

1 Republican central committee consists of hundreds of people.
2 They also mention that, according to the state law, it could
3 be as few as a handful of 17 or so. That's up to the party
4 to decide. Obviously, the State -- the State doesn't have a
5 role in that decision. So it's quite possible that in some
6 cases, the party's leadership could be very, very small.

7 But in any event, opening that up to all of the
8 members of the party, and not just the party leadership, we
9 think fuels -- furthers the public policy and furthers the
10 right to vote by allowing those voters a chance to vote for
11 the candidate that they support, rather than to give all
12 that power to just the party leadership.

13 Finally, I just wanted to point out, as well, that
14 the parties' argument that the right to vote will not be
15 effectively used, that's demonstrated just not to be the
16 case. Both California and Hawaii have recently held special
17 elections. California, for example, was the special
18 election to replace the governor after the recall of Gray
19 Davis in 2003, where anybody could run if they submitted a
20 petition and 65 signatures.

21 There were 135 people on the ballot.

22 THE COURT: And Arnold Schwarzenegger won. I don't
23 even think you want to go there.

24 MR. BENSON: Given the timing of recent events,
25 maybe we should go to Hawaii, instead.

1 But in either event, both candidates won by
2 substantial plurality in those cases. And so the experience
3 of other states demonstrates that these elections can be
4 held with a large slate of candidates. And the voters know
5 who these candidates are. They know who they want to vote
6 for. They're not intimidated by a large slate of
7 candidates, and they can view the votes effectively.

8 So, I don't believe that the experience of other
9 states, or the case law, for that matter, bears out any
10 argument from the plaintiffs that this is going to be a
11 severe burden on their associational rights, or any burden,
12 for that matter.

13 So, for those reasons, Your Honor, we ask that you
14 deny their complaint for injunctive relief and uphold the
15 Secretary's interpretation.

16 THE COURT: One last question for you.

17 MR. BENSON: Certainly.

18 THE COURT: Am I required, under NRS 293.247, sub
19 (4), to give deference to the Secretary of State, if I
20 believe they're wrongly interpreting the statute?

21 MR. BENSON: As you know, Your Honor, agencies are
22 entitled to deference. They are not entitled to deference
23 where the agency's interpretation clearly conflicts with the
24 statute. We don't believe that's the case here. We think
25 that, if anything, the statute compels our interpretation,

1 because our interpretation essentially mirrors the plain
2 language of the statute itself, which is that a major party
3 is nominated by filing their declaration of candidacy.

4 So, in this case, whatever ambiguity there may be
5 as to the procedures for that, I think it's appropriate to
6 give deference to the Secretary of State, with his expertise
7 in administering the official elections.

8 THE COURT: Is it also fair to state that your
9 entire argument is predicated upon NRS 304.240, in the one
10 sentence:

11 "A candidate of a major political party is
12 nominated by filing a declaration or acceptance of
13 candidacy within the period of time
14 prescribed by the Secretary of State pursuant to
15 NRS 293.204"?

16
17 MR. BENSON: That's certainly a large part of it,
18 Your Honor.

19 THE COURT: Thank you.

20 Court's going to be in recess for about ten
21 minutes. Thank you.

22 MR. BENSON: Thank you.

23 (Recess taken.)

24 THE COURT: Please be seated.

25 We're back on the record in respect to

1 Case No. 11 OC 00147, the Nevada Republican Party, David
2 Buell, versus State of Nevada, Secretary of State Ross
3 Miller, and the Intervenor, the State of Nevada Democratic
4 Party.

5 Mr. Elias, are you ready?

6 MR. ELIAS: I am, Your Honor.

7 THE COURT: And in -- I've listened to the
8 arguments in regards to both parties, so, in respect to
9 that, there's no need to reargue a lot of the issues by the
10 Secretary of State, unless you really want to; but that's
11 fine, it's your time.

12 MR. ELIAS: Your Honor, let me start by thanking
13 the Court for allowing me to appear today pro hac vice, and
14 I promise I will not overstay my welcome. I will be -- I
15 will be, hopefully, brief, and hit only a handful of points
16 that I think have come up in the -- in the back-and-forth,
17 where I think I could add -- add, if not value, at least a
18 perspective on behalf of the Nevada Democratic Party.

19 Let me start with what I think is one of the things
20 that I hear in the questioning from the Court, which is this
21 question of whether or not this statute is plain. If you
22 read plaintiffs' briefs initiating this matter, they took
23 the position that the statute actually was clear; that the
24 plain -- that the statute was plain in its text. And, of
25 course, if it is, then the Court need to look no further to

1 traditions, or -- or anything else, but rather it's bound by
2 the plain text.

3 I think there is a distinction to ask -- to answer
4 the question that you asked the Secretary of State's Office
5 about whether the Legislature could have done a better job.
6 I'm not in a position, as a -- as only a visitor, of
7 criticizing the Legislature, but I do want to say that the
8 Nevada statute is not unlike most election administration
9 statutes in this country. They get passed. There is little
10 attention paid to them. They're usually passed, either in
11 this instance, in the wake of September 11, there's a feel
12 there's the need to do something to deal with what happens
13 if there are vacancies, either by catastrophe, or through
14 resignation, or otherwise, and then little happens with
15 them; they sit on the shelves.

16 The fact that these statutes are not always well
17 explained, and the fact that they're not always
18 comprehensive doesn't mean, however, that individual
19 provisions within them are not clear and are not plain.

20 And, Your Honor, the provision that is centrally at
21 issue, quote, "A candidate of a major political party is
22 nominated by filing a declaration or acceptance of candidacy
23 within the time prescribed by the Secretary of State
24 pursuant to NRS 293.204" is plain, and it is clear. That
25 doesn't mean that there aren't other interstices and gaps

1 and questions that have to be worked out, but that's why a
2 state has a chief election official.

3 The elections work in Nevada, they work throughout
4 the country, by having certain principles which are plain
5 and which are clear, and then allowing county -- county
6 election officials, state election officials, the Secretary
7 of State, the opportunity to fill in those gaps.

8 I noticed, I listened with great care to counsel
9 for the plaintiff, who himself acknowledged and admitted --
10 it seems not in contention that the Secretary of State is
11 entitled to deference. I believe the term that plaintiffs'
12 counsel used was as long as the interpretation was, quote,
13 "reasonable."

14 So, the question is, in light of the plain text of
15 that provision, is the way in which the gaps and the
16 interstices have been filled out by the Secretary of State
17 reasonable? If it is, then this Court need look no further,
18 because it is elementary, under principles of agency law,
19 that the Secretary of State is entitled to deference. And
20 that, again, seems not to be a contested issue in this case.

21 The second point I wanted to make is in respect to
22 minor parties. I am here on behalf of a major party. Also
23 in the courtroom is counsel for a major party. Frankly, I
24 am somewhat perplexed why we are debating the rights or the
25 non-rights of non-major parties. If there are minor parties

1 in the state of Nevada who feel that this process is unfair
2 to them, it strikes me, with all due respect, it is not the
3 place of the Republican Party to assert those rights. They
4 have no standing to assert the rights of a minor party, they
5 have no genuine interests in the plight of the minor
6 parties. They're -- they are a major party, and it seems to
7 me that, that that is what this case is ultimately about.

8 That said, it is the rule, not the exception, not
9 just in Nevada, but everywhere -- not just in election
10 administration law, but in all kinds of law, that -- that
11 major parties and minor parties are treated differently, and
12 candidates between them are treated differently.

13 There's a lot of case law water under this bridge,
14 whether it is in the campaign finance arena, the federal
15 public funding statutes that provide greater access, or
16 easier access to greater funding for presidential campaigns
17 for major party candidates and minor party candidates,
18 whether it is in the ballot access arena, whether it is in
19 the presidential or congressional or senatorial or other
20 federal debate arena, where debate commissions set up
21 debates where they invite major party candidates, under more
22 permissive rules, and minor party candidates; whether it is
23 in the campaign finance arena, where major parties are
24 oftentimes given extraordinary rights. By "extraordinary,"
25 I mean rights that are not ordinarily provided to other

1 organizations, including minor parties.

2 The fact that we have a system that treats major
3 parties one way and candidates seeking to run as major party
4 candidates one way, and minor party or unaffiliated
5 candidates another, is both unexceptional, and, frankly, I
6 don't believe is properly before this Court, given the
7 record that is here.

8 The third point I wanted to make relates to
9 something that I -- I listened to with great interest, which
10 is the suggestion that this is an as-applied challenge.
11 This is, with all due respect, an odd as-applied challenge.
12 In fact, we have no facts before the Court, other than now a
13 DVD. We don't have candidates. We don't know whether there
14 are going to be three candidates, two candidates, a hundred
15 fifty-some-odd candidates, as was the case in California.
16 So, we don't actually know what the -- whether there's going
17 to be voter confusion or not. We don't actually have a
18 ballot. We don't -- we don't know whether the ballot is
19 going to seem very clear or very confusing.

20 We don't have any evidence or any testimony in the
21 record regarding what injury the parties will suffer. We
22 have assertion by counsel, we have argument by counsel, but
23 there actually isn't anything concretely put before this
24 Court, that I could find, that lays forth the kind of record
25 that a court would make an as-applied constitutional ruling

1 to this.

2 This is, quite simply, an as-applied challenge to
3 this statute, and what the plaintiffs are asking for is no
4 less sweeping and dramatic to simply declare, or at least
5 part of their argument is to simply sweep this statute out
6 as unconstitutional and replace it and start from -- start
7 from scratch.

8 This is not an as-applied challenge. An as-applied
9 challenge to apply to the facts of this election, with
10 respect to the candidates actually on this ballot, with
11 respect to how this ballot will present what the specimen
12 will look like, and whether or not there is injury in that
13 context.

14 And, indeed, that is, if you look at the -- if you
15 look at the *Grange* case, that was, indeed, the criticism
16 that the Supreme Court offered the plaintiffs in *Grange*, who
17 stood in almost the identical shoes of the kinds of
18 complaints that -- that were being made -- that are being
19 made today were made there.

20 So, it doesn't surprise me that counsel begins by,
21 by -- with a -- with a, with the making the sweeping
22 statement this is an as-applied challenge, because, of
23 course, if Your Honor reads *Grange* carefully, as I know the
24 Court has, you see the court is quite -- is quite influenced
25 by the fact that there were no actual facts before it about

1 how, in this actual election, the actual ballot would look,
2 would actually be presented, and there was no evidence of
3 whether real voters would really be confused, and whether
4 the parties would genuinely be injured. None of that is
5 present in this case.

6 So, where does this leave us? Well, as was
7 mentioned by the Secretary of State, the state of Hawaii and
8 the state of California, and Louisiana, which has had an
9 interesting history -- Louisiana had what they -- had a
10 system which allowed all candidates to run on a single
11 ballot, regardless of party. If any candidate got over
12 50 percent, then there would be no subsequent election, for
13 a variety of reasons, including the constitutional challenge
14 that's unrelated to the issues at hand here. Louisiana
15 moved away from it. Louisiana has now moved back to that
16 system, and I note in moving back to it, though, obviously,
17 not a court decision, I think it is worthwhile this Court
18 being cognizant of the fact that the Department of Justice
19 did preclear that change under section 5 of the Voting
20 Rights Act.

21 So, where does this leave us? It leaves us with
22 the question of whether or not *Jones* or *Grange* compel this
23 Court to throw out the state statute, and I think, quite
24 clearly, they don't.

25 The court in *Jones*, when you read the opinion,

1 Justice Scalia and the majority were quite -- were quite
2 concerned that what seemed to be going on was an effort by
3 the state of California to essentially engineer better --
4 better candidates, and, therefore, better policy, through
5 changing the process by which primary elections were held.

6 And what *Jones*, what the court said in *Jones* is
7 that parties have a associational right not to have what --
8 what several courts have referred to as undesired voters.
9 You're not to have voters that are not of their party choose
10 their standard there.

11 *Jones* didn't stand for the proposition -- and, in
12 fact, in *Grange*, the court makes clear, and subsequently,
13 the Ninth Circuit, in *Alaskan Independence Party*, makes
14 clear that *Jones* doesn't stand for the proposition that
15 parties have a right not to be -- not to associate with
16 candidates they don't like. It's an undesired voter case;
17 it's not an undesired candidate case.

18 And, of course, in this, in this instance, there's
19 no issue as to whether or not who -- the Republican Party is
20 not challenging who gets to vote in this election; their
21 sole concern is who gets to run in this election, and who
22 gets to run with what label next to their name.

23 And though I think counsel ably took *Grange* and did
24 the best he could with it, the fact is, *Grange* stands quite
25 squarely for the proposition that, that in that case, the

1 state of Washington could, in fact, have candidates with
2 party labels next to their names, and that absent some
3 better factual record, which subsequently, as the Secretary
4 of State's Office pointed out, on remand, the plaintiffs
5 were unsuccessful on a true as-applied challenge, as well.
6 But there is -- but the *Grange* court clearly held that there
7 is no -- there is no right of a party to -- to not have
8 multiple candidates with the same party label next to their
9 name.

10 I might add, if this Court feels compelled -- which
11 I don't believe is necessary -- but if this Court feels
12 compelled to engage in some measure of judicial surgery,
13 something short of, of -- of tearing -- of open-heart
14 surgery, which is being proposed on the other side, could be
15 done consistent with what the Secretary of State mentioned,
16 and which we mentioned in footnote 7 of our brief, which is
17 a simple disclaimer on the bottom of the box, on the bottom
18 of the ballot, that is straight out of *Grange*. Straight out
19 of the Supreme Court decision in *Grange*, straight out of the
20 remand decision in *Grange*. And if -- if the -- if,
21 ultimately, the Court believes that this hinges on this
22 question of nominee, which I don't believe it does -- and I
23 think a fair reading of *Grange*, I think, doesn't lead you to
24 that conclusion -- but if the Court believes that that's a
25 concern, then affixing that disclaimer is a much more

1 modest, judicially modest, and a way for this Court to
2 proceed than to simply decree that the -- the legislatively
3 enacted statute has to -- has to be replaced as
4 unconstitutional.

5 THE COURT: Well, one argument you make is nothing
6 precludes either of the parties, major political parties,
7 from going out and having their convention anyway, and going
8 ahead and nominating a candidate, and going forth and say
9 this is -- "this is the candidate we're supporting, and we
10 encourage everybody in the Republican Party, or the
11 Democratic party, to go ahead and vote for this candidate."

12 MR. ELIAS: That's exactly right, Your Honor, and
13 that was actually my next point, so I'm glad you mentioned
14 it.

15 There is, of course, no -- there is, of course, no
16 burden on the associational rights of the Republican Party,
17 because, again, this is not an undesired voter case. It's
18 not a case where the concern is that you're going to have
19 voters, who are not truly of your party, selecting the
20 single standard barer of your party.

21 The Republican Party can say, you know -- "You know
22 who our candidate is?" There are a hundred and -- I forget
23 what the number was -- 154? 125?

24 FROM THE AUDIENCE: Thirty-five.

25 MR. ELIAS: A hundred thirty-five people on this

1 ballot. Were there three? Were there five? Who knows what
2 it will be. "But you know what? This is the person who is
3 our candidate. We'll -- we're going -- we're to knock on
4 doors, and we're going -- we're going to call our members,
5 and we're going to take out advertising, and we're going to
6 publicize that endorsement that this is the true
7 Republican-endorsed candidate." And that is a relatively
8 easy thing for the party to do, and I think an easy solution
9 to the associational rights burden that they -- that they
10 posit.

11 Two final points, and then I -- I promise I'll be
12 done. The first -- the first is that the question came up:
13 What is the compelling state interest? And, again, I think
14 it's -- it's very instructive. It's very interesting
15 reading *Grange* and *Jones* next -- next to each other, because
16 of course, you have Justice Scalia, who, in *Jones*, writes a
17 very, very strong opinion, gets a majority, and then I think
18 quite to your surprise, when you read his dissent, that much
19 of that majority winds up flipping the other way in *Grange*.

