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JOHN DOE #1, ET AL., :

Petitioners :

v. : No. 09-559

SAM REED, WASHINGTON SECRETARY :

OF STATE, ET AL. :

Wednesday, April 28, 2010

APPEARANCES:

ROBERT M. McKENNA, ESQ., Attorney General, Olympia,
Washington; on behalf of Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JAMES BOPP, JR., ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	ROBERT M. McKENNA, ESQ.	
7	On behalf of the Respondents	30
8	REBUTTAL ARGUMENT OF	
9	JAMES BOPP, JR., ESQ.	
10	On behalf of the Petitioners	60
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 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 09-559, John Doe v. Reed,
5 Washington Secretary of State.

6 Mr. Bopp.

7 ORAL ARGUMENT OF JAMES BOPP, JR.,

8 ON BEHALF OF THE PETITIONERS

9 MR. BOPP: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 No person should suffer harassment for
12 participating in our political system, and the First
13 Amendment protects citizens from intimidation resulting
14 from compelled disclosure of their identity and beliefs
15 and their private associations.

16 JUSTICE SCALIA: What -- what about
17 requiring disclosure of campaign contributions?

18 MR. BOPP: Well, the --

19 JUSTICE SCALIA: Do you think that is
20 unconstitutional?

21 MR. BOPP: This Court has upheld the
22 disclosure in Buckley v. Valeo in 1976.

23 JUSTICE SCALIA: Right. Now, why doesn't
24 that fall within your principle that no person should be
25 exposed to criticism for --

1 MR. BOPP: Well, it could --

2 JUSTICE SCALIA: -- his political beliefs?

3 MR. BOPP: It could potentially, and -- but
4 this Court subjected those requirements to the
5 appropriate constitutional First Amendment analysis,
6 found that there was sufficiently important governmental
7 interest, some of which are not present when we're
8 talking about a referendum or initiative, and then also
9 created an exception from even a generally valid statute
10 where there is a reasonable probability of harassment of
11 that particular individual or -- or group.

12 So the First Amendment analysis regarding
13 the privacy of association, the privacy of identity and
14 beliefs, the potential of -- of intimidation are all
15 elements of the analysis that was employed by the Court
16 in Buckley.

17 JUSTICE SOTOMAYOR: I'm -- I'm trying to separate
18 out the harassment aspects of this case from the working
19 proposition that there's some sort of freedom of
20 association, of privacy.

21 Your theory, putting harassment aside, would
22 invalidate all of the State laws that require disclosure
23 of voter registration lists, correct? All of those
24 States like New York that permit public review of voter
25 registration lists and party affiliations, et cetera --

1 that's illegal?

2 MR. BOPP: No.

3 JUSTICE SOTOMAYOR: That's unconstitutional?

4 MR. BOPP: No. We believe they would not.

5 They would certainly be subject to First Amendment
6 analysis. But in -- in those -- in the instance of
7 voter registration, there are other governmental
8 interests that are not present in petition signings for
9 referendums.

10 JUSTICE SOTOMAYOR: Explain to me the
11 difference. And -- well, one other aspect of State
12 legislative -- I can only work from New York because I
13 know it intimately, but it is a State that also permits
14 or requires that petitions for candidate listing on the
15 ballot be public as well. New York relies in part, as
16 this State does, on the public reviewing those
17 petitions. Would that be invalid as well, for a
18 candidate's running?

19 MR. BOPP: Well, we believe it would be
20 subject to First Amendment analysis. But, again, there
21 are different governmental interests when you have
22 candidates involved.

23 JUSTICE SOTOMAYOR: So explain to me what
24 the difference is in those three situations.

25 MR. BOPP: Well, one is you have candidates

1 involved --

2 JUSTICE SOTOMAYOR: With -- with the State's
3 interest.

4 MR. BOPP: One is you have candidates
5 involved. And this Court recognized in Buckley that
6 there were disclosure interests that related
7 specifically, and actually only, to candidates. For
8 instance, people who contribute to a candidate, that
9 information, to the voter, can signal the interests that
10 the candidate, once he or she takes office, will be
11 responsive to.

12 When we have an initiative, we know what the
13 law is that is being voted upon. It's not a matter
14 of -- of electing a representative.

15 JUSTICE SOTOMAYOR: You don't think that --
16 putting aside this kind of referendum, just a
17 hypothetical referendum having to do with a certain tax
18 scheme -- you don't think the voters would be interested
19 in knowing what kinds of people in what occupations are
20 interested in that particular tax benefit or not?

21 MR. BOPP: Well, a few -- few might be, but
22 we think this is marginal information. First, they are
23 adopting a law. And so we know what the law is. And --
24 and while it might be marginal information for a few
25 people, once the measure qualifies for the ballot, this

1 is only -- the petition signature and distribution is
2 only for a very limited governmental interest.

3 CHIEF JUSTICE ROBERTS: Counsel --

4 MR. BOPP: And that -- and that --

5 CHIEF JUSTICE ROBERTS: I'm sorry, go ahead
6 and finish your answer.

7 MR. BOPP: And that limited governmental
8 interest is to preserve State money, to not conduct an
9 election on the matter unless there is sufficient public
10 support. So --

11 CHIEF JUSTICE ROBERTS: Now, counsel, the
12 responses you have given to a couple of the questions
13 has been that the First Amendment analysis would apply.
14 But given you have a facial challenge, is that enough?
15 Don't you have to indicate that the First Amendment
16 analysis would prevail in either all of the other cases,
17 most of the other cases, a significant portion?

18 This is a facial challenge. And if the
19 challenge is going to fail in some of those other cases,
20 I think your facial challenge fails as well.

21 MR. BOPP: Well, we're only challenging the
22 application of the Public Records Act to petitions and
23 referendum petitions. We're not challenging it as it
24 would be applied to petitions to put people on the
25 ballot.

1 CHIEF JUSTICE ROBERTS: So we have to decide,
2 in assessing your claim that, no matter what the
3 referendum issue was, that there's a significant
4 intrusion on First Amendment rights?

5 MR. BOPP: Yes.

6 CHIEF JUSTICE ROBERTS: So that if, for
7 example, the referendum involves a bond issue as to
8 which people may have particular views, but they're not
9 going to get terribly excited about it, we'd still have to
10 say that that's protected under the First Amendment?

11 MR. BOPP: Well, actually, under -- with
12 modern technology, it only takes a few dedicated
13 supporters, and a computer, who are willing to map -- to
14 put this information on the Internet, MapQuest it, as
15 they did with respect to the contributors of
16 Proposition 8, which resulted in -- and then encourage
17 people to harass and intimidate them, which resulted in
18 hundreds of examples of harassment --

19 CHIEF JUSTICE ROBERTS: Well, my point is,
20 though, you're not likely to get that with respect to,
21 you know, a debt issue, raising the debt ceiling from
22 0.8 percent to 0.9 percent. You're not going to get a
23 crowd outside your house because you signed that
24 petition.

25 MR. BOPP: Well, it may not manifest itself

1 in -- in any particular initiative. We agree with that,
2 but we think the potential is there, and there is
3 usually a group of supporters of any measure that, you
4 know, are passionate about that particular issue.

5 JUSTICE GINSBURG: But -- but don't you
6 have -- I thought we were dealing with count 1 of the
7 complaint.

8 MR. BOPP: Yes.

9 JUSTICE GINSBURG: Count 2 would be the
10 counterpart to the exception that's made from the
11 disclosure requirement with regard to contributions with
12 certain organizations whose members might be harassed.

13 MR. BOPP: Well, with this --

14 JUSTICE GINSBURG: That's -- that's not --
15 that would still be open if you lose the first part of
16 this case.

17 So going back to the question you were
18 asked, how does this differ -- that Justice Scalia
19 asked -- how does this differ from the contributor who
20 says, well, I might be harassed? The contributor
21 would have an opportunity to show that.

22 MR. BOPP: Buckley dealt with that exact
23 question. And first -- the first step of the analysis
24 is whether or not the law is -- is valid under the First
25 Amendment. And then there is an exception to even a

1 valid constitutional -- a constitutionally valid law.

2 JUSTICE GINSBURG: So, that's why I'm asking
3 you why, on the first part, should it be any different,
4 as long as you have the door open to show that if you
5 were going to suffer reprisals, harassment, that an
6 exception would have to be made?

7 MR. BOPP: Well, we don't think that the exception
8 is a substitute for considering the initial validity of
9 the law, which --

10 JUSTICE GINSBURG: May I -- may I ask you
11 one -- something that was not in your brief, but was in
12 the Secretary's brief. Is this list available to
13 Project Marriage? And specifically on page 34 of
14 Secretary Reed's brief, the statement is made that the
15 sponsoring organizations sometimes sell or trade these
16 lists. They use them for fundraising purposes. So that
17 would be the end of a person's privacy, at least on one
18 side. Is that true, that the initiative sponsor uses
19 these lists?

20 MR. BOPP: Yes.

21 JUSTICE GINSBURG: Yes?

22 MR. BOPP: Yes, this is an act of private
23 association. The petition signers are associating with
24 the referendum committee for purposes of placing this
25 measure on the ballot --

1 JUSTICE GINSBURG: They don't say: Now, I
2 agree you can use my name for fundraising purposes. But
3 that's -- it's implicit, you say, in their signing the
4 petition that the --

5 MR. BOPP: Well, what --

6 JUSTICE GINSBURG: -- signature collector
7 can sell the names, use them for its own fundraising
8 purposes?

9 MR. BOPP: What is implicit is they are
10 associating with this group for a purpose, and that is
11 support for, in this case, Referendum 71. And so they
12 use those names for valid purposes. But --

13 JUSTICE SCALIA: Mr. Bopp, do you have any
14 case in which we have held that the First Amendment
15 applies to activity that consists of the process of
16 legislation, of legislating --

17 MR. BOPP: Yes, Buckley II.

18 JUSTICE SCALIA: -- or of adopting legislation?
19 What is that?

20 MR. BOPP: Buckley II. You struck down the
21 requirement that the person who is soliciting signatures
22 self-identify.

23 JUSTICE SCALIA: That is --

24 MR. BOPP: That is a process --

25 JUSTICE SCALIA: Soliciting signatures is not

1 taking part in the process of legislating.

2 MR. BOPP: Well --

3 JUSTICE SCALIA: The person who requests a
4 referendum is taking -- when there's a certain number of
5 signatures required to achieve it, is taking part in
6 that.

7 And in light of the fact that for the first
8 century of our existence, even voting was public -- you
9 either did it raising your hand or by voice, or later,
10 you had a ballot that was very visibly red or blue so
11 that people knew which party you were voting for -- the
12 fact is that running a democracy takes a certain amount
13 of civic courage. And the First Amendment does not
14 protect you from criticism or even nasty phone calls
15 when you exercise your political rights to legislate or
16 to take part in the legislative process.

17 MR. BOPP: Well, the --

18 JUSTICE SCALIA: You are asking us to enter
19 into a whole new field where we've never gone before.

20 MR. BOPP: Well, with all due respect, you
21 have already opined in Buckley II that the person on the
22 other side of the clipboard is protected by the First
23 Amendment.

24 JUSTICE GINSBURG: I don't think that's --
25 that's true of Buckley II. What was -- what this Court

1 said could not be done is that the solicitor could not
2 be made to wear a badge that says "I am a paid
3 solicitor," but that the solicitor's name had to be
4 identified for the State. Certainly, the solicitor --
5 there was an affidavit, and there was the filings with
6 whatever was the State agency.

7 So what was -- what this Court said could
8 not be done was this kind of in-your-face big button
9 that says "I am a paid solicitor," but the solicitor's
10 name and address certainly had to be disclosed.

11 MR. BOPP: That is true. You've correctly
12 described Buckley II. But as we can see in the facts of
13 this case, the public disclosure of the petition names
14 in this case -- there was a planned harassment and
15 intimidation of these voters by --

16 JUSTICE KENNEDY: Well, let me -- let me ask
17 you, could the opponents of a particular ballot measure
18 organize a boycott for -- and picket businesses whose
19 managers had supported that boycott?

20 MR. BOPP: Yes.

21 JUSTICE KENNEDY: Had supported that
22 initiative?

23 MR. BOPP: Yes. Under the --

24 JUSTICE KENNEDY: Well, if that's so,
25 then under Claiborne Hardware, which I -- I notice you

1 didn't cite in your brief, but if -- if that's so,
2 then it seems to me that the State's -- or
3 that -- that the signers' interest in keeping their
4 names private is somewhat diminished.

5 MR. BOPP: Yes.

6 JUSTICE KENNEDY: It's a First Amendment
7 activity.

8 MR. BOPP: But what we're -- but what is
9 involved here that is not involved there is the
10 requirement by the government that you publicly disclose
11 your identity and beliefs on a matter that then --

12 JUSTICE GINSBURG: But -- just --

13 MR. BOPP -- subjects you to the boycott.

14 JUSTICE GINSBURG: Let me stop you there,
15 because I think your -- your own brief, I think you said
16 twice that you cannot tell anything about the signer's
17 belief from the mere signature. You said it could be
18 support for -- for the proposition or it could be just
19 support for letting the people decide.

20 MR. BOPP: That is --

21 JUSTICE GINSBURG: Or it could even be, you
22 say, that this solicitor is pesky, and in order to
23 placate the solicitor, to get rid of the solicitor, we'll
24 just sign. So you -- you have said that -- that
25 the signing itself is ambiguous. You don't know what

1 the reason is. It doesn't necessarily mean that the
2 person is a supporter of the proposition.

3 MR. BOPP: But, with all due respect, we
4 did not say the third. We did say the first and the
5 second. And -- but either of those are political
6 statements. The highlighted box at the top, you know,
7 states -- states that by signing R-71, we can reverse that
8 decision, meaning the passage of a law, and protect
9 marriage between a man and a woman.

10 JUSTICE GINSBURG: May I call your attention
11 to page 20 of your reply brief? Because I don't think
12 that your response was correct. You say: Do petition
13 signers support the repeal, simply indicate they would
14 like public election to be held, or simply sign to avoid
15 any further discussion with the petition circulator?

16 MR. BOPP: I acknowledge that we said that,
17 Justice Ginsburg. And, of course, the second statement
18 is -- and which I think is the dominant statement and
19 certainly sufficient -- and that is that we want a measure
20 to be placed on the ballot in order for the people to
21 vote. That is one of the central --

22 JUSTICE ALITO: Well, Mr. Bopp, if a voter --
23 if the legislature passes a statute and someone is -- is
24 satisfied with that statute, how likely is it that that
25 person is going to sign a petition to have a referendum

1 to see whether the statute should be blocked?

