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. :
14 - - - - - - - - - - - - - - - - - - x
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.

1 C O N T E N T S

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 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first today in case 06-713, Washington State Grange v.

5 Washington State Republican Party, et al., consolidated

6 with 06-730, Washington v. Washington State Republican

7 Party, et al.

8 General McKenna.

9 ORAL ARGUMENT OF ROBERT M. McKENNA

10 ON BEHALF OF THE PETITIONERS

11 MR. McKENNA: Mr. Chief Justice, and may it

12 please the Court:

13 In adopting Initiative 872, Washington's

14 voters followed this Court's guidance in California

15 Democratic Party v. Jones. They adopted a top-two

16 election system. By so doing the voters eliminated the

17 crucial constitutional defect of the partisan blanket

18 primary because in the top-two system the voters are no

19 longer selecting the party's nominees for the November

20 election. The Ninth Circuit nonetheless ruled that

21 Initiative 872 is unconstitutional, holding that

22 allowing each candidate to state his or her personal

23 party preference on the ballot would create the

24 appearance of association between a political party and

25 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 ballots 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 candidate 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 the 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: But they chose that and

1 wasn't the purpose that was offered by the proponent of
2 the 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 KENNEDY: 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 KENNEDY: 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 KENNEDY: -- 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 the
2 partisan blanket primary save the constitutionally
3 crucial one: Primary voters are not choosing a
4 party'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 party that they don't know what's in their
15 own 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 dissociate 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 expresses 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 is frankly also likely to have even more

20 information stating the difference between expressing a

21 preference and expressing a formal association, as the

22 sample --

23 JUSTICE SCALIA: Will it -- will it say whether

24 the party that is preferred likes this candidate?

25 MR. McKENNA: It will say, Your Honor, if

1 you would look to the sample --

2 JUSTICE SCALIA: I think you can say yes or

3 no to that. Will it say whether the party for which he

4 expresses a preference claims or disclaims him?

5 MR. McKENNA: It will stay that it is not a

6 statement by the political party identifying that

7 candidate.

8 JUSTICE SCALIA: Please answer yes or no.

9 Will it say whether the party for which he has expressed

10 a preference claims or disavows him?

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

12 JUSTICE SCALIA: All right.

13 JUSTICE SOUTER: General, as I understand it

14 the parties are now free to come up with any scheme they

15 want to for selecting an official candidate.

16 MR. McKENNA: Yes, Your Honor.

17 JUSTICE SOUTER: Let's assume the Democratic

18 Party decides to have a State convention. If the law in

19 Washington provided that the nominee selected by that

20 convention could state on the ballot not merely a

21 preference for Democrats, but a statement that, I am the

22 nominee of the Democratic Party, your position in this

23 case, I take it, would be exactly the same.

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

25 JUSTICE SOUTER: Okay.

1 JUSTICE ALITO: Will the ballot --
2 JUSTICE STEVENS: May I ask this question?
3 Is there anything in the State law that would prevent
4 you from requiring a candidate to be a member of the
5 party whose preference he states?
6 MR. McKENNA: There would not be, Justice
7 Stevens, no.
8 JUSTICE STEVENS: And under the -- under the
9 court's holding it would be equally unconstitutional if
10 he did that, I suppose.
11 MR. McKENNA: Your Honor, it would be
12 equally unconstitutional if we prevented someone, yes,
13 sir, from expressing a party preference or affiliation.
14 JUSTICE SCALIA: Indeed, there's -- I'm
15 sorry. Go ahead.
16 JUSTICE ALITO: Will the ballots necessarily
17 be the same in every county?
18 MR. McKENNA: Yes, Your Honor, because they
19 will be promulgated under regulations established by the
20 State secretary of state.
21 JUSTICE ALITO: Some of the counties have
22 paper ballots, some of the counties have -- is that
23 correct?
24 MR. McKENNA: Yes, Your Honor. But in
25 Washington State nearly all voters vote by mail now. So

1 they -- over 90 percent of voters and eventually nearly
2 100 percent of voters will be voting by mail and will
3 receive the same ballot form, with the same ballot
4 instructions and explanations as in the samples that
5 I've showed you.
6 JUSTICE SCALIA: Is -- is there any, what
7 should I say, truth investigation by the State of
8 Washington? Suppose a candidate who has been a Democrat
9 all his life, has run for office as a Democrat, agrees
10 with all the positions of the Democratic Party, chooses
11 to state on the ballot: I prefer the Republican Party.
12 That's okay?
13 MR. McKENNA: Yes, Your Honor. I would
14 refer you, Justice Scalia, to JA-415. Section 9.5(5) of
15 Initiative 872 requires the candidate to sign a
16 notarized declaration, quote, "stating that the
17 information provided on the form is true." So they are
18 signing declarations -- a declaration which is notarized
19 saying that everything they have put on the form is
20 true.
21 JUSTICE SCALIA: I guess -- how can you say
22 it's false?
23 MR. McKENNA: That's correct, Your Honor.
24 JUSTICE SCALIA: If he says he prefers it,
25 I guess he prefers it, even though it's contrary to his

1 entire life.

2 MR. McKENNA: Yes, Justice Scalia, it is an

3 expression of preference. It is a subjective

4 expression. It would be difficult to disprove.

5 However, if a candidate were to -- let's say the

6 chairman of the State Republican Party filed a

7 declaration of candidacy and said, I prefer the

8 Democratic Party. The Democratic Party would have many

9 opportunities to object. And you know, the ballot is

10 not even the most important source of information that

11 voters have, as this Court has recognized in Tashjian

12 and Celebrezze. So there would be many opportunities.

13 If there is a concern about false

14 statements, Your Honor, it seems to me the correct

15 approach is to provide for more speech, not to limit the

16 speech of all the candidates by refusing to permit them

17 to express their preferences.

18 JUSTICE STEVENS: General McKenna, is there

19 any evidence, any historical evidence, that any candidate

20 has ever done what Justice Scalia suggests?

21 MR. McKENNA: No, Your Honor. I'm not

22 aware of any specific instance.

23 JUSTICE KENNEDY: There is, but then there --

24 CHIEF JUSTICE ROBERTS: Well, there has never

25 been an election under the -- under this law, right?

1 MR. McKENNA: Correct, Mr. Chief Justice. We
2 have not had a chance to even hold an election.
3 JUSTICE KENNEDY: Well, there is evidence, in
4 other States, that those who've preached racial hatred
5 have tried to associate themselves with a particular
6 party, much to the concern of that party, and I see
7 nothing in your position that would prevent that.
8 MR. McKENNA: Justice Kennedy, the
9 candidates will be expressing a preference, this is true,
10 if they wish to. But there will be many -- first of
11 all, that is not compelled speech by the party; and
12 secondly, it is not compelling the party to accept that
13 person as a member -- as a member. As the emergency rules
14 for the declaration and as the sample ballot show, we'll
15 be very explicit in explaining to the voters that
16 someone claiming a preference is -- it's not a statement
17 by the party that they're claiming the person as a member
18 or a formal association.
19 JUSTICE KENNEDY: And is the remedy for the
20 party, you said, to have more speech for the party, to
21 say that this is not their candidate, et cetera?
22 MR. McKENNA: Yes, Your Honor, that is
23 exactly what the remedy would be.
24 JUSTICE KENNEDY: But this Court has said
25 that parties can be strictly limited in the amount of

1 monies they spend to endorse a particular candidate.
2 MR. McKENNA: But there will be many
3 opportunities --
4 JUSTICE KENNEDY: I don't think the law can
5 have it both ways.
6 MR. McKENNA: Your Honor, if I can use an
7 example that might help illustrate our point. Imagine
8 that Mr. Dale from the Boy Scouts v. Dale case moved to
9 Washington State and wanted to run for office, and
10 imagine that, instead of saying party preference, the
11 voters had said, well, you can choose to list any
12 organization for which you have a preference, a
13 political organization or another; and that Mr. Dale
14 decided to express a preference for the Boy Scouts.
15 Mr. Dale would be exercising his own speech, but that
16 would not be the same thing as compelling speech by the
17 Boy Scouts. Nor would he be compelling -- be compelled
18 to accept him as a member.
19 CHIEF JUSTICE ROBERTS: But nobody is voting
20 for Mr. Dale perhaps on the misimpression that he is
21 affiliated with the Boy Scouts, and that's what
22 undermines the Boy Scouts' associational rights. People
23 are going to think he's associated with the Boy Scouts
24 even though they may want to disassociate themselves
25 with him.

1 MR. McKENNA: Allowing -- Mr. Chief Justice,
2 allowing Mr. Dale to say he has a preference for the Boy
3 Scouts I don't think can reasonably be confused with him
4 claiming that he is a member, particularly when as
5 applied --
6 CHIEF JUSTICE ROBERTS: Do you agree that if
7 it were that way, in other words if the ballot looked
8 like the ballot on page 1 of the Grange reply brief,
9 that that would be unconstitutional?
10 MR. McKENNA: Yes, Your Honor, it would be
11 harder to argue from our side. But Your Honor, the
12 Ninth Circuit only assumed that the ballot would look
13 like the ballot on page 1 of the Grange yellow brief.
14 They assumed that the ballot would look exactly like the
15 ballot in a nominating primary, and our point here is
16 that it will not.
17 CHIEF JUSTICE ROBERTS: Do these preference
18 statements continue under the general election?
19 MR. McKENNA: Yes, Your Honor, they do.
20 CHIEF JUSTICE ROBERTS: Can you change
21 between the primary and the general election? Can you
22 say my preferred party is the Republican Party, so you
23 get more Republican votes to get you over the hump so
24 you are one of the two, and then at the end -- general
25 election say, my preference is the Democratic Party,

1 because there are more Democratic voters?
2 MR. McKENNA: No, Mr. Chief Justice. State
3 law would not permit that.
4 JUSTICE ALITO: Well, why can't you do that,
5 if the purpose is to provide accurate information about
6 a candidate's position? Suppose the candidate prefers
7 one party at the time of the primary and then something
8 happens. The issues change. The person -- the
9 candidate says: Well, now my preference is really for
10 the other party. I was close before and I've swung over
11 to the other side. If that's accurate information about
12 where the candidate stands at the time of the general
13 election, why can't that be put on the ballot, unless
14 you're trying to indicate affiliation rather than really
15 preference?
16 MR. McKENNA: Justice Alito, the State could
17 have chosen to allow people to change their preference
18 expression. But the State did not and the State is not
19 required to do so.
20 CHIEF JUSTICE ROBERTS: You're saying --
21 your argument is that they have a First Amendment right
22 to put their preference on the ballot, but somehow when
23 the general election comes along that First Amendment
24 right evaporates.
25 MR. McKENNA: There is also -- Mr. Chief

1 Justice, there is also an important practical
2 consideration here. And the Court has recognized the
3 State has regulatory practical interests --
4 JUSTICE GINSBURG: General McKenna, may I
5 ask you at that point --
6 MR. McKENNA: Yes.
7 JUSTICE GINSBURG: -- if that's a correct
8 statement of your position.
9 I didn't understand you to take the position
10 that a candidate has a constitutional right to state on
11 the ballot. The State of Washington has chosen to give
12 the candidate that option, but is -- I have not read
13 anything in your brief that suggests that a candidate
14 has a right to do so.
15 MR. McKENNA: You're correct, Justice
16 Ginsburg. I did not mean to suggest that candidates
17 have a constitutional right to have any information on
18 the ballot like an expression of party preference. And
19 I was about to say, there is a very important practical
20 reason to require candidates to decide what their
21 preference will be listed as and to keep it the same.
22 The reason is that we have to have time to print the
23 ballots and produce the ballots in time to send out three
24 weeks before the election, when over 90 percent of
25 voters begin voting by mail.