20 But what's really interesting about the majority
21 opinion in -- in -- in *Jones*, is that if you look at what it
22 is the State posited as the harm that they were trying to --
23 to solve, and what their interest is -- was, I think it
24 clearly influenced the court that there just wasn't much
25 there.

1 This is not the State of Nevada trying to pass a
2 statute governing every election they hold, or even every
3 congressional election they hold. This is the State of
4 Nevada passing a statute to deal with the rare -- and we
5 know historically it has been quite rare -- and unusual --
6 we know, historically, that it's been a very unusual
7 circumstance -- of where there is a vacancy. And the
8 vacancy might be caused by death, the vacancy might be
9 caused by resignation, the vacancy might be caused by
10 natural disaster, by a man-made disaster; but this is the
11 State of Nevada dealing with not the usual, but, rather,
12 dealing with the unusual.

13 And I would suggest that the State of Nevada has a
14 much higher, or a much greater compelling interest in making
15 sure that in the unusual case, where it doesn't have two
16 years to prepare for the next election, where it doesn't
17 have schools that know that two -- you know, next November,
18 we're going to be coming to your gymnasium again to put
19 voting machines in; and registrars, you know, don't worry,
20 next November, we're going to be coming back, and you're
21 going to have to print ballots, and you're going to have
22 UOCAVA ballots and MOVE Act requirements, where you have the
23 unusual, the out-of-the-ordinary election.

24 I think the State of Nevada deserves --

25 THE COURT: Does somebody have a cell phone on?

1 We have a sign up that you're not supposed -- you're
2 supposed to turn them off. So please turn any cell phones
3 off. The Court would appreciate it. It's very disrupting
4 to his argument.

5 So, go ahead.

6 MR. ELIAS: Thank you, Your Honor.

7 The State of Nevada has a greater interest, and
8 deserves, candidly, more deference at the legislative level,
9 under constitutional analysis, and with the Secretary of
10 State, under administrative law analysis, deserves more
11 slack to make this system run in the case of the unusual.

12 The Secretary of State has to deal with a lot of
13 different contingencies in every election. Every election,
14 there's some set of issues: voting machines break, or
15 there's not enough voting machines here, or there are
16 observers that are disruptive, and the Secretary of State's
17 Office has to be permitted, along with the counties, has to
18 be permitted enough play in the joints to make the system
19 work; otherwise, it freezes up, and the system breaks.
20 That's particularly true in the case of special elections.
21 These are not regularly scheduled.

22 They -- all of the problems you read about in the
23 newspaper, or, no doubt, hear in this courtroom about
24 getting enough volunteers and getting funding and getting
25 space, all of those things are only greater exacerbated in

1 the case of special elections, and I think that that -- that
2 rises to a different level of -- of interest that the State
3 has in short-cutting some of the other processes that might
4 be in place every two years.

5 The last point I was going to make relates to
6 *Brown*, and I will then promise, I will -- I will end.

7 It is certainly the case that a vacancy in office
8 can create a vacancy nomination. It is not necessarily the
9 true intent. Certainly, in the case of the federal action
10 in *Brown*, they did. But the Legislature actually fixed that
11 through, and I quote, "A candidate of a major political
12 party is nominated by filing the declaration or acceptance
13 of candidacy when the time prescribed -- within the time
14 prescribed by the Secretary of State pursuant to," and
15 there's, then, the citation.

16 The Legislature filled in the gap that was in
17 place, and that's -- in that election, there wasn't any
18 mechanism to deal with the -- the one vacancy, so it caused
19 the other.

20 In this case, the Legislature took its best shot --
21 not a perfect shot -- but candidly, compared to the rest of
22 the states in the country, not that bad a shot at getting
23 this right, and I don't believe that there's anything about
24 it that is unconstitutional, and I believe that the
25 Secretary of State's interpretation is reasonable, which is

1 the standard set forth by plaintiff in his argument, and,
2 therefore, I believe it should be upheld.

3 Unless Your Honor has any questions, I will --

4 THE COURT: No, I'm fine. Thank you very much for
5 your argument.

6 MR. ELIAS: Thank you.

7 THE COURT: Mr. O'Mara or Mr. --

8 MR. O'MARA: Yes, Your Honor. I'm just going to be
9 very brief, and then I'll let Mr. Goodenow come up and talk
10 about some -- the constitutional issues on rebuttal.

11 You heard the State talk about their argument, and
12 its argument is basically, the majority of it, is one
13 sentence, and then they picked and choosed [sic] statutes to
14 fill in gaps. And guess what they picked and choosed?
15 Statutes that are specifically exempt under other
16 legislative statutory provisions. 293.175 excludes many of
17 those provisions that they are now saying fill in the gaps.

18 But what they don't do in filling in the gaps, they
19 don't even look at the statutes that are not exempt, like
20 293.165, which allows for the nomination in a vacancy.

21 What also do they not do in regards to a general
22 election? They don't look at how those individuals are put
23 on the general election ballot, 293.260, which, again, is
24 a -- used in most all circumstances -- it means one
25 candidate from the major party per office. Yes, if no one

1 else runs, that may be two candidates from one major party.

2 Second, the State wants to argue that you should
3 use the specific statute over all the general statutes, but
4 that's only if there's a conflict. And there's no conflict,
5 if you read the statutes of 304.240. It says they were
6 supposed to nominate pursuant to 293. So, we have to read
7 Chapter 293 in conjunction with NRS 304.240. And if you
8 read NRS Chapter 293 in conjunction with 304.240, you're
9 going to come to the result that central committees that
10 nominate major parties, executive committees nominate minor
11 parties, and those go on for that.

12 But what is interesting is, you talk about the
13 difference between major parties and minor parties, and the
14 State says the reason why they have the provision in -- in
15 there that says "and must file a declaration or acceptance
16 of candidacy within the time prescribed by the Secretary of
17 State" -- and he said everybody has to do that -- but that's
18 not the case, because minor parties don't have to declare or
19 file acceptance of candidacy under the interpretation, and
20 neither do independents. They have to file a petition, or a
21 list of candidates.

22 And if you look at that, and you look at the
23 breakdown, Your Honor, it says "must file a declaration of
24 acceptance of candidacy." So, how is a -- how is a major
25 party, an acceptance of candidate, that's line 3. How is --

1 except for, that would take it out of the situation that
2 minor parties don't have to file, except as a candidate,
3 they file a list. So, it's clear, we can read it, and we
4 can come to a constitutionally well-reasoned interpretation
5 that is not what happened with the Secretary of State.

6 Also, if you look at it, you're looking at a
7 nomination and then a placement on the ballot. If we read
8 line, sentence four and sentence five, it doesn't talk about
9 a nominee of a minor political party is placed on -- it is
10 nominated, it only talks about that they are placed --

11 "A minor political party that wishes to place its
12 candidates -- candidates on the ballot, must file a
13 list of candidates with the Secretary of State not
14 more than 46 days before the special election and
15 not less than 32 days before the special election."

16
17 So, where -- how do they nominate them? So, that's
18 another problem that we have.

19 The recall election analysis, Your Honor, is just
20 not something that we need to look at. It's just not the
21 same. It's clearly not the same here in Nevada. The
22 declarations and the nomination forms that are filed have
23 nothing to do with the party. And guess what? There's no
24 vacancy, so we're not looking at a vacancy position.

25 But the -- the statute does provide that if there

1 is a resignation in a recall, then we do have a vacancy; and
2 under that vacancy, we then go to -- to the law of how we
3 fill vacancies.

4 And finally, Your Honor, the deadlines. You heard
5 the State say July 8th. I think that would be sufficient
6 time for all the parties to get their nominations in. If
7 that's what the Secretary -- if that's what the -- if that's
8 what the registrars are telling us.

9 But what we need to look at is when they're picking
10 and choosing, and they're saying that they need all this
11 additional time, they -- they picked the statute, like
12 NRS 293.200, that requires a hundred signatures, it's
13 specifically exempt. They're placing an extra burden on
14 those individuals.

15 And what is -- why we think that the -- also, in
16 regards to the mail-out ballots, we think that the Secretary
17 of State did the right thing in regards to finding that the
18 46 days' provision is not applicable. In fact, we think
19 that it may not even be the federal presumption, or
20 preemption that allows them to do that, because if you look
21 at the statute, it says that he has to provide -- prescribe
22 the time with enough -- sufficient amount of time to mail
23 those ballots. And I think that when we look at this, and
24 we look at how this, the Legislature did this, I mean, they
25 knew that we were going to have problems with 45 days, that

1 the ballots had to be out in 45 days, yet they still put
2 these time frames in here on the minor parties.

3 So, I'm not trying to be political here. I'm
4 trying to look at the law. But doesn't that seem a little
5 fishy, the minor parties now have a time period of 46 to
6 32 days, and we knew? If you look at the Clerk, Alan
7 Glover's statement, and he says, "We have to get these out
8 within 45 days," but they set it at 46 days.

9 So, we think that the statute is clear. If you
10 read it in conjunction with NRS 293, Chapter 293, we believe
11 that our interpretation is exactly what the interpretation
12 should have been by the Secretary of State, and we believe
13 that his interpretation is unreasonable, and we ask that you
14 give us declaratory and injunctive relief.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 Mr. Goodenow, just a few minor comments. Don't go
18 into any lengthy argument. But go ahead, if you want. I
19 will allow you.

20 I've given both parties about the same amount of
21 time. I've tried to be equal.

22 MR. GOODENOW: I think I have three points.

23 THE COURT: Three points?

24 MR. GOODENOW: Yes.

25 THE COURT: Okay. I'm going to hold you to that.

1 MR. GOODENOW: Okay.

2 First of all, I didn't hear any mention, in either
3 one of the arguments given by the defendants, of a state
4 interest, of a compelling state interest. The only possible
5 point that I heard was in Mr. Elias' argument that, look,
6 we -- the Secretary of State has to be given some latitude
7 to make this sit -- make this system work. That's it.

8 And so I think, really, what that gets back to,
9 Your Honor, is my point that the only possible state
10 interest here was in timing, which is what we said was the
11 foundational reason for the -- the statute to begin with.
12 It's not a compelling state interest. There are less
13 restrictive ways to accomplish that timing, certainly within
14 the time frames given by state and federal law. That's
15 first.

16 Second, there is no foundation given here for the
17 conclusion that the Legislature intended a new system of
18 election for the state of Nevada. There -- if we look at
19 the *Alaskan Independence Party* case, 545 F.3d, 1173, that
20 was cited by Mr. Benson, it -- it really is based upon a --
21 an act that was found by the citizens of Alaska to address
22 perceived problems in the party process.

23 That's -- there is nothing in the legislative
24 history, in this instance, to suggest, let alone establish,
25 that the citizens of Nevada took any action whatsoever,

1 through their legislature, or through an initiative process,
2 as was the case in the *Grange* case, to change the election
3 process.

4 Finally, Your Honor, the Nevada -- excuse me -- the
5 U.S. Supreme Court has been clear in *Jones*, *Tashjian*, in *Eu*,
6 and others, that all struck down attempts to interfere with
7 the parties' nomination process. At least there, there were
8 voters involved.

9 Here, it's not the case that we have a general and
10 no nominations. The statute itself, and the Secretary,
11 Secretary of State's interpretation, which is in evidence,
12 state that there will be self-nomination, and that's all we
13 need to do to establish the factual predicate for our case
14 under the First Amendment.

15 Your Honor, thank you. That's all I have.

16 THE COURT: Thank you.

17 Well, obviously, and what I'm going to do in this
18 particular case -- and, first of all, I'd like to thank the
19 attorneys for their excellent briefs in this case. You
20 know, sometimes I don't get excellent briefs; but I got
21 great briefs in this particular case, and the arguments were
22 great. I -- you know, and I appreciate them very much, by
23 everybody.

24 This case, as I kind of indicated, is obviously
25 headed to the Nevada Supreme Court, and time is of the

1 essence. Therefore, it is going to be my intent to rule
2 from the bench to expedite this matter, due to the
3 timetables involved. And so that's the Court's intent in
4 this particular case.

5 The parties also have agreed this matter can be
6 construed on its merits, pursuant to NRS -- excuse me --
7 pursuant to Rule 65(2) of the Nevada Rules of Civil
8 Procedure.

9 And I'd ask the parties, is that correct?

10 MR. GOODENOW: That's correct, Your Honor.

11 THE COURT: Mr. Benson --

12 MR. ELIAS: Yes.

13 THE COURT: -- is that correct?

14 MR. BENSON: That's correct, Your Honor.

15 THE COURT: Okay. I just want that, put that on
16 the record because it was in the briefs, and I wanted to
17 make sure everybody understood that.

18 The Nevada statute in issue, NRS 304.240, is
19 extremely confusing, in the Court's view, and the Nevada
20 Legislature certainly should have been more precise in the
21 language adopted thereby, considering the importance of this
22 issue, and it should be clarified; the Court believes it
23 should be clarified.

24 Mr. Elias says they did a pretty good job. Well,
25 I'm not sure they did a pretty good job. I think it's kind

1 of confusing.

2 Additionally, there is no legislative history that
3 really helps the Court in this particular matter. I've
4 reviewed that legislative history, and it really doesn't
5 help.

6 This Court, additionally, believes, and I presume
7 the Nevada Supreme Court is being asked, then, to make sense
8 out of a very confusing language.

9 And, finally, NRS 304.250 provides that:
10 "The Secretary of State shall adopt such
11 regulations that are necessary for conducting
12 elections pursuant to the provisions of
13 NRS 304.250."

14 And, basically, in that provision from NRS --
15 excuse me -- 304.200 to NRS 304.250, inclusively.

16 And the Court notes there's been more than one
17 secretary of state since the adoption of this statute in
18 2003, so I'm not being disparaging to any secretary of state
19 in regards to that. It's obviously an issue that nobody
20 looked and felt was important at the time, and, obviously,
21 it has become very important at this time in respect to that
22 matter. So, again, the Court notes that in respect to this
23 matter.

24 As to the merits of this case -- and this is going
25 to take a little bit of time, but I'm going to go through it

1 as best I can.

2 First of all, NRS 304.230 clearly provides that we
3 are concerned here with a special election. However,
4 NRS 304.240(2) provides that, (a), the election is conducted
5 pursuant to the provisions of Chapter 293 of NRS; and, the
6 general election laws of the state of Nevada apply to the
7 election.

8 This is, again, an example of kind of the confusion
9 back and forth in regards to the statute.

10 NRS 293.175, sub (5), provides that:

11 "The provisions of NRS 293.175 to NRS 293.203,
12 inclusive, do not apply to: Special elections to
13 fill vacancies."

14 Another example, kind of, of the confusion that we
15 find in regards to these statutes.

16 NRS 304.240 provides, in part, that, (a), no
17 primary election will be held.

18 Also, "Except as otherwise provided in sub," in
19 that subsection, "a candidate must be nominated in
20 the manner provided in chapter 293 of NRS and must
21 file a declaration or acceptance of candidacy
22 within the time prescribed by the Secretary of
23 State pursuant to NRS 293.204, which must be
24 established..." to establish a sufficient time for
25 the -- for the election ballots, for handling the

1 election ballots.

2

3 Also, "A candidate of a major political party is
4 nominated by filing a declaration or acceptance of
5 candidacy within the time prescribed by the
6 Secretary of State pursuant to NRS 293.204.

7 A minority political party that wishes to place its
8 candidates --" and, again, it uses the word
9 "candidates," not "candidate" -- "candidates on
10 the ballot must file a list of its candidates with
11 the Secretary of State not more than 46 days
12 before the special election and not less than
13 32 days before the special election."

14 Again, this is kind of an indication of confusion.
15 It uses the word "candidates," not "candidate."

16 But it's also noted that NRS 293.1715(4) provides
17 that only the name of one candidate of each minority
18 political party for each partisan office may appear on the
19 ballot. Again, another example of confusion in respect to
20 this entire matter.

21 NRS 304.240 further provides that "an independent
22 candidate must file a petition of candidacy within the
23 appropriate -- with the appropriate filing officer," but
24 NRS 293.175, sub (4), provides for nominating independent
25 candidates, pursuant to NRS 293.200, requiring a petition of

1 candidacy signed by 100 registered voters.