2 MR. BOPP: I think it's very unlikely. But
3 it -- we acknowledge it's possible, but we think it's
4 very unlikely.

5 JUSTICE ALITO: It's possible --

6 JUSTICE KENNEDY: But --

7 JUSTICE ALITO: -- but if you were in the
8 real world, if you were to poll the people who sign a
9 referendum petition with respect to a statute that was
10 passed by the State legislature, what percentage do you
11 think would be opposed to that legislation?

12 MR. BOPP: Very few.

13 JUSTICE KENNEDY: And so Justice Alito's
14 question points out that this would be a very slim basis
15 upon which to rest a holding in your favor.

16 And just to go back to the line of questions
17 of the first, the State of California has very
18 complicated referendum and initiative matters. Don't
19 you think it's relevant for the public to know that,
20 say, a public employees union had paid solicitors to put
21 those signatures on the ballot, or that the Chamber of
22 Commerce or the National Association of Manufacturers had
23 paid solicitors to put this on the ballot?

24 Isn't that part of assessing the -- the
25 reasons why this initiative was proposed? And isn't

1 that vital to the voters -- to the voter in making an
2 informed decision?

3 MR. BOPP: Well, actually, after your
4 Buckley II decision, the Ninth Circuit struck down the
5 requirement of disclosing the paid circulators. And, of
6 course, in California, petitions are not public.

7 JUSTICE GINSBURG: They did that. It wasn't
8 due to Buckley II, because as you just acknowledged,
9 under Buckley II, the solicitor is disclosed.

10 MR. BOPP: Well, the Ninth Circuit thought
11 it was Buckley.

12 JUSTICE KENNEDY: Correct me, but the point is,
13 isn't -- isn't there an interest in knowing this
14 information? Not -- not that it's paid.

15 MR. BOPP: There is no evidence --

16 JUSTICE KENNEDY: We'll leave that out.
17 But -- but to know that -- that -- the persons that
18 supported the amendment.

19 MR. BOPP: There's no evidence in the
20 record that that is pertinent information, and, at most,
21 we think it is marginal information.

22 JUSTICE SOTOMAYOR: Counsel, if we create
23 this right of -- this constitutional right of
24 association in the manner that you are describing it,
25 why is it limited to the voting area?

1 Would we be inviting review if a group of
2 citizens get together and send a letter to an agency
3 that says please pass X regulation, or rescind Y
4 regulation? Would the agency be prohibited from making
5 that letter public?

6 MR. BOPP: Well, potentially. And -- and
7 this Court -- I -- because it would be required to be
8 subject to a First Amendment analysis. It's this Court
9 that created, in the NAACP case --

10 JUSTICE SOTOMAYOR: So you're -- you're
11 suggesting --

12 MR. BOPP: -- the right of private
13 association.

14 JUSTICE SOTOMAYOR: -- that when a
15 petitioner or a person engages in political discourse
16 with the government, that they -- when they choose to do
17 it, because the government is not compelling them to
18 write to it; it's not compelling them to sign the
19 referendum. It's just --

20 MR. BOPP: And they're not compelling
21 Ms. McIntyre to distribute her brochure, either. But
22 this Court held that --

23 JUSTICE SOTOMAYOR: But it's -- but
24 Ms. McIntyre wasn't asking the government to engage its
25 process in her favor. She was asking for political

1 reform, but she wasn't asking to engage the government
2 process on her behalf.

3 MR. BOPP: Well, the government, you know,
4 has a lot of options. For instance, they don't have to
5 conduct elections for the election of judge. But if
6 they opt to do that and provide that procedure, well,
7 then, the First Amendment applies to the political
8 speech.

9 JUSTICE ALITO: Well, to follow up on
10 Justice Sotomayor's question, do you think an agency
11 could say, if you want to comment on proposed -- on a
12 proposed rule, you have to disclose to us your name and
13 your address and your telephone number and your
14 political affiliation, and all sorts of -- your marital
15 status and your income level and all sorts of other
16 demographic information?

17 MR. BOPP: And your employer, as in this
18 case here.

19 JUSTICE ALITO: Could they do that?

20 MR. BOPP: No -- no, because there is no
21 sufficient governmental interest that would justify it.

22 JUSTICE SCALIA: Not even just your name, so
23 they can check that this thing isn't phony and that all
24 the names on it aren't -- aren't made up by one person?

25 MR. BOPP: They, of course, can -- can check

1 that.

2 JUSTICE SCALIA: Of course, they can. So
3 they can get your name, right?

4 MR. BOPP: Yes, they can get your name --

5 JUSTICE SCALIA: Okay.

6 MR. BOPP: -- and we're not objecting to
7 filing of a petition.

8 JUSTICE SCALIA: But you're objecting to
9 the public being able to check whether the agency is
10 indeed finding out whether this is a genuine petition or
11 not, correct?

12 MR. BOPP: No. No, I'm not objecting to
13 that.

14 JUSTICE SCALIA: Really?

15 MR. BOPP: They have procedures to check and
16 verify these signatures that do not involve public
17 disclosure.

18 JUSTICE SCALIA: Didn't you have some
19 options, too? Have you started a referendum to repeal
20 the -- the California law that requires disclosure?

21 MR. BOPP: California law does not require
22 disclosure of the petitions, and that has been upheld by
23 the courts of California. And you can verify these
24 signatures.

25 JUSTICE SCALIA: I don't understand. I

1 thought that's what you're challenging. The --

2 MR. BOPP: Well, but you asked about
3 California --

4 JUSTICE SCALIA: I'm sorry. I'm sorry.

5 MR. BOPP: -- if I heard your question.

6 JUSTICE SCALIA: Washington. I got the wrong State.

7 MR. BOPP: Okay. It --

8 JUSTICE BREYER: Can you go back --

9 JUSTICE SCALIA: The people of
10 Washington -- the people Washington evidently think that
11 this is not too much of an imposition upon people's
12 courage, to -- to stand up and sign something and be
13 willing to stand behind it.

14 MR. BOPP: In a sense --

15 JUSTICE SCALIA: Now, if you don't like
16 that, I can see doing it another way. But -- but the
17 people of Washington have chosen to do it this -- this
18 way.

19 MR. BOPP: Actually, for --

20 JUSTICE SCALIA: And you're saying that the
21 First Amendment absolutely forbids that.

22 MR. BOPP: Actually, for a century, they
23 chose not to do this. It wasn't until 2006 --

24 JUSTICE SCALIA: That's fine. Proving my
25 point.

1 MR. BOPP: They did not publicly disclose
2 the petitions for a century.

3 JUSTICE SCALIA: It might have been a good
4 idea.

5 MR. BOPP: Well --

6 CHIEF JUSTICE ROBERTS: I suppose the -- a
7 majority of the voters in Washington decided that, and
8 one of the purposes of the First Amendment is to protect
9 minorities.

10 MR. BOPP: Well, only in the most general
11 sense. They adopted a Public Records Act. They didn't
12 adopt a law that specifically required the disclosure of
13 these petitions. But in a general sense, they did.

14 JUSTICE GINSBURG: Mr. Bopp, this is not a
15 peculiar thing to the State of Washington; that's
16 correct, isn't it? Aren't there about 20-odd States
17 that require disclosure of the names of signers to
18 initiatives, referenda?

19 MR. BOPP: That is true. Some -- some in
20 their initiative and referendum statute, because they
21 actually provide some public input on verification where
22 Washington does not; others under their Public Records
23 Act. Some do not, such as California.

24 JUSTICE GINSBURG: So -- but what you're
25 saying with respect to Washington would go for most of

1 those other States that have -- that have public
2 disclosure of initiative and referendum petitions.

3 MR. BOPP: Well, one -- one thing we say is
4 different between Washington and these other States is
5 that Washington provides no way for the public, even if
6 they get access to the petitions, to participate in the
7 verification process.

8 The only thing the public can do is have --
9 observe -- a limited number of observers. These
10 observers are prohibited from --

11 JUSTICE GINSBURG: I thought that there were
12 instances where the State official missed something and
13 a member of the public who had access to the list of
14 signers said: Wait a minute; I know so-and-so was my
15 neighbor who died 5 years ago.

16 MR. BOPP: That's not allowed in the State
17 of Washington. The instructions from the Secretary of
18 State is while you can have observers to observe the
19 process, the people --

20 JUSTICE GINSBURG: But you mean if -- that was
21 over. It passed the screen of the Secretary of State.
22 It's disclosed to the public. If someone then said
23 you've got a lot of dead souls on these lists, the State
24 would do nothing about it?

25 MR. BOPP: There is absolutely no procedure

1 under Washington statute to do anything with that
2 information.

3 JUSTICE GINSBURG: Well, we'll ask --
4 we'll ask the --

5 MR. BOPP: Nothing.

6 JUSTICE GINSBURG: We'll ask the Attorney
7 General of Washington.

8 MR. BOPP: Yes.

9 JUSTICE SOTOMAYOR: Weren't two of the
10 Petitioners here -- weren't two of the Petitioners here
11 seeking the list so that they could go over the
12 certification process the State had done to ensure that
13 they had certified all the right people, et cetera?

14 MR. BOPP: Well, one of -- one of the
15 intervenors sought an exception from the -- from the
16 injunction, which we did not object to, that -- that
17 they would have access to the list. But under
18 confidentiality and protective order --

19 JUSTICE SOTOMAYOR: I'm not going to the
20 privacy questions. You responded to Justice Ginsburg by
21 saying that there was no way to challenge the State's
22 process of validation, and that -- I don't think that's
23 correct.

24 MR. BOPP: With all respect, I didn't say
25 that.

1 JUSTICE SOTOMAYOR: Oh.

2 MR. BOPP: What I -- what I said is there's
3 no role for the public in verifying signatures. You can
4 ask for judicial review --

5 JUSTICE SOTOMAYOR: That's assuming the
6 answer, meaning if they don't have the right to access,
7 they can't. But, legally, they can challenge it if they
8 find on the petitions that things were erroneously
9 counted by the State. They can go into court and prove
10 that.

11 MR. BOPP: The only thing that they could do
12 is request that the court does its own count. In other
13 words, there's judicial review available. But the
14 public has no role in the verification, but they can
15 trigger judicial review. And then the court conducts
16 its own count.

17 In other words, this is not an adversary
18 process in which people come in and present evidence
19 of -- of people's -- of invalid signatures.

20 JUSTICE GINSBURG: Why would you involve the
21 court? If the State's -- the executive representative
22 of the State says: Oh, we missed that. Now we're going
23 to have to deal with it. We don't need any court to
24 order us to do it.

25 MR. BOPP: Well, the observers can observe

1 the process, and if they feel --

2 JUSTICE GINSBURG: No, this is after the
3 observers. This is --

4 MR. BOPP: Well, but --

5 JUSTICE GINSBURG: We're talking about a member of
6 the public noticing that there are people on the list
7 who shouldn't be there.

8 MR. BOPP: Well, the -- the observer --
9 under the Washington procedure, observers can observe
10 the process, and if they feel, or if anyone feels,
11 that there has been an inadequate job in -- in
12 verification, then they can ask for judicial review.
13 And then the court conducts the --

14 JUSTICE GINSBURG: Why would they ask for
15 judicial review instead of going first to the State's
16 Attorney General and saying, look, you -- your people
17 missed it?

18 MR. BOPP: Well, there's no procedure for
19 that.

20 JUSTICE GINSBURG: Why involve the court?

21 MR. BOPP: That's not -- there's no
22 procedure for that. You know, if they wanted to involve
23 the public -- and that's the difference, I said, between
24 this procedure and other procedures. They're claiming
25 the need for public disclosure so the public can be

1 involved in verification. Well, there's no
2 procedure --

3 JUSTICE STEVENS: Isn't there another --

4 MR. BOPP: -- to be involved in verification.

5 JUSTICE STEVENS: Isn't there another
6 possible public interest? Would it be a legitimate public
7 interest to say I'd like to know who signed the
8 petition because I would like to try to persuade them
9 that their views should be modified?

10 Is there a public interest in encouraging
11 debate on the underlying issue?

12 MR. BOPP: Well, it's possible, but we think
13 this information is marginal. In other words, the --
14 it's much more important --

15 JUSTICE STEVENS: Well, it does identify
16 people who have a -- a particular point of view on a
17 public issue. And if you had the other point of view,
18 don't you have an interest in finding out who you'd
19 like to convince to change their minds?

20 MR. BOPP: Well, we -- we think it's a -- a
21 very marginal interest. The Ninth Circuit recently
22 ruled that if you give a small contribution to an
23 initiative, there's not -- I mean, nobody cares. So why
24 should it be publicly disclosed when it's so marginal?

25 JUSTICE SCALIA: What about just -- just --

1 what about just wanting to know their names so you can
2 criticize them?

3 (Laughter.)

4 MR. BOPP: Well --

5 JUSTICE SCALIA: Is -- is that such a bad
6 thing in a democracy?

7 MR. BOPP: Well, what is bad is not the
8 criticism; it's the public -- it's the government
9 requiring you to disclose your identity and beliefs.

10 JUSTICE SCALIA: But part of the reason is
11 so you can be out there and be responsible for the
12 positions you've taken.

13 MR. BOPP: Well, then why don't they require
14 both sides?

15 JUSTICE SCALIA: So that people -- people
16 can criticize you for the position you have taken.

17 MR. BOPP: Then why don't they require both
18 sides if that was the purpose?

19 JUSTICE SCALIA: What do you mean, "both
20 sides"? The other side hasn't signed anything. When they
21 sign something --

22 (Laughter.)

23 MR. BOPP: Well, but the other side --

24 JUSTICE SCALIA: When they sign something,
25 they'll be out there for public criticism as well.

1 MR. BOPP: Okay. But this is a one-way
2 street.

3 JUSTICE SCALIA: Oh, this is such a
4 touchy-feely, oh, so sensitive about -- about any --
5 (Laughter.)

6 JUSTICE SCALIA: You know, you can't run a
7 democracy this way, with everybody being afraid of
8 having his political positions known.

