14 percent of the voters, for example, identify themselves
15 by -- as independents. Keeping in mind we have no party
16 registration in Washington State, over 40 percent of
17 voters when asked say I'm an independent; I may -- and
18 that does not mean they may not prefer one party over
19 the other, they may not generally vote for one party or
20 the other, but they think of themselves as independent.

21 JUSTICE SOUTER: But it means that they --
22 they will prefer the candidate of one party or another,
23 assuming they vote and there's no independent candidate
24 running. But it seems to me that the very declaration,
25 the very assumption of status as an independent says, I

1 don't as a systemic matter prefer one party to the
2 other; a pox on both their houses.

3 MR. McKENNA: Justice Souter, it may also
4 mean that I choose not to formally affiliate with the
5 party, even though I prefer that party's policies,
6 goals. You look at the independent --

7 JUSTICE SOUTER: It could. But do you
8 really think, again, in the real world, that that's why
9 people register themselves as independents?

10 MR. McKENNA: We have no registration in
11 Washington State, Justice Souter.

12 JUSTICE SOUTER: Well, however the statement
13 is made.

14 MR. McKENNA: There have been a number of
15 cases where individuals have run -- have run for office
16 as independents and then have chosen to, you know,
17 attend the caucus meetings of the Democratic Party, for
18 example. So, yes, it does happen. And the point is
19 that people are allowed to do this, but they're not
20 required to.

21 JUSTICE SCALIA: General McKenna, I'm
22 interested in how this new system meshes with the
23 otherwise quite partisan nature of Washington's election
24 laws. For example, the major political parties have a
25 certain -- certain benefits that are not given to minor

1 parties, and the major parties are determined on the
2 basis of obtaining more than a certain percentage, I
3 think it's 5 percent, in a statewide election. How are
4 you going to figure out whether the Republican Party
5 has, has gotten more than 5 percent when all you have is
6 somebody who expresses a preference for the Republican
7 Party, although he's not really a Republican?

8 MR. McKENNA: Your Honor, as legal counsel
9 for the State we've analyzed that question, and have
10 concluded that unless and until the legislature chooses
11 to alter the statute to harmonize at a practical level,
12 the way that we will apply that statute is to count the
13 votes of the party cast for the party's official
14 nominee. The person who has been identified the party
15 through their separate nominating process, for example,
16 through a convention, that person will be identified.
17 And they will campaign as "the nominee." They will
18 explain that to the voters in every way possible, and we
19 will count the votes cast for that person in calculating
20 whether the 5 percent threshold has been met.

21 JUSTICE KENNEDY: I was going to ask the
22 counsel for the Respondents, and you can answer as well,
23 can you explain to me briefly the existing structure for
24 the Republican Party, the Democratic Party, to say
25 Mr. Smith is our nominee?

1 MR. McKENNA: Well, the Initiative 872,
2 Justice Kennedy, repealed the old State law which
3 required the parties to use the State primary to select
4 their nominees. And Initiative 872, in fact, is silent
5 on the procedures the parties will follow. So they are
6 left as they were back in the early days of statehood to
7 decide for themselves how to designate their nominees.

8 JUSTICE SCALIA: And they have not devised a
9 structure that we know of?

10 MR. McKENNA: No. Actually, Your Honor,
11 they have. In fact, the Republican Party after
12 Initiative 872 was adopted and before it was enjoined
13 adopted rules and procedures for holding nominating
14 conventions.

15 And they also, for example, adopted a rule,
16 which is Rule 5, that they said that if an incumbent
17 runs and receives 66 percent of the support at the
18 nominating convention, no other Republican can go onto
19 the ballot. This is their claim. No other Republican
20 can go onto the first stage ballot and claim to be a
21 Republican. That is their assertion. Only that one
22 person can go on with the "R" after his name -- an idea
23 that we basically reject if it means that no one else
24 can even express a preference for the Republican Party.

25 But we agree that only one candidate will be

1 allowed to truthfully claim that he or she is the
2 nominee of the party if the party has gone through a
3 nominating process of its own.

4 JUSTICE SOUTER: But may not claim that on
5 the ballot itself?

6 MR. McKENNA: Correct, Justice Souter.

7 CHIEF JUSTICE ROBERTS: They're not allowed
8 to split the ballot in their preference, are they, say I
9 prefer one party on domestic issues, I prefer the other
10 party's position on foreign affairs?

11 MR. McKENNA: No, Mr. Chief Justice, they
12 are not.

13 JUSTICE SCALIA: One of the briefs says that
14 the Republicans -- I think the Republicans or the
15 Democrats checked with the, with the State election
16 officials who said that there's no provision for
17 convention, for nomination by convention.

18 MR. McKENNA: Justice Scalia, they did not
19 check with the State officials. They cite in the record
20 letters from a couple of county auditors. But the
21 county auditors have no independent authority. They
22 operate under the secretary of state's rules.

23 JUSTICE SCALIA: So they can-- they can
24 conduct conventions if they wish?

25 MR. McKENNA: Yes, sir, Justice Scalia, they

1 may.

2 I would just like to close this part of my
3 argument, if I may, by pointing out that in our view the
4 voters have adopted a top-two election system which
5 vindicates both the rights of the parties and the
6 people. The parties can select their standardbearers
7 without any State interference, adopting their own
8 nomination process.

9 And the people are not limited to candidates
10 selected by the parties. They have more choice, which
11 is a value that was validated in the Jones decision,
12 albeit holding that you can't do that with nonmembers
13 selecting the party's nominees.

14 The parties, though, argue that no candidate
15 can even state an expression of party preference, cannot
16 make an expression of party preference on the ballot
17 without the party's consent. Taken to its logical
18 conclusion, the parties are really claiming they have a
19 First Amendment right to require the State to place a
20 single candidate of their choosing on the ballot.

21 If you look at the joint appendix, page
22 13 --

23 CHIEF JUSTICE ROBERTS: But clearly, it's
24 just like a trademark case. I mean, they're claiming
25 their people are going to be confused. They are going

1 to think this person is affiliated with the Democratic
2 or Republican Party when they may, in fact, not be at
3 all.

4 MR. McKENNA: Mr. Chief Justice, they make
5 that claim without the benefit of any evidence. The
6 Ninth Circuit and the district court and the parties
7 simply assume this will happen, and they assume, for
8 example, that ballot looks just like the old nominating
9 primary ballot, when, in fact, as we've shown, it
10 clearly will not. And, of course, we don't believe
11 trademark law applies here in this case, although I can
12 address that if you wish.

13 CHIEF JUSTICE ROBERTS: I didn't suggest it
14 would be a trademark violation. I think I said it was
15 just like the same analysis. And I don't know why you
16 would give greater protection to the makers of products
17 than you give to people in the political process.

18 MR. McKENNA: They deserve protection, of
19 course, Mr. Chief Justice. The question is whether or
20 not merely allowing someone to express their party
21 preference somehow will mislead the voters. This Court
22 has shown more faith in the voters than that.

23 I'll reserve the balance of my time. Thank
24 you, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: Thank you, General.

1 Mr. White.

2 ORAL ARGUMENT OF JOHN J. WHITE, JR.

3 ON BEHALF OF RESPONDENTS

4 MR. WHITE: Mr. Chief Justice and may it
5 please the Court:

6 Candidates are the party's messengers to win
7 over the public on the important issues of the day.
8 Initiative 872 converts the established right of
9 political parties to select their messengers into a mere
10 right to endorse.

11 JUSTICE SOUTER: What do you -- what do you
12 say about the fact that you have a right to select and
13 designate an official candidate and it's independent of
14 this ballot procedures?

15 MR. WHITE: As the secretary of state
16 pointed out -- and this is at JA-363 -- the secretary of
17 state indicated the State would pay no attention to the
18 party's nominating conventions and instead would
19 continue to allow candidates to use party labels just as
20 they had in the primary before.

21 JUSTICE SOUTER: Okay. If the rationale in
22 Jones was that the defect was that the association,
23 political association, was being adulterated by the
24 method of, of the use of ballots, to select what was an
25 official nominee, that problem does not exist here.

1 MR. WHITE: It does, it does, Your Honor.
2 And it does in the manner that this -- the candidates
3 who were selected at the Initiative 872, the modified
4 blanket primary, are going to be carrying the party's
5 standard in the general election.

6 JUSTICE SOUTER: You're saying in practical
7 terms, this is a nomination, even though there may be a
8 separate official nomination that nobody pays attention
9 to?

10 MR. WHITE: Absolutely, Your Honor.

11 JUSTICE SOUTER: Then why is one party going
12 to the trouble of establishing a convention system to
13 make nominations?

14 MR. WHITE: We adopted -- the Republican
15 Party, the Democratic Party and the Libertarian Party
16 all adopted rules governing nomination of our candidates
17 by convention. We corresponded with all of the county
18 auditors who would be conducting partisan elections in
19 2005, and we received identical letters from all four of
20 them indicating that they had consulted with the
21 Secretary of State and that the initiative contemplated
22 no partisan nomination process separate and apart from
23 the primary. The Secretary of State received copies of
24 those letters; the Secretary of State's public
25 statements with respect to those letters was that they

1 would pay no attention to the nominating process.

2 JUSTICE SOUTER: Well, they will pay no
3 attention, I take it, in the sense that there will be
4 nothing indicating an official nomination on the ballot
5 itself. But as I -- I am also assuming that the parties
6 through a convention, or whatever other scheme they can
7 come up with, can -- can designate an official nominee
8 quite independently of this ballot. And if they do so
9 designate, they can campaign on that person's behalf.
10 The person in campaigning can say, I am the official
11 nominee of the X party. And those facts are true,
12 aren't they?

13 MR. WHITE: They are, Your Honor, but that
14 converts the right to nominate to a mere right to
15 endorse, and this Court has recognized that the ability
16 to endorse a candidate is no substitute --

17 JUSTICE SOUTER: You're saying that a right
18 to nominate has to be a right to exclude everyone from
19 the ballot except the nominee -- everyone from the
20 ballot under that banner, from the nominee.