2 Given these statutes, the issue before this Court
3 is whether or not the nomination of a major political party
4 candidate or minor political party candidate is governed by
5 either NRS 304.240 or NRS 293.165.

6 As stated, NRS 304.240 provides that NRS 293
7 applies, except as otherwise provided in, in that subsection
8 (1) of that particular statute.

9 The issue then becomes: What does this language
10 mean? What does the following language mean?

11 "A candidate of a major political party is
12 nominated by filing a declaration or acceptance of
13 candidacy."

14 What's that mean? Again, Black's Law Dictionary,
15 Seventh Edition, defines the word "nominate" to mean:

16 "One, to propose a person for election or
17 appointment; or, two, to name or designate a
18 person for a position."

19
20 NRS 293.165 provides as follows:

21 "A vacancy occurring in a major or minor
22 political party nomination for a partisan office
23 may be filled by a candidate designated by
24 the party central committee of the
25 state of the major political party or

1 executive committee of the minor political
2 party."

3
4 This, again, is another kind of example of the
5 confusion that we were going through.

6 Here, the important words, though, in this
7 particular statute, NRS 293.165, is that "a candidate
8 designated by." NRS 304.240, and important words, again,
9 are "a candidate of a major political party."

10 Isn't it the intent of the laws to be read together
11 and given meaning to each of them, that a major political
12 party is the one that should put forth its candidates? When
13 possible, the interpretation of a statute must be harmonized
14 with other statutes to avoid unreasonable or absurd results.
15 That's the *Nevada Power Company vs. Haggerty* case, 115 Nev.
16 353, at 364.

17 Additionally, all statutes are to be read *in pari*
18 *materia*; that's, basically, give an equal effect to all the
19 statutes.

20 The interpretation adopted by the Secretary of
21 State would eliminate the involvement of the major political
22 party in the nomination process. The wording of
23 NRS 304.420 -- 240, excuse me -- does not state "a member of
24 a major political party," but again, "a candidate of a major
25 political party." This language implies that action must be

1 taken for a designation or a nomination of a candidate.

2 Even though the Secretary of State's interpretation
3 is entitled to deference, pursuant to NRS 293.247, sub (4),
4 that interpretation cannot go beyond the plain meaning of
5 the statutes in consideration.

6 Further, the following -- following the arguments
7 by the Secretary of State would allow -- if you follow the
8 arguments of the Secretary of State, you would allow any
9 member of a major political party to file, yet limit the
10 members of a minority party to a list provided by the
11 minority party, disallowing members, all members of a
12 minority party from filing if not on that list. Also, you
13 would limit independent candidates, unless they have filed a
14 petition of candidacy supported by 100 registered voters.

15 Additionally, why are these people being treated
16 differently in respect to what -- is that really fair? And
17 I know the general election laws apply, but we've heard the
18 argument that that's applied in every case. Well, we're not
19 applying it in every case, and this is a special election,
20 and we're going to turn around and allow any member of a
21 majority party to go file, but we're going to limit anybody,
22 any independent filing based upon the requirement that
23 they've got to go retain all these signatures? Or we're
24 going to limit a minority party being on a list? That
25 doesn't make sense to the Court.

1 It appears to me that the language of NRS 304.240
2 sets forth how the candidates get on the ballot after being
3 nominated. If you look at the provision in the -- in
4 respect to minority party candidates, it indicates placement
5 on the ballot. If you look at the indication in regards to
6 the independent, again, it talks about appearance on the
7 ballot. So, we're not giving effect to the sentence right
8 before that, which we should give effect to, and it's how a
9 majority party candidate is then placed on the ballot.

10 There are two steps, the Court believes, in regards
11 to the process set forth in the statutes, how candidates are
12 nominated and put forth by the parties as, again, a
13 candidate, under NRS 293. And the second issue is how those
14 candidates, then, are placed on the ballot. Again, the
15 Court believes NRS 304.240, that section kind of indicates
16 that.

17 And, again, the Court's troubled by the fact that
18 the Secretary of State is picking and choosing from
19 different portions of the statute that they appear to want
20 to apply.

21 As to the argument that NRS 293.165 only applies if
22 there is a, quote, "vacancy in the nomination process," it
23 is clear that under the -- under similar situation or
24 similar legislation, the Nevada Supreme Court, in *Brown vs.*
25 *Georgetta*, 70 Nev. 500, 509, held that a vacancy can exist

1 where there has been no primary, as in this case.

2 NRS 293.165 can be read that there is a vacancy in
3 this particular matter, where no nomination was made in
4 respect to a primary not being -- there not being any
5 primary.

6 Therefore, reviewing this matter -- the Court,
7 additionally, is not going to go into the constitutional
8 issue. If I had to, however, I, again, I think that we are
9 creating a different standard in respect to the different
10 parties, which troubles me greatly. We are also denying the
11 major political parties from, basically, from -- denying
12 them any access or being involved in the process of,
13 basically, just designating their candidates, which I don't
14 think is totally correct. And statutes must be interpreted
15 to be constitutional.

16 Therefore, it is hereby ordered by this Court that:
17 One, it grants a permanent injunction to the plaintiffs and
18 enjoins the Secretary of State from placing the names of
19 members of a majority political party or a minority
20 political party on the ballot until the candidate is
21 determined pursuant to NRS 293.165.

22 Second, that the time frame established by the
23 Secretary of State shall be extended until NRS 293.165 can
24 be complied with, so that a majority political party and a
25 minority political party can nominate their candidates, as

1 indicated in that statute.

2 Thereby, I extend the Secretary of State's deadline
3 until June 30th, 2011.

4 Mr. O'Mara and Mr. Goodenow, you will prepare the
5 order for the Court, and provide it to me no later than
6 May 23rd, 2011, by e-mail, so that I can review it and make
7 any comments, if I want. Additionally, provide it to the
8 other parties, as well.

9 Each party are to bear their own attorney's fees
10 and costs in respect to this matter.

11 Again, thank you very much for -- for your
12 arguments and that. The Court appreciates it very much.

13 Thank you.

14 (Proceedings concluded.)
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1 STATE OF NEVADA)
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2 WASHOE COUNTY)

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I, JULIETTA FORBES, Certified Court Reporter, do
hereby certify:

That I was present in court and took stenotype
notes of the proceedings had in the matter entitled herein,
and that I thereafter reduced the same into typewriting
through the use of computer-aided transcription;

That the foregoing transcript, consisting of pages
1 through 97, is a full, true and accurate transcription of
said proceedings had.

Dated this 20th day of May, 2011.

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#	2003 [3] - 25:22, 63:19, 88:18 2004 [1] - 35:24 2005 [1] - 34:11 2008 [1] - 35:23 2011 [10] - 1:10, 3:1, 3:11, 4:21, 20:21, 29:4, 29:6, 96:3, 96:6, 97:13 203 [1] - 43:8 204 [2] - 38:9, 48:25 20th [1] - 97:13 21 [3] - 37:11, 37:18, 38:7 239 [1] - 42:20 23rd [2] - 24:13, 96:6 24 [1] - 32:1 240 [3] - 30:16, 92:23 25th [1] - 24:13 290 [2] - 12:24, 15:18 293 [19] - 4:23, 12:25, 42:8, 42:9, 42:12, 42:20, 43:8, 49:15, 59:18, 59:19, 81:6, 81:7, 81:8, 84:10, 89:5, 89:20, 91:6, 94:13 293(1) [1] - 14:1 293.165 [23] - 7:15, 8:4, 8:10, 10:9, 10:18, 13:8, 14:4, 18:13, 18:16, 19:5, 27:14, 44:10, 45:4, 46:2, 59:23, 80:20, 91:5, 91:20, 92:7, 94:21, 95:2, 95:21, 95:23 293.165(1) [1] - 13:17 293.166 [1] - 44:13 293.1715(4) [1] - 90:16 293.175 [12] - 9:25, 10:4, 15:20, 17:9, 18:18, 18:19, 18:20, 19:1, 80:16, 89:10, 89:11, 90:24 293.175(5) [1] - 15:19 293.177 [1] - 29:24 293.182 [1] - 55:1 293.200 [5] - 15:19, 50:5, 59:25, 83:12, 90:25 293.203 [2] - 18:20, 89:11 293.204 [5] - 30:22, 65:15, 67:24, 89:23, 90:6 293.247 [2] - 64:18, 93:3 293.260 [3] - 19:8,	51:3, 80:23 2nd [2] - 4:22, 29:4	46 [5] - 82:14, 83:18, 84:5, 84:8, 90:11	absent [1] - 74:2 absentee [1] - 53:20 absolute [1] - 14:8 absurd [2] - 13:5, 92:14 abuse [1] - 24:14 accept [5] - 12:3, 12:7, 20:18, 29:24, 59:19 acceptance [17] - 11:20, 11:21, 13:22, 21:18, 29:15, 30:20, 58:22, 65:12, 67:22, 79:12, 81:15, 81:19, 81:24, 81:25, 89:21, 90:4, 91:12 access [5] - 31:2, 69:15, 69:16, 69:18, 95:12 accomplish [2] - 20:23, 85:13 according [3] - 36:21, 54:24, 63:2 According [1] - 59:25 account [1] - 42:12 accuracy [1] - 56:7 accurate [1] - 97:11 acknowledged [1] - 68:9 Act [5] - 53:15, 53:16, 53:23, 72:20, 77:22 act [3] - 60:6, 60:7, 85:21 ACT [1] - 60:7 action [5] - 5:19, 29:1, 79:9, 85:25, 92:25 actual [7] - 8:14, 9:4, 22:20, 38:8, 71:25, 72:1 add [4] - 8:1, 66:17, 74:10 additional [3] - 26:19, 61:18, 83:11 Additionally [1] - 96:7 additionally [7] - 57:12, 61:8, 88:2, 88:6, 92:17, 93:15, 95:7 address [7] - 5:10, 24:5, 24:8, 34:9, 49:11, 55:24, 85:21 addressed [3] - 34:9, 43:12, 57:20 addresses [1] - 35:15 administer [1] -
#105 [2] - 1:25, 97:17				
0		3	5	
00147 [3] - 1:1, 3:5, 66:1		3 [1] - 81:25 304 [3] - 13:13, 42:17, 43:12 304.200 [4] - 18:8, 25:16, 53:1, 88:15 304.230 [1] - 89:2 304.240 [44] - 6:19, 10:3, 12:16, 13:11, 13:23, 14:3, 16:2, 18:6, 30:6, 31:18, 34:3, 34:9, 35:14, 36:19, 38:9, 38:23, 40:13, 42:3, 42:15, 43:6, 44:22, 45:5, 45:23, 47:7, 47:8, 47:23, 48:4, 49:1, 50:1, 50:22, 59:3, 59:6, 65:9, 81:5, 81:7, 81:8, 87:18, 89:16, 90:21, 91:5, 91:6, 92:8, 94:1, 94:15 304.240(2) [1] - 89:4 304.250 [7] - 18:8, 25:12, 25:16, 52:22, 88:9, 88:13, 88:15 304.420 [1] - 92:23 304.500 [1] - 53:1 30th [3] - 26:13, 26:22, 96:3 32 [5] - 23:17, 52:2, 82:15, 84:6, 90:13 32nd [1] - 23:21 351 [1] - 32:19 353 [1] - 92:16 358 [1] - 33:5 359 [1] - 33:20 360 [1] - 33:21 364 [1] - 92:16	5 [3] - 17:23, 72:19, 89:10 50 [3] - 47:7, 53:22, 72:12 500 [1] - 94:25 509 [1] - 94:25 520 [1] - 32:19 530 [1] - 31:17 545 [1] - 85:19 552 [1] - 35:22 567 [1] - 31:17 574 [1] - 32:11 575 [1] - 31:25	
1			6	
1 [7] - 1:2, 22:8, 25:6, 25:8, 52:8, 91:8, 97:11 100 [6] - 15:22, 16:9, 18:22, 91:1, 93:14 11 [7] - 1:1, 3:5, 37:11, 37:18, 38:7, 66:1, 67:11 112801 [1] - 29:4 115 [1] - 92:15 116 [1] - 38:20 1173 [1] - 85:19 125 [1] - 75:23 135 [1] - 63:21 13th [4] - 4:21, 14:15, 20:21, 31:14 15 [1] - 60:19 154 [1] - 75:23 15th [3] - 26:8, 52:10, 52:19 17 [2] - 21:8, 63:3 17th [1] - 3:11 180 [3] - 14:17, 49:7, 49:10 180-day [1] - 14:20 19 [3] - 1:10, 3:1, 9:20 1925 [1] - 28:22 1940s [1] - 9:21 1950s [1] - 9:21 1954 [2] - 8:18, 9:6 1956 [1] - 9:16 1997 [1] - 32:19 1:25 [1] - 3:1 1B [2] - 1:1, 3:5		65 [1] - 63:20 65(2) [1] - 87:7	65 [1] - 63:20 65(2) [1] - 87:7	
			7	
			7 [1] - 74:16 70 [1] - 94:25 709 [1] - 61:20 716 [1] - 61:20	
			8	
			8 [8] - 22:4, 22:5, 32:1, 34:12, 34:13, 34:21, 35:6, 35:9 872 [1] - 36:1 89509 [1] - 97:18 8th [2] - 52:18, 83:5	
			9	
			90-day [1] - 14:20 939 [1] - 38:20 946 [1] - 38:20 97 [1] - 97:11 9th [1] - 29:6	
2		4	A	
2 [9] - 13:18, 18:6, 18:24, 29:8, 34:12, 34:13, 34:21, 35:9, 56:16 2-0-3 [1] - 18:20 20 [2] - 14:1, 42:15 2000 [2] - 31:17, 38:20		4 [3] - 64:19, 90:24, 93:3 415 [1] - 61:19 442 [1] - 35:22 45 [7] - 21:2, 24:19, 24:23, 53:17, 83:25, 84:1, 84:8 452 [1] - 37:10 453 [2] - 37:18, 38:6 455 [1] - 97:18 458 [1] - 36:7 459 [1] - 36:7	ability [3] - 7:5, 10:6, 14:11 able [5] - 12:11, 21:17, 26:10, 27:22, 47:15 ably [1] - 73:23	