1 JUSTICE GINSBURG: But you did say that it
2 is unlikely voters will be mistaken, that they will
3 mistakenly consider a statement of party preference to
4 be the equivalent of a party endorsement. You did say
5 that, and on what basis are you predicting that the
6 statement of a preference will not be confused with a
7 statement of endorsement?
8 MR. McKENNA: On two bases, Justice
9 Ginsburg. The first basis is that, as we've shown with
10 the sample ballots from the Grange brief, the State will
11 be extremely explicit in stating that the candidate's
12 claim of preference or statement of preference is not
13 the party's statement that the candidate is a member,
14 endorsee, nominee, or what have you.
15 The second basis is I think just the general
16 basis this Court has recognized in Tasjian and in
17 Anderson v. Cellebreze, where the Court expressed a
18 greater faith in the ability of individual voters to
19 inform themselves beyond just the ballot. There are so
20 many other sources of information.
21 JUSTICE SCALIA: I don't think it's enough
22 that -- that there's no claim of party endorsement.
23 There is a claim of associating himself with the party,
24 and if he associates himself with the party it seems to
25 me the party should be able to dissociate itself from

1 him. And I think it harms the party not to permit that.
2 MR. McKENNA: No, Justice Scalia, I
3 respectfully disagree. This is not an association in
4 the constitutional sense. It is merely an expression of
5 preference, which we -- which Initiative 872 in its own
6 language and which the ballot will carefully distinguish
7 from claiming a formal association.
8 JUSTICE SOUTER: Do you know any Democrats
9 who go around saying I prefer the Democratic Party who
10 do not regard themselves and register themselves as
11 Democrats? I mean, in the real world I don't know
12 that -- I don't know whether this is fatal to your case,
13 but in the real world, it seems to me the distinction
14 you're drawing is simply not drawn.
15 MR. McKENNA: Your Honor, I think it's
16 helpful to think of the expression of party preference
17 as a subset of party affiliation. In other words,
18 someone might be a party affiliate --
19 JUSTICE SOUTER: It's helpful to your case,
20 but, going back to my question, do you know any people
21 who go around saying, well, you know, I really prefer
22 the Democrats; I'm a Republican myself? I mean that,
23 that doesn't happen.
24 MR. McKENNA: Well, the example of Senator
25 Lieberman comes to mind, where he said I really prefer

1 the Democrats and I'm running as an Independent.
2 (Laughter.)
3 JUSTICE SOUTER: There's always one.
4 (Laughter.)
5 JUSTICE SOUTER: But seriously, as a systemic matter, do you
6 really think that's -- that's a distinction that anyone
7 would recognize?
8 MR. McKENNA: I think that we are permitted
9 to allow people to express their preference. Many of
10 these people who do so would be independents, I think.
11 JUSTICE SOUTER: No, but that isn't
12 responsive to my question. Do you really think that
13 that distinction is a distinction which is accepted as a
14 working way of thinking in this world?
15 MR. McKENNA: Yes. Yes, I do, Justice
16 Souter.
17 JUSTICE SOUTER: You really do?
18 MR. McKENNA: In Washington State over 40
19 percent of the voters, for example, identify themselves
20 by -- as independents. Keeping in mind we have no party
21 registration in Washington State, over 40 percent of
22 voters when asked say I'm an independent; I may -- and
23 that does not mean they may not prefer one party over
24 the other, they may not generally vote for one party or
25 the other, but they think of themselves as independent.

1 JUSTICE SOUTER: But it means that they --
2 they will prefer the candidate of one party or another,
3 assuming they vote and there's no independent candidate
4 running. But it seems to me that the very declaration,
5 the very assumption of status as an independent says, I
6 don't as a systemic matter prefer one party to the
7 other; a pox on both their houses.
8 MR. McKENNA: Justice Souter, it may also
9 mean that I choose not to formally affiliate with the
10 party, even though I prefer that party's policies,
11 goals. You look at the independent --
12 JUSTICE SOUTER: It could. But do you
13 really think, again, in the real world, that that is why
14 people register themselves as independents?
15 MR. McKENNA: We have no registration in
16 Washington State, Justice Souter.
17 JUSTICE SOUTER: Well, however the statement
18 is made.
19 MR. McKENNA: There have been a number of
20 cases where individuals have run -- have run for office
21 as independents and then have chosen to, you know,
22 attend the caucus meetings of the Democratic Party, for
23 example. So, yes, it does happen. And the point is
24 that people are allowed to do this, but they're not
25 required to.

1 JUSTICE SCALIA: General McKenna, I'm
2 interested in how this new system meshes with the
3 otherwise quite partisan nature of Washington's election
4 laws. For example, the major political parties have a
5 certain -- certain benefits that are not given to minor
6 parties, and the major parties are determined on the
7 basis of obtaining more than a certain percentage -- I
8 think it's 5 percent -- in a statewide election. How are
9 you going to figure out whether the Republican Party
10 has -- has gotten more than 5 percent when all you have is
11 somebody who expresses a preference for the Republican
12 Party, although he's not really a Republican?
13 MR. McKENNA: Your Honor, as legal counsel
14 for the State we've analyzed that question, and have
15 concluded that unless and until the legislature chooses
16 to alter the statute to harmonize at a practical level,
17 the way that we will apply that statute is to count the
18 votes of the party cast for the party's official
19 nominee. The person who has been identified the party
20 through their separate nominating process, for example,
21 through a convention, that person will be identified.
22 And they will campaign as "the nominee." They will
23 explain that to the voters in every way possible, and we
24 will count the votes cast for that person in calculating
25 whether the 5-percent threshold has been met.

1 JUSTICE KENNEDY: I was going to ask the
2 counsel for the Respondents, and you can answer as well,
3 can you explain to me briefly the existing structure for
4 the Republican Party, the Democratic Party, to say
5 Mr. Smith is our nominee?
6 MR. McKENNA: Well, the Initiative 872,
7 Justice Kennedy, repealed the old State law which
8 required the parties to use the State primary to select
9 their nominees. And Initiative 872, in fact, is silent
10 on the procedures the parties will follow. So they are
11 left as they were back in the early days of statehood to
12 decide for themselves how to designate their nominees.
13 JUSTICE KENNEDY: And they have not devised a
14 structure that we know of?
15 MR. McKENNA: No. Actually, Your Honor,
16 they have. In fact, the Republican Party, after
17 Initiative 872 was adopted and before it was enjoined,
18 adopted rules and procedures for holding nominating
19 conventions.
20 And they also, for example, adopted a rule,
21 which is Rule 5, that they said that if an incumbent
22 runs and receives 66 percent of the support at the
23 nominating convention, no other Republican can go onto
24 the ballot. This is their claim. No other Republican
25 can go onto the first stage ballot and claim to be a

1 Republican. That is their assertion. Only that one
2 person can go on with the "R" after his name -- an idea
3 that we basically reject if it means that no one else
4 can even express a preference for the Republican Party.
5 But we agree that only one candidate will be
6 allowed to truthfully claim that he or she is the
7 nominee of the party if the party has gone through a
8 nominating process of its own.
9 JUSTICE SOUTER: But may not claim that on
10 the ballot itself?
11 MR. McKENNA: Correct, Justice Souter.
12 CHIEF JUSTICE ROBERTS: They're not allowed
13 to split the ballot in their preference, are they, say I
14 prefer one party on domestic issues, I prefer the other
15 party's position on foreign affairs?
16 MR. McKENNA: No, Mr. Chief Justice, they
17 are not.
18 JUSTICE SCALIA: One of the briefs says that
19 the Republicans -- I think the Republicans or the
20 Democrats checked with the, with the State election
21 officials who said that there's no provision for
22 convention, for nomination by convention.
23 MR. McKENNA: Justice Scalia, they did not
24 check with the State officials. They cite in the record
25 letters from a couple of county auditors. But the

1 county auditors have no independent authority. They
2 operate under the secretary of state's rules.
3 JUSTICE SCALIA: So they can -- they can
4 conduct conventions if they wish?
5 MR. McKENNA: Yes, sir, Justice Scalia, they
6 may.
7 I would just like to close this part of my
8 argument, if I may, by pointing out that in our view the
9 voters have adopted a top-two election system which
10 vindicates both the rights of the parties and the
11 people. The parties can select their standard bearers
12 without any State interference, adopting their own
13 nomination process.
14 And the people are not limited to candidates
15 selected by the parties. They have more choice, which
16 is a value that was validated in the Jones decision,
17 albeit holding that you can't do that with nonmembers
18 selecting the party's nominees.
19 The parties, though, argue that no candidate
20 can even state an expression of party preference, cannot
21 make an expression of party preference on the ballot
22 without the party's consent. Taken to its logical
23 conclusion, the parties are really claiming they have a
24 First Amendment right to require the State to place a
25 single candidate of their choosing on the ballot.

1 If you look at the joint appendix, page
2 13 --
3 CHIEF JUSTICE ROBERTS: But it's really --
4 it's just like a trademark case. I mean, they're
5 claiming their people are going to be confused. They
6 are going to think this person is affiliated with the
7 Democratic or Republican Party when they may, in fact,
8 not be at all.
9 MR. McKENNA: Mr. Chief Justice, they make
10 that claim without the benefit of any evidence. The
11 Ninth Circuit and the district court and the parties
12 simply assume this will happen, and they assume, for
13 example, that ballot looks just like the old nominating
14 primary ballot, when, in fact, as we've shown, it
15 clearly will not. And, of course, we don't believe
16 trademark law applies here in this case, although I can
17 address that if you wish. So, they make --
18 CHIEF JUSTICE ROBERTS: I didn't suggest it
19 would be a trademark violation. I think I said it was
20 just like the same analysis. And I don't know why you
21 would give greater protection to the makers of products
22 than you give to people in the political process.
23 MR. McKENNA: They deserve protection, of
24 course, Mr. Chief Justice. The question is whether or
25 not merely allowing someone to express their party

1 preference somehow will mislead the voters. This Court
2 has shown more faith in the voters than that.
3 I'll reserve the balance of my time. Thank
4 you, Mr. Chief Justice.
5 CHIEF JUSTICE ROBERTS: Thank you, General.
6 Mr. White.
7 ORAL ARGUMENT OF JOHN J. WHITE, JR.
8 ON BEHALF OF THE RESPONDENTS
9 MR. WHITE: Mr. Chief Justice, and may it
10 please the Court:
11 Candidates are the party's messengers to win
12 over the public on the important issues of the day.
13 Initiative 872 converts the established right of
14 political parties to select their messengers into a mere
15 right to endorse.
16 JUSTICE SOUTER: What do you -- what do you
17 say about the fact that you have a right to select and
18 designate an official candidate and it's independent of
19 this ballot procedure?
20 MR. WHITE: As the secretary of state
21 pointed out -- and this is at JA-363 -- the secretary of
22 state indicated the State would pay no attention to the
23 party's nominating conventions and instead would
24 continue to allow candidates to use party labels just as
25 they had in the -- blanket primary before.

