IN THE SUPREME COURT OF THE UNITED STATES

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WASHINGTON STATE GRANGE, :

Petitioner :

v. : No. 06-713

WASHINGTON STATE :

REPUBLICAN PARTY, ET AL.; :

and :

WASHINGTON, ET AL., :

Petitioners :

v. : No. 06-730

WASHINGTON STATE :

REPUBLICAN PARTY, ET AL. :

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Washington, D.C.

Monday, October 1, 2007

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

APPEARANCES:

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

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P R O C E E D I N G S

(10:02 a.m.)

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

General McKenna.

ORAL ARGUMENT OF ROBERT M. McKENNA

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: What is that and wasn't the

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

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

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

MR. McKENNA: Well, the Grange was --

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

MR. McKENNA: Yes.

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

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

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

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

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

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

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

allowed to disociate itself from the candidate.

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

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

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

itself from that candidate.

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

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

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

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

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

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

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

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

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

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

MR. McKENNA: It will not, Your Honor.

JUSTICE SCALIA: All right.

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

MR. McKENNA: Yes, Your Honor.

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

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

JUSTICE SOUTER: Okay.

JUSTICE STEVENS: Let me ask this question.

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

MR. McKENNA: There would not be, Justice Stevens, no.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. McKENNA: Yes, Justice Scalia, it is

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

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

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

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

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

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

JUSTICE KENNEDY: Well, there is evidence

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

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

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

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

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

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

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

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

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

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

applied --

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: General McKenna, may I

ask you at that point --

MR. McKENNA: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

JUSTICE SOUTER: There's always one.

But seriously, as a systemic matter, do you

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

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

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

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

JUSTICE SOUTER: You really do?

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

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

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

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

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

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

JUSTICE SOUTER: Well, however the statement is made.

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

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

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

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

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

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

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

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

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

But we agree that only one candidate will be

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

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

MR. McKENNA: Correct, Justice Souter.

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

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

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

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

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

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

may.

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. White.

ORAL ARGUMENT OF JOHN J. WHITE, JR.

ON BEHALF OF RESPONDENTS

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

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

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

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

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

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

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

MR. WHITE: Absolutely, Your Honor.

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

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

would pay no attention to the nominating process.

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

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

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

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

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

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

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

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

MR. WHITE: That --

JUSTICE GINSBURG: That would be constitutional?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WHITE: Do we know --

JUSTICE KENNEDY: Accept the hypothetical as

true. Then what's the injury?

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

JUSTICE SOUTER: Right.

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

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

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

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

MR. WHITE: No, Justice --

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

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

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

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

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

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

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

JUSTICE STEVENS: Only if true.

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

brief --

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

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

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

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

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

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

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

provision was just deleted?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WHITE: I think the question there, Your

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

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

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

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

is the fairest statement of the State's interest?

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

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

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

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

(Laughter.)

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. White.

General McKenna, you have 4 minutes

relating.

REBUTTAL ARGUMENT OF ROBERT McKENNA

ON BEHALF OF THE PETITIONERS.

MR. McKENNA: Thank you, Mr. Chief Justice.

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

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

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

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

conclusion.

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

JUSTICE SCALIA: I did, too.

CHIEF JUSTICE ROBERTS: And could you --

JUSTICE SCALIA: You should have said that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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