<p>50:20 administering [1] - 65:7 administration [2] - 67:8, 69:10 administrative [1] - 78:10 admit [3] - 25:1, 39:14 admittance [1] - 26:4 admitted [3] - 25:8, 39:11, 68:9 adopt [4] - 25:13, 52:23, 53:7, 88:10 adopted [9] - 6:19, 25:11, 25:21, 31:18, 34:11, 53:2, 53:4, 87:21, 92:20 adoption [1] - 88:17 advance [3] - 33:9, 36:5, 54:6 advertising [1] - 76:5 advising [1] - 57:22 affects [1] - 7:9 affiliation [2] - 27:4, 57:22 affixing [1] - 74:25 afternoon [3] - 3:17, 3:21, 34:10 agencies [1] - 64:21 agency [1] - 68:18 agency's [1] - 64:23 aggressive [1] - 54:9 ago [3] - 32:12, 37:7, 53:22 agree [1] - 29:24 agreed [2] - 5:10, 87:5 ahead [11] - 5:1, 5:16, 5:20, 28:10, 39:17, 41:5, 46:12, 75:8, 75:11, 78:5, 84:18 aided [1] - 97:9 air [1] - 40:10 Alan [2] - 7:3, 84:6 Alaska [2] - 11:4, 85:21 Alaskan [3] - 61:23, 73:13, 85:19 allow [13] - 5:17, 5:18, 11:14, 12:8, 23:7, 23:25, 41:5, 55:16, 55:18, 84:19, 93:7, 93:8, 93:20 allowed [4] - 3:11, 9:5, 37:7, 72:10 allowing [5] - 61:17, 62:22, 63:10, 66:13, 68:5</p>	<p>allows [8] - 8:5, 19:6, 19:11, 23:18, 23:19, 80:20, 83:20 alluding [2] - 55:9, 56:13 almost [4] - 8:16, 46:8, 58:22, 71:17 alone [1] - 85:24 ambiguity [1] - 65:4 Amendment [5] - 28:20, 28:21, 32:22, 38:11, 86:14 amendments [1] - 34:12 American [1] - 11:4 amount [3] - 21:7, 83:22, 84:20 AN [1] - 60:7 analysis [10] - 6:13, 10:2, 14:6, 16:25, 18:4, 23:12, 30:24, 78:9, 78:10, 82:19 analyze [1] - 11:2 analyzing [1] - 34:7 AND [1] - 1:7 answer [2] - 39:4, 67:3 anti [1] - 32:20 anti-fusion [1] - 32:20 anticipated [2] - 34:25, 53:12 anyway [2] - 45:20, 75:7 apparent [1] - 26:8 appeal [1] - 55:10 appear [8] - 29:14, 51:4, 51:5, 57:9, 58:20, 66:13, 90:18, 94:19 appearance [1] - 94:6 APPEARANCES [1] - 2:1 appearing [2] - 5:2, 33:13 applicable [11] - 15:20, 18:16, 18:21, 19:1, 19:3, 19:4, 22:23, 27:5, 83:18 application [3] - 16:4, 21:18, 39:1 applied [14] - 29:3, 47:16, 58:10, 58:12, 58:15, 70:10, 70:11, 70:25, 71:2, 71:8, 71:22, 74:5, 93:18 applies [6] - 8:10, 22:21, 35:6, 46:3, 91:7, 94:21</p>	<p>apply [18] - 8:16, 15:15, 18:9, 18:11, 18:18, 32:17, 44:21, 46:3, 47:23, 49:15, 49:19, 49:22, 50:7, 71:9, 89:6, 89:12, 93:17, 94:20 applying [2] - 49:19, 93:19 appointed [1] - 9:24 appointment [5] - 45:13, 46:20, 46:24, 47:4, 91:17 appreciate [3] - 45:22, 78:3, 86:22 appreciates [1] - 96:12 approach [1] - 28:4 approached [1] - 28:7 appropriate [9] - 42:16, 42:18, 42:25, 43:1, 43:21, 50:4, 65:5, 90:23 arbitrary [2] - 15:9, 24:15 area [2] - 31:21, 59:15 Area [2] - 32:18 areas [1] - 9:4 arena [4] - 69:14, 69:18, 69:20, 69:23 argue [10] - 5:10, 31:2, 40:13, 40:17, 51:7, 51:20, 51:21, 52:1, 61:15, 81:2 argued [1] - 37:5 arguing [1] - 51:19 argument [43] - 4:13, 5:5, 5:16, 8:8, 11:11, 13:2, 16:25, 17:3, 20:18, 24:20, 27:23, 28:14, 28:15, 30:10, 31:3, 37:14, 37:21, 41:25, 42:5, 44:4, 49:17, 49:20, 50:15, 54:17, 57:13, 60:17, 60:21, 63:14, 64:10, 65:9, 70:22, 71:5, 75:5, 78:4, 80:1, 80:5, 80:11, 80:12, 84:18, 85:5, 93:18, 94:21 arguments [8] - 11:3, 56:12, 66:8, 85:3, 86:21, 93:6, 93:8, 96:12 Arnold [1] - 63:22 arrange [1] - 58:2 as-applied [10] - 58:10, 58:15, 70:10,</p>	<p>70:11, 70:25, 71:2, 71:8, 71:22, 74:5 assert [3] - 12:12, 69:3, 69:4 assertion [1] - 70:22 associate [3] - 32:4, 32:5, 73:15 association [6] - 21:15, 28:19, 29:2, 31:3, 32:5, 34:19 association's [2] - 31:21, 32:9 associational [12] - 32:23, 36:13, 56:19, 57:10, 61:8, 61:22, 62:13, 62:21, 64:11, 73:7, 75:16, 76:9 associations [1] - 32:6 assume [3] - 28:16, 29:7, 57:17 assuming [3] - 30:9, 50:18, 50:24 attached [2] - 22:8, 29:19 attempts [1] - 86:6 attention [1] - 67:10 Attorney [6] - 2:2, 2:4, 2:5, 2:8, 2:10, 2:11 attorney's [1] - 96:9 attorneys [1] - 86:19 AUDIENCE [2] - 48:5, 75:24 authority [8] - 7:6, 7:10, 7:25, 15:1, 38:18, 47:15, 50:20, 61:25 authorized [1] - 7:25 availability [1] - 46:21 avoid [1] - 92:14 aware [3] - 25:10, 38:16, 40:4</p>	<p>50:17, 51:4, 51:6, 51:16, 52:12, 53:20, 54:3, 54:4, 54:5, 56:2, 56:4, 56:6, 56:24, 57:10, 57:21, 58:21, 59:11, 59:17, 59:25, 60:14, 61:12, 63:21, 69:18, 70:18, 71:10, 71:11, 72:1, 72:11, 74:18, 76:1, 80:23, 82:7, 82:12, 90:10, 90:19, 94:2, 94:5, 94:7, 94:9, 94:14, 95:20 ballots [17] - 23:21, 24:11, 26:11, 52:18, 53:17, 54:2, 54:6, 54:14, 61:10, 77:21, 77:22, 83:16, 83:23, 84:1, 89:25, 90:1 bar [1] - 32:13 barer [1] - 75:20 based [3] - 17:2, 85:20, 93:22 bases [1] - 5:8 basis [4] - 5:9, 5:10, 5:24, 39:16 bear [1] - 96:9 bears [1] - 64:9 beat [1] - 45:20 become [4] - 27:7, 41:6, 58:25, 88:21 becomes [1] - 91:9 begin [1] - 85:11 beginning [1] - 39:22 begins [1] - 71:20 BEHALF [3] - 2:2, 2:5, 2:8 behalf [5] - 4:5, 4:14, 5:2, 66:18, 68:22 believes [7] - 58:1, 74:21, 74:24, 87:22, 88:6, 94:10, 94:15 bench [7] - 28:7, 32:1, 35:19, 37:11, 37:19, 38:7, 87:2 Benson [11] - 3:24, 3:25, 4:2, 25:5, 39:7, 39:17, 39:19, 44:19, 85:20, 87:11 BENSON [35] - 2:5, 3:24, 4:1, 4:3, 25:4, 39:8, 39:18, 39:20, 41:12, 42:11, 44:5, 44:23, 45:7, 45:22, 46:15, 48:6, 48:9, 48:23, 49:21, 51:21, 52:13, 53:3, 53:8, 55:18, 55:20, 55:22, 59:20, 60:23, 61:1,</p>
--	--	--	--	---

B

b)(3) [1] - 34:21
b)(4) [1] - 35:9
b)(5) [1] - 35:3
back-and-forth [1] - 66:16
Bacon [1] - 3:23
bad [1] - 79:22
ballot [58] - 4:21, 8:7, 15:7, 17:4, 17:24, 19:12, 19:13, 19:14, 19:16, 24:1, 29:14, 33:13, 35:1, 36:2,

<p>63:24, 64:17, 64:21, 65:17, 65:22, 87:14 best [3] - 73:24, 79:20, 89:1 better [9] - 5:13, 48:4, 48:12, 48:20, 67:5, 73:3, 73:4, 74:3 between [8] - 16:12, 28:3, 44:19, 48:21, 55:13, 60:13, 69:12, 81:13 beyond [2] - 38:17, 93:4 big [1] - 56:4 binder [2] - 27:20, 35:20 binding [1] - 60:5 bit [6] - 6:13, 24:8, 45:20, 49:13, 55:25, 88:25 Black's [2] - 45:9, 91:14 blank [1] - 12:2 blanket [3] - 11:6, 31:18, 37:6 blanks [1] - 13:24 boss [1] - 52:21 bottom [2] - 74:17 bound [1] - 67:1 box [1] - 74:17 BRADLEY [1] - 2:11 Bradley [1] - 4:8 break [2] - 60:19, 78:14 breakdown [1] - 81:23 breaks [1] - 78:19 bridge [1] - 69:13 brief [8] - 10:13, 51:24, 54:21, 55:8, 59:24, 66:15, 74:16, 80:9 briefing [2] - 26:14, 33:10 briefly [2] - 59:21, 60:24 briefs [6] - 34:4, 66:22, 86:19, 86:20, 86:21, 87:16 bring [1] - 27:25 bringing [1] - 48:13 brings [2] - 7:4, 19:7 broad [2] - 9:3, 50:20 brought [3] - 10:12, 55:1, 57:13 Brown [10] - 8:22, 8:25, 10:24, 46:7, 47:17, 47:22, 53:19, 79:6, 79:10, 94:24 Buell [5] - 3:6, 3:19,</p>	<p>4:19, 5:25, 66:2 BUELL [2] - 1:8, 3:21 burden [12] - 32:24, 33:1, 33:3, 36:13, 61:6, 61:13, 62:22, 64:11, 75:16, 76:9, 83:13 burdened [4] - 61:16, 62:12, 62:15, 62:21 burdens [1] - 33:8 business [2] - 41:14, 55:14 BY [1] - 1:25 bylaws [4] - 15:3, 21:3, 24:18</p> <p style="text-align: center;">C</p> <p>California [9] - 31:16, 33:16, 37:15, 37:22, 63:16, 63:17, 70:15, 72:8, 73:3 California's [2] - 31:18, 37:6 campaign [2] - 69:14, 69:23 campaigns [1] - 69:16 candidacy [46] - 11:20, 11:21, 12:6, 13:22, 13:23, 16:5, 16:7, 16:9, 21:19, 22:2, 29:15, 29:16, 30:21, 40:1, 40:15, 40:19, 40:25, 41:22, 42:16, 42:18, 42:21, 43:10, 45:4, 46:2, 48:1, 49:2, 50:3, 50:7, 52:6, 53:10, 58:22, 60:3, 65:3, 65:13, 67:22, 79:13, 81:16, 81:19, 81:24, 89:21, 90:5, 90:22, 91:1, 91:13, 93:14 candidate [77] - 12:2, 12:13, 12:17, 15:25, 16:3, 16:13, 16:14, 16:15, 16:18, 16:20, 16:22, 17:24, 17:25, 18:5, 18:23, 19:12, 19:13, 20:5, 20:11, 20:13, 20:15, 21:17, 23:9, 26:23, 30:19, 33:13, 36:4, 39:25, 40:24, 41:6, 42:7, 43:15, 43:17, 44:2, 44:3, 44:7, 44:8, 44:16, 44:24, 50:2, 50:6, 50:16, 55:1,</p>	<p>63:11, 65:11, 67:21, 72:11, 73:17, 75:8, 75:9, 75:11, 75:22, 76:3, 76:7, 79:11, 80:25, 81:25, 82:2, 89:19, 90:3, 90:9, 90:15, 90:17, 90:22, 91:4, 91:11, 91:23, 92:7, 92:9, 92:24, 93:1, 94:9, 94:13, 95:20 candidate's [1] - 57:23 candidates [93] - 4:21, 7:7, 7:12, 7:23, 10:14, 15:6, 15:7, 15:13, 15:22, 17:16, 17:17, 17:22, 18:2, 20:7, 20:10, 21:22, 23:15, 23:16, 23:20, 26:20, 29:13, 31:13, 32:15, 33:12, 33:20, 34:2, 36:1, 36:12, 36:22, 38:2, 40:14, 40:18, 41:7, 41:21, 42:15, 43:7, 47:5, 50:12, 51:3, 52:2, 52:5, 56:23, 58:20, 59:10, 59:24, 60:1, 60:2, 61:9, 61:11, 61:12, 64:1, 64:4, 64:5, 64:7, 69:12, 69:17, 69:21, 69:22, 70:3, 70:4, 70:5, 70:13, 70:14, 70:15, 71:10, 72:10, 73:4, 73:16, 74:1, 74:8, 81:1, 81:21, 82:12, 82:13, 90:8, 90:9, 90:10, 90:15, 90:25, 92:12, 93:13, 94:2, 94:4, 94:11, 94:14, 95:13, 95:25 candidates' [1] - 54:5 candidly [3] - 48:11, 78:8, 79:21 cannot [2] - 54:14, 93:4 capricious [1] - 24:15 caption [2] - 59:4, 59:5 captions [1] - 59:4 care [3] - 46:6, 47:24, 68:8 careful [1] - 34:17 carefully [1] - 71:23 CARSON [2] - 1:7, 3:1</p>	<p>Carson [1] - 7:3 case [113] - 8:9, 8:19, 8:21, 8:22, 8:24, 8:25, 9:2, 9:6, 9:9, 10:24, 14:14, 15:8, 18:17, 19:18, 20:6, 22:12, 23:4, 26:8, 28:22, 28:23, 29:12, 31:17, 32:13, 32:19, 33:11, 33:23, 35:20, 35:23, 35:25, 36:16, 37:2, 38:20, 45:1, 45:3, 45:5, 46:2, 46:7, 46:9, 46:11, 46:14, 46:15, 46:17, 46:18, 46:19, 47:1, 47:7, 47:13, 47:15, 47:22, 47:23, 49:9, 50:21, 51:8, 51:11, 51:18, 52:6, 53:19, 53:22, 55:23, 56:12, 56:21, 56:25, 57:1, 57:17, 57:25, 58:14, 60:2, 61:2, 61:16, 61:19, 61:22, 61:23, 62:18, 62:25, 63:16, 64:9, 64:24, 65:4, 68:20, 69:7, 69:13, 70:15, 71:15, 72:5, 73:16, 73:17, 73:25, 75:17, 75:18, 77:15, 78:11, 78:20, 79:1, 79:7, 79:9, 79:20, 81:18, 85:19, 86:2, 86:9, 86:13, 86:18, 86:19, 86:21, 86:24, 87:4, 88:24, 92:15, 93:18, 93:19, 95:1 Case [2] - 3:5, 66:1 CASE [1] - 1:1 cases [14] - 9:22, 11:5, 27:21, 31:4, 33:15, 39:12, 44:25, 51:4, 61:23, 62:6, 62:10, 62:24, 63:6, 64:2 catastrophe [3] - 14:19, 35:15, 67:13 catastrophes [1] - 60:11 caused [4] - 77:8, 77:9, 79:18 CCR [2] - 1:25, 97:17 CD [1] - 24:25 cell [2] - 77:25, 78:2 central [8] - 10:20, 21:4, 21:5, 24:17, 45:3, 63:1, 81:9, 91:24 Central [3] - 8:20,</p>	<p>9:10, 33:17 centrally [1] - 67:20 certain [6] - 14:21, 48:23, 49:14, 51:4, 60:10, 68:4 certainly [7] - 48:12, 64:17, 65:17, 79:7, 79:9, 85:13, 87:20 Certified [1] - 97:4 certify [1] - 97:5 challenge [19] - 29:3, 35:23, 57:13, 58:5, 58:6, 58:10, 58:13, 58:15, 61:2, 61:3, 61:25, 70:10, 70:11, 71:2, 71:8, 71:9, 71:22, 72:13, 74:5 challenged [1] - 59:2 challenges [14] - 22:7, 24:21, 24:22, 26:12, 54:20, 54:22, 54:23, 54:24, 54:25, 55:2, 55:6, 55:8, 55:9 challenging [1] - 73:20 chance [2] - 54:2, 63:10 change [9] - 14:25, 27:4, 30:2, 50:19, 50:23, 51:17, 56:4, 72:19, 86:2 changes [1] - 35:11 changing [1] - 73:5 Chapter [8] - 12:25, 13:8, 42:8, 42:20, 81:7, 81:8, 84:10, 89:5 chapter [1] - 89:20 character [1] - 32:24 chief [1] - 68:2 choice [4] - 32:15, 35:23, 57:23, 61:18 choose [7] - 37:9, 37:16, 37:23, 41:18, 56:16, 62:3, 73:9 choosed [3] - 15:15, 80:13, 80:14 choosing [7] - 49:18, 49:22, 57:15, 62:19, 62:20, 83:10, 94:18 Circuit [3] - 37:3, 62:10, 73:13 circumstance [2] - 35:16, 77:7 circumstances [6] - 20:14, 34:15, 35:7, 46:17, 80:24 citation [2] - 38:18, 79:15 cite [2] - 38:20, 53:19</p>
--	--	---	---	---