21 MR. WHITE: To be -- to be a meaningful
22 right to nominate, yes, Your Honor. It --

23 JUSTICE GINSBURG: Where does that right
24 come from? I thought in Jones, the Court had said if
25 you had just a blanket primary, with no indication of

1 party affiliation, that that would be constitutional.
2 And if that's so, then parties don't have any right to
3 have a candidate.

4 MR. WHITE: I'm not suggesting that the
5 parties have a constitutional right to place their party
6 name on a truly nonpartisan ballot, and I think what the
7 Jones Court was hypothesizing was the true nonpartisan
8 primary where there are no party identifications. Our
9 objection is not to a -- necessarily to a nonpartisan
10 ballot. It's to a partisan ballot where the State is
11 going to put someone else on that ballot using our
12 party's name and competing against our nominee under --

13 JUSTICE GINSBURG: So you would have no
14 objection if this - everything was the same, except no
15 party affiliation were shown.

16 MR. WHITE: That --

17 JUSTICE GINSBURG: That would be
18 constitutional?

19 MR. WHITE: That would not violate our First
20 Amendment rights, Your Honor. Washington --

21 JUSTICE STEVENS: May I ask this question?
22 It's hypothetical, I suppose, but supposing the statute
23 further provided that a candidate may not designate a
24 preference unless he has been a registered member of
25 that party for at least a year, and otherwise the

1 statute is exactly how it is now. Would that be
2 constitutional?

3 MR. WHITE: No, Your Honor, because the
4 State is still then resolving what is an internal
5 factional fight between real Republicans using a blanket
6 ballot where voters from rival parties are able to
7 determine --

8 JUSTICE STEVENS: In my hypothesis the
9 person is a real Republican. He is just not the one
10 selected as the candidate.

11 MR. WHITE: That's correct, Your Honor, but
12 then the blanket is still selecting which Republican
13 advances to the general election.

14 JUSTICE KENNEDY: Well then, it's not just a
15 rhetorical flourish. It's true; when the State says
16 that you take the position that you are entitled to say
17 on the ballot who your nominee is, that has to be a
18 correct statement of your position given this statute
19 and given the issues presented to us here.

20 MR. WHITE: I'm -- I'm not --

21 JUSTICE KENNEDY: Or is that just somewhat
22 hyperbolic? It seems to me he is right based on your --
23 on the position you're now stating.

24 MR. WHITE: The political parties have the
25 right to nominate their candidate and restrict the use

1 of the party name to candidates who have been authorized
2 to use that.

3 JUSTICE SCALIA: I didn't understand you to
4 say that you have a right to a partisan process in which
5 your -- only your nominee is shown. I thought you're
6 saying that if it is a process in which party
7 affiliation is shown, then your endorsed candidate
8 should be set aside somehow.

9 MR. WHITE: That, that -- that is our -- is
10 our position, Justice Scalia. We are not suggesting we
11 have a right to a partisan process. Washington's
12 constitution makes its legislative elections a partisan
13 process, but once the State has decided to use partisan
14 identification as the sole information that's presented
15 on the ballot, it is telling the voters that this is the
16 most important thing for you to be considering when you
17 --

18 JUSTICE STEVENS: Even if the information is
19 by statute true, in my hypothetical he must be a member,
20 but still you make the same objections.

21 MR. WHITE: Yes, Your Honor. As this Court
22 pointed out in Jones with the comparison of the Mario
23 Cuomo/Edward Koch race, it is for the political parties
24 to be able to resolve that internal party competition.
25 Initiative 872 still uses blank --

1 JUSTICE STEVENS: You're stating to suppress
2 information. So the plaintiff says there is nothing to
3 prevent the nominee or the convention from publicizing
4 widely the fact that the convention picked me as their
5 standard bearer. The fact that some other member of the
6 party gets his name on the ballot doesn't prevent the
7 public from being informed about the truth, does it?

8 MR. WHITE: Perhaps I misunderstood your
9 question, Justice Stevens. The Republican Party would
10 not prevent the unsuccessful candidate from running in
11 the election. He could run --

12 JUSTICE STEVENS: It would prevent him from
13 running and saying he is a Republican.

14 MR. WHITE: On -- having him listed on the
15 ballot where the State is indicating that that is the
16 most important information to consider, the partisan
17 affiliation, and the State has hypothesized through the
18 Grange reply brief that there are all these other
19 possible formulations to ballot. However, before the
20 Ninth Circuit, in the State's petition appendix at page
21 24a, the Ninth Circuit squarely put to the State's
22 attorney the question: How would candidates be
23 designated on the ballot where you had two Republicans
24 who had competed against each other in the party's
25 nominating process, and one had been selected; and a

1 third candidate who had absolutely no affiliation with
2 the party also entered the race. And the State told the
3 Ninth Circuit yes, they would be identified identically
4 on the ballot.

5 JUSTICE KENNEDY: Suppose there were an
6 empirical study that Washington voters know about this
7 system, and that 80 percent of the Washington voters
8 know that the party has not endorsed any one of these --
9 all of these candidates. That it's just say a statement
10 of preference, that that's all it means; the voters know
11 this. Is your position the same?

12 MR. WHITE: Yes, Your Honor. The notion
13 that disclaimers are necessary, and the State indicates
14 that they will spend a million dollars to try to clear
15 this up, is evidence of the confusion that's likely to
16 occur. But even if the State does come forward and put
17 all these disclaimers and preferences on, what the State
18 is essentially doing on the ballot is masking who the
19 Republican Party's nominee is by the presence of other
20 candidates --

21 JUSTICE KENNEDY: But -- but my submission,
22 or my hypothetical and it's just a hypothetical, is that
23 no one is misled by this.

24 MR. WHITE: Do we know --

25 JUSTICE KENNEDY: Accept the hypothetical as

1 true. Then what's the injury?

2 MR. WHITE: The interest then is that you
3 still have two Republican-identified candidates who are
4 purporting to carry the party's message to the voters,
5 and the voters are resolving that intra-party
6 competition.

7 CHIEF JUSTICE ROBERTS: If you have, for
8 example, a disclaimer, it seems to me that undermines
9 your argument that they are successfully, anyway,
10 purporting to carry the party's message.

11 MR. WHITE: Well, if you have the
12 disclaimer, Your Honor, and the statements that this
13 doesn't really mean anything, then you would come to the
14 question of what legitimate State interest is being
15 advanced by having someone put Republican on the ballot
16 as their party preference, when it in fact means
17 nothing; it does not mean they are associated with the
18 party. It does not mean --

19 JUSTICE GINSBURG: How does one associate --
20 this one -- I think General McKenna told us that in the
21 State of Washington people do not register membership in
22 one party or the other, so how does the Republican Party
23 determine who is a Republican?

24 MR. WHITE: At -- do you mean a legitimate
25 Republican candidate? Or --

1 JUSTICE GINSBURG: No, who do you consider a
2 member of the party? If you say I am a Republican in
3 the State of Washington, what does that mean? It
4 doesn't mean I registered Republican because Washington
5 doesn't register people by party.

6 MR. WHITE: The three political parties each
7 have different definitions and ways to become -- ways to
8 become affiliated with the party. Under the Republican
9 Party rules if you identify yourself to the Republican
10 Party that yes, I am a Republican, you attend our caucus
11 and convention system, you contribute funds to the
12 party, you can be a member of the Republican Party. The
13 Libertarians --

14 JUSTICE GINSBURG: Any one of those,
15 contributing funds is enough? You don't have to go to
16 the convention if you are --

17 MR. WHITE: You don't have to go to the
18 convention, but there is also a difference there between
19 being a rank-and-file member and being a spokesman of
20 the party. I'd like to turn to the Libertarians,
21 though, for instance. The Libertarians require you to
22 sign a membership application and all members of the
23 Libertarian Party in Washington must sign a pledge that
24 they oppose the use of force in the resolution of
25 political disputes.

1 CHIEF JUSTICE ROBERTS: Libertarians have a
2 lot more rules than the other parties.

3 (Laughter.)

4 JUSTICE SOUTER: You -- you have identified
5 -- in the course of your argument, you've identified two
6 separate problems with the -- with the scheme as you see
7 it. One is, as you put it, that it masks the identity
8 of an official nominee, and the other is that it in
9 effect allows competition on the ballot by a person
10 under the same party banner with the official nominee.

11 MR. WHITE: Yes. After the party has
12 already resolved its internal disputes and determined
13 who its spokesman will be, the State allows --

14 JUSTICE SOUTER: Right.

15 MR. WHITE: -- any candidate to appropriate
16 the name and compete against our nominee.

17 JUSTICE SOUTER: I -- I -- no, I understand
18 that to be your position, but my question is, and I
19 realize there is a certain awkwardness to this, but we
20 -- we've got to face it: If the masking of the identity
21 of the candidate is the real flaw, then the -- the
22 hypothetical that was included in the -- in Jones, in
23 the dictum, of the -- of the party that -- of the ballot
24 that has no party identification whatsoever, that would
25 equally be bad, wouldn't it?

1 MR. WHITE: No, Your Honor, because what it
2 is, in this instance, Initiative 872 is a partisan
3 primary that would mask the identity of the party
4 nominee.

5 JUSTICE SOUTER: But if it's the masking
6 that's the problem, the -- the nominee is going to be
7 just as well masked on the ballot or better masked on
8 the ballot that allows no statement of preference at
9 all.

10 MR. WHITE: No, Justice --

11 JUSTICE SOUTER: And -- and I'm not saying
12 that that's fatally your case, but I mean it's -- it's
13 something we need to be careful about when we're doing
14 our thinking, and that's why I'm pressing you on it.

15 MR. WHITE: Well -- and I think it's -- it's
16 the masking in the context of a partisan system. The
17 State may elect to have nonpartisan offices, and many
18 local offices throughout the West are nonpartisan.