9 MR. BOPP: I'm sorry, Justice Scalia, but
10 the campaign manager of this initiative had his family
11 sleep in his living room because of the threats --

12 JUSTICE GINSBURG: Well, then that's --

13 JUSTICE SCALIA: Well, that's bad. The
14 threats should be moved against vigorously --

15 MR. BOPP: And -- and --

16 JUSTICE SCALIA: -- but just because there
17 can be criminal activity doesn't mean that you --
18 you have to eliminate a procedure that is
19 otherwise perfectly reasonable.

20 MR. BOPP: But all we're asking for is a
21 First Amendment analysis of the compelled disclosure of
22 the identity of these people and whether or not these
23 interests are sufficient.

24 Could I reserve the balance of my time?

25 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

1 General McKenna.

2 ORAL ARGUMENT OF GENERAL ROBERT M. MCKENNA

3 ON BEHALF OF THE RESPONDENTS

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

6 I'd like to begin with the question of
7 how the public can bring to the attention of the
8 government that errors and fraud have been discovered.

9 First of all, it's important to understand
10 that the petitions do not become public records after
11 the verification process but, in fact, are made available
12 as public records before the verification process even
13 begins.

14 This is because the Secretary of State's
15 first step after receiving submitted petitions is to
16 take them to his archiving section and to have them
17 digitized. As soon as they're digitized, they're
18 available on disks for anyone who requests them. Then
19 the verification process begins.

20 During the verification process, it is
21 possible --

22 JUSTICE SOTOMAYOR: How much time are we
23 talking about in those processes?

24 MR. MCKENNA: The verification process,
25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: Yes.

2 MR. McKENNA: The verification process
3 will depend on how many signatures have been
4 submitted --

5 JUSTICE SOTOMAYOR: No, no, no. I'm trying
6 to get the relationship between the disks being made
7 available and the verification process.

8 So is there a time for the public to look
9 through the disks before the people who are sent into
10 the room are sent into the room?

11 JUSTICE GINSBURG: That's what you've just
12 said --

13 MR. McKENNA: Yes, they're --

14 JUSTICE GINSBURG: -- that they're --
15 that they are immediately available on the disk, and
16 so while the checking is going on by the Secretary,
17 the public has the list. Is that what you've just said?

18 MR. McKENNA: Yes, that's correct. For
19 example, in the case of Referendum 71, the proponents of
20 the referendum submitted the petition sheets on
21 Saturday, July 25, 2009, and on Tuesday, July 28, a
22 records request was already submitted. And so they
23 can obtain records --

24 CHIEF JUSTICE ROBERTS: Would these
25 records --

1 JUSTICE KENNEDY: Was that pursuant to the
2 Public Records Act that we're talking about --

3 MR. McKENNA: Yes.

4 JUSTICE KENNEDY: -- or was that part of the
5 initiative and referendum structure before the Public
6 Records Act was passed?

7 MR. McKENNA: Justice Kennedy, this is
8 part of the Public Records Act. This is as a result of
9 the Public Records Act that these petition sheets are
10 made available.

11 CHIEF JUSTICE ROBERTS: Counsel --

12 JUSTICE KENNEDY: So -- all right. So
13 this -- the public record -- pardon me. The -- in
14 California, we call it an initiative and referendum
15 process -- existed and was in place before the Public
16 Records Act added this additional feature of disclosure?

17 MR. McKENNA: Yes, that's correct.

18 JUSTICE KENNEDY: So there was a judgment at
19 one time by the State of Washington that it didn't --
20 that it didn't need the public records disclosure?

21 MR. McKENNA: Well, when the initiative
22 and referendum processes were created by public vote on
23 a constitutional amendment of 1912, there was no
24 Public Records Act at all. And the Public Records Act,
25 an Act of general applicability, was adopted by the

1 voters in 1973 as part of an initiative which also
2 enacted comprehensive campaign finance reform.

3 CHIEF JUSTICE ROBERTS: Counsel, if the
4 State had a law that you could disclose voters and for
5 whom they voted, would that implicate First Amendment
6 interests?

7 MR. McKENNA: Yes, Mr. Chief Justice, we
8 would -- we do believe that First Amendment interests
9 would be implicated by revealing how people voted, and
10 we don't see a legitimate State interest in knowing how
11 people voted, only in who voted.

12 JUSTICE SCALIA: So the country was acting
13 unconstitutionally for a whole century before we adopted
14 the Australian secret ballot? Do you really think that?

15 MR. McKENNA: No. No, Justice Scalia. I --

16 JUSTICE SCALIA: That it was
17 unconstitutional --

18 MR. McKENNA: No, Justice Scalia.

19 JUSTICE SCALIA: -- for a whole century
20 not to have a secret ballot?

21 MR. McKENNA: No, Justice Scalia, I
22 didn't say that I thought that the secret ballot was
23 constitutionally required. I was asked by the Chief
24 Justice whether some First Amendment interests would be
25 implicated. They probably would be.

1 CHIEF JUSTICE ROBERTS: What would the First
2 Amendment interests be?

3 MR. McKENNA: Well, the First Amendment
4 interest in how you vote?

5 CHIEF JUSTICE ROBERTS: Yes.

6 MR. McKENNA: You know, it might be
7 implicated by a potential chill from voting, if you know
8 your vote is going to be revealed.

9 CHIEF JUSTICE ROBERTS: Do you think having
10 your name revealed on a petition of this sort might have
11 a chilling effect on whether you sign it?

12 MR. McKENNA: Mr. Chief Justice, some
13 chill may result, just as some chill may result from
14 having your campaign contributions disclosed or the
15 fact that you have registered to vote and provided your
16 name, address, your voting history is being disclosed.
17 So some chill might be -- might result, but we do not
18 think that it is significant enough.

19 CHIEF JUSTICE ROBERTS: You don't think
20 revealing that you're a voter has the same chilling
21 effect as revealing how you voted, do you?

22 MR. McKENNA: No, I do not. I think how
23 you voted would have a much greater chilling effect than
24 the fact that you are registered to vote.

25 And -- and, of course, this Court has not

1 ruled on whether the secret ballot is, you know, a
2 constitutional right. If -- if it is, then is town hall
3 voting in New England unconstitutional? Is the caucus
4 system in Iowa for presidential candidates
5 unconstitutional? The Court in this case does not
6 have --

7 JUSTICE ALITO: -- in the last questions --

8 CHIEF JUSTICE ROBERTS: Well, I thought you
9 told me that the First Amendment interests were implicated
10 with respect to the secret ballot, that you couldn't
11 require people to reveal how they voted.

12 MR. MCKENNA: We don't -- we don't know
13 if this Court would rule that the vote could never be
14 revealed. We know that in some places, votes are done
15 in public. We know that before the late 1800s, there
16 was no secret ballot. We just -- we don't know what the
17 constitutional ruling would be. But we -- we do know
18 that in this case, it's not necessary for the Court to
19 reach that -- that determination, because in this
20 case --

21 JUSTICE ALITO: Well, I'd like to know
22 how far you -- you are -- you want to go. You say in
23 your brief that the availability of the referendum
24 signature petitions allows Washington voters to engage
25 in discussion of referred measures with persons whose

1 acts secured the election and suspension of State law.

2 So would -- would it be consistent with the
3 First Amendment to require anybody who signs a petition
4 to put down not just the person's name and address, but
5 also telephone number, so that they could be engaged in
6 a conversation about what they had done?

7 MR. McKENNA: It -- it would depend on
8 the strength of the State interest in having the
9 telephone number. The State does not have an interest
10 in the telephone number on the petition form, because
11 the State has -- only needs to know from the petition
12 form the name and the address in order to verify --

13 JUSTICE ALITO: I thought that you were
14 saying that one of the interests that's served by this
15 is to allow people who -- to allow Washington citizens
16 to discuss this matter with those who signed the
17 petition. So putting down the telephone number would
18 assist them in doing that.

19 MR. McKENNA: It -- yes, it probably
20 would make it easier for people to contact.

21 JUSTICE ALITO: So you would --

22 MR. McKENNA: But the policy --

23 JUSTICE ALITO: You would endorse that?

24 MR. McKENNA: That would be a policy
25 determination for the legislature to make,

1 Justice Alito.

2 JUSTICE ALITO: No, I'm not asking the
3 policy question. I'm asking whether the First Amendment
4 would permit that.

5 MR. MCKENNA: I believe it could permit
6 that, yes, Justice Alito.

7 JUSTICE ALITO: Now, one of your
8 Co-Respondents says that supplying this information
9 provides insight whether support comes predominantly
10 from members of particular political or religious
11 organizations.

12 Would it be consistent with the First
13 Amendment to require anybody who signs a petition to
14 list the person's religion?

15 MR. MCKENNA: No, I do not believe it
16 would, Justice Alito.

17 JUSTICE BREYER: Suppose that in 1957 in
18 Little Rock, a group of Little Rock citizens had wanted
19 to put on the ballot a petition to require the school
20 board to reopen Central High School, which had been
21 closed because there was a sentiment in the community
22 that they didn't want integration. And it was pointed
23 out that if they signed this petition, there was a very
24 good chance that their businesses would be bombed, that
25 they would certainly be boycotted, that their children

1 might be harassed.

2 Now, is there no First Amendment right in
3 protecting those people? And if there is, how does it
4 differ from your case?

5 MR. McKENNA: Justice Breyer, that is
6 count 2. That is count 2 of the Petitioners'
7 complaint. This Court ruled as recently as Citizens
8 United that such situations should be evaluated on a
9 case-by-case basis to evaluate the reasonable
10 probability of threats, harassments, and reprisals. But
11 that --

12 JUSTICE SCALIA: So you -- you would have no
13 objection to as an-applied challenge to disclosing the
14 names of individuals to a particular cause, where it is
15 demonstrated that the opponents of that cause are
16 violent and will do violence to the people who signed
17 the petition?

18 MR. McKENNA: Yes, Justice Scalia. That
19 would be the Socialist Workers Party case. This -- this
20 Court has ruled that, on a case-by-case basis, it is
21 possible that some information otherwise disclosed --

22 JUSTICE KENNEDY: What about a business
23 boycott?

24 JUSTICE SCALIA: So this is just a general
25 challenge to ever, ever disclosing the names of petition

1 signers?

2 MR. McKENNA: Of any type of petition
3 including nominating petitions --

4 JUSTICE SCALIA: Right.

5 MR. McKENNA: -- initiative petitions,
6 and the rest.

7 JUSTICE KENNEDY: What about a business
8 boycott? Suppose that were a -- a likely outcome of
9 disclosing the name?

10 MR. McKENNA: Well, of course, boycotts
11 have been upheld under the First Amendment in Claiborne
12 Hardware, and so if someone wanted to boycott a business
13 because it turned out that the manager of the business
14 had been a supporter of a particular ballot measure,
15 that would be allowable, of course, to that person
16 choosing to boycott.

17 CHIEF JUSTICE ROBERTS: Counsel, your answer
18 to Justice Breyer was that they can bring an as-applied
19 challenge. Now, that as-applied challenge would be
20 small comfort unless the names were protected pending
21 the resolution of that challenge, correct?

22 MR. McKENNA: Yes.

23 CHIEF JUSTICE ROBERTS: So you think a stay
24 should be granted in this case to allow the Petitioners
25 to pursue an as-applied challenge.

1 MR. McKENNA: Yes, of course -- yes,
2 they could apply for another preliminary injunction if
3 this Court upholds the court of appeals. They were able
4 to obtain that preliminary injunction in this case,
5 which is why these petition forms have not been released
6 to date, except under a protective order by the court to
7 the opponents.

8 JUSTICE GINSBURG: And that would --

9 CHIEF JUSTICE ROBERTS: Do you think that
10 the disclosure of the names, pending the resolution of
11 their as-applied challenge, would subject them to
12 incidents of violence and intimidation?

13 MR. McKENNA: We -- there is no evidence
14 of that in the record. There's no evidence --

15 JUSTICE GINSBURG: Does -- is it --

16 CHIEF JUSTICE ROBERTS: There's no
17 evidence -- there's no evidence of episodes of violence
18 or intimidation?

19 MR. McKENNA: Involving the
20 Referendum 71 signers? No. The evidence in the record
21 is about people who were out circulating petitions,
22 people who were out, you know, campaigning for the
23 petitions, the campaign manager for the measure. But
24 none of the evidence in the record speaks to petition
25 signers, and none of the evidence in the record speaks

1 to petition signers for other, similar measures which
2 were cited by the Petitioners.

3 JUSTICE GINSBURG: Is that because nobody
4 got to count 2? And the district court -- this whole
5 case in the lower courts was on count 1 alone; wasn't
6 that so?

7 MR. MCKENNA: Yes, that is -- yes, that
8 is correct.

9 JUSTICE GINSBURG: And count 2 is the one
10 that deals with the harassment.

11 MR. MCKENNA: That is true,
12 Justice Ginsburg. Of course, in several other States,
13 Arkansas, Florida, and Massachusetts, which had similar
14 measures regarding gay civil rights or same-sex marriage
15 on the ballot -- in those three States, the petition
16 forms were obtained under public records, were put on
17 the Internet, and no evidence has been provided that's
18 in the record that anyone who signed any of those
19 petitions in those three States was subjected to
20 harassment --

21 JUSTICE ALITO: Well, let's say somebody is
22 thinking of circulating a petition on a sensitive
23 subject and fears that people may be dissuaded from
24 signing because they fear retaliation. At what point
25 could they bring this as-applied challenge?

1 Do they have to -- could they do it before
2 they even begin to circulate the petition, arguing that
3 if -- if these names -- if people are not assured ahead
4 of time that their name and address is not going to be
5 revealed to the public on the Internet, they're not
6 going to sign this?

7 MR. MCKENNA: Justice Alito, it would be
8 possible procedurally for them to bring the motion for
9 an injunction even before collecting the signatures --

10 JUSTICE ALITO: And how would they --

11 MR. MCKENNA: -- if they had sufficient
12 evidence.

13 JUSTICE ALITO: How would they prove that
14 there's -- that there's a -- a threat, a sufficient
15 threat of harassment in that particular case, before the
16 petition is even signed?

17 MR. MCKENNA: I believe that the
18 sponsors of the measure would bring to the court
19 evidence, if they have any, of -- because of the
20 controversial nature of that particular measure, that is
21 based on what's happened to some of the people who were
22 planning to put the measure on the ballot.

23 JUSTICE SCALIA: But -- but you -- you've
24 rejected that here. You've said there's no evidence here
25 that any of the petition -- petition signers were

1 subjected to any harassment.