<p>cited [2] - 47:16, 85:20</p> <p>Cities [1] - 32:18</p> <p>citizens [2] - 85:21, 85:25</p> <p>Citizens [1] - 38:19</p> <p>City [1] - 7:3</p> <p>CITY [2] - 1:7, 3:1</p> <p>Civil [1] - 87:7</p> <p>claimed [1] - 6:5</p> <p>clarified [2] - 87:22, 87:23</p> <p>clear [19] - 6:10, 20:3, 20:25, 40:5, 49:1, 49:7, 53:9, 53:11, 66:23, 67:19, 67:24, 68:5, 70:19, 73:12, 73:14, 82:3, 84:9, 86:5, 94:23</p> <p>cleared [1] - 48:24</p> <p>clearer [1] - 49:3</p> <p>clearly [20] - 6:9, 10:21, 11:25, 12:16, 12:18, 12:23, 16:2, 18:7, 22:12, 37:2, 44:11, 49:11, 60:2, 61:6, 64:23, 72:24, 74:6, 76:24, 82:21, 89:2</p> <p>clerk [1] - 43:2</p> <p>Clerk [2] - 7:3, 84:6</p> <p>Clerk-Recorder [1] - 7:3</p> <p>clerks [3] - 26:10, 52:14, 58:2</p> <p>client [1] - 4:3</p> <p>close [1] - 13:20</p> <p>closed [2] - 12:15, 31:8</p> <p>closing [1] - 24:10</p> <p>cognizant [1] - 72:18</p> <p>coming [5] - 41:7, 41:9, 48:15, 77:18, 77:20</p> <p>comment [4] - 5:18, 48:6, 55:11, 55:12</p> <p>comments [3] - 48:18, 84:17, 96:7</p> <p>commissions [1] - 69:20</p> <p>Committee [3] - 8:21, 9:10, 33:17</p> <p>committee [16] - 6:24, 7:6, 7:7, 7:10, 7:11, 8:1, 10:20, 10:21, 17:13, 21:4, 21:5, 21:21, 45:3, 63:1, 91:24, 92:1</p> <p>committees [4] - 24:16, 24:17, 81:9,</p>	<p>81:10</p> <p>Company [1] - 92:15</p> <p>compared [1] - 79:21</p> <p>comparison [1] - 35:17</p> <p>comparisons [1] - 34:6</p> <p>compel [1] - 72:22</p> <p>compelled [3] - 40:3, 74:10, 74:12</p> <p>compelling [10] - 33:9, 33:25, 35:12, 62:11, 62:16, 62:19, 76:13, 77:14, 85:4, 85:12</p> <p>compels [1] - 64:25</p> <p>complaint [2] - 4:18, 64:14</p> <p>complaints [1] - 71:18</p> <p>completely [3] - 13:6, 40:21, 42:2</p> <p>complex [1] - 5:6</p> <p>complied [1] - 95:24</p> <p>comprehensive [1] - 67:18</p> <p>computer [1] - 97:9</p> <p>computer-aided [1] - 97:9</p> <p>concern [3] - 73:21, 74:25, 75:18</p> <p>concerned [3] - 34:10, 73:2, 89:3</p> <p>concerns [2] - 23:11, 33:2</p> <p>conclude [1] - 60:23</p> <p>concluded [1] - 96:14</p> <p>concluding [1] - 36:9</p> <p>conclusion [2] - 74:24, 85:17</p> <p>concretely [1] - 70:23</p> <p>conducted [4] - 12:24, 19:9, 21:1, 89:4</p> <p>conducting [3] - 25:14, 52:24, 88:11</p> <p>Conference [1] - 24:25</p> <p>conference [2] - 26:5, 26:6</p> <p>conferred [1] - 53:24</p> <p>conflict [2] - 81:4</p> <p>conflicts [1] - 64:23</p> <p>confused [2] - 58:8, 72:3</p> <p>confusing [5] - 48:10, 70:19, 87:19, 88:1, 88:8</p>	<p>confusion [8] - 49:13, 57:19, 70:17, 89:8, 89:14, 90:14, 90:19, 92:5</p> <p>Congress [15] - 19:23, 34:8, 34:12, 34:17, 34:25, 35:3, 35:10, 46:21, 47:11, 48:16, 53:23, 55:5, 56:17, 60:9</p> <p>congressional [3] - 7:17, 69:19, 77:3</p> <p>Congressional [2] - 4:22, 56:16</p> <p>congressmen [1] - 34:14</p> <p>conjunction [3] - 81:7, 81:8, 84:10</p> <p>Connecticut [1] - 33:18</p> <p>connection [1] - 12:10</p> <p>consider [2] - 33:2, 35:1</p> <p>consideration [1] - 93:5</p> <p>considered [1] - 35:21</p> <p>considering [2] - 33:24, 87:21</p> <p>consistency [1] - 50:14</p> <p>consistent [2] - 40:3, 74:15</p> <p>consistently [1] - 28:12</p> <p>consisting [1] - 97:10</p> <p>consists [1] - 63:1</p> <p>Constitution [3] - 28:13, 28:20, 28:21</p> <p>constitutional [25] - 5:11, 11:12, 17:8, 24:5, 24:7, 27:20, 30:10, 30:24, 37:6, 38:18, 51:19, 51:21, 54:18, 55:24, 56:11, 59:15, 60:17, 61:5, 61:7, 70:25, 72:13, 78:9, 80:10, 95:7, 95:15</p> <p>constitutionally [2] - 38:23, 82:4</p> <p>constraints [1] - 34:5</p> <p>construct [2] - 11:15, 12:21</p> <p>construction [5] - 22:25, 40:6, 41:25, 42:1, 54:17</p>	<p>construed [2] - 38:17, 87:6</p> <p>consulted [1] - 52:13</p> <p>contained [1] - 59:6</p> <p>contains [1] - 25:3</p> <p>contemplates [1] - 12:18</p> <p>contents [1] - 33:1</p> <p>contention [1] - 68:10</p> <p>contested [1] - 68:20</p> <p>context [1] - 71:13</p> <p>contingencies [1] - 78:13</p> <p>contradiction [1] - 38:17</p> <p>contrary [1] - 58:18</p> <p>contrasted [1] - 33:11</p> <p>control [2] - 32:7, 33:14</p> <p>controls [1] - 47:12</p> <p>convention [3] - 7:22, 7:24, 75:7</p> <p>copy [5] - 32:1, 35:19, 37:11, 37:19, 38:7</p> <p>corollary [1] - 32:4</p> <p>correct [16] - 8:23, 10:21, 16:6, 21:12, 22:14, 30:8, 39:3, 44:22, 44:23, 51:12, 52:8, 87:9, 87:10, 87:13, 87:14, 95:14</p> <p>costs [1] - 96:10</p> <p>Counsel [1] - 28:7</p> <p>counsel [10] - 4:24, 27:24, 28:3, 68:8, 68:12, 68:23, 70:22, 71:20, 73:23</p> <p>counties [1] - 78:17</p> <p>country [3] - 67:9, 68:4, 79:22</p> <p>COUNTY [1] - 97:2</p> <p>county [8] - 21:9, 42:24, 43:1, 43:2, 52:14, 58:2, 68:5</p> <p>County [2] - 33:17, 52:14</p> <p>couple [4] - 25:25, 27:21, 34:6, 48:18</p> <p>course [11] - 49:13, 52:15, 53:4, 55:8, 55:23, 66:25, 71:23, 73:18, 75:15, 76:16</p> <p>court [11] - 57:19, 60:18, 70:25, 71:24, 72:17, 72:25, 73:6, 73:12, 74:6, 76:24, 97:6</p>	<p>Court [73] - 3:10, 3:11, 6:16, 9:3, 20:4, 20:10, 21:6, 26:4, 27:11, 27:13, 27:20, 28:23, 31:15, 31:19, 32:2, 32:17, 32:19, 33:11, 33:22, 34:21, 35:21, 37:2, 37:12, 37:25, 38:21, 38:22, 39:12, 40:7, 42:1, 43:21, 46:11, 46:15, 58:1, 58:5, 61:9, 62:14, 66:13, 66:20, 66:25, 68:17, 70:6, 70:12, 70:24, 71:16, 71:24, 72:17, 72:23, 74:10, 74:11, 74:19, 74:21, 74:24, 75:1, 78:3, 86:5, 86:25, 87:22, 88:3, 88:6, 88:7, 88:16, 88:22, 91:2, 93:25, 94:10, 94:15, 94:24, 95:6, 95:16, 96:5, 96:12, 97:4</p> <p>COURT [75] - 1:6, 3:4, 3:16, 3:18, 3:20, 3:22, 3:25, 4:2, 4:6, 4:10, 4:13, 4:16, 5:1, 5:15, 6:16, 8:8, 8:22, 12:16, 16:1, 16:11, 18:6, 20:18, 21:25, 22:11, 25:2, 25:5, 25:9, 25:20, 25:25, 27:16, 28:1, 28:5, 28:8, 28:10, 39:6, 39:9, 41:3, 42:5, 43:13, 44:10, 45:6, 45:9, 46:6, 48:2, 48:8, 48:10, 49:17, 51:19, 52:7, 52:20, 53:5, 55:11, 55:19, 55:21, 59:3, 60:16, 60:25, 63:22, 64:16, 64:18, 65:8, 65:19, 65:24, 66:7, 75:5, 77:25, 80:4, 80:7, 84:16, 84:23, 84:25, 86:16, 87:11, 87:13, 87:15</p> <p>court's [2] - 29:20, 36:9</p> <p>Court's [11] - 27:22, 31:20, 31:25, 32:11, 33:5, 38:7, 38:11, 65:20, 87:3, 87:19, 94:17</p> <p>courtroom [2] - 68:23, 78:23</p> <p>courts [1] - 73:8</p> <p>cover [2] - 5:4, 59:21</p>
---	--	--	---	--

<p>create [3] - 13:5, 41:10, 79:8</p> <p>created [4] - 22:19, 22:22, 46:16, 57:20</p> <p>creating [1] - 95:9</p> <p>credence [1] - 44:20</p> <p>critical [2] - 30:24, 36:8</p> <p>criticism [1] - 71:15</p> <p>criticizing [1] - 67:7</p> <p>crux [1] - 16:25</p> <p>cutting [1] - 79:3</p>	<p>63:5, 72:17, 74:19, 74:20</p> <p>decisions [2] - 32:7, 62:23</p> <p>declaration [27] - 12:25, 13:22, 21:18, 22:2, 29:15, 30:20, 36:23, 40:1, 40:15, 40:19, 40:25, 45:4, 46:1, 47:25, 49:2, 53:10, 58:21, 60:3, 65:3, 65:12, 67:22, 79:12, 81:15, 81:23, 89:21, 90:4, 91:12</p> <p>declarations [2] - 52:5, 82:22</p> <p>declaratory [3] - 6:1, 27:11, 84:14</p> <p>declare [2] - 71:4, 81:18</p> <p>decline [1] - 48:6</p> <p>decree [1] - 75:2</p> <p>defendant [1] - 3:8</p> <p>DEFENDANT [1] - 2:5</p> <p>defendants [4] - 9:12, 14:7, 38:12, 85:3</p> <p>Defendants [1] - 1:13</p> <p>defendants' [1] - 11:3</p> <p>deference [14] - 22:13, 22:17, 22:23, 24:6, 28:16, 30:9, 64:19, 64:22, 65:6, 68:11, 68:19, 78:8, 93:3</p> <p>defined [2] - 34:15, 35:7</p> <p>defines [1] - 91:15</p> <p>delegates [1] - 21:8</p> <p>Democrat [2] - 20:15, 23:8</p> <p>DEMOCRATIC [1] - 2:8</p> <p>Democratic [11] - 3:8, 3:12, 4:7, 12:13, 20:6, 31:1, 31:16, 33:17, 66:3, 66:18, 75:11</p> <p>Democrats [1] - 57:9</p> <p>demonstrated [1] - 63:15</p> <p>demonstrates [1] - 64:3</p> <p>denomination [1] - 51:6</p> <p>deny [1] - 64:14</p> <p>denying [2] - 95:10,</p>	<p>95:11</p> <p>Department [2] - 54:8, 72:18</p> <p>dependents [1] - 54:1</p> <p>depriving [1] - 34:1</p> <p>DEPT [1] - 1:2</p> <p>Deputy [2] - 2:5, 2:7</p> <p>describe [1] - 41:1</p> <p>described [1] - 35:24</p> <p>deserves [3] - 77:24, 78:8, 78:10</p> <p>designate [3] - 45:14, 62:2, 91:17</p> <p>designated [4] - 36:2, 44:16, 91:23, 92:8</p> <p>designating [1] - 95:13</p> <p>designation [2] - 51:12, 93:1</p> <p>designed [2] - 47:20, 56:6</p> <p>determinative [1] - 29:11</p> <p>determine [1] - 28:25</p> <p>determined [2] - 29:9, 95:21</p> <p>determines [1] - 55:5</p> <p>Dictionary [2] - 45:10, 91:14</p> <p>died [2] - 9:7, 46:10</p> <p>difference [2] - 56:12, 81:13</p> <p>different [18] - 13:12, 13:14, 14:18, 14:20, 15:15, 16:15, 17:4, 17:5, 23:3, 41:11, 46:18, 54:23, 57:6, 78:13, 79:2, 94:19, 95:9</p> <p>differentiate [1] - 16:11</p> <p>differentiation [1] - 55:12</p> <p>differently [3] - 69:11, 69:12, 93:16</p> <p>direct [2] - 44:5, 61:24</p> <p>direction [1] - 5:13</p> <p>directly [2] - 39:23, 43:11</p> <p>disagree [1] - 56:5</p> <p>disallowing [1] - 93:11</p> <p>disapproved [1] - 31:15</p> <p>disaster [2] - 77:10</p> <p>disclaimer [4] - 57:21, 58:11, 74:17,</p>	<p>74:25</p> <p>discretion [1] - 24:15</p> <p>discuss [1] - 31:4</p> <p>discussed [1] - 59:24</p> <p>Discussion [1] - 28:3</p> <p>discussions [1] - 6:25</p> <p>disingenuous [1] - 21:13</p> <p>disinterested [1] - 62:9</p> <p>disparaging [2] - 25:23, 88:18</p> <p>disrupting [1] - 78:3</p> <p>disruptive [1] - 78:16</p> <p>dissent [1] - 76:18</p> <p>distinct [1] - 6:25</p> <p>distinction [3] - 41:3, 60:13, 67:3</p> <p>distinguishable [1] - 46:18</p> <p>DISTRICT [2] - 1:6, 1:16</p> <p>District [2] - 4:22, 56:16</p> <p>district [2] - 7:17, 55:3</p> <p>divide [1] - 5:6</p> <p>document [1] - 11:24</p> <p>documents [2] - 23:13, 39:11</p> <p>done [12] - 13:4, 22:19, 27:14, 38:10, 48:4, 48:12, 48:19, 51:18, 56:8, 67:5, 74:15, 76:12</p> <p>doomed [1] - 37:6</p> <p>doors [1] - 76:4</p> <p>doubt [2] - 38:16, 78:23</p> <p>doubts [1] - 62:14</p> <p>down [13] - 6:21, 12:1, 16:19, 20:6, 31:18, 33:18, 41:6, 41:7, 41:9, 55:17, 56:23, 58:9, 86:6</p> <p>draft [1] - 34:17</p> <p>drafting [1] - 48:4</p> <p>dramatic [1] - 71:4</p> <p>drawing [1] - 49:23</p> <p>due [4] - 5:5, 69:2, 70:11, 87:2</p> <p>during [5] - 9:20, 9:21, 26:5, 26:6, 27:8</p> <p>DVD [1] - 70:13</p>	<p>E</p> <p>e-mail [1] - 96:6</p> <p>ease [1] - 27:22</p> <p>easier [2] - 20:24, 69:16</p> <p>easy [3] - 20:22, 76:8</p> <p>Edition [1] - 91:15</p> <p>effect [7] - 31:4, 40:7, 40:11, 43:6, 92:18, 94:7, 94:8</p> <p>effectively [2] - 63:15, 64:7</p> <p>effort [1] - 73:2</p> <p>eight [1] - 20:9</p> <p>either [11] - 8:19, 11:6, 41:16, 45:1, 45:2, 64:1, 67:10, 67:13, 75:6, 85:2, 91:5</p> <p>Election [1] - 24:25</p> <p>election [116] - 4:22, 6:3, 6:7, 8:5, 8:18, 9:8, 9:11, 9:13, 9:14, 9:15, 9:17, 9:19, 10:5, 12:3, 12:12, 14:5, 14:20, 14:24, 15:8, 18:8, 18:9, 18:11, 19:9, 19:20, 20:1, 20:12, 20:16, 20:21, 23:18, 23:21, 27:3, 27:5, 29:1, 29:14, 31:2, 31:8, 31:9, 31:10, 31:13, 32:21, 35:11, 36:6, 38:8, 41:14, 41:15, 41:20, 41:24, 45:13, 46:23, 47:3, 47:17, 49:9, 50:12, 50:14, 51:13, 52:2, 53:18, 54:10, 55:15, 55:16, 55:23, 56:14, 56:15, 56:24, 57:8, 57:16, 58:21, 59:8, 59:9, 60:8, 60:10, 61:18, 62:1, 63:18, 67:8, 68:2, 68:6, 69:9, 71:9, 72:1, 72:12, 73:20, 73:21, 77:2, 77:3, 77:16, 77:23, 78:13, 79:17, 80:22, 80:23, 82:14, 82:15, 82:19, 85:18, 86:2, 89:3, 89:4, 89:6, 89:7, 89:17, 89:25, 90:1, 90:12, 90:13, 91:16, 93:17, 93:19</p> <p>Elections [1] - 2:7</p> <p>elections [21] - 9:19, 9:25, 15:21, 18:19,</p>
--	--	--	---	--