19 JUSTICE SOUTER: But if -- but if it's just
20 masking in a partisan system, then it seems to me you're
21 making the same argument that you make when you say, by
22 allowing statements of preference, we obscure the
23 character of the official nominee and in effect allow
24 somebody to have a -- a second shot at -- at getting
25 Republican support as a Republican.

1 It seems to me that if it's masking in a
2 partisan ballot that's the real problem, there's only
3 one objection and the objection is not so much the
4 masking as it is the submergence of the official
5 nomination by allowing competition under the party's
6 name by another candidate. Isn't that fair to say?

7 MR. WHITE: I -- I think, Justice Souter,
8 that it -- that it is two separate inquiries. First you
9 have the difficulty that as a practical matter these
10 candidates will be identified as Republican nominees or
11 Republican candidates, but even if the State were able
12 to posit sufficient disclaimers and caveats, that the
13 State has shown no valid interest in allowing a
14 candidate to use the name --

15 JUSTICE STEVENS: Well, but don't you think
16 it's relevant information? Wouldn't a voter like to
17 know whether a person preferred the Democrats or the
18 Republicans?

19 MR. WHITE: Well, it's -- it's relevant
20 information, Justice Stevens, only to the extent that it
21 connects the candidate.

22 JUSTICE STEVENS: Only if true.

23 MR. WHITE: To -- to the extent it connects
24 the candidate to the political party and its positions
25 on the issues. And as the State points out in its reply

1 brief --

2 JUSTICE STEVENS: Let me ask this question:
3 This is a facial challenge, is it not?

4 MR. WHITE: Yes, it is, Your Honor.

5 JUSTICE STEVENS: And what exactly -- what
6 relief did the district court grant? Did he enjoin the
7 entire blanket primary or just the designation of
8 parties?

9 MR. WHITE: The district court enjoined the
10 entirety of Initiative 872 because it determined that
11 the party preference provisions of Initiative 872 were
12 not severable under Washington State's test for
13 severability.

14 JUSTICE STEVENS: Do you think that was the
15 narrowest relief he could have granted to avoid the
16 constitutional difficulty that you see?

17 MR. WHITE: I -- I think that was the -- I
18 think that was the appropriate, and it is a narrow
19 relief. The court looked at the structure of the
20 initiative, the connection of the party preference, and
21 the party preference provisions permeate Initiative 872,
22 and determined that severability was not appropriate.
23 Yes, I do, Your Honor.

24 JUSTICE STEVENS: Do you think it would be
25 administerable if it was severed, if the preference

1 provision was just deleted?

2 MR. WHITE: I'm not -- I'm not sure that it
3 would, Your Honor. I'm not sure that it would because
4 -- and what the State and the Grange argued below is
5 that -- they actually argued for severance because that
6 would then convert Initiative 872 into a truly
7 nonpartisan primary, but that's not what was on the
8 ballot. If you take a look at -- it's JA 400.

9 JUSTICE STEVENS: I'm confused about the
10 difference between a facial challenge and an as-applied
11 challenge. On the one hand, it's very helpful to you.
12 There's no evidence out there that this has ever -- this
13 has ever been a problem, so you've got to attack it
14 right away, but then you have this relief that basically
15 enjoins the whole -- whole procedure.

16 MR. WHITE: Well, the Court asked General
17 McKenna a question during his argument about whether the
18 problem had ever occurred with a false-flag candidate
19 capturing a party's name on the ballot. It has not
20 under Initiative 872 because it was enjoined before
21 being effective. But at page JA 239 there's testimony
22 that --

23 JUSTICE STEVENS: Yes, but it also seems
24 highly improbable if you have a nominee as a result of a
25 convention, everybody reads the newspapers, they know

1 who the Republican nominee is, that there's going to be
2 such confusion that everybody thinks it's one or two of
3 the other people who also put an R after their name.
4 The likelihood of massive confusion seems highly
5 improbable to me. I mean you -- you have your own
6 convention where you nominate the Republican nominee,
7 your preferred candidate, and that's publicized
8 generally throughout the State, and you're concerned
9 that somebody going into the ballot box won't -- won't
10 understand what's been going on.

11 MR. WHITE: Your Honor, it's -- the State
12 has indicated that our nominee, the unsuccessful nominee
13 and the false-flag candidate would all be listed on the
14 ballot identically. The --

15 JUSTICE STEVENS: But, again, the ballot's
16 not the only information available to voters when they
17 go into the polls.

18 MR. WHITE: No, but it's the only
19 information presented to the -- the voters at the
20 critical moment when they're casting their ballot, and
21 as this Court has noted in -- with respect to term
22 limits or provision of truthful information regarding
23 race on a ballot, a State cannot put its thumbs on the
24 electoral scales by favoring one group of candidates
25 over another.

1 JUSTICE SCALIA: I suppose you could say the
2 same thing about the candidates' party preferences.
3 They can make that known to the voters in the newspapers
4 when they run.

5 MR. WHITE: That's -- that's exactly the
6 case, Justice --

7 JUSTICE SCALIA: I don't have the Republican
8 Party endorsement, but I prefer the Republican Party.

9 MR. WHITE: And with respect to the
10 importance of party designations and party information
11 on the ballot, last term the Chief Justice, in Wisconsin
12 Right to Life, ordered a study that showed that 85
13 percent of voters couldn't name a single candidate for
14 the United States House of Representatives in their own
15 district, but the -- the voters know the political
16 parties. The political parties spent, in our case, a
17 century and a half and, in the Democratic Party's case,
18 200 years developing a message and developing a set of
19 principles with which the parties are associated, and --

20 JUSTICE KENNEDY: What would be the validity
21 or the invalidity, in your view, of a scheme which said
22 that the ballot has one candidate who says, Smith,
23 Republican nominee, and the other candidates -- other
24 candidates say, Republican preference?

25 MR. WHITE: I think the question there, Your

1 Honor, is what is the legitimate interest of the State
2 in putting that information on the ballot? At -- their
3 reply brief at page 6, the State says an independent who
4 does share the views of either the Republican or
5 Democratic Party may prefer the Republican Party. That
6 preference may be because that independent is running in
7 a district that's 70 percent Republican. And the
8 question is, what is the legitimate interest of the
9 State in providing that information that says, I prefer
10 the Republican Party, where it connotes no connotation,
11 no --

12 JUSTICE KENNEDY: You -- you can't answer my
13 question? You can't hypothesize any legitimate State
14 interest for doing that?

15 MR. WHITE: I -- I cannot, Your Honor,
16 because either -- if there is legitimate State interest,
17 the interest is in providing information about that
18 candidate's positions and linkages to the Republican
19 Party by saying, my preference is Republican because I
20 believe what the Republicans are, whether that candidate
21 is David Duke, in the Republican case, or in the case of
22 the Democrats, a Lyndon LaRouche candidate.

23 JUSTICE KENNEDY: Well, when the Court
24 writes this opinion, what's the fairest statement of the
25 State's interest in this requirement? What do you think

1 is the fairest statement of the State's interest?

2 MR. WHITE: I think the fairest -- the
3 fairest statement of the State interest would be that
4 the State has no interest in creating the impression of
5 false associations or allowing opportunistic candidates
6 to appropriate the political party --

7 JUSTICE KENNEDY: You think there's no
8 legitimate interest? It's -- it's an unfair question, I
9 suppose.

10 JUSTICE SCALIA: I thought you said the
11 State's interest was to -- to do what we disapproved in
12 Jones without seeming to do what we disapproved in
13 Jones.

14 MR. WHITE: That -- that would be an
15 acceptable phrasing of the State's interest as well,
16 Justice Scalia.

17 (Laughter.)

18 JUSTICE KENNEDY: Well, I'm going to ask the
19 State the same question.

20 MR. WHITE: If there are no further
21 questions, Initiative 872 is unconstitutional and the
22 judgment of the lower court should be affirmed.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. White.

25 General McKenna, you have 4 minutes

1 relating.

2 REBUTTAL ARGUMENT OF ROBERT MCKENNA

3 ON BEHALF OF THE PETITIONERS.

4 MR. MCKENNA: Thank you, Mr. Chief Justice.

5 First of all, Justice Kennedy, the State's
6 interest is what we have said it is all along. It is to
7 convey some information on the ballot in the same way
8 that the party label does. I have noticed that the
9 political parties have never objected to having their
10 nominees listed on the ballot as -- you know, as such.

11 In this case it's an expression of party
12 preference, to be sure, and nothing more than that; and
13 there is useful information which is conveyed. We are
14 not required to allow it, but the voters have chosen to
15 allow it.

16 JUSTICE ALITO: Can I ask you to clarify
17 something you said during your initial argument? I
18 understood you to say that the sample ballot on page 1
19 of the Grange reply would be unconstitutional.

20 MR. MCKENNA: No, Your Honor. I did not say
21 that it would be unconstitutional. I said that that
22 would be a different argument. It might be a more
23 difficult argument. The Ninth Circuit assumed that that
24 is what the ballot would look like, even though there
25 was not basis for the Ninth Circuit reaching that

1 conclusion.

2 CHIEF JUSTICE ROBERTS: Maybe I'm wrong. I
3 thought you did say it would be unconstitutional.

4 JUSTICE SCALIA: I did, too.

5 CHIEF JUSTICE ROBERTS: And could you --

6 JUSTICE SCALIA: You should have said that.

7 CHIEF JUSTICE ROBERTS: I mean how would you
8 defend that? I mean --

9 MR. MCKENNA: Well, I would defend it, Your
10 Honor, by saying that this is a facial challenge. Let's
11 apply it. And if there is evidence --

12 CHIEF JUSTICE ROBERTS: Well, we are
13 assuming it is applied in the way that is shown on the
14 Grange reply brief at page 1. If it were applied in
15 that way, would that be unconstitutional? It just says
16 R or D.

17 MR. MCKENNA: It would -- it could be
18 unconstitutional, Mr. Chief Justice, if there were
19 evidence that the voters were misled or confused.