2 MR. McKENNA: Right.

3 JUSTICE SCALIA: Of course there isn't,
4 because the names haven't gotten out yet. How could you
5 possibly demonstrate before the names get out that
6 petition signers are going to be subjected to
7 harassment?

8 MR. McKENNA: One could look to --

9 JUSTICE SCALIA: Or otherwise, don't insist
10 upon evidence that these very petition signers will be
11 harassed.

12 MR. McKENNA: I imagine, Justice Scalia,
13 that the individuals moving for that preliminary
14 injunction would do what the Petitioners have done in
15 this case. They would cite to an example from another
16 State involving a comparable measure.

17 JUSTICE SCALIA: And you think that would be
18 an acceptable type of evidence?

19 MR. McKENNA: They could bring it into the
20 court. I'm not saying the court would accept it,
21 because I don't know --

22 JUSTICE SCALIA: Well, if you don't think
23 it's acceptable, then -- then -- then you're not making
24 an argument.

25 MR. McKENNA: Justice Scalia, I didn't

1 say it couldn't be acceptable. I'm saying this is a
2 hypothetical, so I don't know what the evidence would
3 look like in the hypothetical example.

4 JUSTICE ALITO: Well, the -- the
5 hypothetical is that before this petition is circulated,
6 the supporters came into court, and they said: Look what
7 has happened in California with -- with Proposition 8.
8 Don't disclose -- enter an order prohibiting the public
9 disclosure of the names and addresses here.

10 Would that be sufficient?

11 MR. MCKENNA: Justice Alito, I think
12 that the evidence would have to be very strong. It
13 would have to rise above criticism. I think it would
14 have to rise to the level of threatened violence. It
15 would have to rise to the level of the Socialist Workers
16 Party case, for example, or the NAACP case.

17 I think the standard would be very high.
18 But it would be up to the trial judge to decide whether
19 or not the evidence was sufficient to issue the
20 preliminary injunction.

21 JUSTICE GINSBURG: Is it -- the State has
22 had this procedure now for some time, and there have
23 been controversial ballot initiatives. Is there any
24 history in the State of Washington that signers have
25 been subject to harassment?

1 MR. McKENNA: There has not,
2 Justice Ginsburg, and that's even though a half a dozen
3 initiatives on a variety of topics have been released.
4 Another half dozen are pending.

5 CHIEF JUSTICE ROBERTS: What -- what's the
6 most sensitive similar petition for a referendum?

7 MR. McKENNA: There has been no measure
8 on domestic partner benefits or same-sex marriage in
9 Washington State --

10 CHIEF JUSTICE ROBERTS: No, but what's the --

11 MR. McKENNA: -- but there are other --

12 CHIEF JUSTICE ROBERTS: What's -- what's
13 the other one that's going to get people -- that's the
14 most controversial public issue?

15 MR. McKENNA: Justice --

16 JUSTICE SOTOMAYOR: Proposition 8?

17 MR. McKENNA: Well --

18 CHIEF JUSTICE ROBERTS: No, I'm talking
19 about in Washington, counsel.

20 MR. McKENNA: In Washington State.

21 Mr. Chief Justice, we have had measures on assisted
22 suicide, for example, which was very controversial,
23 and -- and there's no evidence involving that set of
24 petitions.

25 CHIEF JUSTICE ROBERTS: Was the referendum

1 in favor or opposed to assisted suicide?

2 MR. McKENNA: It was -- well, the
3 referendum challenges the assisted suicide law. So if
4 you vote for the referendum, you vote to uphold the
5 legislature's adoption of that law, which -- which
6 allowed assisted suicide.

7 So there have been controversial measures.

8 JUSTICE KENNEDY: This case will likely be
9 controlled by our First Amendment precedents, because
10 that's the most fully developed.

11 Did you look at the Petition Clause at all?
12 In the early days of the republic, the petitions were
13 the way in which you communicated with your legislator.

14 MR. McKENNA: Yes.

15 JUSTICE KENNEDY: And I tried to look it up.
16 I have a recollection, but I'm not sure, that those
17 petitions were sometimes put in the Congressional
18 Record. But did you look at the history of the Petition
19 Clause?

20 MR. McKENNA: Justice Kennedy, we have
21 considered the history of the Petition Clause, and we
22 see a basic difference between the kinds of petitions
23 under the Petition Clause and the petitions at issue
24 here because, essentially, petitioning the government
25 under the Petition Clause is asking the government to do

1 something. You're petitioning them: Please do
2 something.

3 The petitions for a referendum or an
4 initiative are telling the government to do something.
5 The petition form says that I, the signer, am directing
6 the Secretary of State to conduct an election. And by
7 submitting these petitions in a referendum, I am
8 suspending the law which the legislature has already
9 approved until the election has taken place.

10 Tell versus ask. I think that's a pretty
11 big -- a significant difference.

12 JUSTICE KENNEDY: But, of course, that can
13 cut the other way, too, because then it's more like a
14 vote. And there -- there is strong interest in keeping
15 the -- the vote private.

16 MR. McKENNA: And, Justice Kennedy, I'd
17 like to speak to that question, because several
18 Justices asked: Well, what can we tell from what, you
19 know, someone who signed? Do we know how they're going
20 to vote.

21 I -- I agree that many people signing a
22 petition are going to vote in favor of -- in the case of
23 an initiative, in favor of the law the initiative would
24 put on the ballot. But also we know from the social
25 science research, which is cited, for example, in the

1 Direct Democracy Scholars green brief, that many people
2 sign simply because they believe it's important for
3 the -- for the public to have an opportunity to vote.
4 And, of course, as the Petitioners have acknowledged and
5 we also point out, some people vote just to get around the
6 circulator and get into the store.

7 CHIEF JUSTICE ROBERTS: What percentage --
8 what percentage of the people who signed this petition
9 to put this law on the referendum do you think signed it
10 because they think these sort of things should be
11 generally put to a public vote as opposed to because
12 they opposed the law?

13 MR. McKENNA: The percentage of people
14 who believe simply that there should be a vote held has
15 not been quantified by the research, except that several
16 scholars indicate that it is significant. So, whether
17 it's 20 percent or 40 percent, I -- I really can't say
18 within a certain --

19 CHIEF JUSTICE ROBERTS: You think as much as
20 20 percent of the people who signed this petition are
21 actually in favor of the law that it's aimed to repeal?

22 MR. McKENNA: It is possible. But it's
23 also possible some of those 20 percent don't have an
24 opinion on the law, Mr. Chief Justice. They simply
25 think that there should be a vote held, and they'll

1 make their mind up later on.

2 There are plenty of people who aren't aware
3 when certain laws are -- are adopted that are subjected
4 to a referendum, and they may not have decided at all.
5 In fact, one of the reasons they may sign the petition
6 is to say: Well, I'm not sure how I'm going to vote,
7 but, you know, I think a public vote would be a good
8 idea. So, I'm going to let it go forward to be on the
9 ballot, and I'll decide.

10 JUSTICE ALITO: Can I ask you this question?
11 It seems to me your -- the strongest State interest here
12 is detecting fraud. And you mentioned that the records
13 are digitized. And maybe you can correct my impression
14 of this, but it seems to me that if the records are
15 digitized, there are very simple ways of detecting fraud
16 that would not require the disclosure of the list to the
17 public.

18 If somebody wants to see whether his or her
19 name has been fraudulently put on the list, wouldn't it
20 be very simple to set up a Web site where the person
21 could put in a little bit of identifying information and
22 see whether that person's name is on the list? And if
23 the -- the purpose is to see whether a particular person
24 lives at a particular address, couldn't you just
25 cross-reference by means of a computer program the

1 information on the referendum with the -- with the
2 voting lists?

3 So if you've got John Jones who lives at 10
4 Main Street, you see whether there really is a
5 registered voter John Jones who lives at 10 Main Street?
6 Why does this all have to be put out on the Internet?

7 MR. McKENNA: Justice Alito, the -- just
8 to be clear, you are right. They do use computer --
9 computers because when -- in the verification process,
10 the Secretary of State's staff, with the observers looking
11 over their shoulder, will look at the petition and look
12 up that voter in an -- in an electronic voter
13 registration database.

14 This is exactly why the information is so
15 useful to the public as well. They have access to
16 electronic online voter registration history as well,
17 and they can also check.

18 In -- in Massachusetts, under their public
19 records law in 2006, petition forms obtained by public
20 records requests were put online, and over 2,000 people,
21 as has been documented in the Lambda amicus brief,
22 discovered that they -- their names are on petitions
23 that they claimed did not sign, and discovered that they
24 had been, in some cases, misled.

25 JUSTICE ALITO: Well, what's the answer to

1 my question? Couldn't you -- couldn't this be done very
2 simply? If I want to see whether somebody has
3 fraudulently signed my name, very quickly go to a
4 Web site, wouldn't be expensive to set up, put in your
5 voter ID number, and see whether -- and your name, and
6 see whether you're on the -- on the --

7 MR. McKENNA: Yes.

8 JUSTICE ALITO: -- whether you --
9 somebody signed your name to the petition?

10 MR. McKENNA: Yes, Justice Alito,
11 that -- that could be done. In our State and the
12 other States that's done when somebody requests the public
13 records and chooses them to put online. The State
14 doesn't -- does not put the petition forms online
15 itself, although, you know, other information is put
16 online by the State.

17 JUSTICE KENNEDY: Do -- do we take this case
18 on the assumption -- do you make the contention before
19 us that the Secretary of State and those who assist it
20 are not capable of determining whether the petition
21 signatures are valid?

22 MR. McKENNA: No, we are not taking
23 that position, Justice Kennedy. Of course --

24 JUSTICE KENNEDY: I mean without public
25 disclosure?

1 MR. McKENNA: What we know,
2 Justice Kennedy, is that in dozens of States around
3 the -- around the country, as recently as 2009 in
4 Maryland, 2006 in Massachusetts, and so on, it was
5 the -- it was the public who requested ballot petitions
6 by public records request who found significant fraud
7 and error. This isn't just about fraud -- fraud is very
8 important -- it's also about finding plain old mistakes
9 which the State, Secretary of State, or auditor has
10 missed.

11 That -- that does happen with regularity in
12 this country, and we cite cases in our brief where error
13 is not fraud, but errors in Washington State have been
14 discovered by people who look at these public records.
15 And --

16 JUSTICE SCALIA: Sometimes the public may
17 not trust the Secretary of State.

18 MR. McKENNA: Yes, sir. Justice Scalia,
19 we agree.

20 JUSTICE SCALIA: It -- it may be an issue in
21 which his administration has taken a particularly firm
22 stand, and the public may not trust the job that the
23 Secretary of State does.

24 MR. McKENNA: That goes to the heart to
25 the Public Records Act, Justice Scalia: Trust but

1 verify. The people did not leave to the State the idea
2 that, well, we'll let you know what you need to know.
3 The people want a --

4 JUSTICE SCALIA: Trust but verify -- I like
5 that.

6 (Laughter.)

7 JUSTICE GINSBURG: You did say something
8 about this category of speech. You said, well, this is
9 in the category that -- it's like O'Brien. It has speech
10 elements and non-speech elements. And I was trying to
11 figure out which -- what is it in the signature that
12 speaks and what is it in the signature that doesn't
13 speak?

14 MR. McKENNA: The speech element could
15 be construed in the fact that someone has chosen to sign
16 a petition which we know means they want something to be
17 put on the ballot. So, they favor having it on the
18 ballot. That -- that much we know.

19 But we also looked to Burdick, of course,
20 because in this -- in -- in the Burdick decision this
21 Court held that write-in voting could be prohibited by
22 the State of Hawaii. That was upheld by the court of
23 appeals and this Court. And this Court found that
24 writing in a candidate's name was not even expressive
25 conduct.

1 So we look to the Burdick level of
2 intermediate scrutiny, to the O'Brien level of
3 intermediate scrutiny for the test.

4 Justice Ginsburg, the other point I wanted
5 to bring up is something about Buckley II, which --

6 JUSTICE ALITO: Well, what is the -- to finish
7 your answer to Justice Ginsburg's question, what is the
8 non-speech component of signing a petition?

9 MR. MCKENNA: The non-speech component
10 is suspension of law in the case of a referendum or the
11 legislative effect. We believe this is a legislative
12 act fundamentally. In --

13 JUSTICE ALITO: And what's the State's interest
14 in regulating the non-speech component? When you --
15 when you talk about the vote cast by an elected
16 representative, of course, there's a strong interest in
17 knowing how an elected representative voted, because the
18 representative is answerable to the voters. But
19 somebody who signs a petition isn't answerable to
20 anybody -- any other citizen. So what's your interest?

21 MR. MCKENNA: The interest, Justice
22 Alito, is knowing, first of all, that there were a
23 sufficient number of signatures submitted to qualify the
24 measure for the ballot.

25 JUSTICE ALITO: It's the fraud interest?

1 MR. McKENNA: That's the fraud interest.

2 And, secondly, there is a valid informational
3 interest in knowing who is it exactly who's calling for
4 this election and suspending the --

5 JUSTICE ALITO: Well, but how far does that
6 go? When I asked whether you could -- you want to know
7 the religion of the people who signed, no, you can't do
8 that. How much more demographic information could be
9 -- could be -- does the -- does the State of
10 Washington have an interest in making publicly available
11 about the people who support this election?

12 Let's say it's -- it's a referendum about
13 immigration. Does the State of Washington have an
14 interest in providing information to somebody who says
15 I want to know how many people with Hispanic names
16 signed this, or how many people with Asian names signed
17 this? Is that -- that what you want to facilitate?

18 MR. McKENNA: No, Justice Alito, we
19 don't need to know that. We need to know whether there
20 were a sufficient number of registered voters who
21 signed -- we need to know whether they signed more than
22 once. We need to know they are registered in Washington
23 State.

24 Informational interest I think that you could
25 -- the information you could collect to satisfy

1 informational interest might include other information
2 that's in the voter registration records. You might
3 want to know --

4 CHIEF JUSTICE ROBERTS: I thought one of the
5 reasons you wanted to do this was so people would have
6 information that would allow them to participate in the
7 civic process, and there are people who -- might think
8 it makes a difference whether a referendum was requested
9 by -- primarily by members of a particular ethnic group
10 or not. So isn't -- doesn't -- I thought your brief
11 would say the State has an interest in that type of
12 disclosure.