<p>25:15, 49:15, 50:7, 50:20, 51:5, 51:7, 52:25, 60:8, 63:17, 64:3, 65:7, 68:3, 73:5, 78:20, 79:1, 88:12, 89:12</p> <p>electronic [2] - 23:24, 35:2</p> <p>elementary [1] - 68:18</p> <p>Elias [3] - 4:11, 66:5, 87:24</p> <p>ELIAS [10] - 2:8, 4:12, 4:15, 66:6, 66:12, 75:12, 75:25, 78:6, 80:6, 87:12</p> <p>Elias' [1] - 85:5</p> <p>eliminate [1] - 92:21</p> <p>elite [1] - 21:12</p> <p>empty [1] - 32:6</p> <p>enact [1] - 34:23</p> <p>enacted [3] - 34:12, 47:8, 75:3</p> <p>enacting [2] - 50:22, 53:23</p> <p>encourage [1] - 75:10</p> <p>end [9] - 29:17, 32:9, 36:19, 37:16, 38:3, 49:7, 52:10, 53:11, 79:6</p> <p>endorsed [1] - 76:7</p> <p>endorsement [3] - 45:3, 57:24, 76:6</p> <p>enforce [1] - 54:12</p> <p>enforcement [1] - 37:3</p> <p>enforcing [1] - 54:9</p> <p>engage [1] - 74:12</p> <p>engineer [1] - 73:3</p> <p>enhanced [1] - 61:17</p> <p>enjoined [1] - 37:3</p> <p>enjoins [1] - 95:18</p> <p>enjoy [1] - 11:8</p> <p>ensuing [1] - 12:3</p> <p>entertain [2] - 55:7, 62:14</p> <p>entertained [3] - 54:21, 54:24, 55:4</p> <p>entire [2] - 65:9, 90:20</p> <p>entitled [7] - 20:5, 64:22, 68:11, 68:19, 93:3, 97:7</p> <p>equal [3] - 5:17, 84:21, 92:18</p> <p>ESQ [1] - 2:6</p> <p>essence [1] - 87:1</p> <p>essentially [11] - 20:19, 22:12, 44:25,</p>	<p>45:12, 53:24, 55:12, 58:16, 59:1, 61:2, 65:1, 73:3</p> <p>establish [3] - 85:24, 86:13, 89:24</p> <p>established [1] - 95:22</p> <p>established.. [1] - 89:24</p> <p>estimation [1] - 52:16</p> <p>Eu [2] - 33:15, 86:5</p> <p>evaluation [2] - 38:11, 38:12</p> <p>event [4] - 60:10, 62:15, 63:7, 64:1</p> <p>events [1] - 63:24</p> <p>everywhere [1] - 69:9</p> <p>evidence [6] - 25:1, 39:11, 58:7, 70:20, 72:2, 86:11</p> <p>exacerbated [1] - 78:25</p> <p>exact [1] - 8:17</p> <p>exactly [5] - 18:10, 47:20, 75:12, 84:11</p> <p>example [9] - 14:14, 15:16, 42:14, 59:24, 63:17, 89:8, 89:14, 90:19, 92:4</p> <p>excellent [3] - 45:7, 86:19, 86:20</p> <p>except [7] - 13:2, 18:13, 42:8, 44:13, 82:1, 82:2, 91:7</p> <p>Except [2] - 18:7, 89:18</p> <p>exception [1] - 69:8</p> <p>exclude [1] - 31:22</p> <p>excluded [3] - 18:13, 19:10, 61:12</p> <p>excludes [1] - 80:16</p> <p>Excuse [1] - 3:25</p> <p>excuse [13] - 4:10, 11:17, 13:16, 16:3, 16:5, 38:9, 38:24, 42:20, 43:8, 86:4, 87:6, 88:15, 92:23</p> <p>executive [10] - 7:6, 7:10, 7:11, 8:1, 10:19, 10:20, 17:13, 21:21, 81:10, 92:1</p> <p>exempt [3] - 80:15, 80:19, 83:13</p> <p>exercise [1] - 35:5</p> <p>Exhibit [4] - 22:8, 25:6, 25:8, 52:8</p> <p>exist [1] - 94:25</p> <p>exists [1] - 50:24</p>	<p>expands [1] - 8:24</p> <p>expedite [1] - 87:2</p> <p>expedited [1] - 5:24</p> <p>experience [2] - 64:2, 64:8</p> <p>expertise [1] - 65:6</p> <p>explained [1] - 67:17</p> <p>explicitly [1] - 57:13</p> <p>extend [2] - 54:14, 96:2</p> <p>extended [2] - 26:14, 95:23</p> <p>extending [1] - 51:25</p> <p>extent [2] - 33:2, 59:14</p> <p>extra [1] - 83:13</p> <p>extraordinary [5] - 34:14, 35:6, 35:16, 69:24</p> <p>extremely [1] - 87:19</p>	<p>F</p> <p>F.3d [1] - 85:19</p> <p>face [2] - 36:11, 36:13</p> <p>facial [4] - 35:23, 58:4, 58:6, 58:12</p> <p>facially [2] - 36:20, 39:1</p> <p>fact [18] - 9:6, 20:3, 20:23, 32:14, 49:10, 57:8, 67:16, 67:17, 70:2, 70:12, 71:25, 72:18, 73:12, 73:24, 74:1, 83:18, 94:17</p> <p>facts [3] - 70:12, 71:9, 71:25</p> <p>factual [2] - 74:3, 86:13</p> <p>fair [3] - 65:8, 74:23, 93:16</p> <p>fairly [1] - 54:8</p> <p>familiar [1] - 42:22</p> <p>faster [3] - 56:3, 56:5, 56:9</p> <p>federal [8] - 52:4, 53:18, 54:13, 69:14, 69:20, 79:9, 83:19, 85:14</p> <p>fees [2] - 18:21, 96:9</p> <p>felt [1] - 88:20</p> <p>few [2] - 63:3, 84:17</p> <p>field [1] - 56:23</p> <p>fifty [1] - 70:15</p> <p>fifty-some-odd [1] - 70:15</p> <p>figure [1] - 14:21</p> <p>file [39] - 8:2, 11:21,</p>	<p>12:25, 13:22, 15:23, 16:4, 16:7, 16:18, 16:19, 21:18, 21:23, 22:2, 26:24, 30:13, 36:18, 40:19, 41:6, 41:9, 41:15, 41:20, 41:21, 42:16, 45:4, 52:5, 55:17, 60:1, 81:15, 81:19, 81:20, 81:23, 82:2, 82:3, 82:12, 89:21, 90:10, 90:22, 93:9, 93:21</p> <p>filed [7] - 4:18, 14:13, 16:18, 23:13, 24:14, 82:22, 93:13</p> <p>filling [30] - 13:20, 18:21, 26:12, 29:14, 30:20, 36:23, 40:1, 40:15, 40:24, 41:8, 42:16, 42:19, 42:25, 43:1, 46:1, 47:25, 49:2, 50:4, 53:10, 58:21, 60:3, 65:3, 65:12, 67:22, 79:12, 90:4, 90:23, 91:12, 93:12, 93:22</p> <p>fill [9] - 43:9, 47:4, 50:7, 60:9, 68:7, 80:14, 80:17, 83:3, 89:13</p> <p>filled [6] - 21:12, 44:16, 49:6, 68:16, 79:16, 91:23</p> <p>filling [4] - 7:16, 10:22, 13:24, 80:18</p> <p>fills [1] - 50:11</p> <p>final [2] - 5:18, 76:11</p> <p>finally [4] - 63:13, 83:4, 86:4, 88:9</p> <p>finance [2] - 69:14, 69:23</p> <p>fine [5] - 25:2, 28:1, 39:6, 66:11, 80:4</p> <p>finish [1] - 60:20</p> <p>First [5] - 28:20, 32:22, 38:10, 38:19, 86:14</p> <p>FIRST [1] - 1:6</p> <p>first [21] - 5:13, 6:24, 12:23, 13:15, 13:16, 17:20, 34:7, 34:19, 34:22, 39:10, 44:11, 46:23, 50:17, 52:10, 76:12, 85:2, 85:15, 86:18, 89:2</p> <p>fishy [1] - 84:5</p> <p>five [4] - 75:24, 75:25, 76:1, 82:8</p> <p>fix [1] - 48:21</p> <p>fixed [1] - 79:10</p>	<p>flaw [2] - 37:14, 37:21</p> <p>flipping [1] - 76:19</p> <p>follow [5] - 10:25, 14:2, 19:10, 27:22, 93:7</p> <p>following [5] - 33:15, 43:15, 91:10, 93:6</p> <p>follows [1] - 91:20</p> <p>footnote [1] - 74:16</p> <p>FOR [1] - 1:7</p> <p>FORBES [2] - 97:4, 97:17</p> <p>Forbes [1] - 1:25</p> <p>forbid [1] - 14:19</p> <p>foregoing [1] - 97:10</p> <p>forget [1] - 75:22</p> <p>form [9] - 11:20, 12:6, 15:23, 29:16, 29:23, 30:2, 30:13, 42:21</p> <p>former [1] - 33:16</p> <p>forms [5] - 11:21, 15:23, 36:18, 43:10, 82:22</p> <p>forth [15] - 15:20, 16:2, 17:7, 18:25, 44:19, 48:15, 66:16, 70:24, 75:8, 80:1, 89:9, 92:12, 94:2, 94:11, 94:12</p> <p>forward [8] - 10:17, 11:25, 12:9, 20:20, 23:23, 24:1, 26:18, 27:25</p> <p>foundation [1] - 85:16</p> <p>foundational [1] - 85:11</p> <p>four [2] - 20:8, 82:8</p> <p>Fourteenth [2] - 28:21, 32:22</p> <p>frame [1] - 95:22</p> <p>frames [6] - 13:12, 14:4, 14:7, 15:2, 84:2, 85:14</p> <p>framework [1] - 6:15</p> <p>Francisco [1] - 33:16</p> <p>frankly [2] - 68:23, 70:5</p> <p>free [3] - 50:19, 50:23, 51:17</p> <p>freedom [2] - 31:3, 32:5</p> <p>freely [1] - 23:5</p> <p>freezes [1] - 78:19</p> <p>frequent [1] - 51:10</p> <p>frequently [1] - 51:10</p> <p>FROM [2] - 48:5,</p>
--	--	---	--	--	--