20 Mr. Chief Justice, this is an excellent
21 opportunity to point out that the letter after the name,
22 whether it's the letter as on page one of the Grange
23 ballot or an expression of party preference on pages two
24 and three, is not the only information on the ballot.

25 As we've shown in the samples, there will be

1 lots of other information on the ballot which clearly
2 distinguishes the expression of party preference.

3 JUSTICE STEVENS: Isn't it also true that,
4 by hypothesis, there will be other candidates beside the
5 one R and the one D? If there aren't at least two R's
6 and two D's, there is no problem.

7 MR. MCKENNA: In the scenario or the ballot
8 on page 1, Justice Stevens, I believe that what would
9 happen is the Secretary of State would still provide the
10 additional language. If that additional language is not
11 provided, if it were just that bare ballot with no
12 explanatory language, then, yes, it would be much harder
13 to defend as being constitutional. But that, in fact,
14 is not the way it's going to work.

15 JUSTICE STEVENS: But my point is there
16 could never be a ballot just like this, what your
17 opponents are talking about, because there are always
18 going to be at least two or three R's and two or three
19 D's. And the sample shows there is only one, which must
20 then be the party chosen -- I mean the nominee chosen at
21 the convention.

22 MR. MCKENNA: But the key here, Your Honor,
23 is that even under the ballot on page one, what is not
24 happening under top- two is that the nominee of the
25 party is not being selected. That's not happening any

1 more. And in Jones the Court said that the top-two is
2 the same in all characteristics save one, which is the
3 result of the nominee not being selected.

4 And that is exactly what is happening under
5 top-two: The nominee is not being selected; and, as
6 applied, we are going to be providing lots of other
7 information on the ballot to make it very clear what the
8 expression "party preference" means.

9 JUSTICE KENNEDY: Does the State have a
10 legitimate interest in weakening the influence of
11 political parties?

12 MR. McKENNA: No, Your Honor, it does not.

13 JUSTICE KENNEDY: If we found that that was
14 the necessary effect of this ballot measure, then would
15 it be invalid?

16 MR. McKENNA: I think Your Honor you would
17 have to find there is a severe burden on the parties and
18 subject the provision to party presence to strict
19 scrutiny. It would be receiver -- Your Honor.

20 CHIEF JUSTICE ROBERTS: If the state has no
21 legitimate interest it's going to fail any level of
22 scrutiny.

23 MR. McKENNA: It has legitimate interest
24 indicating something about party on the ballot. This,
25 the same legitimate interest that occurs in a nominating

1 primary where the, where the party, where all the
2 candidates who have filed under that office are going to
3 miss the party in terms of conveying our -- on the
4 question of receiveribility I think Washington law
5 applies here the McGowan three-part test which is
6 paralleled under Federal severability and booker simply
7 states that an act or statute is not unconstitutional no
8 its entirety unless it's believed the voters would not
9 have passed one without the other or unless the
10 validation party to accomplish the legislative purposes
11 clearly understands in this case the main purpose was to
12 preserve choice. It was called the People's Choice
13 Initiative. Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Thank you, general.
15 The case is submitted.

16 (Wherupon, at 10:53 a.m. the case in the
17 above-entitled matter was submitted.)

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A	<p>agrees 12:7</p> <p>ahead 11:13</p> <p>al 1:7,9,13 3:5,7</p> <p>albeit 26:12</p> <p>Alito 5:4,25 6:12 11:14,19 16:25 17:12 47:16</p> <p>Alito's 6:21</p> <p>allow 5:10,16,20 5:22 17:13 21:4 28:19 39:23 47:14,15</p> <p>allowed 5:21,23 7:24 8:1 22:19 25:1,7</p> <p>allowing 3:22 5:5 7:7 15:22 15:23 27:20 39:22 40:5,13 46:5</p> <p>allows 38:9,13 39:8</p> <p>alter 23:11</p> <p>Amendment 8:19 17:17,19 26:19 31:20</p> <p>amount 14:22</p> <p>analysis 27:15</p> <p>analyzed 23:9</p> <p>Anderson 7:9 19:13</p> <p>answer 6:17 10:7 23:22 45:12</p> <p>anyway 36:9</p> <p>apart 29:22</p> <p>appearance 3:24 4:2</p> <p>APPEARAN... 1:21</p> <p>appears 4:18</p> <p>appendix 4:18 7:4 26:21 34:20</p> <p>application 37:22</p> <p>applied 16:1</p>	<p>48:13,14 50:6</p> <p>applies 27:11 51:5</p> <p>apply 23:12 48:11</p> <p>approach 13:13</p> <p>appropriate 38:15 41:18,22 46:6</p> <p>argue 16:7 26:14</p> <p>argued 42:4,5</p> <p>argument 1:19 2:2,5,8 3:3,9 17:17 26:3 28:2 36:9 38:5 39:21 42:17 47:2,17,22,23</p> <p>aside 33:8</p> <p>asked 6:13 21:17 42:16</p> <p>assertion 24:21</p> <p>associate 7:25 8:5,24 14:2 36:19</p> <p>associated 8:13 15:19 36:17 44:19</p> <p>associates 19:20</p> <p>associating 19:19</p> <p>association 3:24 8:11,15,19,20 9:21 14:15 19:24 20:3 28:22,23</p> <p>associational 15:18</p> <p>associations 46:5</p> <p>assume 10:16 27:7,7</p> <p>assumed 16:8,10 47:23</p> <p>assumes 4:3</p> <p>assuming 21:23 30:5 48:13</p>	<p>assumption 21:25</p> <p>assurance 4:7</p> <p>as-applied 7:18 42:10</p> <p>attack 42:13</p> <p>attend 22:17 37:10</p> <p>attention 28:17 29:8 30:1,3</p> <p>attorney 1:22 34:22</p> <p>auditors 25:20 25:21 29:18</p> <p>authority 25:21</p> <p>authorized 33:1</p> <p>available 43:16</p> <p>avoid 41:15</p> <p>aware 13:20</p> <p>awkwardness 38:19</p> <p>a.m 1:20 3:2 51:16</p>	<p>40:2 42:8,19 43:9,14,20,23 44:11,22 45:2 47:7,10,18,24 48:23,24 49:1 49:7,11,16,23 50:7,14,24</p> <p>ballots 4:3,4,9 9:4,8,10 11:14 11:20 18:19,19 19:6 28:24</p> <p>ballot's 43:15</p> <p>banner 30:20 38:10</p> <p>bare 49:11</p> <p>based 32:22</p> <p>bases 19:4</p> <p>basically 24:23 42:14</p> <p>basis 19:1,5,11 19:12 23:2 47:25</p> <p>bearer 34:5</p> <p>behalf 1:23,25 2:4,7,10 3:10 28:3 30:9 47:3</p> <p>believe 7:6,13 9:9 27:10 45:20 49:8</p> <p>believed 51:8</p> <p>benefit 27:5</p> <p>benefits 22:25</p> <p>best 7:15</p> <p>better 5:10 39:7</p> <p>beyond 19:15</p> <p>blank 4:22,25 5:2 33:25</p> <p>blanket 3:17 6:6 7:2 29:4 30:25 32:5,12 41:7</p> <p>booker 51:6</p> <p>box 4:25 5:2 43:9</p> <p>Boy 15:5,11,14 15:17,18,19,23</p> <p>brief 9:3 16:4,9 18:9 19:6</p>
			B	
			<p>back 20:16 24:6</p> <p>bad 38:25</p> <p>balance 19:15 27:23</p> <p>ballot 3:23 4:5 4:14 5:3,7,22 7:24 8:6,7,23 8:25 9:15,18 10:19 12:1,1,9 13:7 14:11 16:3,4,8,9,10 16:11 17:9,18 18:7,14 20:2 24:19,20 25:5 25:8 26:16,20 27:8,9 28:14 30:4,8,19,20 31:6,10,10,11 32:6,17 33:15 34:6,15,19,23 35:4,18 36:15 38:9,23 39:7,8</p>	