1 JUSTICE SOUTER: Okay. If the rationale in
2 Jones was that the defect was that the association,
3 political association, was being adulterated by the
4 method of -- of the use of ballots, to select what was
5 an official nominee, that problem does not exist here.
6 MR. WHITE: It does, it does, Your Honor.
7 And it does in the manner that this -- the candidates
8 who were selected at the Initiative 872, the modified
9 blanket primary, are going to be carrying the party's
10 standard in the general election.
11 JUSTICE SOUTER: You're saying in practical
12 terms, this is a nomination, even though there may be a
13 separate official nomination that nobody pays attention
14 to?
15 MR. WHITE: Absolutely, Your Honor.
16 JUSTICE SOUTER: Then why is one party going
17 to the trouble of establishing a convention system to
18 make nominations?
19 MR. WHITE: We adopted -- the Republican
20 Party, the Democratic Party and the Libertarian Party
21 all adopted rules governing nomination of our candidates
22 by convention. We corresponded with all of the county
23 auditors who would be conducting partisan elections in
24 2005, and we received identical letters from all four of
25 them indicating that they had consulted with the

1 secretary of state and that the initiative contemplated
2 no partisan nomination process separate and apart from
3 the primary. The secretary of state received copies of
4 those letters; the Secretary of State's public
5 statements with respect to those letters was that they
6 would pay no attention to the nominating process.
7 JUSTICE SOUTER: Well, they will pay no
8 attention, I take it, in the sense that there will be
9 nothing indicating an official nomination on the ballot
10 itself. But as I -- I am also assuming that the parties
11 through a convention, or whatever other scheme they
12 come up with, can -- can designate an official nominee
13 quite independently of this ballot. And if they do so
14 designate, they can campaign on that person's behalf.
15 The person in campaigning can say, I am the official
16 nominee of the X party. And those facts are true,
17 aren't they?
18 MR. WHITE: They are, Your Honor, but that
19 converts the right to nominate to a mere right to
20 endorse, and this Court has recognized that the ability
21 of a party to endorse a candidate is no substitute --
22 JUSTICE SOUTER: You're saying that a right
23 to nominate has to be a right to exclude everyone from
24 the ballot except the nominee -- everyone from the
25 ballot under that banner, from the nominee.

1 MR. WHITE: To be -- to be a meaningful
2 right to nominate, yes, Your Honor, it does.
3 JUSTICE GINSBURG: Where does that right
4 come from? I thought that in Jones the Court had said if
5 you had just a blanket primary, with no indication of
6 party affiliation, that that would be constitutional.
7 And if that's so, then parties don't have any right to
8 have a candidate.
9 MR. WHITE: I'm not suggesting that the
10 parties have a constitutional right to place their party
11 name on a truly nonpartisan ballot, and I think what the
12 Jones Court was hypothesizing was the true nonpartisan
13 primary where there are no party identifications. Our
14 objection is not to a -- necessarily to a nonpartisan
15 ballot. It's to a partisan ballot where the State is
16 going to put someone else on that ballot using our
17 party's name and competing against our nominee under the
18 same name.
19 JUSTICE GINSBURG: So you would have no
20 objection if this -- everything was the same, except no
21 party affiliation were shown.
22 MR. WHITE: That --
23 JUSTICE GINSBURG: That would be
24 constitutional?
25 MR. WHITE: That would not violate our First

1 Amendment rights, Your Honor. The State of Washington --
2 JUSTICE STEVENS: May I ask this question?
3 It's hypothetical, I suppose, but supposing the statute
4 further provided that a candidate may not designate a
5 preference unless he has been a registered member of
6 that party for at least a year, and otherwise the
7 statute is exactly how it is now. Would that be
8 constitutional?
9 MR. WHITE: No, Your Honor, because the
10 State is still then resolving what is an internal
11 factional fight between real Republicans using a blanket
12 ballot where voters from rival parties are able to
13 determine --
14 JUSTICE STEVENS: In my hypothesis the
15 person is a real Republican. He is just not the one
16 selected as the candidate.
17 MR. WHITE: That's correct, Your Honor, but
18 then the blanket primary is still selecting which
19 Republican advances to the general election.
20 JUSTICE KENNEDY: Well then, it's not just a
21 rhetorical flourish. It's true, when the State says
22 that you take the position that you are entitled to say
23 on the ballot who your nominee is, that has to be a
24 correct statement of your position given this statute
25 and given the issues presented to us here.

1 MR. WHITE: I'm -- I'm not --
2 JUSTICE KENNEDY: Or is that just somewhat
3 hyperbolic? It seems to me he is right based on your --
4 on the position you're now stating.
5 MR. WHITE: The political parties have the
6 right to nominate their candidate and restrict the use
7 of the party name to candidates who have been authorized
8 to use that.
9 JUSTICE SCALIA: I didn't understand you to
10 say that you have a right to a partisan process in which
11 your -- only your nominee is shown. I thought you're
12 saying that if it is a process in which party
13 affiliation is shown, then your endorsed candidate
14 should be set aside somehow.
15 MR. WHITE: That, that -- that is our -- is
16 our position, Justice Scalia. We are not suggesting we
17 have a right to a partisan process. Washington's
18 constitution makes its legislative elections a partisan
19 process, but once the State has decided to use partisan
20 identification as the sole information that's presented
21 on the ballot, it is telling the voters that this is the
22 most important thing for you to be considering when you
23 walk into the ballot --
24 JUSTICE STEVENS: Even if the information is
25 by statute true, in my hypothetical he must be a member,

1 but still you make the same objections.
2 MR. WHITE: Yes, Your Honor. As this Court
3 pointed out in Jones with the comparison of the Mario
4 Cuomo/Edward Koch race, it is for the political parties
5 to be able to resolve that internal party competition.
6 Initiative 872 still uses blank --
7 JUSTICE STEVENS: You're seeking to suppress
8 information because, as I understand it, there is nothing
9 to prevent the nominee of the convention from publicizing
10 widely the fact that the convention picked me as their
11 standard bearer. The fact that some other member of the
12 party gets his name on the ballot doesn't prevent the
13 public from being informed about the truth, does it?
14 MR. WHITE: Perhaps I misunderstood your
15 question, Justice Stevens. The Republican Party would
16 not prevent the unsuccessful candidate from running in
17 the election. He could run as an Independent --
18 JUSTICE STEVENS: It would prevent him from
19 running and saying he is a Republican.
20 MR. WHITE: On -- having him listed on the
21 ballot where the State is indicating that that is the
22 most important information to consider, the partisan
23 affiliation, and the State has hypothesized through the
24 Grange reply brief that there are all these other
25 possible formulations of the ballot. However, before the

1 Ninth Circuit, in the State's petition appendix at page
2 24a, the Ninth Circuit squarely put to the State's
3 attorney the question: How would candidates be
4 designated on the ballot where you had two Republicans
5 who had competed against each other in the party's
6 nominating process, and one had been selected; and a
7 third candidate who had absolutely no affiliation with
8 the party also entered the race. And the State told the
9 Ninth Circuit yes, they would be identified identically
10 on the ballot.
11 JUSTICE KENNEDY: Suppose there were an
12 empirical study that Washington voters know about this
13 system, and that 80 percent of the Washington voters
14 know that the party has not endorsed any one of these --
15 all of these candidates. That it's just a statement
16 of preference, that that's all it means; the voters know
17 this. Is your position the same?
18 MR. WHITE: Yes, Your Honor, because the notion
19 that disclaimers are necessary, and the State indicates
20 that they will spend a million dollars to try to clear
21 this up, is evidence of the confusion that's likely to
22 occur. But even if the State does come forward and put
23 all these disclaimers and preferences on, what the State
24 is essentially doing on the ballot is masking who the
25 Republican Party's nominee is by the presence of other

1 candidates --

2 JUSTICE KENNEDY: But -- but my submission,

3 or my hypothetical-- it's just a hypothetical -- is that

4 no one is misled by this.

5 JUSTICE GINSBURG: Do we know --

6 JUSTICE KENNEDY: Accept the hypothetical as

7 true. Then what's the injury?

8 MR. WHITE: The interest then is that you

9 still have two Republican-identified candidates who are

10 purporting to carry the party's message to the voters,

11 and the voters are resolving that intra-party

12 competition.

13 CHIEF JUSTICE ROBERTS: If you have, for

14 example, a disclaimer, it seems to me that undermines

15 your argument that they are successfully, anyway,

16 purporting to carry the party's message.

17 MR. WHITE: Well, if you have the

18 disclaimer, Your Honor, and the statements that this

19 doesn't really mean anything, then you come to the

20 question of what legitimate State interest is being

21 advanced by having someone put Republican on the ballot

22 as their party preference, when it in fact means

23 nothing; it does not mean that they are associated with

24 the party. It does not mean --

25 JUSTICE GINSBURG: How does one associate --

1 this is -- it was -- I think General McKenna told us that
2 in the State of Washington people do not register
3 membership in one party or the other, so how does the
4 Republican Party determine who is a Republican?
5 MR. WHITE: At -- do you mean a legitimate
6 Republican candidate or membership in general?
7 JUSTICE GINSBURG: No, who do you consider a
8 member of the party? If you say I am a Republican in
9 the State of Washington, what does that mean? It
10 doesn't mean I registered Republican because Washington
11 doesn't register people by party.
12 MR. WHITE: The three political parties each
13 have different definitions and ways to become -- ways to
14 become affiliated with the party. Under the Republican
15 Party rules if you identify yourself to the Republican
16 Party that yes, I am a Republican, you attend our caucus
17 or convention system, you contribute funds to the
18 party, you can be a member of the Republican Party. The
19 Libertarians --
20 JUSTICE GINSBURG: Any one of those,
21 contributing funds is enough? You don't have to go to
22 the convention as well?
23 MR. WHITE: You don't have to go to the
24 convention, but there is also a difference there between
25 being a rank-and-file member and being a spokesman of

1 the party. I'd like to turn to the Libertarians,
2 though, for instance. The Libertarians require you to
3 sign a membership application and all members of the
4 Libertarian Party in Washington must sign a pledge that
5 they oppose the use of force in the resolution of
6 political disputes.
7 CHIEF JUSTICE ROBERTS: Libertarians have a
8 lot more rules than the other parties.
9 (Laughter.)
10 JUSTICE SOUTER: You -- you have identified
11 -- in the course of your argument, you've identified two
12 separate problems with the -- with the scheme as you see
13 it. One is, as you put it, that it masks the identity
14 of an official nominee, and the other is that it in
15 effect allows competition on the ballot by a person
16 under the same party banner with the official nominee.
17 MR. WHITE: Yes. After the party has
18 already resolved its internal disputes and determined
19 who its spokesman will be, the State allows --
20 JUSTICE SOUTER: Right.
21 MR. WHITE: -- any candidate to appropriate
22 the name and compete against our nominee.
23 JUSTICE SOUTER: I -- I -- no, I understand
24 that to be your position, but my question is, and I
25 realize there is a certain awkwardness to this, but we

1 -- we've got to face it: If the masking of the identity
2 of the candidate is the real flaw, then the -- the
3 hypothetical that was included in the -- in Jones, in
4 the dictum, of the -- of the party that -- of the ballot
5 that has no party identification whatsoever, that would
6 equally be bad, wouldn't it?
7 MR. WHITE: No, Your Honor, because what it
8 is, in this instance, Initiative 872 is a partisan
9 primary that would mask the identity of the party
10 nominee.
11 JUSTICE SOUTER: But if it's the masking
12 that's the problem, the -- the nominee is going to be
13 just as well masked on the ballot; in fact, rather better
14 masked on the ballot that allows no statement of
15 preference at all.
16 MR. WHITE: No, Justice --
17 JUSTICE SOUTER: And -- and I'm not saying
18 that that's fatal to your case, but I mean it's -- it's
19 something we need to be careful about when we're doing
20 our thinking, and that's why I'm pressing you on it.
21 MR. WHITE: Well -- and I think it's -- it's
22 the masking in the context of a partisan system. The
23 State may elect to have nonpartisan offices, and many
24 local offices throughout the West are nonpartisan.
25 JUSTICE SOUTER: But if -- but if it's just