75:24 fuels [1] - 63:9 full [1] - 97:11 fully [3] - 6:4, 26:19, 36:25 fundamental [1] - 51:2 funding [3] - 69:15, 69:16, 78:24 furtherance [1] - 15:12 further [3] - 62:23, 63:9 fusion [1] - 32:20	2:2, 3:15, 4:25, 5:2, 27:18, 28:2, 28:4, 28:6, 28:9, 28:11, 84:22, 84:24, 85:1, 87:10 governed [1] - 91:4 governing [1] - 77:2 Government [1] - 38:19 governor [5] - 14:16, 14:23, 49:9, 59:8, 63:18 governs [1] - 50:6 Grange [24] - 11:3, 35:19, 35:22, 36:25, 38:14, 56:20, 56:25, 57:14, 58:4, 71:15, 71:16, 71:23, 72:22, 73:12, 73:23, 73:24, 74:6, 74:18, 74:19, 74:20, 74:23, 76:15, 76:19, 86:2 grange [1] - 11:4 grants [1] - 95:17 Gray [1] - 63:18 great [7] - 5:21, 37:25, 60:16, 68:8, 70:9, 86:21, 86:22 greater [5] - 69:15, 69:16, 77:14, 78:7, 78:25 greatly [1] - 95:10 GRIFFIN [1] - 2:9 Griffin [1] - 4:8 Guam [1] - 54:11 guarantee [1] - 32:6 guess [4] - 52:10, 52:11, 80:14, 82:23 guidance [6] - 43:9, 49:16, 49:23, 49:25, 50:10, 50:13 gymnasium [1] - 77:18	21:14 harm [1] - 76:22 harmonized [1] - 92:13 Hawaii [3] - 63:16, 63:25, 72:7 headed [1] - 86:25 hear [3] - 66:20, 78:23, 85:2 heard [4] - 80:11, 83:4, 85:5, 93:17 hearing [6] - 4:17, 5:23, 6:24, 22:9, 22:10, 25:7 Hearing [1] - 1:9 heart [1] - 74:13 held [11] - 9:13, 9:15, 9:16, 28:3, 60:10, 63:16, 64:4, 73:5, 74:6, 89:17, 94:25 Heller [1] - 29:6 help [2] - 6:20, 88:5 helpful [4] - 34:6, 34:8, 35:17, 58:1 helps [1] - 88:3 hereby [2] - 95:16, 97:5 herein [1] - 97:7 higher [1] - 77:14 highest [1] - 7:25 himself [1] - 68:9 hinges [1] - 74:21 historically [2] - 77:5, 77:6 history [19] - 6:6, 6:8, 6:14, 6:17, 6:20, 7:19, 9:18, 10:23, 11:19, 34:3, 47:9, 48:17, 48:18, 49:4, 72:9, 85:24, 88:2, 88:4 hit [1] - 66:15 hold [4] - 46:15, 77:2, 77:3, 84:25 holding [1] - 59:9 Honest [1] - 38:19 Honor [67] - 3:15, 3:17, 3:21, 3:24, 4:4, 4:9, 4:12, 4:15, 4:25, 5:4, 5:12, 5:22, 8:23, 10:13, 11:18, 14:14, 17:10, 22:10, 22:16, 24:2, 24:10, 24:24, 25:4, 25:19, 26:14, 27:1, 27:15, 27:18, 28:4, 28:15, 30:18, 34:4, 34:7, 34:20, 35:17, 36:8, 38:16, 38:22, 39:4, 39:8, 39:18, 39:20, 41:12,	45:8, 45:22, 48:7, 54:16, 64:13, 64:21, 65:18, 66:6, 66:12, 67:20, 71:23, 75:12, 78:6, 80:3, 80:8, 81:23, 82:19, 83:4, 84:15, 85:9, 86:4, 86:15, 87:10, 87:14 Honor's [1] - 30:4 HONORABLE [1] - 1:16 hopefully [1] - 66:15 hour [1] - 60:19 House [2] - 29:5, 35:8 hundred [12] - 14:24, 15:17, 15:18, 15:22, 16:8, 16:23, 35:8, 41:10, 70:14, 75:22, 75:25, 83:12 hundreds [2] - 21:5, 63:1 hunt [1] - 36:19 hypothetically [1] - 38:13	impossible [1] - 14:4 impression [1] - 7:13 improper [2] - 26:16, 27:12 IN [2] - 1:6, 1:7 include [2] - 9:3, 54:4 included [1] - 24:23 including [4] - 57:4, 57:5, 70:1, 72:13 inclusive [2] - 25:16, 89:12 inclusively [1] - 88:15 incorporated [1] - 28:21 indeed [2] - 71:14, 71:15 Independence [2] - 73:13, 85:19 Independent [1] - 61:23 independent [28] - 5:8, 15:16, 15:24, 15:25, 16:3, 16:12, 16:13, 16:22, 18:22, 19:4, 19:16, 20:14, 21:25, 27:8, 41:8, 41:21, 42:14, 50:2, 50:6, 50:12, 52:1, 55:13, 59:24, 90:21, 90:24, 93:13, 93:22, 94:6 independents [7] - 15:21, 22:1, 23:9, 23:17, 23:19, 81:20 indicate [1] - 52:22 indicated [4] - 16:21, 52:11, 86:24, 96:1 indicates [11] - 12:17, 16:2, 18:7, 22:12, 25:12, 44:11, 44:12, 45:11, 59:7, 94:4, 94:15 indication [2] - 90:14, 94:5 individual [3] - 1:9, 12:9, 67:18 individuals [6] - 9:23, 15:22, 21:6, 27:9, 80:22, 83:14 infirmary [1] - 37:6 influence [1] - 62:7 influenced [2] - 71:24, 76:24 information [3] - 26:7, 43:23, 57:22 infringe [1] - 34:18 initiating [1] - 66:22 initiative [4] - 35:24,
G gap [1] - 79:16 gaps [7] - 50:11, 67:25, 68:7, 68:15, 80:14, 80:17, 80:18 gather [1] - 43:2 gears [1] - 56:11 general [21] - 9:14, 15:7, 18:8, 18:11, 19:9, 19:20, 19:25, 31:7, 36:6, 47:3, 54:10, 55:21, 55:22, 56:24, 57:16, 80:21, 80:23, 81:3, 86:9, 89:6, 93:17 General [1] - 2:5 genuine [1] - 69:5 genuinely [1] - 72:4 Georgetta [9] - 8:22, 8:25, 10:24, 46:7, 47:1, 47:17, 47:22, 53:19, 94:25 GILLES [2] - 2:6, 4:4 Gilles [2] - 4:3, 4:4 Gitlow [1] - 28:22 given [16] - 14:15, 21:10, 22:24, 35:19, 41:15, 45:17, 63:24, 69:24, 70:6, 84:20, 85:3, 85:6, 85:14, 85:16, 91:2, 92:11 glad [1] - 75:13 glass [1] - 11:18 Glover [1] - 7:3 Glover's [1] - 84:7 God [1] - 14:18 goodenow [2] - 17:7, 96:4 Goodenow [9] - 3:14, 5:2, 11:12, 24:4, 24:8, 27:17, 28:10, 80:9, 84:17 GOODENOW [14] -	H habit [1] - 39:21 hac [1] - 66:13 Haggerty [1] - 92:15 hand [2] - 51:1, 72:14 handful [3] - 56:23, 63:3, 66:15 handling [1] - 89:25 Hansen [1] - 7:20 Hansen's [1] - 10:21 happy [1] - 39:4 hard [2] - 21:14 hard-working [1] -	I I-872 [5] - 35:25, 36:11, 37:5, 37:15, 37:22 identical [2] - 46:8, 71:17 identified [2] - 36:2, 62:24 ignore [3] - 42:2, 42:6, 42:9 Illinois [1] - 54:12 impact [1] - 52:12 impacted [1] - 52:15 impinges [1] - 61:13 implement [1] - 38:9 implicate [2] - 56:18, 57:10 implicated [1] - 59:23 implication [1] - 59:1 implies [3] - 44:3, 59:23, 92:25 imply [2] - 44:8, 57:24 importance [2] - 35:4, 87:21 important [9] - 29:11, 31:22, 36:24, 48:14, 88:20, 88:21, 92:6, 92:8 imposes [1] - 32:25 imposing [1] - 33:7	I I-872 [5] - 35:25, 36:11, 37:5, 37:15, 37:22 identical [2] - 46:8, 71:17 identified [2] - 36:2, 62:24 ignore [3] - 42:2, 42:6, 42:9 Illinois [1] - 54:12 impact [1] - 52:12 impacted [1] - 52:15 impinges [1] - 61:13 implement [1] - 38:9 implicate [2] - 56:18, 57:10 implicated [1] - 59:23 implication [1] - 59:1 implies [3] - 44:3, 59:23, 92:25 imply [2] - 44:8, 57:24 importance [2] - 35:4, 87:21 important [9] - 29:11, 31:22, 36:24, 48:14, 88:20, 88:21, 92:6, 92:8 imposes [1] - 32:25 imposing [1] - 33:7	

<p>37:4, 37:5, 86:1 Initiative [1] - 36:1 injunction [3] - 22:9, 22:10, 95:17 injunctive [5] - 4:19, 6:1, 27:12, 64:14, 84:14 injured [1] - 72:4 injury [2] - 70:21, 71:12 instance [3] - 67:11, 73:18, 85:24 instead [2] - 40:22, 63:25 instructive [1] - 76:14 intended [5] - 25:23, 40:22, 40:23, 59:21, 85:17 intent [8] - 19:19, 26:1, 60:6, 60:7, 79:9, 87:1, 87:3, 92:10 interest [18] - 32:8, 33:9, 33:25, 35:12, 35:13, 61:21, 62:6, 62:18, 70:9, 76:13, 76:23, 77:14, 78:7, 79:2, 85:4, 85:10, 85:12 interesting [5] - 11:23, 72:9, 76:14, 76:20, 81:12 interests [6] - 32:25, 62:7, 62:11, 62:17, 62:24, 69:5 interfere [1] - 86:6 interfering [1] - 33:19 interpreted [2] - 6:11, 38:24 Interpretation [1] - 29:4 interpretation [61] - 5:9, 6:2, 6:6, 6:13, 10:13, 12:9, 22:5, 22:13, 22:17, 22:18, 22:20, 26:17, 27:13, 28:17, 28:18, 29:8, 29:11, 29:19, 30:8, 30:11, 30:12, 31:11, 37:1, 39:3, 39:23, 40:2, 41:11, 42:12, 43:5, 45:18, 49:16, 50:9, 50:10, 52:3, 54:20, 54:25, 58:16, 58:19, 58:24, 59:1, 59:14, 61:4, 64:15, 64:23, 64:25, 65:1, 68:12, 79:25, 81:19, 82:4, 84:11, 84:13,</p>	<p>86:11, 92:13, 92:20, 93:2, 93:4 interpreted [8] - 6:9, 6:10, 28:12, 36:16, 36:19, 38:23, 38:25, 95:14 interpreting [1] - 64:20 interstices [2] - 67:25, 68:16 intertwined [1] - 61:11 intervene [1] - 3:12 Intervenor [1] - 66:3 Intervenor [1] - 3:9 intimidated [1] - 64:6 inventing [1] - 40:10 invite [1] - 69:21 involve [2] - 33:14, 38:12 involved [6] - 47:1, 49:13, 61:24, 86:8, 87:3, 95:12 involvement [1] - 92:21 involves [1] - 36:16 irrelevant [1] - 10:3 issuance [1] - 59:8 issue [27] - 7:4, 7:19, 11:12, 17:8, 19:15, 21:16, 22:25, 24:5, 24:23, 28:24, 35:18, 40:17, 46:8, 48:14, 52:21, 60:17, 67:21, 68:20, 73:19, 87:18, 87:22, 88:19, 91:2, 91:9, 94:13, 95:8 issued [2] - 3:10, 29:4 issues [15] - 5:6, 5:7, 5:11, 22:15, 34:9, 51:20, 51:22, 52:12, 54:18, 55:24, 56:2, 66:9, 72:14, 78:14, 80:10 itself [7] - 47:23, 57:21, 58:17, 58:23, 61:3, 65:2, 86:10</p>	<p>73:11, 73:14, 76:15, 76:16, 76:21, 86:5 JUDGE [1] - 1:16 Judicial [1] - 74:12 JUDICIAL [1] - 1:6 Judicially [1] - 75:1 Julietta [1] - 1:25 JULIETTA [2] - 97:4, 97:17 July [6] - 26:8, 26:21, 52:10, 52:18, 52:19, 83:5 June [4] - 26:13, 26:22, 52:10, 96:3 Justice [1] - 37:12 Justice [5] - 37:13, 54:8, 72:18, 73:1, 76:16 justifies [1] - 34:1 justify [2] - 33:1, 35:12</p>	<p>54:10, 64:16, 79:5 lately [1] - 39:19 latitude [1] - 85:6 Law [7] - 2:2, 2:4, 2:8, 2:10, 2:11, 45:9, 91:14 law [28] - 7:13, 7:14, 19:18, 22:11, 22:12, 22:19, 22:22, 25:22, 31:9, 32:21, 38:2, 40:12, 47:15, 51:15, 52:4, 54:9, 54:14, 59:15, 63:2, 64:9, 68:18, 69:10, 69:13, 78:10, 83:2, 84:4, 85:14 laws [9] - 6:3, 6:5, 18:8, 18:11, 32:20, 40:9, 89:6, 92:10, 93:17 lays [1] - 70:24 lead [1] - 74:23 leadership [6] - 41:19, 62:5, 62:8, 63:6, 63:8, 63:12 least [4] - 19:20, 66:17, 71:4, 86:7 leave [3] - 52:20, 72:6, 72:21 leaves [1] - 72:21 legal [1] - 55:9 legislation [2] - 34:24, 94:24 legislative [18] - 6:14, 6:17, 6:20, 7:18, 10:23, 19:19, 34:3, 47:9, 48:17, 49:4, 60:6, 60:7, 78:8, 80:16, 85:23, 88:2, 88:4 legislatively [1] - 75:2 Legislature [1] - 86:1 Legislature [19] - 6:18, 6:25, 14:11, 18:17, 19:25, 21:9, 23:22, 48:3, 48:19, 50:19, 50:21, 67:5, 67:7, 79:10, 79:16, 79:20, 83:24, 85:17, 87:20 Legislature's [1] - 51:17 legitimate [1] - 38:14 lengthy [1] - 84:18 less [5] - 49:10, 71:4, 82:15, 85:12, 90:12 letting [1] - 62:1 level [2] - 78:8, 79:2 Liberties [1] - 11:4</p>	<p>light [1] - 68:14 Lightfoot [1] - 61:22 limit [6] - 32:7, 41:6, 93:9, 93:13, 93:21, 93:24 limited [1] - 8:13 line [3] - 39:24, 81:25, 82:8 list [14] - 8:1, 16:21, 21:22, 21:23, 23:16, 41:21, 60:1, 81:21, 82:3, 82:13, 90:10, 93:10, 93:12, 93:24 listened [3] - 66:7, 68:8, 70:9 lists [7] - 10:15, 17:16, 17:17, 17:22, 17:25, 18:2, 34:21 live [1] - 55:3 LLC [2] - 1:25, 97:17 local [1] - 51:10 logic [1] - 56:7 look [69] - 6:6, 7:2, 7:4, 8:9, 8:25, 9:18, 9:20, 10:7, 10:8, 10:9, 10:25, 11:2, 11:15, 11:19, 12:22, 13:7, 13:8, 13:13, 13:18, 15:2, 15:13, 17:14, 17:15, 17:19, 17:20, 17:23, 18:24, 19:5, 19:7, 19:8, 19:18, 22:4, 22:18, 27:10, 42:20, 43:8, 44:22, 46:12, 48:21, 50:2, 59:4, 66:25, 68:17, 71:12, 71:14, 71:15, 72:1, 76:21, 80:19, 80:22, 81:22, 82:6, 82:20, 83:9, 83:20, 83:23, 83:24, 84:4, 84:6, 85:5, 85:18, 94:3, 94:5 looked [7] - 20:4, 22:20, 39:12, 39:15, 45:9, 53:8, 88:20 looking [8] - 8:24, 10:18, 11:25, 12:6, 48:17, 60:18, 82:6, 82:24 lost [2] - 9:21, 9:22 Louisiana [4] - 72:8, 72:9, 72:14, 72:15 Lubin [1] - 61:19</p>
K				
<p>Kevin [2] - 3:23, 3:25 KEVIN [1] - 2:5 key [1] - 56:12 kind [17] - 12:18, 12:19, 45:11, 50:22, 51:14, 53:6, 57:19, 59:5, 60:4, 70:24, 86:24, 87:25, 89:8, 89:14, 90:14, 92:4, 94:15 kinds [3] - 55:6, 69:10, 71:17 knock [1] - 76:3 knowledge [1] - 53:3 knows [1] - 76:1</p>				
L				
<p>label [2] - 73:22, 74:8 labels [1] - 74:2 lack [1] - 24:16 laid [1] - 41:13 LANE [1] - 97:18 language [19] - 6:10, 9:2, 12:18, 29:10, 30:15, 39:24, 40:4, 40:7, 42:6, 58:17, 59:3, 65:2, 87:21, 88:8, 91:9, 91:10, 92:25, 94:1 large [3] - 64:4, 64:6, 65:17 Las [1] - 20:6 last [5] - 7:23, 54:9,</p>				
J				
<p>JAMES [1] - 1:16 job [7] - 48:4, 48:13, 48:20, 48:24, 67:5, 87:24, 87:25 joints [1] - 78:18 Jones [15] - 31:16, 57:1, 57:3, 57:7, 72:22, 72:25, 73:6,</p>				
M				
<p>machines [7] - 23:25, 56:3, 56:7,</p>				