13 MR. McKENNA: I don't see what the valid
14 State interest would be of knowing the ethnicity of the
15 person. I mean, of course, anyone could look at the
16 petition ballot forms and, I suppose, divine something about
17 the ethnicity based on the last name, but the State's
18 interest doesn't go -- go to that. That we -- we
19 don't believe we need to know that. We believe we need
20 to know what is requested -- required on the -- on the
21 petition form.

22 JUSTICE ALITO: Then I don't understand what
23 information is being -- what information you think you're
24 providing to the public. Outside of the fraud area,
25 if I see that John Jones from Seattle signed this

1 petition, that tells me absolutely nothing.

2 MR. McKENNA: Well, Justice Alito, it
3 might -- if you know John Jones, that would tell you
4 something. Number two, we know from the -- we know from
5 the, you know, Direct Democracy Scholars green brief
6 that intermediaries and especially the press and
7 sometimes social science researchers and others will --
8 will look at the names, and they'll be able to tell,
9 for example, that a large number of employees at one
10 company signed a measure; maybe it's a measure that would cut
11 a tax break for a particular industry. Or perhaps members
12 of a union, in large numbers, have signed. They have been --

13 CHIEF JUSTICE ROBERTS: How can they --

14 MR. McKENNA: -- able to provide
15 that information.

16 CHIEF JUSTICE ROBERTS: How can they find that out
17 with just the name and address, that a large number of people
18 from a company signed it?

19 MR. McKENNA: Well --

20 CHIEF JUSTICE ROBERTS: You don't have to
21 put on who you work for, do you?

22 MR. McKENNA: No, you do not. I'm
23 saying intermediaries might discover this, for example,
24 by taking a close look at who's paying for the
25 signature gathering. If it's paid signature gathering,

1 they might be aware of prominent sponsors. In fact,
2 the -- the importance of knowing who the sponsors is, is
3 demonstrated --

4 CHIEF JUSTICE ROBERTS: I'm sorry. I'm still
5 on the companies. How -- how does knowing who the
6 sponsors are tell you how many people from a particular
7 company signed the petition?

8 MR. MCKENNA: Well, a voter who -- who
9 works at that same company or does business with that
10 same company might know that, gosh, I know these
11 employees, and they've -- they have all signed this
12 petition. The press might be able to do the research to
13 find that out. Intermediaries do play an important role.

14 The last point, if I may, I wanted to make
15 about -- about Buckley II is that the Petitioners have
16 stressed that Buckley II struck down the requirement to wear
17 the name badge. But in that same decision this Court
18 upheld the requirement by Colorado that affidavits
19 signed by the petition circulators, including the
20 petition circulator's name and address, can be disclosed
21 as public records.

22 And the Court ruled that -- found that and
23 compared it favorably to the badge requirement because
24 the disclosures of public record occurred after the heat
25 of the moment, after the moment of interactive discussion.

1 It happened later on. And we believe, of all the Court's
2 rulings, that -- that approval of the disclosure requirement
3 of the -- of the affidavit, in contrast to the badges, is the
4 most similar to requiring after the fact or allowing
5 after the fact for petitions to be disclosed under the
6 Public Records Act.

7 JUSTICE ALITO: You know, if somebody called
8 your office and said I'd like the -- the home
9 address of all the attorneys who work in the Attorney
10 General's Office because we want to -- we want to go to
11 their homes and have uncomfortable conversations with
12 them --

13 (Laughter.)

14 JUSTICE ALITO: -- which is what has been
15 alleged here, would you release that information?

16 MR. MCKENNA: We would not, Justice
17 Alito. We would not release it because they can come to
18 the office and have uncomfortable conversations with
19 them --

20 (Laughter.)

21 MR. MCKENNA: -- which I can personally
22 attest happens with some regularity.

23 (Laughter.)

24 JUSTICE SCALIA: Isn't that information, at
25 least the names of those people -- isn't it probably

1 public information anyway?

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

4 JUSTICE SCALIA: Can it be obtained under
5 the Freedom of Information Act in this case?

6 MR. McKENNA: Yes, it can. Their names,
7 their office locations, their office phone numbers,
8 their office e-mails is all a matter of public record in
9 our State.

10 Thank you very much.

11 CHIEF JUSTICE ROBERTS: Thank you, General
12 McKenna.

13 Mr. Bopp, you have 2 minutes remaining.

14 REBUTTAL ARGUMENT OF JAMES BOPP, JR.,

15 ON BEHALF OF THE PETITIONERS

16 MR. BOPP: Thank you. First a clarification
17 of what we sought in the preliminary injunction. We
18 were -- we sought to base our preliminary injunction on
19 both count 1 and count 2. Of course, the district
20 court and the Ninth Circuit did not reach -- in either
21 case -- reach count 2.

22 Secondly, with respect to whether or not
23 there's any conduct here, I don't think signing a
24 written statement is conduct. And, of course, by signing
25 the statement, the person is adopting the statement on

1 the petition, one of which involves their preference on
2 the referendum, and the second is the -- the request
3 that the matter goes on the ballot. And, of course, it has
4 no legal effect unless 122,000 make the same political
5 statement.

6 Third, evidence of harassment comes in,
7 as in Citizens United, because the weight of the
8 interest that is required depends upon the burden of the
9 First Amendment -- to the First Amendment speech
10 involved; and this Court specifically referred in
11 Citizens United to the lack of evidence of harassment of
12 the donors that might occur if they were disclosed
13 through the reports which Citizens United upheld.

14 Here we do have evidence of harassment, and
15 we believe that that requires a greater burden in the
16 First Amendment analysis --

17 JUSTICE GINSBURG: But that's out of the
18 case up till now. That's count 2. You put it in your
19 pleading, but it wasn't reached by the court.

20 MR. BOPP: Actually not. Many is the case --

21 JUSTICE GINSBURG: So everybody agrees
22 that that's still in the case.

23 MR. BOPP: Yes, but it is relevant to count
24 1. Bates, for instance, looked to the evidence of
25 harassment in protecting the membership list of the

1 NAACP from disclosure.

2 JUSTICE GINSBURG: The court did not rule on
3 whether there was a risk of harassment here.

4 MR. BOPP: Well, that --

5 JUSTICE GINSBURG: It dealt only with count 1.

6 MR. BOPP: That is -- that is true, Your Honor.
7 There are -- there were several First Amendment claims
8 made -- made under count 1, and this decision was --
9 was based on other claims.

10 I see my time is up. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

12 The case is submitted.

13 (Whereupon, at 11:08 a.m., the case in the
14 above-entitled matter was submitted.)

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A	affidavit 13:5 59:3 affidavits 58:18 affiliation 19:14 affiliations 4:25 afraid 29:7 agency 13:6 18:2,4 19:10 20:9 ago 23:15 agree 9:1 11:2 47:21 52:19 agrees 61:21 ahead 7:5 42:3 aimed 48:21 AL 1:3,7 Alito 15:22 16:5 16:7 19:9,19 35:7,21 36:13 36:21,23 37:1 37:2,6,7,16 41:21 42:7,10 42:13 44:4,11 49:10 50:7,25 51:8,10 54:6 54:13,22,25 55:5,18 56:22 57:2 59:7,14 59:17 Alito's 16:13 alleged 59:15 allow 36:15,15 39:24 56:6 allowable 39:15 allowed 23:16 46:6 allowing 59:4 allows 35:24 ambiguous 14:25 amendment 3:13 4:5,12 5:5 5:20 7:13,15 8:4,10 9:25 11:14 12:13,23 14:6 17:18	18:8 19:7 21:21 22:8 29:21 32:23 33:5,8,24 34:2 34:3 35:9 36:3 37:3,13 38:2 39:11 46:9 61:9,9,16 62:7 amicus 50:21 amount 12:12 analysis 4:5,12 4:15 5:6,20 7:13,16 9:23 18:8 29:21 61:16 answer 7:6 25:6 39:17 50:25 54:7 answerable 54:18,19 anybody 36:3 37:13 54:20 anyway 60:1 an-applied 38:13 appeals 40:3 53:23 APPEARAN... 1:15 applicability 32:25 application 7:22 applied 7:24 applies 11:15 19:7 apply 7:13 40:2 appropriate 4:5 approval 59:2 approved 47:9 April 1:10 archiving 30:16 area 17:25 56:24 arguing 42:2 argument 1:13 2:2,5,8 3:4,7 30:2 43:24	60:14 Arkansas 41:13 Asian 55:16 aside 4:21 6:16 asked 9:18,19 21:2 33:23 47:18 55:6 asking 10:2 12:18 18:24,25 19:1 29:20 37:2,3 46:25 aspect 5:11 aspects 4:18 assessing 8:2 16:24 assist 36:18 51:19 assisted 45:21 46:1,3,6 associating 10:23 11:10 association 4:13 4:20 10:23 16:22 17:24 18:13 associations 3:15 assuming 25:5 assumption 51:18 assured 42:3 as-applied 39:18 39:19,25 40:11 41:25 attention 15:10 30:7 attest 59:22 Attorney 1:18 24:6 26:16 59:9 attorneys 59:9 auditor 52:9 Australian 33:14 availability 35:23	available 10:12 25:13 30:11,18 31:7,15 32:10 55:10 avoid 15:14 aware 49:2 58:1 a.m 1:14 3:2 62:13
			B	
			back 9:17 16:16 21:8 bad 28:5,7 29:13 badge 13:2 58:17,23 badges 59:3 balance 29:24 ballot 5:15 6:25 7:25 10:25 12:10 13:17 15:20 16:21,23 33:14,20,22 35:1,10,16 37:19 39:14 41:15 42:22 44:23 47:24 49:9 52:5 53:17,18 54:24 56:16 61:3 base 60:18 based 42:21 56:17 62:9 basic 46:22 basis 16:14 38:9 38:20 Bates 61:24 begins 30:13,19 behalf 1:16,19 2:4,7,10 3:8 19:2 30:3 60:15 belief 14:17 beliefs 3:14 4:2 4:14 14:11 28:9 believe 5:4,19 33:8 37:5,15	

42:17 48:2,14 54:11 56:19,19 59:1 61:15 benefit 6:20 benefits 45:8 big 13:8 47:11 bit 49:21 blocked 16:1 blue 12:10 board 37:20 bombed 37:24 bond 8:7 Bopp 1:16 2:3,9 3:6,7,9,18,21 4:1,3 5:2,4,19 5:25 6:4,21 7:4 7:7,21 8:5,11 8:25 9:8,13,22 10:7,20,22 11:5,9,13,17 11:20,24 12:2 12:17,20 13:11 13:20,23 14:5 14:8,13,20 15:3,16,22 16:2,12 17:3 17:10,15,19 18:6,12,20 19:3,17,20,25 20:4,6,12,15 20:21 21:2,5,7 21:14,19,22 22:1,5,10,14 22:19 23:3,16 23:25 24:5,8 24:14,24 25:2 25:11,25 26:4 26:8,18,21 27:4,12,20 28:4,7,13,17 28:23 29:1,9 29:15,20,25 60:13,14,16 61:20,23 62:4 62:6,11 box 15:6	boycott 13:18,19 14:13 38:23 39:8,12,16 boycotted 37:25 boycotts 39:10 break 57:11 Breyer 21:8 37:17 38:5 39:18 brief 10:11,12 10:14 14:1,15 15:11 35:23 48:1 50:21 52:12 56:10 57:5 bring 30:7 39:18 41:25 42:8,18 43:19 54:5 brochure 18:21 Buckley 3:22 4:16 6:5 9:22 11:17,20 12:21 12:25 13:12 17:4,8,9,11 54:5 58:15,16 burden 61:8,15 Burdick 53:19 53:20 54:1 business 38:22 39:7,12,13 58:9 businesses 13:18 37:24 button 13:8 <hr/> C <hr/> C 2:1 3:1 California 16:17 17:6 20:20,21 20:23 21:3 22:23 32:14 44:7 call 15:10 32:14 called 59:7 calling 55:3 calls 12:14 campaign 3:17	29:10 33:2 34:14 40:23 campaigning 40:22 candidate 5:14 6:8,10 candidates 5:22 5:25 6:4,7 35:4 candidate's 5:18 53:24 capable 51:20 cares 27:23 case 3:4 4:18 9:16 11:11,14 13:13,14 18:9 19:18 31:19 35:5,18,20 38:4,19 39:24 40:4 41:5 42:15 43:15 44:16,16 46:8 47:22 51:17 54:10 60:5,21 61:18,20,22 62:12,13 cases 7:16,17,19 50:24 52:12 case-by-case 38:9,20 cast 54:15 category 53:8,9 caucus 35:3 cause 38:14,15 ceiling 8:21 central 15:21 37:20 century 12:8 21:22 22:2 33:13,19 certain 6:17 9:12 12:4,12 48:18 49:3 certainly 5:5 13:4,10 15:19 37:25 certification	24:12 certified 24:13 cetera 4:25 24:13 challenge 7:14 7:18,19,20 24:21 25:7 38:13,25 39:19 39:19,21,25 40:11 41:25 challenges 46:3 challenging 7:21 7:23 21:1 Chamber 16:21 chance 37:24 change 27:19 check 19:23,25 20:9,15 50:17 checking 31:16 Chief 3:3,9 7:3,5 7:11 8:1,6,19 22:6 29:25 30:4 31:24 32:11 33:3,7 33:23 34:1,5,9 34:12,19 35:8 39:17,23 40:9 40:16 45:5,10 45:12,18,21,25 48:7,19,24 56:4 57:13,16 57:20 58:4 60:11 62:11 children 37:25 chill 34:7,13,13 34:17 chilling 34:11,20 34:23 choose 18:16 chooses 51:13 choosing 39:16 chose 21:23 chosen 21:17 53:15 Circuit 17:4,10 27:21 60:20	circulate 42:2 circulated 44:5 circulating 40:21 41:22 circulator 15:15 48:6 circulators 17:5 58:19 circulator's 58:20 cite 14:1 43:15 52:12 cited 41:2 47:25 citizen 54:20 citizens 3:13 18:2 36:15 37:18 38:7 61:7,11,13 civic 12:13 56:7 civil 41:14 Claiborne 13:25 39:11 claim 8:2 claimed 50:23 claiming 26:24 claims 62:7,9 clarification 60:16 Clause 46:11,19 46:21,23,25 clear 50:8 clipboard 12:22 close 57:24 closed 37:21 collect 55:25 collecting 42:9 collector 11:6 Colorado 58:18 come 25:18 59:17 comes 37:9 61:6 comfort 39:20 comment 19:11 Commerce 16:22 committee 10:24
---	--	--	---	--