1 masking in a partisan system, then it seems to me you're
2 making the same argument that you make when you say, by
3 allowing statements of preference, we obscure the
4 character of the official nominee and in effect allow
5 somebody to have a -- a second shot at -- at getting
6 Republican support as a Republican.
7 It seems to me that if it's masking in a
8 partisan ballot that's the real problem, there's only
9 one objection and the objection is not so much the
10 masking as it is the submergence of the official
11 nomination by allowing competition under the party's
12 name by another candidate. Isn't that fair to say?
13 MR. WHITE: I -- I think, Justice Souter,
14 that it -- that it is two separate inquiries. First you
15 have the difficulty that as a practical matter these
16 candidates will be identified as Republican nominees or
17 Republican candidates, but even if the State were able
18 to posit sufficient disclaimers and caveats, that the
19 State has shown no valid interest in allowing a
20 candidate to use the name --
21 JUSTICE STEVENS: Well, but don't you think
22 it's relevant information? Wouldn't a voter like to
23 know whether a person preferred the Democrats or the
24 Republicans?
25 MR. WHITE: Well, it's -- it's relevant

1 information, Justice Stevens, only to the extent that it
2 connects the candidate.
3 JUSTICE STEVENS: Only to the extent it's
4 true.
5 MR. WHITE: To -- to the extent that it
6 connects the candidate to the political party and its
7 positions on the issues. And as the State points out in
8 its reply brief --
9 JUSTICE STEVENS: May I ask this question:
10 This was a facial challenge, was it not?
11 MR. WHITE: Yes, it is, Your Honor.
12 JUSTICE STEVENS: And what exactly -- what
13 relief did the district court grant? Did he enjoin the
14 entire blanket primary or just the designation of
15 parties?
16 MR. WHITE: The district court enjoined the
17 entirety of Initiative 872 because it determined that
18 the party preference provisions of Initiative 872 were
19 not severable under Washington State's test for
20 severability.
21 JUSTICE STEVENS: Do you think that was the
22 narrowest relief he could have granted to avoid the
23 constitutional difficulty that you see?
24 MR. WHITE: I -- I think that was the -- I
25 think that was the appropriate, and it is a narrow

1 relief. The court looked at the structure of the
2 initiative, the connection of the party preference, and
3 the party preference provisions permeate Initiative 872,
4 and determined that severability was not appropriate.
5 Yes, I do, Your Honor.
6 JUSTICE STEVENS: Do you think it would be
7 administerable if it was severed, if the preference
8 provision was just deleted?
9 MR. WHITE: I'm not -- I'm not sure that it
10 would, Your Honor. I'm not sure that it would because
11 -- and what the State and the Grange argued below is
12 that -- they actually argued for severance because that
13 would then convert Initiative 872 into a truly
14 nonpartisan primary, but that's not what was on the
15 ballot. If you take a look at -- it's JA 400.
16 JUSTICE STEVENS: I'm confused about the
17 difference between a facial challenge and an as-applied
18 challenge. On the one hand, it's very helpful to you.
19 There's no evidence out there that this has ever -- this
20 has ever been a problem, so you've got to attack it
21 right away, but then you have this relief that basically
22 enjoins the whole -- whole procedure.
23 MR. WHITE: Well, the Court asked General
24 McKenna a question during his argument about whether the
25 problem had ever occurred with a false-flag candidate

1 capturing a party's name on the ballot. It has not
2 under Initiative 872 because it was enjoined before
3 being effective. But at page JA 239 there's testimony
4 that --
5 JUSTICE STEVENS: But it also seems
6 highly improbable if you have a nominee as a result of a
7 convention, everybody reads the newspapers, they know
8 who the Republican nominee is, that there's going to be
9 such confusion that everybody thinks it's one or two of
10 the other people who also put an "R" after their name.
11 The likelihood of massive confusion seems highly
12 improbable to me. I mean you -- you have your own
13 convention where you nominate the Republican nominee,
14 your preferred candidate, and that's publicized
15 generally throughout the State, and you're concerned
16 that somebody going into the ballot box won't -- won't
17 understand what's been going on.
18 MR. WHITE: Your Honor, it's -- the State
19 has indicated that our nominee, the unsuccessful nominee
20 and the false-flag candidate would all be listed on the
21 ballot identically. The --
22 JUSTICE STEVENS: But, again, the ballot's
23 not the only information available to voters when they
24 go into the polls.
25 MR. WHITE: No, but it is the only

1 information presented to the -- the voters at the
2 critical moment when they're casting their ballot, and
3 as this Court has noted in -- with respect to term
4 limits or provision of truthful information regarding
5 race on a ballot, a State cannot put its thumbs on the
6 electoral scales by favoring one group of candidates
7 over another.
8 JUSTICE SCALIA: I suppose you could say the
9 same thing about the candidates' party preferences.
10 They can make that known to the voters in the newspapers
11 when they run.
12 MR. WHITE: That's -- that's exactly the
13 case, Justice --
14 JUSTICE SCALIA: I don't have the Republican
15 Party endorsement, but I prefer the Republican Party.
16 MR. WHITE: And with respect to the
17 importance of party designations and party information
18 on the ballot, last term the Chief Justice, in Wisconsin
19 Right to Life, noted a study that showed that 85
20 percent of voters couldn't name a single candidate for
21 the United States House of Representatives in their own
22 district, but the -- the voters know the political
23 parties. The political parties have spent, in our case, a
24 century and a half and, in the Democratic Party's case,
25 200 years developing a message and developing a set of

1 principles with which the parties are associated, and --
2 JUSTICE KENNEDY: What would be the validity
3 or the invalidity, in your view, of a scheme which said
4 that the ballot has one candidate who says, Smith,
5 Republican nominee, and the other candidates -- other
6 candidates say, Republican preference?
7 MR. WHITE: I think the question there, Your
8 Honor, is what is the legitimate interest of the State
9 in putting that information on the ballot? At -- their
10 reply brief at page 6, the State says an independent who
11 does share the views of either the Republican or
12 Democratic Party may prefer the Republican Party. That
13 preference may be because that independent is running in
14 a district that's 70 percent Republican. And the
15 question is, what is the legitimate interest of the
16 State in providing that information that says, I prefer
17 the Republican Party, where it connotes no connotation,
18 no --
19 JUSTICE KENNEDY: You -- you can't answer my
20 question? You can't hypothesize any legitimate State
21 interest for doing that?
22 MR. WHITE: I -- I cannot, Your Honor,
23 because either -- if there is a legitimate State interest,
24 the interest is in providing information about that
25 candidate's positions and linkages to the Republican

1 Party by saying, my preference is Republican because I
2 believe what the Republicans are, whether that candidate
3 is David Duke, in the Republican case, or in the case of
4 the Democrats, a Lyndon LaRouche candidate.
5 JUSTICE KENNEDY: Well, when the Court
6 writes this opinion, what's the fairest statement of the
7 State's interest in this requirement? What do you think
8 is the fairest statement of the State's interest?
9 MR. WHITE: I think the fairest -- the
10 fairest statement of the State interest would be that
11 the State has no interest in creating the impression of
12 false associations or allowing opportunistic candidates
13 to appropriate the political party --
14 JUSTICE KENNEDY: You think there's no
15 legitimate interest? It's -- it's an unfair question, I
16 suppose.
17 JUSTICE SCALIA: I thought you said the
18 State's interest was to -- to do what we disapproved in
19 Jones without seeming to do what we disapproved in
20 Jones.
21 (Laughter.)
22 MR. WHITE: That -- that would be an
23 acceptable phrasing of the State's interest as well,
24 Justice Scalia.
25 (Laughter.)

1 JUSTICE KENNEDY: Well, I'm going to ask the
2 State the same question.
3 MR. WHITE: If there are no further
4 questions, Initiative 872 is unconstitutional and the
5 judgment of the lower court should be affirmed.
6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. White.
8 General McKenna, you have 4 minutes
9 remaining.
10 REBUTTAL ARGUMENT OF ROBERT McKENNA
11 ON BEHALF OF THE PETITIONERS.
12 MR. McKENNA: Thank you, Mr. Chief Justice.
13 First of all, Justice Kennedy, the State's
14 interest is what we have said it is all along. It is to
15 convey some information on the ballot in the same way
16 that the party label does. I have noticed that the
17 political parties have never objected to having their
18 nominees listed on the ballot as -- you know, as such.
19 In this case it's an expression of party
20 preference, to be sure, and nothing more than that; and
21 there is useful information which is conveyed. We are
22 not required to allow it, but the voters have chosen to
23 allow it.
24 JUSTICE ALITO: Can I ask you to clarify
25 something you said during your initial argument? I

1 understood you to say that the sample ballot on page 1
2 of the Grange reply would be unconstitutional.
3 MR. McKENNA: No, Your Honor. I did not say
4 that it would be unconstitutional. I said that that
5 would be a different argument. It might be a more
6 difficult argument. The Ninth Circuit assumed that that
7 is what the ballot would look like, even though there
8 was no basis for the Ninth Circuit reaching that
9 conclusion.
10 CHIEF JUSTICE ROBERTS: Maybe I'm wrong. I
11 thought you did say it would be unconstitutional.
12 JUSTICE SCALIA: I did, too.
13 CHIEF JUSTICE ROBERTS: And could you --
14 JUSTICE SCALIA: You should have said that.
15 CHIEF JUSTICE ROBERTS: I mean how would you
16 defend that? I mean --
17 MR. McKENNA: Well, I would defend it, Your
18 Honor, by saying this is a facial challenge. Let's
19 apply it. And if there is evidence --
20 CHIEF JUSTICE ROBERTS: Well, we are
21 assuming it is applied in the way that is shown on the
22 Grange reply brief at page 1. If it were applied in
23 that way, would that be unconstitutional? It just says
24 "R" or "D."
25 MR. McKENNA: It would -- it could be

1 unconstitutional, Mr. Chief Justice, if there were
2 evidence that the voters were misled or confused.
3 It would impart -- Mr. Chief Justice,
4 this is an excellent opportunity to point out that the
5 letter after the name, whether it's the letter as on page
6 one of the Grange ballot or it's -- expression of party
7 preference on pages two and three, is not the only
8 information on the ballot.
9 As we've shown in the samples, there will be
10 lots of other information on the ballot which clearly
11 distinguishes the expression of party preference.
12 JUSTICE STEVENS: And it's also true that,
13 by hypothesis, there will be other candidates beside the
14 one :R" and the one "D"? If there aren't at least two
15 "R"'s and two "D"'s, there is no problem.
16 MR. McKENNA: In the scenario of the ballot
17 on page 1, Justice Stevens, I believe that what would
18 happen is you would have -- the Secretary of State would
19 still provide the additional language. If that additional
20 language is not provided, if it were just that bare ballot
21 with no explanatory language, then, yes, it would be much
22 harder to defend as being constitutional. But that, in
23 fact, is not the way this is going to work.
24 JUSTICE STEVENS: But my point is there
25 could never be a ballot just like this, what your

1 opponents are talking about, because there are always
2 going to be at least two or three "R"'s and two or three
3 "D"'s. And the sample shows there is only one, which must
4 be then the party chosen -- I mean the nominee chosen at
5 the convention.
6 MR. McKENNA: But the key here, Your Honor,
7 is that even under the ballot on page one, what is not
8 happening under top-two is that the nominee of the
9 party is not being selected. That's not happening any
10 more. And in Jones the Court said that the top-two is
11 the same in all characteristics save one, which is the
12 result of the nominee not being selected.
13 And that is exactly what is happening under
14 top-two: The nominee is not being selected; and, as
15 applied, we are going to be providing lots of other
16 information on the ballot to make it very clear what
17 "expression of party preference" means.
18 JUSTICE KENNEDY: Does the State have a
19 legitimate interest in weakening the influence of
20 political parties?
21 MR. McKENNA: No, Your Honor, it does not.
22 JUSTICE KENNEDY: If we found that that was
23 the necessary effect of this ballot measure, then would
24 it be invalid?
25 MR. McKENNA: I think Your Honor you would