<p>34:18 41:1 45:3 48:14 briefly 23:23 briefs 25:13 bring 7:18 burden 50:17</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calculating 23:19 California 3:14 called 51:12 campaign 23:17 30:9 campaigning 7:5 30:10 candidacy 4:16 4:21 9:5 13:5 candidate 3:22 3:25 4:22,23 5:1,5,12,13 7:24 8:1,3,4,12 9:1,23 10:6,14 11:2 12:6,13 13:3,17 14:18 14:23 17:2,5,8 18:6,8,9 19:9 21:22,23 24:25 26:14,20 28:13 30:16 31:3,23 32:10,25 33:7 34:10 35:1 36:25 38:15,21 40:6,14,21,24 42:18 43:7,13 44:13,22 45:20 45:22 candidates 4:21 5:9,16,18 8:22 13:14 14:6 18:12,16 26:9 28:6,19 29:2 29:16 33:1 34:22 35:9,20 36:3 40:10,11 43:24 44:2,23</p>	<p>44:24 46:5 49:4 51:2 candidate's 17:2 19:7 45:18 capturing 42:19 careful 39:13 carefully 20:2 carry 36:4,10 carrying 29:4 case 3:4 10:22 15:5 20:8,15 26:24 27:11 39:12 44:6,16 44:17 45:21,21 47:11 51:11,15 51:16 cases 7:17,19 22:15 cast 23:13,19 casting 43:20 caucus 22:17 37:10 caveats 40:12 Celebrezze 7:9 13:10 Cellebreze 19:13 century 44:17 certain 22:25,25 23:2 38:19 cetera 5:14 chairman 13:4 challenge 7:17 41:3 42:10,11 48:10 challenges 7:18 chance 13:24 change 6:3 16:16 17:4,13 character 39:23 characteristic 6:10 characteristics 7:1 50:2 check 4:24 5:2 25:19 checked 25:15</p>	<p>Chief 3:3,11 4:6 4:19 9:7 13:21 13:23 15:15,22 16:2,13,16,23 17:16,21 25:7 25:11 26:23 27:4,13,19,24 27:25 28:4 36:7 38:1 44:11 46:23 47:4 48:2,5,7 48:12,18,20 50:20 51:13,14 choice 26:10 51:12,12 choices 9:12 choose 15:8 22:4 chooses 12:8 23:10 choosing 7:3 26:20 chose 5:19 chosen 5:16,24 17:13 18:7 22:16 47:14 49:20,20 Circuit 3:20 4:1 16:8 27:6 34:20,21 35:3 47:23,25 Circuit's 4:2 cite 25:19 claim 19:8,18,19 24:19,20 25:1 25:4 27:5 claiming 14:13 14:14 15:25 20:3 26:18,24 claims 10:3,9 clarify 47:16 clear 35:14 50:7 clearly 26:23 27:10 49:1 51:11 close 17:6 26:2 come 10:13 30:7 30:24 35:16</p>	<p>36:13 comes 17:19 20:21 comparison 33:22 compelled 8:16 14:8 compelling 14:9 15:13,14 compete 38:16 competed 34:24 competing 31:12 competition 33:24 36:6 38:9 40:5 concern 13:11 14:3 concerned 8:2 43:8 concluded 23:10 conclusion 4:3 26:18 48:1 conduct 25:24 conducting 29:18 confused 15:24 19:2 26:25 42:9 48:19 confusion 35:15 43:2,4 connection 41:20 connects 40:21 40:23 connotation 45:10 connotes 45:10 consent 26:17 consider 18:24 34:16 37:1 consideration 17:23 considering 33:16 consolidated 3:5 constitution</p>	<p>33:12 constitutional 3:17 8:14 11:10 18:6,13 19:25 31:1,5 31:18 32:2 41:16 49:13 constitutionally 7:2 consulted 29:20 contemplated 29:21 context 39:16 continue 16:14 28:19 contrary 12:23 contribute 37:11 contributing 37:15 convention 10:17,19 23:16 24:18 25:17,17 29:12,17 30:6 34:3,4 37:11 37:16,18 42:25 43:6 49:21 conventions 24:14 25:24 28:18 convert 42:6 converts 28:8 30:14 convey 5:6 47:7 conveyed 47:13 conveying 51:3 copies 29:23 correct 4:11 11:21 12:21 13:12,23 18:3 18:11 25:6 32:11,18 corrected 4:18 corresponded 29:17 counsel 23:8,22 count 23:12,19</p>
---	---	---	--	---

<p>counties 11:19 11:20 county 11:15 25:20,21 29:17 couple 25:20 course 6:7 27:10 27:19 38:5 court 1:1,19 3:12 4:12 8:14 13:9 14:21 17:23 19:12,13 27:6,21 28:5 30:15,24 31:7 33:21 41:6,9 41:19 42:16 43:21 45:23 46:22 50:1 court's 3:14 11:7 create 3:23 creates 8:23 creating 46:4 critical 43:20 crucial 3:17 7:3 Cuomo/Edward 33:23</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 48:16 49:5 Dale 15:5,5,10 15:12,16,23 David 45:21 day 28:7 days 5:17 24:6 decide 18:16 24:7 decided 5:7,7 15:11 33:13 decides 10:17 decision 6:2 26:11 declaration 4:16 4:20 9:5 12:14 12:16 13:5 14:11 21:24 declarations 12:16</p>	<p>declare 5:5 declaring 4:21 defect 3:17 28:22 defend 6:12 48:8 48:9 49:13 definitions 37:7 deleted 42:1 Democrat 5:14 12:6,7 Democratic 3:15 8:6 10:16 10:21 12:8 13:6,6 16:21 16:22 20:5 22:17 23:24 27:1 29:15 44:17 45:5 Democrats 10:20 20:4,7 20:18,22 25:15 40:17 45:22 deserve 27:18 designate 24:7 28:13 30:7,9 31:23 designated 34:23 designation 41:7 designations 44:10 determine 32:7 36:23 determined 23:1 38:12 41:10,22 developing 44:18,18 devised 24:8 dictionary 8:11 dictum 38:23 difference 6:5,7 9:20 37:18 42:10 different 37:7 47:22 difficult 13:2 47:23</p>	<p>difficulty 40:9 41:16 disadvantage 8:9 disagree 19:24 disapproved 46:11,12 disassociate 15:20 19:21 disavows 10:9 disclaimer 36:8 36:12 disclaimers 35:13,17 40:12 disclaims 10:3 disociate 8:1 disprove 13:2 disputes 37:25 38:12 dissociate 8:25 distinction 20:9 21:1,8,8 distinguish 20:2 distinguishes 49:2 district 4:12 27:6 41:6,9 44:15 45:7 doing 3:16 35:18 39:13 45:14 dollars 35:14 domestic 25:9 drawing 20:10 drawn 20:10 Duke 45:21 D's 49:6,19 D.C 1:15</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earliest 5:17 early 24:6 effect 38:9 39:23 50:14 effective 42:21 either 45:4,16 elect 39:17</p>	<p>election 3:16,20 4:5,8,11 6:8 8:21 13:22,24 16:14,17,20 17:9,19 18:20 22:23 23:3 25:15 26:4 29:5 32:13 34:11 elections 29:18 33:12 electoral 43:24 eliminated 3:16 emergency 14:10 empirical 35:6 endorse 14:23 28:10 30:15,16 endorsed 33:7 35:8 endorsee 19:10 endorsement 18:25 19:3,18 44:8 enjoin 41:6 enjoined 4:12 24:12 41:9 42:20 enjoins 42:15 entered 35:2 entire 12:24 41:7 entirety 41:10 51:8 entitled 32:16 equally 11:7,10 38:25 equivalent 18:25 ESQ 1:22,24 2:3 2:6,9 essentially 35:18 established 11:17 28:8 establishing 29:12 et 1:7,9,13 3:5,7</p>	<p>5:14 etcetera 14:18 evaporates 17:20 eventually 11:24 everybody 42:25 43:2 evidence 7:19,19 13:16,17,25 27:5 35:15 42:12 48:11,19 exact 7:23 exactly 10:22 14:20 16:10 32:1 41:5 44:5 50:4 example 15:4 20:20 21:14 22:18,24 23:15 24:15 27:8 36:8 examples 9:18 excellent 48:20 exclude 30:18 exercising 15:12 exist 28:25 existing 23:23 explain 23:18,23 explaining 14:12 explanation 6:18 explanations 12:2 explanatory 49:12 explicit 14:12 19:7 express 13:15 15:11 21:4 24:24 27:20 expressed 8:12 10:8 19:13 expresses 5:11 10:3 23:6 expressing 9:20 9:21 11:11</p>
--	---	--	--	---

<p>14:6 expression 5:19 5:20,23 7:7,21 13:1,2 17:14 18:14 19:25 20:12 26:15,16 47:11 48:23 49:2 50:8 extent 40:20,23 extremely 19:7</p> <hr/> <p style="text-align: center;">F</p> <p>face 38:20 facial 7:16 41:3 42:10 48:10 fact 5:17 8:2,4 24:4,11 27:2,9 28:12 34:4,5 36:16 49:13 factional 32:5 facts 30:11 fail 50:21 fair 8:20 40:6 fairest 45:24 46:1,2,3 faith 19:14 27:22 false 12:20 13:11 46:5 false-flag 42:18 43:13 fatal 20:8 fatally 39:12 favoring 43:24 Federal 51:6 fight 32:5 figure 23:4 filed 13:4 51:2 find 50:17 first 3:4 4:2 6:8 8:19 14:7 17:17,19 19:5 24:20 26:19 31:19 40:8 47:5 five 5:18 flaw 38:21</p>	<p>flourish 32:15 follow 24:5 followed 3:14 force 37:24 forced 8:15,19 foreign 25:10 form 4:16,21 5:22 12:1,15 12:17 formal 9:21 14:15 20:3 formally 22:4 formulations 34:19 forum 5:22 forward 35:16 found 8:14 50:13 four 29:19 frankly 9:19 free 10:13 funds 37:11,15 further 31:23 46:20</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 general 1:22 3:8 6:8 9:14 10:12 16:14,17,20 17:8,19,25 19:11 22:21 27:25 29:5 32:13 36:20 42:16 46:25 51:14 generally 21:19 43:8 getting 39:24 Ginsburg 9:12 9:17 17:25 18:3,12,22 19:5 30:23 31:13,17 36:19 37:1,14 give 4:6 18:7 27:16,17</p>	<p>given 5:18 22:25 32:18,19 go 11:13 20:5,17 24:18,20,22 37:15,17 43:17 goals 22:6 going 4:9 5:8 7:23 9:8 15:19 20:16 23:4,21 26:25,25 29:4 29:11 31:11 39:6 43:1,9,10 46:18 49:14,18 50:6,21 51:2 gotten 23:5 governing 4:14 29:16 Grange 1:3 3:4 6:13,15,25 9:3 16:4,9 19:6 34:18 42:4 47:19 48:14,22 grant 41:6 granted 41:15 great 8:8 greater 19:14 27:16 group 43:24 guess 12:19,23 guidance 3:14</p> <hr/> <p style="text-align: center;">H</p> <p>half 44:17 hand 42:11 happen 20:19 22:18 27:7 49:9 happening 49:24,25 50:4 happens 17:4 hard 7:13 harder 16:7 49:12 harmed 7:20 harmonize 23:11 harms 19:22</p>	<p>hatred 14:1 hear 3:3 help 15:4 helpful 20:12,15 42:11 highly 42:24 43:4 historical 6:19 13:17 hold 13:24 holding 3:21 11:7 24:13 26:12 Honor 4:10,15 4:19 5:15 6:4 6:24 7:16 9:2,9 9:24 10:10,15 10:23 11:9,16 11:22 12:11,21 13:12,19 14:19 15:3 16:6,7,15 20:11 23:8 24:10 29:1,10 30:13,22 31:20 32:3,11 33:21 35:12 36:12 39:1 41:4,23 42:3 43:11 45:1,15 47:20 48:10 49:22 50:12,16,19 House 44:14 houses 22:2 hump 16:19 hyperbolic 32:22 hypothesis 32:8 49:4 hypothesize 45:13 hypothesized 34:17 hypothesizing 31:7 hypothetical 31:22 33:19 35:22,22,25</p>	<p>38:22</p> <hr/> <p style="text-align: center;">I</p> <p>idea 24:22 identical 29:19 identically 35:3 43:14 identification 33:14 38:24 identifications 31:8 identified 6:10 23:14,16 35:3 38:4,5 40:10 identify 21:14 37:9 identifying 10:5 identity 38:7,20 39:3 Iis 12:4 illustrate 15:4 imagine 15:4,7 immense 6:5,7 importance 44:10 important 13:8 17:22 18:15 28:7 33:16 34:16 impression 46:4 improbable 42:24 43:5 include 5:16 included 38:22 incorporate 9:4 incumbent 24:16 independent 5:1 20:22 21:17,20 21:23,25 22:6 25:21 28:13 45:3,6 independently 30:8 independents 21:5,15 22:9 22:16</p>
--	--	--	--	--