communicated 46:13	construed 53:15	couple 7:12	date 40:6	10:3 23:4
community 37:21	contact 36:20	courage 12:13	days 46:12	digitized 30:17
companies 58:5	contention 51:18	21:12	dead 23:23	30:17 49:13,15
company 57:10	contrast 59:3	course 15:17	deal 25:23	diminished 14:4
57:18 58:7,9	contribute 6:8	17:6 19:25	dealing 9:6	Direct 48:1 57:5
58:10	contribution 27:22	20:2 34:25	deals 41:10	directing 47:5
comparable 43:16	contributions 3:17 9:11	39:10,15 40:1	dealt 9:22 62:5	disclose 14:10
compared 58:23	34:14	41:12 43:3	debate 27:11	19:12 22:1
compelled 3:14	contributor 9:19	47:12 48:4	debt 8:21,21	28:9 33:4 44:8
29:21	9:20	51:23 53:19	decide 8:1 14:19	disclosed 13:10
compelling 18:17,18,20	contributors 8:15	54:16 56:15	44:18 49:9	17:9 23:22
complaint 9:7	controlled 46:9	60:19,24 61:3	decided 22:7	27:24 34:14,16
38:7	controversial 42:20 44:23	court 1:1,13	49:4	38:21 58:20
complicated 16:18	45:14,22 46:7	3:10,21 4:4,15	decision 15:8	59:5 61:12
component 54:8	conversation 36:6	6:5 12:25 13:7	17:2,4 53:20	disclosing 17:5
54:9,14	conversations 59:11,18	18:7,8,22 25:9	58:17 62:8	38:13,25 39:9
comprehensive 33:2	convince 27:19	25:12,15,21,23	dedicated 8:12	disclosure 3:14
computer 8:13	correct 4:23	26:13,20 30:5	democracy 12:12 28:6	3:17,22 4:22
49:25 50:8	15:12 17:12	34:25 35:5,13	29:7 48:1 57:5	6:6 9:11 13:13
computers 50:9	20:11 22:16	35:18 38:7,20	demographic 19:16 55:8	20:17,20,22
conduct 7:8 19:5	24:23 31:18	40:3,3,6 41:4	demonstrate 43:5	22:12,17 23:2
47:6 53:25	32:17 39:21	42:18 43:20,20	demonstrated 38:15 58:3	26:25 29:21
60:23,24	41:8 49:13	44:6 53:21,22	depend 31:3	32:16,20 40:10
conducts 25:15	correctly 13:11	53:23,23 58:17	36:7	44:9 49:16
26:13	counsel 7:3,11	58:22 60:20	depends 61:8	51:25 56:12
confidentiality 24:18	17:22 32:11	61:10,19 62:2	described 13:12	59:2 62:1
Congressional 46:17	33:3 39:17	courts 20:23	describing 17:24	disclosures 58:24
considered 46:21	45:19	41:5	detecting 49:12	discourse 18:15
considering 10:8	count 9:6,9	Court's 59:1	49:15	discover 57:23
consistent 36:2	25:12,16 38:6	Co-Responde... 37:8	determination 35:19 36:25	discovered 30:8
37:12	38:6 41:4,5,9	create 17:22	51:20	50:22,23 52:14
consists 11:15	60:19,19,21	created 4:9 18:9	developed 46:10	discuss 36:16
constitutional 4:5 10:1 17:23	61:18,23 62:5	32:22	died 23:15	discussion 15:15
32:23 35:2,17	62:8	criminal 29:17	differ 9:18,19	35:25 58:25
constitutionally 10:1 33:23	counted 25:9	criticism 3:25	38:4	disk 31:15
	counterpart 9:10	12:14 28:8,25	difference 5:11	disks 30:18 31:6
	country 33:12	44:13	5:24 26:23	31:9
	52:3,12	criticize 28:2,16	46:22 47:11	dissuaded 41:23
		49:25	56:8	distribute 18:21
		crowd 8:23	different 5:21	distribution 7:1
		cut 47:13 57:10		district 41:4
				60:19
		D		divine 56:16
		D 3:1		documented 50:21
		database 50:13		

Doe 1:3 3:4	engaged 36:5	executive 25:21	7:13,15 8:4,10	22:10,13 24:7
doing 21:16	engages 18:15	exercise 12:15	9:15,23,23,24	26:16 30:1,2
36:18	England 35:3	existed 32:15	10:3 11:14	32:25 38:24
domestic 45:8	ensure 24:12	existence 12:8	12:7,13,22	60:11
dominant 15:18	enter 12:18 44:8	expensive 51:4	14:6 15:4	generally 4:9
donors 61:12	episodes 40:17	explain 5:10,23	16:17 18:8	48:11
door 10:4	erroneously	exposed 3:25	19:7 21:21	General's 59:10
dozen 45:2,4	25:8	expressive 53:24	22:8 26:15	genuine 20:10
dozens 52:2	error 52:7,12	e-mails 60:8	29:21 30:9,15	Ginsburg 9:5,9
due 12:20 15:3	errors 30:8		33:5,8,24 34:1	9:14 10:2,10
17:8	52:13		34:3 35:9 36:3	10:21 11:1,6
D.C 1:9	especially 57:6	F	37:3,12 38:2	12:24 14:12,14
	ESQ 1:16,18 2:3	facial 7:14,18,20	39:11 46:9	14:21 15:10,17
	2:6,9	facilitate 55:17	54:22 60:16	17:7 22:14,24
E	essentially 46:24	fact 12:7,12	61:9,9,16 62:7	23:11,20 24:3
E 2:1 3:1,1	et 1:3,7 4:25	30:11 34:15,24		24:6,20 25:20
early 46:12	24:13	49:5 53:15	Florida 41:13	26:2,5,14,20
easier 36:20	ethnic 56:9	58:1 59:4,5	follow 19:9	29:12 31:11,14
effect 34:11,21	ethnicity 56:14	facts 13:12	forbids 21:21	40:8,15 41:3,9
34:23 54:11	56:17	fail 7:19	form 36:10,12	41:12 44:21
61:4	evaluate 38:9	fails 7:20	47:5 56:21	45:2 53:7 54:4
either 7:16 12:9	evaluated 38:8	fall 3:24	forms 40:5	61:17,21 62:2
15:5 18:21	everybody 29:7	family 29:10	41:16 50:19	62:5
60:20	61:21	far 35:22 55:5	51:14 56:16	Ginsburg's 54:7
elected 54:15,17	evidence 17:15	favor 16:15	forward 49:8	give 27:22
electing 6:14	17:19 25:18	18:25 46:1	found 4:6 52:6	given 7:12,14
election 7:9	40:13,14,17,17	47:22,23 48:21	53:23 58:22	go 7:5 16:16
15:14 19:5	40:20,24,25	53:17	fraud 30:8 49:12	21:8 22:25
36:1 47:6,9	41:17 42:12,19	favorably 58:23	49:15 52:6,7,7	24:11 25:9
55:4,11	42:24 43:10,18	fear 41:24	52:13 54:25	35:22 49:8
elections 19:5	44:2,12,19	fears 41:23	55:1 56:24	51:3 55:6
electronic 50:12	45:23 61:6,11	feature 32:16	fraudulently	56:18,18 59:10
50:16	61:14,24	feel 26:1,10	49:19 51:3	goes 52:24 61:3
element 53:14	evidently 21:10	feels 26:10	freedom 4:19	going 7:19 8:9
elements 4:15	exact 9:22	field 12:19	60:5	8:22 9:17 10:5
53:10,10	exactly 50:14	figure 53:11	fully 46:10	15:25 24:19
eliminate 29:18	55:3	filing 20:7	fundamentally	25:22 26:15
employed 4:15	example 8:7	filings 13:5	54:12	31:16 34:8
employees 16:20	31:19 43:15	finance 33:2	fundraising	42:4,6 43:6
57:9 58:11	44:3,16 45:22	find 25:8 57:16	10:16 11:2,7	45:13 47:19,22
employer 19:17	47:25 57:9,23	58:13	further 15:15	49:6,8
enacted 33:2	examples 8:18	finding 20:10		good 22:3 37:24
encourage 8:16	exception 4:9	27:18 52:8	G	49:7
encouraging	9:10,25 10:6,7	fine 21:24	G 3:1	gosh 58:10
27:10	24:15	finish 7:6 54:6	gathering 57:25	gotten 43:4
endorse 36:23	excited 8:9	firm 52:21	57:25	government
engage 18:24		first 3:12 4:5,12	gay 41:14	
19:1 35:24		5:5,20 6:22	general 1:18	

14:10 18:16,17 18:24 19:1,3 28:8 30:8 46:24,25 47:4 governmental 4:6 5:7,21 7:2 7:7 19:21 granted 39:24 greater 34:23 61:15 green 48:1 57:5 group 4:11 9:3 11:10 18:1 37:18 56:9	high 37:20 44:17 highlighted 15:6 Hispanic 55:15 history 34:16 44:24 46:18,21 50:16 holding 16:15 home 59:8 homes 59:11 Honor 62:6 house 8:23 hundreds 8:18 hypothetical 6:17 44:2,3,5	21:11 impression 49:13 inadequate 26:11 incidents 40:12 include 56:1 including 39:3 58:19 income 19:15 Indiana 1:16 indicate 7:15 15:13 48:16 individual 4:11 individuals 38:14 43:13 industry 57:11 information 6:9 6:22,24 8:14 17:14,20,21 19:16 24:2 27:13 37:8 38:21 49:21 50:1,14 51:15 55:8,14,25 56:1,6,23,23 57:15 59:15,24 60:1,5 informational 55:2,24 56:1 informed 17:2 initial 10:8 initiative 4:8 6:12 9:1 10:18 13:22 16:18,25 22:20 23:2 27:23 29:10 32:5,14,21 33:1 39:5 47:4 47:23,23 initiatives 22:18 44:23 45:3 injunction 24:16 40:2,4 42:9 43:14 44:20 60:17,18	input 22:21 insight 37:9 insist 43:9 instance 5:6 6:8 19:4 61:24 instances 23:12 instructions 23:17 integration 37:22 interactive 58:25 interest 4:7 6:3 7:2,8 14:3 17:13 19:21 27:6,7,10,18 27:21 33:10 34:4 36:8,9 47:14 49:11 54:13,16,20,21 54:25 55:1,3 55:10,14,24 56:1,11,14,18 61:8 interested 6:18 6:20 interests 5:8,21 6:6,9 29:23 33:6,8,24 34:2 35:9 36:14 intermediaries 57:6,23 58:13 intermediate 54:2,3 Internet 8:14 41:17 42:5 50:6 intervenors 24:15 intimately 5:13 intimidate 8:17 intimidation 3:13 4:14 13:15 40:12,18 intrusion 8:4 invalid 5:17	25:19 invalidate 4:22 inviting 18:1 involve 20:16 25:20 26:20,22 involved 5:22 6:1,5 14:9,9 27:1,4 61:10 involves 8:7 61:1 involving 40:19 43:16 45:23 in-your-face 13:8 Iowa 35:4 isn't 17:13 54:19 issue 8:3,7,21 9:4 27:11,17 44:19 45:14 46:23 52:20 it's 18:18 54:25 I'd 27:7 30:6 35:21 47:16 I'll 49:9 I'm 4:17 10:2
H	I			J
half 45:2,4 hall 35:2 hand 12:9 happen 52:11 happened 42:21 44:7 59:1 happens 59:22 harass 8:17 harassed 9:12 9:20 38:1 43:11 harassment 3:11 4:10,18,21 8:18 10:5 13:14 41:10,20 42:15 43:1,7 44:25 61:6,11 61:14,25 62:3 harassments 38:10 Hardware 13:25 39:12 Haute 1:16 Hawaii 53:22 hear 3:3 heard 21:5 heart 52:24 heat 58:24 held 11:14 15:14 18:22 48:14,25 53:21	ID 51:5 idea 22:4 49:8 53:1 identified 13:4 identify 27:15 identifying 49:21 identity 3:14 4:13 14:11 28:9 29:22 II 11:17,20 12:21,25 13:12 17:4,8,9 54:5 58:15,16 illegal 5:1 imagine 43:12 immediately 31:15 immigration 55:13 implicate 33:5 implicated 33:9 33:25 34:7 35:9 implicit 11:3,9 importance 58:2 important 4:6 27:14 30:9 48:2 52:8 58:13 imposition			JAMES 1:16 2:3 2:9 3:7 60:14 job 26:11 52:22 John 1:3 3:4 50:3,5 56:25 57:3 Jones 50:3,5 56:25 57:3 JR 1:16 2:3,9 3:7 60:14 judge 19:5 44:18 judgment 32:18 judicial 25:4,13 25:15 26:12,15 July 31:21,21 Justice 3:3,9,16 3:19,23 4:2,17 5:3,10,23 6:2 6:15 7:3,5,11 8:1,6,19 9:5,9