1 have to find there is a severe burden on the parties and
2 subject the provision on party preference to strict
3 scrutiny. And if you did that, and it were
4 unconstitutional, as it probably would be in that
5 instance, it would be severable, Your Honor, a question
6 that was raised earlier.
7 CHIEF JUSTICE ROBERTS: Well, it's -- it
8 wouldn't need to be strict scrutiny; if the State has no
9 legitimate interest, it's going to fail any level of
10 scrutiny.
11 MR. McKENNA: Except that it does have a
12 legitimate interest, Your Honor, the same legitimate
13 interest it has in putting any information indicating
14 something about party on the ballot. This is --
15 the same legitimate interest that occurs in a nominating
16 primary where the -- where the party -- where all the
17 candidates who have filed under that office are allowed
18 to list the party. It is the same interest in terms of
19 conveying information which this Court recognized as
20 legitimate in Tashjian and Anderson v. Celebrezze and so
21 forth. And on the question of severability I think
22 Washington law applies here. The McGowan three-part test,
23 which is paralleled by this Court's test under Federal
24 severability and Booker, simply states that an act or
25 statute is not unconstitutional in its entirety unless

1 it's believed that the voters would have passed without --
2 one without the other or unless elimination of the invalid
3 part would render the remaining part useless to accomplish
4 the legislative purposes. Clearly, Your Honors, in this
5 case the main purpose was to preserve choice. It was
6 called the People's Choice Initiative. Thank you,
7 Mr. Chief Justice.
8 CHIEF JUSTICE ROBERTS: Thank you, General.
9 The case is submitted.
10 (Wherupon, at 10:53 a.m. the case in the
11 above-entitled matter was submitted.)
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24
25

A

ability 19:18 30:20
able 7:18 19:25 32:12 34:5 40:17
above-entitled 1:18 52:11
absolutely 29:15 35:7
accept 14:12 15:18 36:6
acceptable 46:23
accepted 21:13
accomplish 52:3
accurate 6:22 17:5,11
act 51:24
additional 49:19 49:19
address 27:17
administerable 42:7
adopted 3:15 24:17,18,20 26:9 29:19,21
adopting 3:13 26:12
adoption 4:14
adulterated 29:3
advanced 36:21
advances 32:19
affairs 25:15
affiliate 20:18 22:9
affiliated 15:21 27:6 37:14
affiliation 5:8 11:13 17:14 20:17 31:6,21 33:13 34:23 35:7
affirmed 47:5
agree 16:6 25:5
agrees 12:9
ahead 11:15
al 1:7,9,13 3:5,7
albeit 26:17
Alito 5:4,25 6:12 11:1,16,21 17:4,16 47:24
Alito's 6:21
allow 5:10,16,20 5:22 17:17 21:9 28:24 40:4 47:22,23
allowed 5:21,23 7:24 8:1 22:24 25:6,12 51:17
allowing 3:22 5:5 7:7 16:1,2 27:25 40:3,11 40:19 46:12
allows 38:15,19 39:14
alter 23:16
Amendment 8:19 17:21,23 26:24 32:1
amount 14:25
analysis 27:20
analyzed 23:14
Anderson 7:9 19:17 51:20
answer 6:17 10:8 24:2 45:19
anyway 36:15
apart 30:2
appearance 3:24 4:2
APPEARAN... 1:21
appears 4:18
appendix 4:18 7:4 27:1 35:1
application 38:3
applied 16:5 48:21,22 50:15
applies 27:16 51:22
apply 23:17 48:19
approach 13:15
appropriate 38:21 41:25 42:4 46:13
argue 16:11 26:19
argued 42:11,12
argument 1:19 2:2,5,8 3:3,9 17:21 26:8 28:7 36:15 38:11 40:2 42:24 47:10,25 48:5,6
aside 33:14
asked 6:13 21:22 42:23
assertion 25:1
associate 7:25 8:5,24 14:5 36:25
associated 8:13 15:23 36:23 45:1
associates 19:24
associating 19:23
association 3:24 8:11,15,19,20 9:21 14:18 20:3,7 29:2,3
associational 15:22
associations 46:12
assume 10:17 27:12,12
assumed 16:12 16:14 48:6
assumes 4:3
assuming 22:3 30:10 48:21
assumption 22:5
assurance 4:7
as-applied 7:18 42:17
attack 42:20
attend 22:22 37:16
attention 28:22 29:13 30:6,8
attorney 1:22 35:3
auditors 25:25 26:1 29:23
authority 26:1
authorized 33:7
available 43:23
avoid 41:22
aware 13:22
awkwardness 38:25
a.m 1:20 3:2 52:10

B

back 20:20 24:11
bad 39:6
balance 28:3
ballot 3:23 4:5 5:3,7,22 7:24 8:6,7,23,25 9:15,18 10:20 11:1 12:3,3,11 13:9 14:14 16:7,8,12,13 16:14,15 17:13 17:22 18:11,18 19:19 20:6 24:24,25 25:10 25:13 26:21,25 27:13,14 28:19 30:9,13,24,25 31:11,15,15,16 32:12,23 33:21 33:23 34:12,21 34:25 35:4,10 35:24 36:21 38:15 39:4,13 39:14 40:8 42:15 43:1,16 43:21 44:2,5 44:18 45:4,9 47:15,18 48:1 48:7 49:6,8,10 49:16,20,25 50:7,16,23 51:14
ballots 4:3,4,9 4:14 9:4,8,10 11:16,22 18:23 18:23 19:10 29:4
ballot's 43:22
banner 30:25 38:16
bare 49:20
based 33:3
bases 19:8
basically 25:3 42:21
basis 19:5,9,15 19:16 23:7 48:8
bearer 34:11
bearers 26:11
behalf 1:23,25 2:4,7,10 3:10 28:8 30:14 47:11
believe 7:6,13 9:9 27:15 46:2 49:17
believed 52:1
benefit 27:10
benefits 23:5
best 7:15
better 5:10 39:13
beyond 19:19
blank 4:22,25 5:2 34:6
blanket 3:17 6:6 7:2 28:25 29:9 31:5 32:11,18 41:14
Booker 51:24
box 4:25 5:2 43:16

Boy 15:8,14,17 15:21,22,23 16:2
brief 9:3 16:8,13 18:13 19:10 34:24 41:8 45:10 48:22
briefly 24:3
briefs 25:18
bring 7:18
burden 51:1

C

C 2:1 3:1
calculating 23:24
California 3:14
called 52:6
campaign 23:22 30:14
campaigning 7:5 30:15
candidacy 4:16 4:21 9:5 13:7
candidate 3:22 3:25 4:21,22 4:23 5:1,5,12 5:13 7:24 8:1,3 8:4,12 9:1,24 10:7,15 11:4 12:8,15 13:5 13:19 14:21 15:1 17:6,9,12 18:10,12,13 19:13 22:2,3 25:5 26:19,25 28:18 30:21 31:8 32:4,16 33:6,13 34:16 35:7 37:6 38:21 39:2 40:12,20 41:2 41:6 42:25 43:14,20 44:20 45:4 46:2,4
candidates 5:9 5:16,18 8:22 13:16 14:9 18:16,20 26:14 28:11,24 29:7 29:21 33:7 35:3,15 36:1,9 40:16,17 44:6 44:9 45:5,6 46:12 49:13 51:17
candidate's 17:6 19:11 45:25
capturing 43:1
careful 39:19
carefully 20:6
carry 36:10,16
carrying 29:9
case 3:4 10:23 15:8 20:12,19 27:4,16 39:18 44:13,23,24 46:3,3 47:19 52:5,9,10
cases 7:17,19 22:20
cast 23:18,24
casting 44:2
caucus 22:22 37:16
caveats 40:18
Celebrezze 7:9 13:12 51:20
Cellebreze 19:17
century 44:24
certain 23:5,5,7 38:25
cetera 5:14 14:21
chairman 13:6
challenge 7:17 41:10 42:17,18 48:18
challenges 7:18
chance 14:2
change 6:3 16:20 17:8,17
character 40:4
characteristic 6:10
characteristics 7:1 50:11
check 4:24 5:2 25:24
checked 25:20
Chief 3:3,11 4:6 4:19 9:7 13:24 14:1 15:19 16:1,6,17,20 17:2,20,25 25:12,16 27:3 27:9,18,24 28:4,5,9 36:13 38:7 44:18 47:6,12 48:10 48:13,15,20 49:1,3 51:7 52:7,8
choice 26:15 52:5,6
choices 9:12
choose 15:11 22:9
chooses 12:10 23:15
choosing 7:3 26:25
chose 5:19,25
chosen 5:16,24 17:17 18:11 22:21 47:22 50:4,4
Circuit 3:20 4:1 16:12 27:11 35:1,2,9 48:6,8
Circuit's 4:2
cite 25:24
claim 19:12,22 19:23 24:24,25 25:6,9 27:10
claiming 14:16 14:17 16:4 20:7 26:23 27:5
claims 10:4,10
clarify 47:24
clear 35:20 50:16
clearly 27:15 49:10 52:4
close 17:10 26:7
come 10:14 30:12 31:4 35:22 36:19
comes 17:23 20:25
comparison 34:3
compelled 8:16 14:11 15:17
compelling 14:12 15:16,17
compete 38:22
competed 35:5
competing 31:17
competition 34:5 36:12 38:15 40:11
concern 13:13 14:6
concerned 8:2 43:15
concluded 23:15
conclusion 4:3 26:23 48:9
conduct 26:4
conducting 29:23
confused 16:3 19:6 27:5 42:16 49:2
confusion 35:21 43:9,11
connection 42:2
connects 41:2,6
connotation 45:17
connotes 45:17
consent 26:22
consider 19:3 34:22 37:7
consideration 18:2
considering 33:22
consolidated 3:5
constitution 33:18
constitutional 3:17 8:14 18:10,17 20:4 31:6,10,24 32:8 41:23 49:22
constitutionally 7:2
consulted 29:25
contemplated 30:1
context 39:22
continue 16:18 28:24
contrary 12:25
contribute 37:17
contributing 37:21
convention 10:18,20 23:21 24:23 25:22,22 29:17,22 30:11 34:9,10 37:17 37:22,24 43:7 43:13 50:5
conventions 24:19 26:4 28:23
convert 42:13
converts 28:13 30:19
convey 5:6 47:15
conveyed 47:21
conveying 51:19
copies 30:3
correct 4:11 11:23 12:23 13:14 14:1

18:7,15 25:11 32:17,24
corrected 4:18
corresponded 29:22
counsel 23:13 24:2
count 23:17,24
counties 11:21 11:22
county 11:17 25:25 26:1 29:22
couple 25:25
course 6:7 27:15 27:24 38:11
court 1:1,19 3:12 4:12 8:14 13:11 14:24 18:2 19:16,17 27:11 28:1,10 30:20 31:4,12 34:2 41:13,16 42:1,23 44:3 46:5 47:5 50:10 51:19
court's 3:14 11:9 51:23
create 3:23
creates 8:23
creating 46:11
critical 44:2
crucial 3:17 7:3
Cuomo/Edward 34:4