<p>indicate 5:8 17:10 indicated 28:17 43:12 indicates 35:13 indicating 29:20 30:4 34:15 50:24 indication 30:25 individual 8:23 19:14 individuals 22:15 influence 50:10 inform 19:15 information 5:6 5:17 9:20 12:15 13:8 17:1,7 18:13 19:16 33:14,18 34:2,16 40:16 40:20 43:16,19 43:22 44:10 45:2,9,17 47:7 47:13 48:24 49:1 50:7 informed 34:7 initial 47:17 initiative 3:13 3:21 5:1 6:2 12:13 20:1 24:1,4,12 28:8 29:3,21 33:25 39:2 41:10,11 41:20,21 42:6 42:20 46:21 51:13 injured 7:11 injury 36:1 inquiries 40:8 instance 13:20 37:21 39:2 instructions 12:2 interest 7:7,15 36:2,14 40:13 45:1,8,14,16</p>	<p>45:17,25 46:1 46:3,4,8,11,15 47:6 50:10,21 50:23,25 interested 22:22 interests 17:24 interference 26:7 internal 32:4 33:24 38:12 intra-party 36:5 invalid 50:15 invalidity 44:21 investigation 12:5 issues 17:4 25:9 28:7 32:19 40:25</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 1:24 2:6 28:2 JA 42:8,21 JA-363 28:16 JA-415 12:12 JOHN 1:24 2:6 28:2 joint 4:18 7:4 26:21 Jones 3:15 6:2 6:11 26:11 28:22 30:24 31:7 33:22 38:22 46:12,13 50:1 JR 1:24 2:6 28:2 judgment 46:22 Justice 3:3,11 4:6,20 5:4,25 6:12,12,16,21 6:21 7:10,22 8:10,18 9:7,12 9:17,22 10:1,7 10:11,12,16,24 10:25 11:4,6 11:12,14,19 12:4,12,19,22 12:25 13:16,18</p>	<p>13:21,23,25 14:5,16,21 15:1,15,22 16:2,13,16,23 16:25 17:12,16 17:22,25 18:3 18:11,22 19:4 19:17,23 20:4 20:15,24 21:6 21:10,12,21 22:3,7,11,12 22:21 23:21 24:2,8 25:4,6,7 25:11,13,18,23 25:25 26:23 27:4,13,19,24 27:25 28:4,11 28:21 29:6,11 30:2,17,23 31:13,17,21 32:8,14,21 33:3,10,18 34:1,9,12 35:5 35:21,25 36:7 36:19 37:1,14 38:1,4,14,17 39:5,10,11,19 40:7,15,20,22 41:2,5,14,24 42:9,23 43:15 44:1,6,7,11,20 45:12,23 46:7 46:10,16,18,23 47:4,5,16 48:2 48:4,5,6,7,12 48:18,20 49:3 49:8,15 50:9 50:13,20 51:13 51:14 Justices 9:3</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep 18:17 Keeping 21:15 Kennedy 7:10 13:25 14:5,16 14:21 15:1</p>	<p>23:21 24:2 32:14,21 35:5 35:21,25 44:20 45:12,23 46:7 46:18 47:5 50:9,13 key 49:22 Kirkland 1:24 know 4:9 7:14 7:22,23,24 13:7 20:4,7,8 20:16,17 22:16 24:9 27:15 35:6,8,10,24 40:17 42:25 44:15 47:10 known 44:3 Koch 33:23</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>label 47:8 labels 28:19 laid 9:4 language 9:5 20:2 49:10,10 49:12 LaRouche 45:22 Laughter 20:23 38:3 46:17 law 10:17 11:1 13:22 15:1 16:24 24:2 27:11 51:4 laws 22:24 left 5:2 24:6 legal 23:8 legislative 33:12 51:10 legislature 23:10 legitimate 36:14 36:24 45:1,8 45:13,16 46:8 50:10,21,23,25 letter 48:21,22 letters 25:20 29:19,24,25</p>	<p>let's 10:16 13:3 48:10 level 23:11 50:21 Libertarian 5:14 29:15 37:23 Libertarians 37:13,20,21 38:1 Lieberman 20:21 life 12:7,24 44:12 likelihood 43:4 likes 9:23 limit 5:9,13 13:13 limited 14:22 26:9 limits 43:22 linkages 45:18 list 15:8 listed 18:17 34:14 43:13 47:10 little 6:3 local 39:18 logical 26:17 longer 3:19 6:9 look 4:4,9,15 9:8 9:10,16,18,25 16:8,10 22:6 26:21 42:8 47:24 looked 16:3 41:19 looks 27:8 lot 38:2 lots 49:1 50:6 lower 46:22 Lyndon 45:22</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 1:22 2:3,9 3:9 mail 11:23,25 18:21</p>
---	---	---	--	---

main 51:11	36:13,17,18,24	Monday 1:16	10:18,21 19:10	offered 6:1
major 7:17	37:3,4 39:12	moneys 14:23	23:14,17,25	office 4:22 12:7
22:24 23:1	43:5 48:7,8	moved 15:5	25:2 28:25	15:6 22:15
makers 27:16	49:20		30:7,11,19,20	51:2
making 8:20	meaningful	<hr/> N <hr/>	31:12 32:17	offices 39:17,18
39:21	30:21	N 2:1,1 3:1	33:5 34:3	official 10:14
manner 29:2	means 21:21	name 24:22 31:6	35:19 38:8,10	23:13 28:13,25
Mario 33:22	24:23 35:10	31:12 33:1	38:16 39:4,6	29:8 30:4,7,10
mask 39:3	36:16 50:8	34:6 38:16	39:23 42:24	38:8,10 39:23
masked 39:7,7	measure 50:14	40:6,14 42:19	43:1,6,12,12	40:4
masking 35:18	meetings 22:17	43:3 44:13	44:23 49:20,24	officials 25:16
38:20 39:5,16	member 11:2	48:21	50:3,5	25:19
39:20 40:1,4	14:10,10,14	names 5:9	nominees 3:19	of-association
masks 38:7	15:25 19:9	narrow 41:18	6:9 24:4,7	4:3
massive 43:4	31:24 33:19	narrowest 41:15	26:13 40:10	oh 6:17
matter 1:18 6:18	34:5 37:2,12	nature 22:23	47:10	okay 10:24
20:25 22:1	37:19	nearly 11:23,24	nonmembers	12:10 28:21
40:9 51:17	members 37:22	necessarily	26:12	old 4:20 6:6 24:2
McGowan 51:5	membership	11:14 31:9	nonpartisan	27:8
McKENNA	36:21 37:22	necessary 35:13	31:6,7,9 39:17	Olympia 1:22
1:22 2:3,9 3:8	mere 28:9 30:14	50:14	39:18 42:7	once 5:6,7 33:13
3:9,11 4:10	merely 10:19	need 39:13	notarized 12:14	open 20:1
5:15 6:4,15,20	19:25 27:20	neither 5:2	12:16	operate 25:22
6:24 7:16 8:10	meshes 22:22	never 47:9 49:16	noted 43:21	opinion 45:24
9:2,9,14,17,24	message 36:4,10	new 22:22	noticed 47:8	opponents 49:17
10:4,10,15,23	44:18	newspapers	notion 35:12	opportunistic
11:4,9,16,22	messengers 28:6	42:25 44:3	November 3:19	46:5
12:11,21,25	28:9	Ninth 3:20 4:1,2	no-new-taxes	opportunities
13:19,23 14:5	met 23:20	16:8 27:6	5:13	13:7,10 14:25
14:19,24 15:3	method 28:24	34:20,21 35:3	no-taxes 8:3	opportunity
15:22 16:6,15	million 35:14	47:23,25	number 22:14	4:13,17,24 8:7
16:23 17:12,21	mind 20:21	nominate 8:22		8:21 48:21
17:25 18:2,11	21:15	30:14,18,22	<hr/> O <hr/>	oppose 37:24
19:4,23 20:11	minor 22:25	32:25 43:6	O 2:1 3:1	option 18:8
20:20 21:3,10	minutes 46:25	nominating 4:4	object 13:7	oral 1:18 2:2,5
21:13 22:3,10	misimpression	6:6 16:11	objected 47:9	3:9 28:2
22:14,21 23:8	15:16	23:15 24:13,18	objecting 8:15	ordered 44:12
24:1,10 25:6	mislead 27:21	25:3 27:8	8:16	organization
25:11,18,25	misled 35:23	28:18 30:1	objection 31:9	15:9,10
27:4,18 36:20	48:19	34:25 50:25	31:14 40:3,3	
42:17 46:25	mistaken 18:23	nomination	objections 33:20	<hr/> P <hr/>
47:2,4,20 48:9	mistakenly	25:17 26:8	obscure 39:22	P 3:1
48:17 49:7,22	18:24	29:7,8,16,22	obtaining 23:2	page 2:2 9:13
50:12,16,23	misunderstood	30:4 40:5	occur 35:16	16:4,9 26:21
mean 7:13 18:12	34:8	nominations	occurred 42:18	34:20 42:21
20:7,18 21:18	modified 29:3	29:13	occurs 50:25	45:3 47:18
22:4 26:24	moment 43:20	nominee 7:4	October 1:16	48:14,22 49:8