10:10,21 11:1	47:12,16 48:7	53:2,2,16,18	33:10	man 15:9
11:6,13,18,23	48:19,24 49:10	55:6,15,19,19	letter 18:2,5	manager 29:10
11:25 12:3,18	50:7,25 51:8	55:21,22 56:3	letting 14:19	39:13 40:23
12:24 13:16,21	51:10,17,23,24	56:19,20 57:3	let's 41:21 55:12	managers 13:19
13:24 14:6,12	52:2,16,18,20	57:4,4,5 58:10	level 19:15	manifest 8:25
14:14,21 15:10	52:25 53:4,7	58:10 59:7	44:14,15 54:1	manner 17:24
15:17,22 16:5	54:4,6,7,13,21	knowing 6:19	54:2	Manufacturers
16:6,7,13,13	54:25 55:5,18	17:13 33:10	light 12:7	16:22
17:7,12,16,22	56:4,22 57:2	54:17,22 55:3	limited 7:2,7	map 8:13
18:10,14,23	57:13,16,20	56:14 58:2,5	17:25 23:9	MapQuest 8:14
19:9,10,19,22	58:4 59:7,14	known 29:8	line 16:16	marginal 6:22
20:2,5,8,14,18	59:16,24 60:3		list 10:12 23:13	6:24 17:21
20:25 21:4,6,8	60:4,11 61:21	L	24:11,17 26:6	27:13,21,24
21:9,15,20,24	62:2,5,11	lack 61:11	31:17 37:14	marital 19:14
22:3,6,14,24	Justices 47:18	Lambda 50:21	49:16,19,22	marriage 10:13
23:11,20 24:3	justify 19:21	large 57:9,12,17	61:25	15:9 41:14
24:6,9,19,20	JUSTINE 61:17	late 35:15	listing 5:14	45:8
25:1,5,20 26:2		Laughter 28:3	lists 4:23,25	Maryland 52:4
26:5,14,20	K	28:22 29:5	10:16,19 23:23	Massachusetts
27:3,5,15,25	keeping 14:3	53:6 59:13,20	50:2	41:13 50:18
28:5,10,15,19	47:14	59:23	little 37:18,18	52:4
28:24 29:3,6,9	Kennedy 13:16	law 6:13,23,23	49:21	matter 1:12 6:13
29:12,13,16,25	13:21,24 14:6	9:24 10:1,9	lives 49:24 50:3	7:9 8:2 14:11
30:4,22,25	16:6,13 17:12	15:8 20:20,21	50:5	36:16 60:8
31:1,5,11,14	17:16 32:1,4,7	22:12 33:4	living 29:11	61:3 62:14
31:24 32:1,4,7	32:12,18 38:22	36:1 46:3,5	locations 60:7	matters 16:18
32:11,12,18	39:7 46:8,15	47:8,23 48:9	long 10:4	McIntyre 18:21
33:3,7,12,15	46:20 47:12,16	48:12,21,24	look 26:16 31:8	18:24
33:16,18,19,21	51:17,23,24	50:19 54:10	43:8 44:3,6	McKENNA
33:24 34:1,5,9	52:2	laws 4:22 49:3	46:11,15,18	1:18 2:6 30:1,2
34:12,19 35:7	kind 6:16 13:8	leave 17:16 53:1	50:11,11 52:14	30:4,24 31:2
35:8,21 36:13	kinds 6:19 46:22	legal 61:4	54:1 56:15	31:13,18 32:3
36:21,23 37:1	knew 12:11	legally 25:7	57:8,24	32:7,17,21
37:2,6,7,16,17	know 5:13 6:12	legislate 12:15	looked 53:19	33:7,15,18,21
38:5,12,18,22	6:23 8:21 9:4	legislating 11:16	61:24	34:3,6,12,22
38:24 39:4,7	14:25 15:6	12:1	looking 50:10	35:12 36:7,19
39:17,18,23	16:19 17:17	legislation 11:16	lose 9:15	36:22,24 37:5
40:8,9,15,16	19:3 23:14	11:18 16:11	lot 19:4 23:23	37:15 38:5,18
41:3,9,12,21	26:22 27:7	legislative 5:12	lower 41:5	39:2,5,10,22
42:7,10,13,23	28:1 29:6 34:6	12:16 54:11,11		40:1,13,19
43:3,9,12,17	34:7 35:1,12	legislator 46:13	M	41:7,11 42:7
43:22,25 44:4	35:14,15,16,17	legislature 15:23	M 1:18 2:6 30:2	42:11,17 43:2
44:11,21 45:2	35:21 36:11	16:10 36:25	Main 50:4,5	43:8,12,19,25
45:5,10,12,15	40:22 43:21	47:8	majority 22:7	44:11 45:1,7
45:16,18,21,25	44:2 47:19,19	legislature's	making 17:1	45:11,15,17,20
46:8,15,20	47:24 49:7	46:5	18:4 43:23	46:2,14,20
	51:15 52:1	legitimate 27:6	55:10	

47:16 48:13,22 50:7 51:7,10 51:22 52:1,18 52:24 53:14 54:9,21 55:1 55:18 56:13 57:2,14,19,22 58:8 59:16,21 60:2,6,12 mean 15:1 23:20 27:23 28:19 29:17 51:24 56:15 meaning 15:8 25:6 means 49:25 53:16 measure 6:25 9:3 10:25 13:17 15:19 39:14 40:23 42:18,20,22 43:16 45:7 54:24 57:10,10 measures 35:25 41:1,14 45:21 46:7 member 23:13 26:5 members 9:12 37:10 56:9 57:11 membership 61:25 mentioned 49:12 mere 14:17 mind 49:1 minds 27:19 minorities 22:9 minute 23:14 minutes 60:13 misled 50:24 missed 23:12 25:22 26:17 52:10	mistakes 52:8 modern 8:12 modified 27:9 moment 58:25 58:25 money 7:8 morning 3:4 motion 42:8 moved 29:14 moving 43:13 <hr/> N N 2:1,1 3:1 NAACP 18:9 44:16 62:1 name 11:2 13:3 13:10 19:12,22 20:3,4 34:10 34:16 36:4,12 39:9 42:4 49:19,22 51:3 51:5,9 53:24 56:17 57:17 58:17,20 names 11:7,12 13:13 14:4 19:24 22:17 28:1 38:14,25 39:20 40:10 42:3 43:4,5 44:9 50:22 55:15,16 57:8 59:25 60:6 nasty 12:14 National 16:22 nature 42:20 necessarily 15:1 necessary 35:18 need 25:23 26:25 32:20 53:2 55:19,19 55:21,22 56:19 56:19 needs 36:11 neighbor 23:15 never 12:19 35:13	new 4:24 5:12 5:15 12:19 35:3 Ninth 17:4,10 27:21 60:20 nominating 39:3 non-speech 53:10 54:8,9 54:14 notice 13:25 noticing 26:6 number 12:4 19:13 23:9 36:5,9,10,17 51:5 54:23 55:20 57:4,9 57:17 numbers 57:12 60:7 <hr/> O O 2:1 3:1 object 24:16 objecting 20:6,8 20:12 objection 38:13 observe 23:9,18 25:25 26:9 observer 26:8 observers 23:9 23:10,18 25:25 26:3,9 50:10 obtain 31:23 40:4 obtained 41:16 50:19 60:4 occupations 6:19 occur 61:12 occurred 58:24 office 6:10 59:8 59:10,18 60:7 60:7,8 official 23:12 oh 25:1,22 29:3 29:4 Okay 20:5 21:7	29:1 old 52:8 Olympia 1:18 once 6:10,25 55:22 one-way 29:1 online 50:16,20 51:13,14,16 open 9:15 10:4 opined 12:21 opinion 48:24 opponents 13:17 38:15 40:7 opportunity 9:21 48:3 opposed 16:11 46:1 48:11,12 opt 19:6 options 19:4 20:19 oral 1:12 2:2,5 3:7 30:2 order 14:22 15:20 24:18 25:24 36:12 40:6 44:8 organizations 9:12 10:15 37:11 organize 13:18 outcome 39:8 outside 8:23 56:24 O'Brien 53:9 54:2 <hr/> P P 3:1 page 2:2 10:13 15:11 paid 13:2,9 16:20,23 17:5 17:14 57:25 pardon 32:13 part 5:15 9:15 10:3 12:1,5,16 16:24 28:10	32:4,8 33:1 participate 23:6 56:6 participating 3:12 particular 4:11 6:20 8:8 9:1,4 13:17 27:16 37:10 38:14 39:14 42:15,20 49:23,24 56:9 57:11 58:6 particularly 52:21 partner 45:8 party 4:25 12:11 38:19 44:16 pass 18:3 passage 15:8 passed 16:10 23:21 32:6 passes 15:23 passionate 9:4 paying 57:24 peculiar 22:15 pending 39:20 40:10 45:4 people 6:8,19,25 7:24 8:8,17 12:11 14:19 15:20 16:8 21:9,10,17 23:19 24:13 25:18 26:6,16 27:16 28:15,15 29:22 31:9 33:9,11 35:11 36:15,20 38:3 38:16 40:21,22 41:23 42:3,21 45:13 47:21 48:1,5,8,13,20 49:2 50:20 52:14 53:1,3 55:7,11,15,16 56:5,7 57:17
--	---	--	---	--

<p>58:6 59:25 people's 21:11 25:19 percent 8:22,22 48:17,17,20,23 percentage 16:10 48:7,8 48:13 perfectly 29:19 permit 4:24 37:4 37:5 permits 5:13 person 3:11,24 11:21 12:3,21 15:2,25 18:15 19:24 39:15 49:20,23 56:15 60:25 personally 59:21 persons 17:17 35:25 person's 10:17 36:4 37:14 49:22 persuade 27:8 pertinent 17:20 pesky 14:22 petition 5:8 7:1 8:24 10:23 11:4 13:13 15:12,15,25 16:9 20:7,10 27:8 31:20 32:9 34:10 36:3,10,11,17 37:13,19,23 38:17,25 39:2 40:5,24 41:1 41:15,22 42:2 42:16,25,25 43:6,10 44:5 45:6 46:11,18 46:21,23,25 47:5,22 48:8 48:20 49:5 50:11,19 51:9</p>	<p>51:14,20 53:16 54:8,19 56:16 56:21 57:1 58:7,12,19,20 61:1 petitioner 18:15 Petitioners 1:4 1:17 2:4,10 3:8 24:10,10 38:6 39:24 41:2 43:14 48:4 58:15 60:15 petitioning 46:24 47:1 petitions 5:14,17 7:22,23,24 17:6 20:22 22:2,13 23:2,6 25:8 30:10,15 35:24 39:3,5 40:21,23 41:19 45:24 46:12,17 46:22,23 47:3 47:7 50:22 52:5 59:5 phone 12:14 60:7 phony 19:23 picket 13:18 placate 14:23 place 32:15 47:9 placed 15:20 places 35:14 placing 10:24 plain 52:8 planned 13:14 planning 42:22 play 58:13 pleading 61:19 please 3:10 18:3 30:5 47:1 plenty 49:2 point 8:19 17:12 21:25 27:16,17 41:24 48:5 54:4 58:14</p>	<p>pointed 37:22 points 16:14 policy 36:22,24 37:3 political 3:12 4:2 12:15 15:5 18:15,25 19:7 19:14 29:8 37:10 61:4 poll 16:8 portion 7:17 position 28:16 51:23 positions 28:12 29:8 possible 16:3,5 27:6,12 30:21 38:21 42:8 48:22,23 possibly 43:5 potential 4:14 9:2 34:7 potentially 4:3 18:6 precedents 46:9 predominantly 37:9 preference 61:1 preliminary 40:2,4 43:13 44:20 60:17,18 present 4:7 5:8 25:18 preserve 7:8 presidential 35:4 press 57:6 58:12 pretty 47:10 prevail 7:16 primarily 56:9 principle 3:24 privacy 4:13,13 4:20 10:17 24:20 private 3:15 10:22 14:4</p>	<p>18:12 47:15 probability 4:10 38:10 probably 33:25 36:19 59:25 procedurally 42:8 procedure 19:6 23:25 26:9,18 26:22,24 27:2 29:18 44:22 procedures 20:15 26:24 process 11:15,24 12:1,16 18:25 19:2 23:7,19 24:12,22 25:18 26:1,10 30:11 30:12,19,20,24 31:2,7 32:15 50:9 56:7 processes 30:23 32:22 program 49:25 prohibited 18:4 23:10 53:21 prohibiting 44:8 Project 10:13 prominent 58:1 proponents 31:19 proposed 16:25 19:11,12 proposition 4:19 8:16 14:18 15:2 44:7 45:16 protect 12:14 15:8 22:8 protected 8:10 12:22 39:20 protecting 38:3 61:25 protective 24:18 40:6 protects 3:13</p>	<p>prove 25:9 42:13 provide 19:6 22:21 57:14 provided 34:15 41:17 provides 23:5 37:9 providing 55:14 56:24 Proving 21:24 public 4:24 5:15 5:16 7:9,22 12:8 13:13 15:14 16:19,20 17:6 18:5 20:9 20:16 22:11,21 22:22 23:1,5,8 23:13,22 25:3 25:14 26:6,23 26:25,25 27:6 27:6,10,17 28:8,25 30:7 30:10,12 31:8 31:17 32:2,5,8 32:9,13,15,20 32:22,24,24 35:15 41:16 42:5 44:8 45:14 48:3,11 49:7,17 50:15 50:18,19 51:12 51:24 52:5,6 52:14,16,22,25 56:24 58:21,24 59:6 60:1,8 publicly 14:10 22:1 27:24 55:10 purpose 11:10 28:18 49:23 purposes 10:16 10:24 11:2,8 11:12 22:8 pursuant 32:1 pursue 39:25</p>
--	---	---	--	--