D

D 3:1 48:24 49:14,15 50:3
Dale 15:8,8,13 15:15,20 16:2
David 46:3
day 28:12
days 5:17 24:11
decide 18:20 24:12
decided 5:7,7 15:14 33:19
decides 10:18
decision 6:2 26:16
declaration 4:16 4:20 9:5 12:16 12:18 13:7 14:14 22:4
declarations 12:18
declare 5:5
declaring 4:21
defect 3:17 29:2
defend 6:12 48:16,17 49:22
definitions 37:13
deleted 42:8
Democrat 5:14 12:8,9
Democratic 3:15 8:6 10:17 10:22 12:10 13:8,8 16:25 17:1 20:9 22:22 24:4 27:7 29:20 44:24 45:12
Democrats 10:21 20:8,11 20:22 21:1 25:20 40:23 46:4
deserve 27:23
designate 24:12 28:18 30:12,14 32:4
designated 35:4
designation 41:14
designations 44:17
determine 32:13 37:4
determined 23:6 38:18 41:17 42:4
developing 44:25,25
devised 24:13
dictionary 8:11
dictum 39:4
difference 6:5,7 9:20 37:24 42:17
different 37:13 48:5
difficult 13:4 48:6
difficulty 40:15 41:23
disadvantage 8:9
disagree 20:3
disapproved 46:18,19
disassociate 15:24
disavows 10:10
disclaimer 36:14,18
disclaimers 35:19,23 40:18
disclaims 10:4
disprove 13:4
disputes 38:6,18
dissociate 8:1,25 19:25
distinction 20:13 21:6,13 21:13
distinguish 20:6
distinguishes 49:11
district 4:12 27:11 41:13,16 44:22 45:14
doing 3:16 35:24 39:19 45:21
dollars 35:20
domestic 25:14
drawing 20:14
drawn 20:14
Duke 46:3
D.C 1:15

E

E 2:1 3:1,1
earlier 51:6
earliest 5:17
early 24:11
effect 38:15 40:4 50:23
effective 43:3
either 45:11,23
elect 39:23
election 3:16,20 4:5,8,11 6:8 8:21 13:25 14:2 16:18,21 16:25 17:13,23 18:24 23:3,8 25:20 26:9 29:10 32:19 34:17
elections 29:23 33:18
electoral 44:6
eliminated 3:16
elimination 52:2
emergency 14:13
empirical 35:12
endorse 15:1 28:15 30:20,21
endorsed 33:13 35:14
endorsee 19:14
endorsement 19:4,7,22 44:15
enjoin 41:13
enjoined 4:12 24:17 41:16 43:2
enjoins 42:22
entered 35:8
entire 13:1 41:14
entirety 41:17 51:25
entitled 32:22
equally 11:9,12 39:6
equivalent 19:4
ESQ 1:22,24 2:3 2:6,9
essentially 35:24
established 11:19 28:13
establishing 29:17
et 1:7,9,13 3:5,7 5:14 14:21
evaporates 17:24
eventually 12:1
everybody 43:7 43:9
evidence 7:19,19 13:19,19 14:3 27:10 35:21 42:19 48:19 49:2
exact 7:23
exactly 10:23 14:23 16:14 32:7 41:12 44:12 50:13
example 15:7 20:24 21:19 22:23 23:4,20 24:20 27:13 36:14
examples 9:18
excellent 49:4
exclude 30:23
exercising 15:15
exist 29:5
existing 24:3
explain 23:23 24:3
explaining 14:15
explanation 6:18
explanations 12:4

explanatory 49:21
explicit 14:15 19:11
express 13:17 15:14 21:9 25:4 27:25
expressed 10:9 19:17
expresses 5:11 8:12 10:4 23:11
expressing 9:20 9:21 11:13 14:9
expression 5:19 5:20,23 7:7,21 13:3,4 17:18 18:18 20:4,16 26:20,21 47:19 49:6,11 50:17
extent 41:1,3,5
extremely 19:11

F

face 39:1
facial 7:16 41:10 42:17 48:18
fact 5:17 8:2,4 24:9,16 27:7 27:14 28:17 34:10,11 36:22 39:13 49:23
factional 32:11
facts 30:16
fail 51:9
fair 8:20 40:12
fairest 46:6,8,9 46:10
faith 19:18 28:2
false 12:22 13:13 46:12
false-flag 42:25 43:20
fatal 20:12 39:18
favoring 44:6
Federal 51:23
fight 32:11
figure 23:9
filed 13:6 51:17
find 51:1
first 3:4 4:2 6:8 8:19 14:10 17:21,23 19:9 24:25 26:24 31:25 40:14 47:13
five 5:18
flaw 39:2
flourish 32:21
follow 24:10
followed 3:14
force 38:5
forced 8:15,19
foreign 25:15
form 4:16,21 5:22 12:3,17 12:19
formal 9:21 14:18 20:7
formally 22:9
formulations 34:25
forth 51:21
forum 5:22
forward 35:22
found 8:14 50:22
four 29:24
frankly 9:19
free 10:14
funds 37:17,21
further 32:4 47:3

G

G 3:1
general 1:22 3:8 6:8 9:14 10:13 13:18 16:18,21 16:24 17:12,23 18:4 19:15 23:1 28:5 29:10 32:19 37:1,6 42:23 47:8 52:8
generally 21:24 43:15
getting 40:5
Ginsburg 9:12 9:17 18:4,7,16 19:1,9 31:3,19 31:23 36:5,25 37:7,20
give 4:6 18:11 27:21,22
given 5:18 23:5 32:24,25
go 11:15 20:9,21 24:23,25 25:2 37:21,23 43:24
goals 22:11
going 4:9 5:8 7:23 9:8 15:23 20:20 23:9 24:1 27:5,6 29:9,16 31:16 39:12 43:8,16 43:17 47:1 49:23 50:2,15 51:9
gotten 23:10
governing 4:14 29:21
Grange 1:3 3:4 6:13,15,25 9:3 16:8,13 19:10 34:24 42:11 48:2,22 49:6
grant 41:13
granted 41:22
great 8:8
greater 19:18 27:21
group 44:6
guess 12:21,25
guidance 3:14

H

half 44:24
hand 42:18
happen 20:23 22:23 27:12 49:18
happening 50:8 50:9,13
happens 17:8
hard 7:13
harder 16:11 49:22
harmed 7:20
harmonize 23:16
harms 20:1
hatred 14:4
hear 3:3
help 15:7
helpful 20:16,19 42:18
highly 43:6,11
historical 6:19 13:19
hold 14:2
holding 3:21 11:9 24:18 26:17
Honor 4:10,15 4:19 5:15 6:4 6:24 7:16 9:2,9 9:25 10:11,16 10:24 11:11,18 11:24 12:13,23 13:14,21 14:22 15:6 16:10,11 16:19 20:15 23:13 24:15 29:6,15 30:18 31:2 32:1,9,17 34:2 35:18 36:18 39:7 41:11 42:5,10 43:18 45:8,22 48:3,18 50:6 50:21,25 51:5 51:12
Honors 52:4
House 44:21
houses 22:7
hump 16:23
hyperbolic 33:3
hypothesis 32:14 49:13
hypothesize 45:20
hypothesized 34:23
hypothesizing 31:12
hypothetical 32:3 33:25 36:3,3,6 39:3

I

idea 25:2
identical 29:24
identically 35:9 43:21
identification 33:20 39:5
identifications 31:13
identified 6:10 23:19,21 35:9 38:10,11 40:16
identify 21:19 37:15
identifying 10:6
identity 38:13 39:1,9
illustrate 15:7
imagine 15:7,10
immense 6:5,7
impart 49:3
importance 44:17
important 13:10 18:1,19 28:12 33:22 34:22
impression 46:11
improbable 43:6,12
include 5:16
included 39:3

incorporate 9:4
incumbent 24:21
independent 5:1 21:1,22,25 22:3,5,11 26:1 28:18 34:17 45:10,13
independently 30:13
independents 21:10,20 22:14 22:21
indicate 5:8 17:14
indicated 28:22 43:19
indicates 35:19
indicating 29:25 30:9 34:21 51:13
indication 31:5
individual 8:23 19:18
individuals 22:20
influence 50:19
inform 19:19
information 5:6 5:17 9:20 12:17 13:10 17:5,11 18:17 19:20 33:20,24 34:8,22 40:22 41:1 43:23 44:1,4,17 45:9 45:16,24 47:15 47:21 49:8,10 50:16 51:13,19
informed 34:13
initial 47:25
initiative 3:13 3:21 5:1 6:2 12:15 20:5 24:6,9,17 28:13 29:8 30:1 34:6 39:8 41:17,18 42:2 42:3,13 43:2 47:4 52:6
injured 7:11
injury 36:7
inquiries 40:14
instance 13:22 38:2 39:8 51:5
instructions 12:4
interest 7:7,15 36:8,20 40:19 45:8,15,21,23 45:24 46:7,8 46:10,11,15,18 46:23 47:14 50:19 51:9,12 51:13,15,18
interested 23:2
interests 18:3
interference 26:12
internal 32:10 34:5 38:18
intra-party 36:11
invalid 50:24 52:2
invalidity 45:3
investigation 12:7
issues 17:8 25:14 28:12 32:25 41:7

J

J 1:24 2:6 28:7
JA 42:15 43:3
JA-363 28:21
JA-415 12:14
JOHN 1:24 2:6 28:7
joint 4:18 7:4 27:1
Jones 3:15 6:2 6:11 26:16 29:2 31:4,12 34:3 39:3 46:19,20 50:10
JR 1:24 2:6 28:7
judgment 47:5
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 9:17,23 10:2,8 10:12,13,17,25 11:1,2,6,8,14 11:16,21 12:6 12:14,21,24 13:2,18,20,23 13:24 14:1,3,8 14:19,24 15:4 15:19 16:1,6 16:17,20 17:2 17:4,16,20 18:1,4,7,15 19:1,8,21 20:2 20:8,19 21:3,5 21:11,15,17 22:1,8,12,16 22:17 23:1 24:1,7,13 25:9 25:11,12,16,18 25:23 26:3,5 27:3,9,18,24 28:4,5,9,16 29:1,11,16 30:7,22 31:3 31:19,23 32:2 32:14,20 33:2 33:9,16,24 34:7,15,18 35:11 36:2,5,6 36:13,25 37:7 37:20 38:7,10 38:20,23 39:11 39:16,17,25 40:13,21 41:1 41:3,9,12,21 42:6,16 43:5 43:22 44:8,13 44:14,18 45:2 45:19 46:5,14 46:17,24 47:1 47:6,12,13,24 48:10,12,13,14 48:15,20 49:1 49:3,12,17,24 50:18,22 51:7 52:7,8
Justices 9:3

K

keep 18:21
Keeping 21:20
Kennedy 6:12 6:16,21 7:10 13:23 14:3,8 14:19,24 15:4 24:1,7,13 32:20 33:2 35:11 36:2,6 45:2,19 46:5 46:14 47:1,13 50:18,22
key 50:6
Kirkland 1:24
know 4:9 7:14 7:22,23,24 13:9 20:8,11 20:12,20,21 22:21 24:14 27:20 35:12,14 35:16 36:5 40:23 43:7 44:22 47:18
known 44:10
Koch 34:4

L

label 47:16
labels 28:24
laid 9:4
language 9:5 20:6 49:19,20 49:21
LaRouche 46:4
Laughter 21:2,4 38:9 46:21,25
law 10:18 11:3 13:25 15:4 17:3 24:7 27:16 51:22
laws 23:4
left 5:2 24:11
legal 23:13
legislative 33:18 52:4
legislature 23:15
legitimate 36:20 37:5 45:8,15 45:20,23 46:15 50:19 51:9,12 51:12,15,20
letter 49:5,5
letters 25:25 29:24 30:4,5
let's 10:17 13:5 48:18
level 23:16 51:9
Libertarian 5:14 29:20 38:4
Libertarians 37:19 38:1,2,7
Lieberman 20:25
life 12:9 13:1 44:19
likelihood 43:11
likes 9:24
limit 5:9,13 13:15
limited 14:25 26:14
limits 44:4
linkages 45:25
list 15:11 51:18
listed 18:21 34:20 43:20 47:18
little 6:3
local 39:24
logical 26:22
longer 3:19 6:9

look 4:4,9,15 9:8 9:10,16,18 10:1 16:12,14 22:11 27:1 42:15 48:7
looked 16:7 42:1
looks 27:13
lot 38:8
lots 49:10 50:15
lower 47:5
Lyndon 46:4