<p>49:23 pages 4:18 9:3 48:23 pamphlet 6:25 paper 11:20 paralleled 51:6 part 26:2 particular 14:2 14:23 particularly 15:25 parties 5:9 6:10 7:11,12,14,18 7:20 8:9,21 10:13 14:22 22:24 23:1,1 24:3,5 26:5,6 26:10,14,18 27:6 28:9 30:5 31:2,5 32:6,24 33:23 37:6 38:2 41:8 44:16,16,19 47:9 50:11,17 partisan 3:17 7:2 22:23 29:18,22 31:10 33:4,11,12,13 34:16 39:2,16 39:20 40:2 party 1:7,13 3:5 3:7,15,23,24 4:4,23,25 5:8 5:20 7:7,21,25 7:25 8:5,6,6,16 8:17,24,25 9:23 10:2,5,8 10:17,21 11:3 11:11 12:8,9 13:4,6,6 14:3,3 14:8,9,14,17 14:17 15:7 16:18,18,21 17:3,6 18:14 18:24,25 19:18 19:19,20,21,22 20:5,12,13,14</p>	<p>21:15,18,19,22 22:1,5,17 23:4 23:7,13,14,24 23:24 24:11,24 25:2,2,9 26:15 26:16 27:2,20 28:19 29:11,15 29:15,15 30:11 31:1,5,8,15,25 33:1,6,24 34:6 34:9 35:2,8 36:16,18,22,22 37:2,5,8,9,10 37:12,12,20,23 38:10,11,23,24 39:3 40:24 41:11,20,21 44:2,8,8,10,10 45:5,5,10,19 46:6 47:8,11 48:23 49:2,20 49:25 50:8,18 50:24 51:1,3 51:10 party's 3:19 19:9 22:5 23:13 25:10 26:13,17 28:6 28:18 29:4 31:12 34:24 35:19 36:4,10 40:5 42:19 44:17 passed 51:9 pay 28:17 30:1,2 pays 29:8 people 15:18 17:13 20:16 21:4,5 22:9,19 26:6,9,25 27:17 36:21 37:5 43:3 People's 51:12 percent 11:24 11:25 18:20 21:14,16 23:3 23:5,20 24:17</p>	<p>35:7 44:13 45:7 percentage 23:2 permeate 41:21 permit 13:14 16:24 19:22 permitted 21:3 person 8:8 14:10 14:14 17:4 23:14,16,19 24:22 27:1 30:10 32:9 38:9 40:17 personal 3:22 person's 30:9 petition 34:20 Petitioner 1:4 Petitioners 1:10 1:23 2:4,10 3:10 47:3 phrase 5:10 phrasing 7:23 46:15 pick 5:10 picked 34:4 place 26:19 31:5 plaintiff 34:2 please 3:12 10:7 28:5 pledge 37:23 point 5:11 15:4 16:11 18:1 22:18 48:21 49:15 pointed 28:16 33:22 pointing 26:3 points 40:25 policies 22:5 policy 8:13 political 3:24 5:22 10:5 15:10 22:24 27:17 28:9,23 32:24 33:23 37:6,25 40:24 44:15,16 46:6</p>	<p>47:9 50:11 polls 43:17 posit 40:12 position 6:23 7:11,12 10:21 14:4 17:2 18:4 18:5 25:10 32:16,18,23 33:10 35:11 38:18 positions 12:8 40:24 45:18 possible 6:3 23:18 34:19 pox 22:2 practical 17:22 17:24 18:15 23:11 29:6 40:9 preached 14:1 predicting 19:1 prefer 12:9 13:5 20:5,17,21 21:18,22 22:1 22:5 25:9,9 44:8 45:5,9 preference 3:23 4:25 5:5,20 7:7 7:21 8:12 9:21 10:3,9,20 11:3 11:11 13:1 14:6,13 15:7,9 15:11,23 16:13 16:21 17:5,11 17:13,18 18:14 18:17,24 19:2 19:8,8 20:1,12 21:4 23:6 24:24 25:8 26:15,16 27:21 31:24 35:10 36:16 39:8,22 41:11,20,21,25 44:24 45:6,19 47:12 48:23 49:2 50:8 preferences</p>	<p>13:15 35:17 44:2 preferred 9:23 16:18 40:17 43:7 prefers 12:22,23 17:2 presence 35:19 50:18 presented 32:19 33:14 43:19 preserve 51:12 pressing 39:14 prevent 11:1 14:4 34:3,6,10 34:12 prevented 11:10 primary 3:18 6:7 7:2,3 16:11 16:17 17:3 24:3 27:9 28:20 29:4,23 30:25 31:8 39:3 41:7 42:7 51:1 primary's 7:4 principles 44:19 print 18:18 problem 28:25 39:6 40:2 42:13,18 49:6 problems 38:6 procedure 42:15 procedures 24:5 24:13 28:14 process 6:8 23:15 25:3 26:8 27:17 29:22 30:1 33:4,6,11,13 34:25 produce 18:19 products 27:16 promulgate 4:13,17 promulgated 11:17</p>
---	--	--	--	---

<p>proponent 6:1 proponent's 6:22 protection 27:16 27:18 provide 13:13 17:1 49:9 provided 10:18 12:15 31:23 49:11 providing 45:9 45:17 50:6 provision 25:16 42:1 43:22 50:18 provisions 41:11 41:21 pro-environm... 5:12 public 8:13 28:7 29:24 34:7 publicized 43:7 publicizing 34:3 purporting 36:4 36:10 purpose 5:4 6:1 6:14 7:6 17:1 51:11 purposes 8:20 51:10 put 12:17 17:9 17:18 31:11 34:21 35:16 36:15 38:7 43:3,23 putting 45:2</p> <hr/> <p style="text-align: center;">Q</p> <p>question 6:13,17 6:22 10:25 20:16 21:7 23:9 27:19 31:21 34:9,22 36:14 38:18 41:2 42:17 44:25 45:8,13 46:8,19 51:4</p>	<p>questions 46:21 quite 6:17 22:23 30:8 quote 7:1 12:14</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 24:22 43:3 48:16 49:5 race 33:23 35:2 43:23 racial 14:1 rank-and-file 37:19 rationale 28:21 reaching 47:25 read 18:8 reads 42:25 real 20:7,9 22:8 32:5,9 38:21 40:2 realize 38:19 really 7:11 17:5 17:10 20:17,21 21:1,7,12 22:8 23:7 26:18 36:13 reason 18:16,18 reasonably 15:24 reasons 4:2 REBUTTAL 2:8 47:2 receive 12:1 received 29:19 29:23 receiver 50:19 receiveribility 51:4 receives 24:17 recognize 21:2 recognized 13:9 17:23 19:12 30:15 record 6:19 7:20 25:19 refer 9:2 12:12 referenced 7:8</p>	<p>refusing 13:14 regard 20:6 regarding 43:22 register 20:6 22:9 36:21 37:5 registered 31:24 37:4 registration 21:16 22:10 regulations 4:13 9:6 11:17 regulatory 7:6 17:24 reject 24:23 relating 47:1 relevant 7:6 40:16,19 relief 41:6,15,19 42:14 remedy 14:16 repealed 24:2 replaces 6:6 reply 16:4 34:18 40:25 45:3 47:19 48:14 Representatives 44:14 representing 9:14 Republican 1:7 1:13 3:5,6 5:14 8:5,24,25 12:9 13:4 16:18,19 20:18 23:4,6,7 23:24 24:11,18 24:19,21,24 27:2 29:14 32:9,12 34:9 34:13 35:19 36:15,22,23,25 37:2,4,8,9,10 37:12 39:25,25 40:10,11 43:1 43:6 44:7,8,23 44:24 45:4,5,7 45:10,18,19,21</p>	<p>Republicans 25:14,14 32:5 34:23 40:18 45:20 Republican-id... 36:3 require 18:16 26:19 37:21 required 5:21 17:15 22:20 24:3 47:14 requirement 45:25 requires 12:13 requiring 11:2 reserve 27:23 resolution 37:24 resolve 33:24 resolved 38:12 resolving 32:4 36:5 respect 6:22 29:25 43:21 44:9 respectfully 19:24 Respondents 1:25 2:7 23:22 28:3 responsive 21:7 restrict 32:25 result 42:24 50:3 rhetorical 32:15 right 10:11 13:22 17:17,20 18:6,10,13 26:19 28:8,10 28:12 30:14,14 30:17,18,22,23 31:2,5 32:22 32:25 33:4,11 38:14 42:14 44:12 rights 15:18 26:5 31:20 rival 32:6</p>	<p>ROBERT 1:22 2:3,9 3:9 47:2 ROBERTS 3:3 4:6 9:7 13:21 15:15 16:2,13 16:16 17:16 25:7 26:23 27:13,25 36:7 38:1 46:23 48:2,5,7,12 50:20 51:14 rule 24:15,16 ruled 3:20 rules 14:10 24:13 25:22 29:16 37:9 38:2 run 12:7 15:6 22:15,15 34:11 44:4 running 20:22 21:24 34:10,13 45:6 runs 24:17 R's 49:5,18</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 sample 9:4,25 14:11 19:6 47:18 49:19 samples 12:2 48:25 save 7:2 50:2 saying 4:23 5:13 12:17 15:7 17:16 20:5,17 29:6 30:17 33:6 34:13 39:11 45:19 48:10 says 17:5 21:25 25:13 32:15 34:2 44:22 45:3,9 48:15 scales 43:24 Scalia 7:22 8:10</p>
--	---	---	--	--