<p>put 7:24 8:14 16:20,23 36:4 37:19 41:16 42:22 46:17 47:24 48:9,11 49:19,21 50:6 50:20 51:4,13 51:14,15 53:17 57:21 61:18 putting 4:21 6:16 36:17</p> <hr/> <p>Q</p> <p>qualifies 6:25 qualify 54:23 quantified 48:15 question 9:17,23 16:14 19:10 21:5 30:6 37:3 47:17 49:10 51:1 54:7 questions 7:12 16:16 24:20 35:7 quickly 51:3</p> <hr/> <p>R</p> <p>R 3:1 raising 8:21 12:9 reach 35:19 60:20,21 reached 61:19 real 16:8 really 20:14 33:14 48:17 50:4 reason 15:1 28:10 reasonable 4:10 29:19 38:9 reasons 16:25 49:5 56:5 REBUTTAL 2:8 60:14 receiving 30:15 recognized 6:5</p>	<p>recollection 46:16 record 17:20 32:13 40:14,20 40:24,25 41:18 46:18 58:24 60:8 records 7:22 22:11,22 30:10 30:12 31:22,23 31:25 32:2,6,8 32:9,16,20,24 32:24 41:16 49:12,14 50:19 50:20 51:13 52:6,14,25 56:2 58:21 59:6 red 12:10 Reed 1:6 3:4 Reed's 10:14 referenda 22:18 referendum 4:8 6:16,17 7:23 8:3,7 10:24 11:11 12:4 15:25 16:9,18 18:19 20:19 22:20 23:2 31:19,20 32:5 32:14,22 35:23 40:20 45:6,25 46:3,4 47:3,7 48:9 49:4 50:1 54:10 55:12 56:8 61:2 referendums 5:9 referred 35:25 61:10 reform 19:1 33:2 regard 9:11 regarding 4:12 41:14 registered 34:15 34:24 50:5</p>	<p>55:20,22 registration 4:23,25 5:7 50:13,16 56:2 regularity 52:11 59:22 regulating 54:14 regulation 18:3 18:4 rejected 42:24 related 6:6 relationship 31:6 release 59:15,17 released 40:5 45:3 relevant 16:19 61:23 relies 5:15 religion 37:14 55:7 religious 37:10 remaining 60:13 reopen 37:20 repeal 15:13 20:19 48:21 reply 15:11 reports 61:13 representative 6:14 25:21 54:16,17,18 reprisals 10:5 38:10 republic 46:12 request 25:12 31:22 52:6 61:2 requested 52:5 56:8,20 requests 12:3 30:18 50:20 51:12 require 4:22 20:21 22:17 28:13,17 35:11 36:3 37:13,19</p>	<p>49:16 required 12:5 18:7 22:12 33:23 56:20 61:8 requirement 9:11 11:21 14:10 17:5 58:16,18,23 59:2 requirements 4:4 requires 5:14 20:20 61:15 requiring 3:17 28:9 59:4 rescind 18:3 research 47:25 48:15 58:12 researchers 57:7 reserve 29:24 resolution 39:21 40:10 respect 8:15,20 12:20 15:3 16:9 22:25 24:24 35:10 60:22 responded 24:20 Respondents 1:19 2:7 30:3 response 15:12 responses 7:12 responsible 28:11 responsive 6:11 rest 16:15 39:6 result 32:8 34:13,13,17 resulted 8:16,17 resulting 3:13 retaliation 41:24 reveal 35:11 revealed 34:8,10 35:14 42:5 revealing 33:9</p>	<p>34:20,21 reverse 15:7 review 4:24 18:1 25:4,13,15 26:12,15 reviewing 5:16 rid 14:23 right 3:23 17:23 17:23 18:12 20:3 24:13 25:6 32:12 35:2 38:2 39:4 43:2 50:8 rights 8:4 12:15 41:14 rise 44:13,14,15 risk 62:3 ROBERT 1:18 2:6 30:2 ROBERTS 3:3 7:3,5,11 8:1,6 8:19 22:6 29:25 31:24 32:11 33:3 34:1,5,9,19 35:8 39:17,23 40:9,16 45:5 45:10,12,18,25 48:7,19 56:4 57:13,16,20 58:4 60:11 62:11 Rock 37:18,18 role 25:3,14 58:13 room 29:11 31:10,10 rule 19:12 35:13 62:2 ruled 27:22 35:1 38:7,20 58:22 ruling 35:17 rulings 59:2 run 29:6 running 5:18 12:12</p>
--	--	---	--	--

R-71 15:7	second 15:5,17 61:2	sign 14:24 15:14 15:25 16:8	similar 41:1,13 45:6 59:4	60:17,18
S	secondly 55:2	18:18 21:12	simple 49:15,20	souls 23:23
S 2:1 3:1	60:22	28:21,24 34:11	simply 15:13,14	so-and-so 23:14
SAM 1:6	secret 33:14,20	42:6 48:2 49:5	48:2,14,24	speak 47:17
same-sex 41:14	33:22 35:1,10	50:23 53:15	51:2	53:13
45:8	35:16	signal 6:9	sir 52:18	speaks 40:24,25
satisfied 15:24	Secretary 1:6	signature 7:1	site 49:20 51:4	53:12
satisfy 55:25	3:5 10:14	11:6 14:17	situations 5:24	specifically 6:7
Saturday 31:21	23:17,21 30:14	35:24 53:11,12	38:8	10:13 22:12
saying 21:20	31:16 47:6	57:25,25	sleep 29:11	61:10
22:25 24:21	50:10 51:19	signatures 11:21	slim 16:14	speech 19:8 53:8
26:16 36:14	52:9,17,23	11:25 12:5	small 27:22	53:9,14 61:9
43:20 44:1	Secretary's	16:21 20:16,24	39:20	sponsor 10:18
57:23	10:12	25:3,19 31:3	social 47:24 57:7	sponsoring
says 9:20 13:2,9	section 30:16	42:9 51:21	Socialist 38:19	10:15
18:3 25:22	secured 36:1	54:23	44:15	sponsors 42:18
37:8 47:5	see 13:12 16:1	signed 8:23 27:7	soliciting 11:21	58:1,2,6
55:14	21:16 33:10	28:20 36:16	11:25	staff 50:10
Scalia 3:16,19	46:22 49:18,22	37:23 38:16	solicitor 13:1,3,4	stand 21:12,13
3:23 4:2 9:18	49:23 50:4	41:18 42:16	13:9 14:22,23	52:22
11:13,18,23,25	51:2,5,6 56:13	47:19 48:8,9	14:23 17:9	standard 44:17
12:3,18 19:22	56:25 62:10	48:20 51:3,9	solicitors 16:20	started 20:19
20:2,5,8,14,18	seeking 24:11	55:7,16,16,21	16:23	State 1:7 3:5
20:25 21:4,6,9	self-identify	55:21 56:25	solicitor's 13:3,9	4:22 5:11,13
21:15,20,24	11:22	57:10,12,18	somebody 41:21	5:16 7:8 13:4,6
22:3 27:25	sell 10:15 11:7	58:7,11,19	49:18 51:2,9	16:10,17 21:6
28:5,10,15,19	send 18:2	signer 47:5	51:12 54:19	22:15 23:12,16
28:24 29:3,6,9	sense 21:14	signers 10:23	55:14 59:7	23:18,21,23
29:13,16 33:12	22:11,13	14:3 15:13	somewhat 14:4	24:12 25:9,22
33:15,16,18,19	sensitive 29:4	22:17 23:14	soon 30:17	32:19 33:4,10
33:21 38:12,18	41:22 45:6	39:1 40:20,25	sorry 7:5 21:4,4	36:1,8,9,11
38:24 39:4	sent 31:9,10	41:1 42:25	29:9 58:4	43:16 44:21,24
42:23 43:3,9	sentiment 37:21	43:6,10 44:24	sort 4:19 34:10	45:9,20 47:6
43:12,17,22,25	separate 4:17	signer's 14:16	48:10	49:11 51:11,13
52:16,18,20,25	served 36:14	significant 7:17	sorts 19:14,15	51:16,19 52:9
53:4 59:24	set 45:23 49:20	8:3 34:18	Sotomayor 4:17	52:9,13,17,23
60:3,4	51:4	47:11 48:16	5:3,10,23 6:2	53:1,22 55:9
scheme 6:18	sheets 31:20	52:6	6:15 17:22	55:13,23 56:11
scholars 48:1,16	32:9	signing 11:3	18:10,14,23	56:14 60:9
57:5	shoulder 50:11	14:25 15:7	24:9,19 25:1,5	statement 10:14
school 37:19,20	show 9:21 10:4	41:24 47:21	30:22,25 31:1	15:17,18 60:24
science 47:25	side 10:18 12:22	54:8 60:23,24	31:5 45:16	60:25,25 61:5
57:7	28:20,23	signings 5:8	Sotomayor's	statements 15:6
screen 23:21	sides 28:14,18	signs 36:3 37:13	19:10	states 1:1,13
scrutiny 54:2,3	28:20	54:19	sought 24:15	4:24 15:7,7
Seattle 56:25				22:16 23:1,4

41:12,15,19 51:12 52:2 State's 6:2 14:2 24:21 25:21 26:15 30:14 54:13 56:17 State's 50:10 status 19:15 statute 4:9 15:23 15:24 16:1,9 22:20 24:1 stay 39:23 step 9:23 30:15 STEVENS 27:3 27:5,15 stop 14:14 store 48:6 street 29:2 50:4 50:5 strength 36:8 stressed 58:16 strong 44:12 47:14 54:16 strongest 49:11 struck 11:20 17:4 58:16 structure 32:5 subject 5:5,20 18:8 40:11 41:23 44:25 subjected 4:4 41:19 43:1,6 49:3 subjects 14:13 submitted 30:15 31:4,20,22 54:23 62:12,14 submitting 47:7 substitute 10:8 suffer 3:11 10:5 sufficient 7:9 15:19 19:21 29:23 42:11,14 44:10,19 54:23 55:20 sufficiently 4:6	suggesting 18:11 suicide 45:22 46:1,3,6 supplying 37:8 support 7:10 11:11 14:18,19 15:13 37:9 55:11 supported 13:19 13:21 17:18 supporter 15:2 39:14 supporters 8:13 9:3 44:6 suppose 22:6 37:17 39:8 56:16 Supreme 1:1,13 sure 46:16 49:6 suspending 47:8 55:4 suspension 36:1 54:10 system 3:12 35:4	Terre 1:16 terribly 8:9 test 54:3 Thank 3:9 29:25 60:10,11,16 62:10,11 that's 8:10 9:10 21:1 29:12 41:17 56:2 theory 4:21 there's 4:19 17:19 25:2 26:21 27:1 40:16,17 42:14 42:14,24 45:23 60:23 they'll 28:25 48:25 57:8 they're 8:8 18:20 26:24 30:17,17 31:13 42:5 47:19 thing 19:23 22:15 23:3,8 25:11 28:6 things 25:8 48:10 think 3:19 6:15 6:18,22 7:20 9:2 10:7 12:24 14:15,15 15:11 15:18 16:2,3 16:11,19 17:21 19:10 21:10 24:22 27:12,20 33:14 34:9,18 34:19,22 39:23 40:9 43:17,22 44:11,13,17 47:10 48:9,10 48:19,25 49:7 55:24 56:7,23 60:23 thinking 41:22 third 15:4 61:6 thought 9:6	17:10 21:1 23:11 33:22 35:8 36:13 56:4,10 threat 42:14,15 threatened 44:14 threats 29:11,14 38:10 three 5:24 41:15 41:19 till 61:18 time 29:24 30:22 31:8 32:19 42:4 44:22 62:10 told 35:9 top 15:6 topics 45:3 touchy-feely 29:4 town 35:2 trade 10:15 trial 44:18 tried 46:15 trigger 25:15 true 10:18 12:25 13:11 22:19 41:11 62:6 trust 52:17,22 52:25 53:4 try 27:8 trying 4:17 31:5 53:10 Tuesday 31:21 turned 39:13 twice 14:16 two 24:9,10 57:4 type 39:2 43:18 56:11	unconstitutio... 33:13 underlying 27:11 understand 20:25 30:9 56:22 union 16:20 57:12 United 1:1,13 38:8 61:7,11 61:13 upheld 3:21 20:22 39:11 53:22 58:18 61:13 uphold 46:4 upholds 40:3 use 10:16 11:2,7 11:12 50:8 useful 50:15 uses 10:18 usually 9:3
<hr/>				
T				
<hr/>				
T 2:1,1 take 12:16 30:16 51:17 taken 28:12,16 47:9 52:21 takes 6:10 8:12 12:12 talk 54:15 talking 4:8 26:5 30:23 32:2 45:18 tax 6:17,20 57:11 technology 8:12 telephone 19:13 36:5,9,10,17 tell 14:16 47:10 47:18 57:3,8 58:6 telling 47:4 tells 57:1				
<hr/>				
U				
<hr/>				
uncomfortable 59:11,18 unconstitutio... 3:20 5:3 33:17 35:3,5				
<hr/>				
V				
<hr/>				
v 1:5 3:4,22 Valeo 3:22 valid 4:9 9:24 10:1,1 11:12 51:21 55:2 56:13 validation 24:22 validity 10:8 variety 45:3 verification 22:21 23:7 25:14 26:12 27:1,4 30:11 30:12,19,20,24 31:2,7 50:9 verify 20:16,23 36:12 53:1,4 verifying 25:3 versus 47:10 view 27:16,17 views 8:8 27:9 vigorously 29:14				

violence 38:16 40:12,17 44:14	Washington 1:6 1:9,19 3:5 21:6 21:10,10,17 22:7,15,22,25 23:4,5,17 24:1 24:7 26:9 32:19 35:24 36:15 44:24 45:9,19,20 52:13 55:10,13 55:22	59:9 Workers 38:19 44:15 working 4:18 works 58:9 world 16:8 wouldn't 49:19 51:4 write 18:18 write-in 53:21 writing 53:24 written 60:24 wrong 21:6	1800s 35:15 1912 32:23 1957 37:17 1973 33:1 1976 3:22
voice 12:9 vote 15:21 32:22 34:4,8,15,24 35:13 46:4,4 47:14,15,20,22 48:3,5,11,14 48:25 49:6,7 54:15 voted 6:13 33:5 33:9,11,11 34:21,23 35:11 54:17 voter 4:23,24 5:7 6:9 15:22 17:1 34:20 50:5,12,12,16 51:5 56:2 58:8 voters 6:18 13:15 17:1 22:7 33:1,4 35:24 54:18 55:20 votes 35:14 voting 12:8,11 17:25 34:7,16 35:3 50:2 53:21	wasn't 17:7 18:24 19:1 21:23 41:5 61:19 way 21:16,18 23:5 24:21 29:7 46:13 47:13 ways 49:15 wear 13:2 58:16 Web 49:20 51:4 Wednesday 1:10 weight 61:7 weren't 24:10 Weren't 24:9 We'll 17:16 we're 7:23 14:8 25:22 we'd 8:9 we'll 3:3 14:23 24:3,4,6 53:2 we're 4:7 7:21 20:6 26:5 29:20 32:2 we've 12:19 what's 45:10,12 54:20 who's 55:3 57:24 willing 8:13 21:13 woman 15:9 words 25:13,17 27:13 work 5:12 57:21	X x 1:2,8 18:3 Y Y 18:3 years 23:15 York 4:24 5:12 5:15 you'd 27:18 you're 8:20,22 20:8 21:1,20 22:24 34:20 43:23 47:1 51:6 56:23 you've 28:12 31:11,17 42:23 42:24 # #1 1:3 0 0.8 8:22 0.9 8:22 09-559 1:5 3:4 1 1 9:6 41:5 60:19 61:24 62:5,8 10 50:3,5 10:11 1:14 3:2 11:08 62:13 122,000 61:4	2 2 9:9 38:6,6 41:4 41:9 60:13,19 60:21 61:18 2,000 50:20 20 15:11 48:17 48:20,23 20-odd 22:16 2006 21:23 50:19 52:4 2009 31:21 52:3 2010 1:10 25 31:21 28 1:10 31:21 3 3 2:4 30 2:7 34 10:13 4 40 48:17 5 5 23:15 6 60 2:10 7 71 11:11 31:19 40:20 8 8 8:16 44:7 45:16
W Wait 23:14 want 15:19 19:11 35:22 37:22 51:2 53:3,16 55:6 55:15,17 56:3 59:10,10 wanted 26:22 37:18 39:12 54:4 56:5 58:14 wanting 28:1 wants 49:18			