M

M 1:22 2:3,9 3:9
mail 11:25 12:2 18:25
main 52:5
major 7:17 23:4 23:6
makers 27:21
making 8:20 40:2
manner 29:7
Mario 34:3
mask 39:9
masked 39:13 39:14
masking 35:24 39:1,11,22 40:1,7,10
masks 38:13
massive 43:11
matter 1:18 6:18 21:5 22:6 40:15 52:11
McGowan 51:22
McKENNA 1:22 2:3,9 3:8 3:9,11 4:10 5:15 6:4,15,20 6:24 7:16 8:10 9:2,9,14,17,25 10:5,11,16,24 11:6,11,18,24 12:13,23 13:2 13:18,21 14:1 14:8,22 15:2,6 16:1,10,19 17:2,16,25 18:4,6,15 19:8 20:2,15,24 21:8,15,18 22:8,15,19 23:1,13 24:6 24:15 25:11,16 25:23 26:5 27:9,23 37:1 42:24 47:8,10 47:12 48:3,17 48:25 49:16 50:6,21,25 51:11
mean 7:13 18:16 20:11,22 21:23 22:9 27:4 36:19,23,24 37:5,9,10 39:18 43:12 48:15,16 50:4
meaningful 31:1
means 22:1 25:3 35:16 36:22 50:17
measure 50:23
meetings 22:22
member 11:4 14:13,13,17 15:18 16:4 19:13 32:5 33:25 34:11 37:8,18,25
members 38:3
membership 37:3,6 38:3
mere 28:14 30:19
merely 10:20 20:4 27:25
meshes 23:2
message 36:10 36:16 44:25
messengers 28:11,14
met 23:25
method 29:4
million 35:20
mind 20:25 21:20
minor 23:5
minutes 47:8
misimpression 15:20
mislead 28:1
misled 36:4 49:2
mistaken 19:2
mistakenly 19:3
misunderstood 34:14
modified 29:8
moment 44:2
Monday 1:16
monies 15:1
moved 15:8

N

N 2:1,1 3:1
name 25:2 31:11 31:17,18 33:7 34:12 38:22 40:12,20 43:1 43:10 44:20 49:5
names 5:9
narrow 41:25
narrowest 41:22
nature 23:3
nearly 11:25 12:1
necessarily 11:16 31:14
necessary 35:19 50:23
need 39:19 51:8
neither 5:2
never 13:24 47:17 49:25
new 23:2
newspapers 43:7 44:10
Ninth 3:20 4:1,2 16:12 27:11 35:1,2,9 48:6,8
nominate 8:22 30:19,23 31:2 33:6 43:13
nominating 4:4 6:6 16:15 23:20 24:18,23 25:8 27:13 28:23 30:6 35:6 51:15
nomination 25:22 26:13 29:12,13,21 30:2,9 40:11
nominations 29:18
nominee 7:4 10:19,22 19:14 23:19,22 24:5 25:7 29:5 30:12,16,24,25 31:17 32:23 33:11 34:9 35:25 38:14,16 38:22 39:10,12 40:4 43:6,8,13 43:19,19 45:5 50:4,8,12,14
nominees 3:19 6:9 24:9,12 26:18 40:16 47:18
nonmembers 26:17
nonpartisan 31:11,12,14 39:23,24 42:14
notarized 12:16 12:18
noted 44:3,19
noticed 47:16
notion 35:18
November 3:19
no-new-taxes 5:13
no-taxes 8:3
number 22:19

O

O 2:1 3:1
object 13:9
objected 47:17
objecting 8:15 8:16
objection 31:14 31:20 40:9,9
objections 34:1
obscure 40:3
obtaining 23:7
occur 35:22
occurred 42:25
occurs 51:15
October 1:16
offered 6:1
office 4:22 12:9 15:9 22:20 51:17
offices 39:23,24
official 10:15 23:18 28:18 29:5,13 30:9 30:12,15 38:14 38:16 40:4,10
officials 25:21 25:24
of-association 4:3
oh 6:17
okay 10:25 12:12 29:1
old 4:20 6:6 24:7 27:13
Olympia 1:22
once 5:6,7 33:19
operate 26:2
opinion 46:6
opponents 50:1
opportunistic 46:12
opportunities 13:9,12 15:3
opportunity 4:13,17,24 8:7

8:21 49:4
oppose 38:5
option 18:12
oral 1:18 2:2,5 3:9 28:7
organization 15:12,13

P

P 3:1
page 2:2 9:13 16:8,13 27:1 35:1 43:3 45:10 48:1,22 49:5,17 50:7
pages 4:18 9:3 49:7
pamphlet 6:25
paper 11:22
paralleled 51:23
part 26:7 52:3,3
particular 14:5 15:1
particularly 16:4
parties 5:9 6:10 7:11,12,18,20 8:9,21 10:14 14:25 23:4,6,6 24:8,10 26:10 26:11,15,19,23 27:11 28:14 30:10 31:7,10 32:12 33:5 34:4 37:12 38:8 41:15 44:23,23 45:1 47:17 50:20 51:1
partisan 3:17 7:2 23:3 29:23 30:2 31:15 33:10,17,18,19 34:22 39:8,22 40:1,8
party 1:7,13 3:5 3:7,15,23,24 4:4,23,25 5:8 5:20 7:7,14,21 7:25,25 8:5,6,6 8:16,17,24,25 9:24 10:3,6,9 10:18,22 11:5 11:13 12:10,11 13:6,8,8 14:6,6 14:11,12,17,20 14:20 15:10 16:22,22,25 17:7,10 18:18 19:3,4,22,23 19:24,25 20:1 20:9,16,17,18 21:20,23,24 22:2,6,10,22 23:9,12,18,19 24:4,4,16 25:4 25:7,7,14 26:20,21 27:7 27:25 28:24 29:16,20,20,20 30:16,21 31:6 31:10,13,21 32:6 33:7,12 34:5,12,15 35:8,14 36:22 36:24 37:3,4,8 37:11,14,15,16 37:18,18 38:1 38:4,16,17 39:4,5,9 41:6 41:18 42:2,3 44:9,15,15,17 44:17 45:12,12 45:17 46:1,13 47:16,19 49:6 49:11 50:4,9 50:17 51:2,14 51:16,18
party's 3:19 7:4 19:13 22:10 23:18 25:15 26:18,22 28:11 28:23 29:9 31:17 35:5,25 36:10,16 40:11 43:1 44:24
passed 52:1
pay 28:22 30:6,7
pays 29:13
people 15:22 17:17 20:20 21:9,10 22:14 22:24 26:11,14 27:5,22 37:2 37:11 43:10
People's 52:6
percent 12:1,2 18:24 21:19,21 23:8,10 24:22 35:13 44:20 45:14
percentage 23:7
permeate 42:3
permit 13:16 17:3 20:1
permitted 21:8
person 8:8 14:13 14:17 17:8 23:19,21,24 25:2 27:6 30:15 32:15 38:15 40:23
personal 3:22
person's 30:14
petition 35:1
Petitioner 1:4
Petitioners 1:10 1:23 2:4,10 3:10 47:11
phrase 5:10
phrasing 7:23 46:23
pick 5:10
picked 34:10
place 26:24 31:10
please 3:12 10:8 28:10
pledge 38:4
point 5:11 15:7 16:15 18:5 22:23 49:4,24
pointed 28:21 34:3
pointing 26:8
points 41:7
policies 22:10
policy 8:13
political 3:24 5:22 10:6 15:13 23:4 27:22 28:14 29:3 33:5 34:4 37:12 38:6 41:6 44:22,23 46:13 47:17 50:20
polls 43:24
posit 40:18
position 6:23 7:11,12 10:22 14:7 17:6 18:8 18:9 25:15 32:22,24 33:4 33:16 35:17 38:24
positions 12:10 41:7 45:25
possible 6:3 23:23 34:25
pox 22:7
practical 18:1,3 18:19 23:16 29:11 40:15
preached 14:4
predicting 19:5
prefer 12:11 13:7 20:9,21 20:25 21:23 22:2,6,10 25:14,14 44:15 45:12,16
preference 3:23 4:25 5:5,20 7:7 7:21 8:12 9:21 10:4,10,21 11:5,13 13:3 14:9,16 15:10 15:12,14 16:2 16:17,25 17:9 17:15,17,22 18:18,21 19:3 19:6,12,12 20:5,16 21:9 23:11 25:4,13 26:20,21 28:1 32:5 35:16 36:22 39:15 40:3 41:18 42:2,3,7 45:6 45:13 46:1 47:20 49:7,11 50:17 51:2
preferences 13:17 35:23 44:9
preferred 9:24 16:22 40:23 43:14
prefers 12:24,25 17:6
presence 35:25
presented 32:25 33:20 44:1
preserve 52:5
pressing 39:20
prevent 11:3 14:7 34:9,12 34:16,18
prevented 11:12
primary 3:18 6:7 7:2,3 16:15 16:21 17:7 24:8 27:14 28:25 29:9 30:3 31:5,13 32:18 39:9 41:14 42:14 51:16
principles 45:1
print 18:22
probably 51:4
problem 29:5 39:12 40:8 42:20,25 49:15

problems 38:12
procedure 28:19 42:22
procedures 24:10,18
process 6:8 23:20 25:8 26:13 27:22 30:2,6 33:10 33:12,17,19 35:6
produce 18:23
products 27:21
promulgate 4:13,17
promulgated 11:19
proponent 6:1
proponent's 6:22
protection 27:21 27:23
provide 13:15 17:5 49:19
provided 10:19 12:17 32:4 49:20
providing 45:16 45:24 50:15
provision 25:21 42:8 44:4 51:2
provisions 41:18 42:3
pro-environm... 5:12
public 8:13 28:12 30:4 34:13
publicized 43:14
publicizing 34:9
purporting 36:10,16
purpose 5:4 6:1 6:14 7:6 17:5 52:5
purposes 8:20 52:4
put 12:19 17:13 17:22 31:16 35:2,22 36:21 38:13 43:10 44:5
putting 45:9 51:13

Q

question 6:13,17 6:22 11:2 20:20 21:12 23:14 27:24 32:2 34:15 35:3 36:20 38:24 41:9 42:24 45:7,15 45:20 46:15 47:2 51:5,21
questions 47:4
quite 6:17 23:3 30:13
quote 7:1 12:16