8:18 9:22 10:1 10:7,11 12:4 12:12,19,22,25 13:18 19:17,23 22:21 24:8 25:13,18,23,25 33:3,10 44:1,7 46:10,16 48:4 48:6 scenario 49:7 scheme 10:13 30:6 38:6 44:21 Scouts 15:5,11 15:14,17,18,19 15:24 scrutiny 50:19 50:22 second 19:11 39:24 secondly 14:9 secretary 4:11 4:16 11:18 25:22 28:15,16 29:21,23,24 49:9 Section 12:12 see 4:19 7:8 14:3 38:6 41:16 select 6:9 24:3 26:6 28:9,12 28:24 selected 10:18 26:10 29:3 32:10 34:25 49:25 50:3,5 selecting 3:19 10:14 26:13 32:12 Senator 20:20 send 18:19 sense 8:11,14 19:25 30:3 separate 23:15 29:8,22 38:6 40:8 seriously 20:25	set 33:8 44:18 severability 41:13,22 51:6 severable 41:12 severance 42:5 severe 50:17 severed 41:25 share 45:4 shot 39:24 show 14:11 showed 12:3 44:12 shown 19:5 27:9 27:22 31:15 33:5,7 40:13 48:13,25 shows 49:19 side 16:7 17:7 sign 12:13 37:22 37:23 signing 12:16 silent 24:4 simply 5:6 20:10 27:7 51:6 single 26:20 44:13 sir 11:11 25:25 Smith 23:25 44:22 sole 33:14 somebody 5:11 23:6 39:24 43:9 somewhat 32:21 sorry 11:13 source 13:8 sources 19:16 Souter 10:12,16 10:24 20:4,15 20:24 21:6,11 21:12,21 22:3 22:7,11,12 25:4,6 28:11 28:21 29:6,11 30:2,17 38:4 38:14,17 39:5 39:11,19 40:7	speak 8:16 specific 13:20 speech 13:13,14 14:8,17 15:12 15:13 spend 14:23 35:14 spent 44:16 split 25:8 spokesman 37:19 38:13 squarely 34:21 stage 6:8 24:20 standard 29:5 34:5 standardbear... 26:6 stands 17:8 state 1:3,6,12 3:4,5,6,22 4:12 4:17 5:7,21,21 5:23 7:6 9:15 10:17,19 11:1 11:18,18,23 12:5,9 13:4 15:6 16:23 17:12,14,14,24 18:6,7 19:6 21:13,16 22:11 23:9 24:2,3 25:15,19 26:7 26:15,19 28:15 28:17,17 29:21 29:23 31:10 32:4,15 33:13 34:15,17 35:2 35:13,16,17 36:14,21 37:3 38:13 39:17 40:11,13,25 42:4 43:8,11 43:23 45:1,3,9 45:13,16 46:3 46:4,19 49:9 50:9,20 stated 6:14 statehood 24:6	statement 6:25 10:5,20 14:13 18:4,24 19:2,3 19:8,9 22:12 32:18 35:9 39:8 45:24 46:1,3 statements 13:12 16:14 29:25 36:12 39:22 states 1:1,19 11:3 14:1 44:14 51:7 statewide 23:3 state's 5:17 25:22 29:24 34:20,21 41:12 45:25 46:1,11 46:15 47:5 stating 9:20 12:14 19:7 32:23 34:1 status 21:25 statute 23:11,12 31:22 32:1,18 33:19 51:7 stay 10:4 Stevens 6:12,16 6:21 10:25 11:5,6,12 13:16 31:21 32:8 33:18 34:1,9,12 40:15,20,22 41:2,5,14,24 42:9,23 43:15 49:3,8,15 strict 50:18 strictly 14:22 structure 23:23 24:9 41:19 study 35:6 44:12 subject 50:18 subjective 13:1 submergence 40:4	submission 35:21 submitted 51:15 51:17 subset 20:13 substitute 30:16 successfully 36:9 sufficient 40:12 suggest 18:12 27:13 suggesting 31:4 33:10 suggests 13:18 18:9 support 8:22 24:17 39:25 suppose 11:8 12:6 17:2 31:22 35:5 44:1 46:9 supposing 31:22 suppress 34:1 Supreme 1:1,19 sure 42:2,3 47:12 swung 17:6 system 3:16,18 4:5,8 6:3,5,6 7:1 8:23 22:22 26:4 29:12 35:7 37:11 39:16,20 systemic 20:25 22:1 <hr/> T <hr/> T 2:1,1 take 4:7 10:22 18:5 30:3 32:16 42:8 Taken 26:17 talking 8:18,19 49:17 Tashjian 7:8 13:9 Tasjian 19:12
--	--	---	--	--

<p>tell 7:14 telling 9:7 33:15 term 43:21 44:11 terms 29:7 51:3 test 41:12 51:5 testimony 42:21 Thank 27:23,25 46:23 47:4 51:13,14 thing 15:13 33:16 44:2 think 9:13 10:1 15:1,19,24 19:11,17,22 20:11,12 21:1 21:3,5,7,20 22:8 23:3 25:14 27:1,14 31:6 36:20 39:15 40:7,15 41:14,17,18,24 44:25 45:25 46:2,7 50:16 51:4 thinking 21:9 39:14 thinks 12:22 43:2 third 35:1 thought 30:24 33:5 46:10 48:3 three 37:6 48:24 49:18,18 three-part 51:5 threshold 23:20 thumbs 43:23 time 17:3,8 18:18,19 27:23 today 3:4 told 35:2 36:20 top 49:24 top-two 3:15,18 4:3,5 6:5 26:4 50:1,5 trademark</p>	<p>26:24 27:11,14 tried 14:2 trouble 29:12 true 12:15,18 14:6 30:11 31:7 32:15 33:19 36:1 40:22 49:3 truly 31:6 42:6 truth 12:5 34:7 truthful 43:22 truthfully 25:1 try 6:2 35:14 trying 17:10 turn 37:20 two 4:1 9:4,12 9:18 16:20 19:4 34:23 36:3 38:5 40:8 43:2 48:23 49:5,6,18,18 49:24 two-stage 6:8</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unable 8:25 unconstitutio... 3:21 11:7 16:5 46:21 47:19,21 48:3,15,18 51:7 underlying 7:17 undermines 15:18 36:8 understand 10:12 18:5 33:3 38:17 43:10 understands 51:11 understood 47:18 unfair 46:8 United 1:1,19 44:14 unsuccessful 34:10 43:12</p>	<p>use 5:18 15:3 24:3 28:19,24 32:25 33:2,13 37:24 40:14 useful 5:6 47:13 uses 33:25</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5,11 3:4,6,15 7:9 15:5 19:13 valid 40:13 validated 26:11 validation 51:10 validity 44:20 value 26:11 versus 8:13 view 5:11 26:3 44:21 views 45:4 vindicates 26:5 violate 31:19 violation 27:14 vote 11:23 21:19 21:23 voter 40:16 voters 3:14,16 3:18 5:6,15,19 6:25 7:3 11:23 11:24,25 13:9 14:12 15:8 16:22 18:21,23 19:14 21:14,17 23:18 26:4 27:21,22 32:6 33:15 35:6,7 35:10 36:4,5 43:16,19 44:3 44:13,15 47:14 48:19 51:8 votes 16:19 23:13,19 voting 11:25 15:15 18:21</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>want 5:11 10:14 15:20 wanted 15:6</p>	<p>Wash 1:23,24 Washington 1:3 1:6,9,12,15 3:4 3:5,6,6 9:15 10:18 11:23 12:6 15:6 18:7 21:13,16 22:11 31:20 35:6,7 36:21 37:3,4 37:23 41:12 51:4 Washington's 3:13 22:23 33:11 wasn't 5:25 way 5:24 8:11 16:3 21:9 23:12,18 47:7 48:13,15 49:14 ways 15:2 37:7,7 weakening 50:10 weeks 18:20 West 39:18 we'll 3:3 14:11 we're 39:13 we've 19:5 23:9 27:9 38:20 48:25 whatsoever 38:24 Wherupon 51:16 White 1:24 2:6 28:1,2,4,15 29:1,10,14 30:13,21 31:4 31:16,19 32:3 32:11,20,24 33:9,21 34:8 34:14 35:12,24 36:2,11,24 37:6,17 38:11 38:15 39:1,10 39:15 40:7,19 40:23 41:4,9 41:17 42:2,16</p>	<p>43:11,18 44:5 44:9,25 45:15 46:2,14,20,24 widely 34:4 win 28:6 Wisconsin 44:11 wish 14:7 25:24 27:12 wished 5:19 words 5:18 16:3 20:13 work 49:14 working 21:9 world 20:7,9 21:9 22:8 wouldn't 38:25 40:16 writes 45:24 wrong 4:1 48:2</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,14 30:11</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 31:25 years 44:18 yellow 9:3 16:9</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>06-713 1:5 3:4 06-730 1:11 3:6</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 1:16 16:4,9 47:18 48:14 49:8 10:02 1:20 3:2 10:53 51:16 100 11:25 12 9:13 13 26:22</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 9:3 200 44:18 2005 29:19 2007 1:16 239 42:21</p>
--	---	--	---	--

<p>24a 34:21 28 2:7</p> <hr/> <p>3</p> <hr/> <p>3 2:4 9:3 18:19</p> <hr/> <p>4</p> <hr/> <p>4 46:25 40 21:13,16 400 42:8 47 2:10</p> <hr/> <p>5</p> <hr/> <p>5 23:3,5,20 24:16 592-593 4:19</p> <hr/> <p>6</p> <hr/> <p>6 45:3 66 24:17</p> <hr/> <p>7</p> <hr/> <p>70 45:7 79 7:4</p> <hr/> <p>8</p> <hr/> <p>80 35:7 85 44:12 872 3:13,21 5:1 12:13 20:1 24:1,4,12 28:8 29:3 33:25 39:2 41:10,11 41:21 42:6,20 46:21 872's 4:14</p> <hr/> <p>9</p> <hr/> <p>9.5(5) 12:12 90 11:24 18:20</p>				
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