R

R 3:1 25:2 43:10 48:24 49:14,15 50:2
race 34:4 35:8 44:5
racial 14:4
raised 51:6
rank-and-file 37:25
rationale 29:1
reaching 48:8
read 18:12
reads 43:7
real 20:11,13 22:13 32:11,15 39:2 40:8
realize 38:25
really 7:11 17:9 17:14 20:21,25 21:6,12,17 22:13 23:12 26:23 27:3 36:19
reason 18:20,22
reasonably 16:3
reasons 4:2
REBUTTAL 2:8 47:10
receive 12:3
received 29:24 30:3
receives 24:22
recognize 21:7
recognized 13:11 18:2 19:16 30:20 51:19
record 6:19 7:20 25:24
refer 9:2 12:14
referenced 7:8
refusing 13:16
regard 20:10
regarding 44:4
register 20:10 22:14 37:2,11
registered 32:5 37:10
registration 21:21 22:15
regulations 4:13 9:6 11:19
regulatory 7:6 18:3
reject 25:3
relevant 7:6 40:22,25
relief 41:13,22 42:1,21
remaining 47:9 52:3
remedy 14:19 14:23
render 52:3
repealed 24:7
replaces 6:6
reply 16:8 34:24 41:8 45:10 48:2,22
Representatives 44:21
representing 9:14
Republican 1:7 1:13 3:5,6 5:14 8:5,24,25 12:11 13:6 16:22,23 20:22 23:9,11,12 24:4,16,23,24 25:1,4 27:7 29:19 32:15,19 34:15,19 35:25 36:21 37:4,4,6 37:8,10,14,15 37:16,18 40:6 40:6,16,17 43:8,13 44:14 44:15 45:5,6 45:11,12,14,17 45:25 46:1,3
Republicans 25:19,19 32:11 35:4 40:24 46:2
Republican-id... 36:9
require 18:20 26:24 38:2
required 5:21 17:19 22:25 24:8 47:22
requirement 46:7
requires 12:15
requiring 11:4
reserve 28:3
resolution 38:5
resolve 34:5
resolved 38:18
resolving 32:10 36:11
respect 6:22 30:5 44:3,16
respectfully 20:3
Respondents 1:25 2:7 24:2 28:8
responsive 21:12
restrict 33:6
result 43:6 50:12
rhetorical 32:21
right 10:12 13:25 17:21,24 18:10,14,17 26:24 28:13,15 28:17 30:19,19 30:22,23 31:2 31:3,7,10 33:3 33:6,10,17 38:20 42:21 44:19
rights 15:22 26:10 32:1
rival 32:12
ROBERT 1:22 2:3,9 3:9 47:10
ROBERTS 3:3 4:6 9:7 13:24 15:19 16:6,17 16:20 17:20 25:12 27:3,18 28:5 36:13 38:7 47:6 48:10,13,15,20 51:7 52:8
rule 24:20,21
ruled 3:20
rules 14:13 24:18 26:2 29:21 37:15 38:8
run 12:9 15:9 22:20,20 34:17 44:11
running 21:1 22:4 34:16,19 45:13
runs 24:22

S

s 2:1 3:1 49:15 49:15 50:2,3
sample 9:4,22 10:1 14:14 19:10 48:1 50:3
samples 12:4 49:9
save 7:2 50:11
saying 4:23 5:13 12:19 15:10 17:20 20:9,21 29:11 30:22 33:12 34:19 39:17 46:1 48:18
says 12:24 17:9 22:5 25:18 32:21 45:4,10 45:16 48:23
scales 44:6
Scalia 7:22 8:10 8:18 9:23 10:2 10:8,12 11:14 12:6,14,21,24 13:2,20 19:21 20:2 23:1 25:18,23 26:3 26:5 33:9,16 44:8,14 46:17 46:24 48:12,14
scenario 49:16
scheme 10:14 30:11 38:12 45:3
Scouts 15:8,14 15:17,21,22,23 16:3
scrutiny 51:3,8 51:10
second 19:15 40:5
secondly 14:12
secretary 4:11 4:16 11:20 26:2 28:20,21 30:1,3,4 49:18
Section 12:14
see 4:19 7:8 14:6 38:12 41:23
seeking 34:7
select 6:9 24:8 26:11 28:14,17 29:4
selected 10:19 26:15 29:8 32:16 35:6 50:9,12,14
selecting 3:19 10:15 26:18 32:18
Senator 20:24
send 18:23
sense 8:11,14 20:4 30:8
separate 23:20 29:13 30:2 38:12 40:14
seriously 21:5
set 33:14 44:25
severability 41:20 42:4 51:21,24
severable 41:19 51:5
severance 42:12
severe 51:1
severed 42:7
share 45:11
shot 40:5
show 14:14
showed 12:5 44:19
shown 19:9 27:14 28:2 31:21 33:11,13 40:19 48:21 49:9
shows 50:3
side 16:11 17:11
sign 12:15 38:3 38:4
signing 12:18
silent 24:9
simply 5:6 20:14 27:12 51:24
single 26:25 44:20
sir 11:13 26:5
Smith 24:5 45:4
sole 33:20
somebody 5:11 23:11 40:5 43:16
somewhat 33:2
sorry 11:15
source 13:10
sources 19:20
Souter 10:13,17 10:25 20:8,19 21:3,5,11,16 21:17 22:1,8 22:12,16,17 25:9,11 28:16 29:1,11,16 30:7,22 38:10 38:20,23 39:11 39:17,25 40:13
speak 8:16
specific 13:22
speech 13:15,16 14:11,20 15:15 15:16
spend 15:1 35:20
spent 44:23
split 25:13
spokesman 37:25 38:19
squarely 35:2
stage 6:8 24:25
standard 26:11 29:10 34:11
stands 17:12
state 1:3,6,12 3:4,5,6,22 4:12 4:17 5:7,21,21 5:23 7:6 9:15 10:18,20 11:3 11:20,20,25 12:7,11 13:6 15:9 17:2,16 17:18,18 18:3 18:10,11 19:10 21:18,21 22:16 23:14 24:7,8 25:20,24 26:12 26:20,24 28:20 28:22,22 30:1 30:3 31:15 32:1,10,21 33:19 34:21,23 35:8,19,22,23 36:20 37:2,9 38:19 39:23 40:17,19 41:7 42:11 43:15,18 44:5 45:8,10 45:16,20,23 46:10,11 47:2 49:18 50:18 51:8
stated 6:14
statehood 24:11
statement 6:25 10:6,21 14:16 18:8 19:3,6,7 19:12,13 22:17 32:24 35:15 39:14 46:6,8 46:10
statements 13:14 16:18 30:5 36:18 40:3
states 1:1,19 11:5 14:4 44:21 51:24
statewide 23:8
state's 5:17 26:2 30:4 35:1,2 41:19 46:7,8 46:18,23 47:13
stating 9:20 12:16 19:11 33:4
status 22:5
statute 23:16,17 32:3,7,24 33:25 51:25
stay 10:5
Stevens 11:2,7,8 13:18 32:2,14 33:24 34:7,15 34:18 40:21 41:1,3,9,12,21 42:6,16 43:5 43:22 49:12,17 49:24
strict 51:2,8
strictly 14:25
structure 24:3 24:14 42:1
study 35:12 44:19
subject 51:2
subjective 13:3
submergence 40:10
submission 36:2
submitted 52:9 52:11
subset 20:17
substitute 30:21
successfully 36:15
sufficient 40:18
suggest 18:16 27:18
suggesting 31:9 33:16
suggests 13:20 18:13
support 8:22 24:22 40:6
suppose 11:10 12:8 17:6 32:3 35:11 44:8 46:16
supposing 32:3
suppress 34:7
Supreme 1:1,19
sure 42:9,10 47:20

swung 17:10
system 3:16,18 4:5,8 6:3,5,6 7:1 8:23 23:2 26:9 29:17 35:13 37:17 39:22 40:1
systemic 21:5 22:6

T

T 2:1,1
take 4:7 10:23 18:9 30:8 32:22 42:15
Taken 26:22
talking 8:18,19 50:1
Tashjian 7:8 13:11 51:20
Tasjian 19:16
tell 7:14
telling 9:7 33:21
term 44:3,18
terms 29:12 51:18
test 41:19 51:22 51:23
testimony 43:3
Thank 28:3,5 47:6,12 52:6,8
thing 15:16 33:22 44:9
think 9:13 10:2 15:4,23 16:3 19:15,21 20:1 20:15,16 21:6 21:8,10,12,25 22:13 23:8 25:19 27:6,19 31:11 37:1 39:21 40:13,21 41:21,24,25 42:6 45:7 46:7 46:9,14 50:25 51:21
thinking 21:14 39:20
thinks 43:9
third 35:7
thought 31:4 33:11 46:17 48:11
three 18:23 37:12 49:7 50:2,2
three-part 51:22
threshold 23:25
thumbs 44:5
time 17:7,12 18:22,23 28:3
today 3:4
told 35:8 37:1
top-two 3:15,18 4:3,5 6:5 26:9 50:8,10,14
trademark 27:4 27:16,19
tried 14:5
trouble 29:17
true 12:17,20 14:9 30:16 31:12 32:21 33:25 36:7 41:4 49:12
truly 31:11 42:13
truth 12:7 34:13
truthful 44:4
truthfully 25:6
try 6:2 35:20
trying 17:14
turn 38:1
two 4:1 9:4,12 9:18 16:24 19:8 35:4 36:9 38:11 40:14 43:9 49:7,14 49:15 50:2,2
two-stage 6:8

U

unable 8:25
unconstitutio... 3:21 11:9,12 16:9 47:4 48:2 48:4,11,23 49:1 51:4,25
underlying 7:17
undermines 15:22 36:14
understand 10:13 18:9 33:9 34:8 38:23 43:17
understood 48:1
unfair 46:15
United 1:1,19 44:21
unsuccessful 34:16 43:19
use 5:18 15:6 24:8 28:24 29:4 33:6,8,19 38:5 40:20
useful 5:6 47:21
useless 52:3
uses 34:6

V

v 1:5,11 3:4,6,15 7:9 15:8 19:17 51:20
valid 40:19
validated 26:16
validity 45:2
value 26:16
versus 8:13
view 5:11 26:8 45:3
views 45:11
vindicates 26:10
violate 31:25
violation 27:19
vote 11:25 21:24 22:3
voter 40:22
voters 3:14,16 3:18 5:6,15,19 6:25 7:3 11:25 12:1,2 13:11 14:15 15:11 17:1 18:25 19:2,18 21:19 21:22 23:23 26:9 28:1,2 32:12 33:21 35:12,13,16 36:10,11 43:23 44:1,10,20,22 47:22 49:2 52:1
votes 16:23 23:18,24
voting 12:2 15:19 18:25

W

walk 33:23
want 5:11 10:15 15:24
wanted 15:9
Wash 1:23,24
Washington 1:3 1:6,9,12,15 3:4 3:5,6,6 9:15 10:19 11:25 12:8 15:9 18:11 21:18,21 22:16 32:1 35:12,13 37:2 37:9,10 38:4 41:19 51:22
Washington's 3:13 23:3 33:17
wasn't 6:1
way 5:24 8:11 16:7 21:14 23:17,23 47:15 48:21,23 49:23
ways 15:5 37:13 37:13
weakening 50:19
weeks 18:24
West 39:24
we'll 3:3 14:14
we're 39:19
we've 19:9 23:14 27:14 39:1 49:9
whatsoever 39:5
Wherupon 52:10
White 1:24 2:6 28:6,7,9,20 29:6,15,19 30:18 31:1,9 31:22,25 32:9 32:17 33:1,5 33:15 34:2,14 34:20 35:18 36:8,17 37:5 37:12,23 38:17 38:21 39:7,16 39:21 40:13,25 41:5,11,16,24 42:9,23 43:18 43:25 44:12,16 45:7,22 46:9 46:22 47:3,7
who've 14:4
widely 34:10
win 28:11
Wisconsin 44:18
wish 14:10 26:4 27:17
wished 5:19
words 5:18 16:7 20:17
work 49:23
working 21:14
world 20:11,13 21:14 22:13
wouldn't 39:6 40:22 51:8
writes 46:6
wrong 4:1 48:10

X

x 1:2,14 30:16

Y

year 32:6

years 44:25
yellow 9:3 16:13

0

06-713 1:5 3:4
06-730 1:11 3:6

1

1 1:16 16:8,13 48:1,22 49:17
10:02 1:20 3:2
10:53 52:10
100 12:2
12 9:13
13 27:2

2

2 9:3
200 44:25
2005 29:24
2007 1:16
239 43:3
24a 35:2
28 2:7

3

3 2:4 9:3

4

4 47:8
40 21:18,21
400 42:15
47 2:10

5

5 23:8,10 24:21
5-percent 23:25
592-593 4:19

6

6 45:10
66 24:22

7

70 45:14
79 7:4

8

80 35:13
85 44:19
872 3:13,21 5:1 12:15 20:5 24:6,9,17 28:13 29:8 34:6 39:8 41:17,18 42:3 42:13 43:2 47:4
872's 4:14

9

9.5(5) 12:14
90 12:1 18:24