56:10, 77:19, 78:14, 78:15 magnitude [1] - 32:24 mail [4] - 26:11, 83:16, 83:22, 96:6 mail-out [1] - 83:16 major [69] - 7:5, 8:12, 10:19, 12:17, 13:16, 15:3, 16:14, 18:1, 19:11, 19:12, 19:13, 19:15, 20:2, 20:10, 21:1, 23:15, 26:15, 28:24, 29:13, 30:19, 31:11, 34:1, 39:25, 40:14, 40:24, 41:5, 41:16, 43:15, 43:16, 43:17, 44:1, 44:4, 44:14, 55:17, 58:19, 60:2, 65:2, 65:11, 67:21, 68:22, 68:23, 68:25, 69:6, 69:11, 69:17, 69:21, 69:23, 70:2, 70:3, 75:6, 79:11, 80:25, 81:1, 81:10, 81:13, 81:24, 90:3, 91:3, 91:11, 91:21, 91:25, 92:9, 92:11, 92:21, 92:24, 93:9, 95:11 majority [13] - 16:17, 23:6, 36:9, 37:13, 73:1, 76:17, 76:19, 76:20, 80:12, 93:21, 94:9, 95:19, 95:24 man [1] - 77:10 man-made [1] - 77:10 manage [1] - 50:20 manner [3] - 42:7, 43:7, 89:20 Marc [1] - 4:11 MARC [1] - 2:8 mark [1] - 25:6 marked [1] - 25:8 materia [1] - 92:18 Matt [1] - 4:8 matter [19] - 5:23, 25:7, 45:11, 45:21, 46:7, 46:8, 64:9, 64:12, 66:22, 87:2, 87:5, 88:3, 88:22, 88:23, 90:20, 95:3, 95:6, 96:10, 97:7 matters [3] - 43:24, 55:14, 60:11 MATTHEW [1] - 2:9 MAY [1] - 3:1 McCarran [1] - 9:7 mean [19] - 7:14,	15:10, 27:2, 42:17, 44:4, 44:25, 45:6, 45:24, 48:10, 49:20, 59:15, 67:18, 67:25, 69:25, 83:24, 91:10, 91:14, 91:15 meaning [5] - 6:21, 7:10, 42:3, 92:11, 93:4 meaningless [1] - 40:22 means [8] - 12:9, 13:4, 17:25, 35:2, 45:10, 45:12, 50:5, 80:24 measure [1] - 74:12 mechanism [1] - 79:18 mechanisms [2] - 13:14, 33:15 meet [2] - 21:21, 54:15 member [13] - 16:18, 23:7, 29:6, 41:5, 43:16, 44:1, 44:25, 55:16, 55:18, 92:23, 93:9, 93:20 members [12] - 32:16, 53:25, 55:6, 57:5, 62:4, 62:9, 63:8, 76:4, 93:10, 93:11, 95:19 membership [1] - 62:2 mention [5] - 54:19, 56:2, 58:4, 63:2, 85:2 mentioned [8] - 33:10, 49:14, 49:25, 62:25, 72:7, 74:15, 74:16, 75:13 merely [2] - 32:13, 40:17 merits [2] - 87:6, 88:24 met [1] - 54:6 method [8] - 6:12, 7:16, 8:6, 10:22, 13:9, 19:9, 34:13, 34:22 methodically [1] - 27:19 Mexico [1] - 54:11 might [10] - 41:17, 49:12, 53:22, 55:10, 57:20, 74:10, 77:8, 77:9, 79:3 military [1] - 53:16 Miller [2] - 3:7, 66:3 MILLER [2] - 1:12, 2:5 minimum [1] - 26:21	Minnesota's [1] - 32:20 minor [46] - 7:5, 7:9, 7:21, 8:12, 10:6, 10:14, 10:15, 10:20, 12:13, 18:1, 18:5, 19:14, 20:15, 21:20, 23:8, 23:16, 23:19, 26:15, 41:20, 44:14, 48:18, 52:1, 60:1, 68:22, 68:25, 69:4, 69:5, 69:11, 69:17, 69:22, 70:1, 70:4, 81:10, 81:13, 81:18, 82:2, 82:9, 82:11, 84:2, 84:5, 84:17, 91:4, 91:21, 92:1 minority [18] - 16:14, 16:20, 17:11, 17:15, 17:22, 18:25, 19:3, 41:7, 55:13, 90:7, 90:17, 93:10, 93:11, 93:12, 93:24, 94:4, 95:19, 95:25 minutes [2] - 60:19, 65:21 mirrors [3] - 58:17, 61:4, 65:1 modest [2] - 75:1 moment [2] - 30:25, 32:12 most [3] - 52:15, 67:8, 80:24 motion [1] - 21:2 move [3] - 24:1, 51:23, 54:17 MOVE [4] - 53:15, 53:16, 53:23, 77:22 moved [3] - 26:18, 72:15 moving [3] - 29:19, 36:7, 72:16 MR [76] - 3:15, 3:17, 3:19, 3:21, 3:24, 4:1, 4:3, 4:4, 4:9, 4:12, 4:15, 4:25, 5:2, 5:21, 6:23, 8:14, 8:23, 12:20, 16:6, 16:24, 18:10, 20:22, 22:1, 22:15, 25:4, 25:18, 25:24, 26:3, 27:18, 28:2, 28:4, 28:6, 28:9, 28:11, 39:8, 39:18, 39:20, 41:12, 42:11, 44:5, 44:23, 45:7, 45:22, 46:15, 48:6, 48:9, 48:23, 49:21, 51:21, 52:13, 53:3, 53:8, 55:18, 55:20, 55:22, 59:20, 60:23,	61:1, 63:24, 64:17, 64:21, 65:17, 65:22, 66:6, 66:12, 75:12, 75:25, 78:6, 80:6, 80:8, 84:22, 84:24, 85:1, 87:10, 87:12, 87:14 multiple [3] - 57:9, 74:8 must [21] - 6:6, 12:24, 12:25, 13:22, 16:4, 24:14, 32:23, 33:8, 38:17, 42:7, 81:15, 81:23, 82:12, 89:19, 89:20, 89:23, 90:10, 90:22, 92:13, 92:25, 95:14 muster [1] - 58:12	6:2, 10:25, 11:7, 11:9, 11:24, 12:14, 19:24, 20:4, 29:3, 31:1, 34:11, 36:19, 50:16, 51:15, 61:24, 66:1, 66:2, 66:3, 66:18, 67:8, 68:3, 69:1, 69:9, 77:1, 77:4, 77:11, 77:13, 77:24, 78:7, 82:21, 85:18, 85:25, 86:4, 86:25, 87:7, 87:18, 87:19, 88:7, 89:6, 92:15, 94:24 NEVADA [6] - 1:6, 1:8, 1:12, 2:8, 3:1, 97:1 Nevada's [4] - 6:7, 31:7, 31:9, 37:1 never [2] - 38:2, 53:6 new [3] - 6:5, 40:9, 85:17 New [5] - 28:22, 32:18, 54:11 newspaper [1] - 78:23 next [18] - 13:3, 13:21, 14:24, 19:8, 20:1, 35:6, 35:17, 73:22, 74:2, 74:8, 75:13, 76:15, 77:16, 77:17, 77:20 Nice [1] - 4:6 Ninth [3] - 37:3, 62:10, 73:13 NO [2] - 1:1, 1:2 nobody [2] - 25:20, 88:19 nominate [28] - 8:20, 9:10, 10:8, 11:19, 12:11, 15:4, 15:6, 17:18, 17:20, 21:17, 23:5, 23:6, 23:8, 23:9, 26:22, 29:21, 33:20, 34:2, 35:5, 45:6, 45:17, 47:5, 81:6, 81:10, 82:17, 91:15, 95:25 nominated [35] - 4:23, 11:10, 12:2, 12:18, 27:7, 29:13, 30:20, 36:23, 39:25, 40:15, 40:24, 41:2, 42:7, 43:7, 44:2, 44:8, 45:1, 45:23, 45:25, 46:1, 47:25, 49:2, 53:10, 58:20, 60:3, 65:3, 65:12, 67:22, 79:12, 82:10, 89:19, 90:4, 91:12, 94:3, 94:12
--	---	---	---	---

<p>nominating [7] - 13:15, 19:1, 31:12, 33:15, 36:22, 75:8, 90:24</p> <p>nomination [45] - 7:1, 8:12, 8:13, 8:15, 10:7, 10:10, 10:11, 11:25, 12:4, 12:7, 12:19, 12:24, 13:4, 13:8, 13:17, 13:19, 13:25, 14:10, 17:21, 19:6, 20:25, 29:25, 30:7, 30:11, 36:12, 36:18, 44:7, 44:15, 46:4, 46:17, 47:20, 47:24, 59:9, 79:8, 80:20, 82:7, 82:22, 86:7, 86:12, 91:3, 91:22, 92:22, 93:1, 94:22, 95:3</p> <p>nominations [5] - 34:19, 34:22, 60:14, 83:6, 86:10</p> <p>nominee [18] - 10:17, 17:13, 19:23, 26:25, 31:23, 37:9, 41:19, 56:20, 57:3, 57:4, 57:8, 57:15, 57:17, 58:25, 62:3, 62:19, 74:22, 82:9</p> <p>nominees [20] - 8:19, 10:16, 11:10, 17:6, 24:13, 27:14, 28:25, 29:22, 29:24, 30:14, 31:5, 31:7, 32:16, 36:18, 37:16, 37:23, 38:2, 56:14, 56:22, 62:2</p> <p>non [3] - 8:11, 68:25</p> <p>non-major [1] - 68:25</p> <p>non-rights [1] - 68:25</p> <p>none [2] - 18:18, 72:4</p> <p>nonexistent [1] - 10:4</p> <p>nonmembers [1] - 57:5</p> <p>nonpartisan [5] - 13:19, 13:20, 51:8, 51:11, 51:12</p> <p>normal [1] - 10:6</p> <p>normally [1] - 57:14</p> <p>note [6] - 11:23, 30:4, 37:25, 54:19, 56:1, 72:16</p> <p>noted [1] - 90:16</p> <p>notes [3] - 88:16, 88:22, 97:7</p>	<p>nothing [8] - 18:12, 42:17, 59:18, 59:22, 60:13, 75:5, 82:23, 85:23</p> <p>notice [2] - 19:21, 21:3</p> <p>noticed [1] - 68:8</p> <p>notion [2] - 21:11, 51:14</p> <p>November [2] - 77:17, 77:20</p> <p>NRS [84] - 4:23, 6:19, 7:15, 8:4, 8:10, 10:4, 10:9, 12:16, 12:24, 13:11, 15:19, 15:20, 16:2, 17:9, 18:6, 18:8, 18:13, 18:16, 18:19, 25:11, 25:16, 29:24, 30:22, 31:17, 34:3, 34:9, 35:14, 36:19, 38:23, 42:9, 44:10, 44:13, 48:4, 52:22, 53:1, 59:3, 59:6, 64:18, 65:9, 65:15, 67:24, 81:7, 81:8, 83:12, 84:10, 87:6, 87:18, 88:9, 88:13, 88:14, 88:15, 89:2, 89:4, 89:5, 89:10, 89:11, 89:16, 89:20, 89:23, 90:6, 90:16, 90:21, 90:24, 90:25, 91:5, 91:6, 91:20, 92:7, 92:8, 92:23, 93:3, 94:1, 94:13, 94:15, 94:21, 95:2, 95:21, 95:23</p> <p>nullified [1] - 13:6</p> <p>nullify [2] - 11:16, 12:22</p> <p>number [2] - 13:18, 75:23</p> <p>NV [3] - 1:25, 97:17, 97:18</p>	<p>objection [5] - 5:15, 25:2, 25:4, 26:5, 39:10</p> <p>obligation [1] - 53:24</p> <p>observed [2] - 32:2, 34:4</p> <p>observers [1] - 78:16</p> <p>obviously [9] - 7:14, 8:4, 26:15, 63:4, 72:16, 86:17, 86:24, 88:19, 88:20</p> <p>OC [3] - 1:1, 3:5, 66:1</p> <p>occur [4] - 9:20, 14:9, 14:10, 15:8</p> <p>occurred [1] - 14:2</p> <p>occurring [4] - 8:11, 13:19, 44:14, 91:21</p> <p>occurs [2] - 8:15, 13:25</p> <p>odd [2] - 70:11, 70:15</p> <p>oddly [1] - 29:5</p> <p>OF [10] - 1:6, 1:8, 1:12, 1:12, 2:2, 2:5, 2:5, 2:8, 97:1</p> <p>offered [1] - 71:16</p> <p>office [15] - 11:10, 13:17, 32:15, 33:23, 36:1, 36:5, 44:15, 46:16, 51:9, 53:18, 60:9, 79:7, 80:25, 90:18, 91:22</p> <p>Office [3] - 67:4, 74:4, 78:17</p> <p>officer [6] - 42:17, 42:19, 42:25, 43:1, 50:4, 90:23</p> <p>offices [1] - 51:11</p> <p>official [2] - 65:7, 68:2</p> <p>officials [2] - 68:6</p> <p>oftentimes [1] - 69:24</p> <p>ON [3] - 2:2, 2:5, 2:8</p> <p>once [1] - 13:24</p> <p>one [54] - 5:8, 5:18, 6:21, 7:10, 11:1, 13:15, 13:16, 16:16, 17:24, 18:4, 19:11, 19:13, 19:21, 19:23, 20:5, 20:7, 20:11, 20:13, 21:9, 21:22, 23:4, 25:9, 26:7, 33:13, 46:19, 50:16, 51:15, 51:16, 51:22, 52:15, 53:5, 54:19, 55:9, 55:11, 56:1, 57:18, 58:10, 64:16, 65:9, 66:19, 70:3,</p>	<p>70:4, 75:5, 79:18, 80:12, 80:24, 80:25, 81:1, 85:3, 88:16, 90:17, 91:16, 92:12, 95:17</p> <p>onus [1] - 41:8</p> <p>open [6] - 11:6, 11:7, 20:8, 23:17, 31:2, 74:13</p> <p>open-access [1] - 31:2</p> <p>open-heart [1] - 74:13</p> <p>opening [2] - 20:11, 63:7</p> <p>opinion [6] - 33:5, 37:25, 38:7, 72:25, 76:17, 76:21</p> <p>opportunity [3] - 15:5, 38:9, 68:7</p> <p>opposed [1] - 37:4</p> <p>opposing [2] - 27:24, 57:6</p> <p>option [1] - 34:23</p> <p>optional [1] - 53:18</p> <p>order [5] - 3:10, 6:4, 12:20, 36:25, 96:5</p> <p>ordered [1] - 95:16</p> <p>ordinarily [2] - 47:3, 69:25</p> <p>ordinary [4] - 45:25, 47:5, 50:12, 77:23</p> <p>organizations [1] - 70:1</p> <p>otherwise [11] - 18:7, 18:13, 42:8, 44:13, 46:23, 49:24, 60:20, 67:14, 78:19, 89:18, 91:7</p> <p>ought [3] - 48:20, 49:22</p> <p>out-of-the-ordinary [1] - 77:23</p> <p>outline [3] - 59:6, 59:22, 60:4</p> <p>outside [1] - 12:14</p> <p>overinclusive [1] - 35:14</p> <p>overseas [3] - 35:1, 53:16, 54:1</p> <p>overstay [1] - 66:14</p> <p>own [4] - 34:23, 46:2, 55:6, 96:9</p>	<p>36:7, 37:10, 37:11, 37:18, 38:6, 38:7</p> <p>pages [2] - 33:20, 97:10</p> <p>paid [1] - 67:10</p> <p>pains [1] - 37:25</p> <p>Panish [1] - 61:19</p> <p>papers [1] - 29:20</p> <p>paragraph [2] - 29:8, 36:9</p> <p>pari [1] - 92:17</p> <p>part [5] - 58:6, 59:16, 65:17, 71:5, 89:16</p> <p>partial [1] - 11:7</p> <p>particular [15] - 5:19, 8:10, 45:2, 46:9, 46:11, 46:13, 46:17, 59:16, 86:18, 86:21, 87:4, 88:3, 91:8, 92:7, 95:3</p> <p>particularly [1] - 78:20</p> <p>parties [69] - 7:5, 7:9, 7:21, 7:22, 10:19, 10:20, 13:16, 15:3, 15:4, 17:11, 17:22, 18:1, 18:25, 21:1, 21:20, 23:9, 23:20, 26:14, 26:15, 26:16, 26:22, 28:25, 31:12, 34:1, 34:20, 34:22, 35:4, 36:21, 41:2, 41:16, 41:20, 50:17, 56:19, 61:25, 66:8, 68:22, 68:25, 69:6, 69:11, 69:23, 70:1, 70:3, 70:21, 72:4, 73:7, 73:15, 75:6, 81:10, 81:11, 81:13, 81:18, 82:2, 83:6, 84:2, 84:5, 84:20, 87:5, 87:9, 94:12, 95:10, 95:11, 96:8</p> <p>parties' [4] - 37:16, 37:23, 63:14, 86:7</p> <p>partisan [6] - 11:5, 13:17, 44:15, 51:9, 90:18, 91:22</p> <p>parts [1] - 43:6</p> <p>PARTY [2] - 1:8, 2:8</p> <p>Party [26] - 3:6, 3:8, 3:12, 3:13, 4:7, 4:19, 5:25, 12:12, 12:13, 20:7, 31:2, 31:16, 32:18, 33:18, 35:22, 61:23, 66:1, 66:4, 66:18, 69:3, 73:13, 73:19, 75:10, 75:16, 75:21, 85:19</p> <p>party [148] - 7:21,</p>
O				
<p>O'Mara [10] - 3:16, 5:9, 5:13, 5:20, 27:16, 30:5, 34:4, 52:7, 80:7, 96:4</p> <p>O'MARA [18] - 2:3, 3:17, 3:19, 5:21, 6:23, 8:14, 8:23, 12:20, 16:6, 16:24, 18:10, 20:22, 22:1, 22:15, 25:18, 25:24, 26:3, 80:8</p> <p>O'Mara's [2] - 28:13, 49:17</p>				
P				
<p>P.M [1] - 3:1</p> <p>page [12] - 31:25, 32:1, 32:11, 33:5,</p>				

<p>7:25, 10:6, 10:14, 10:15, 11:11, 12:1, 12:3, 12:11, 12:17, 13:25, 15:24, 16:3, 16:14, 16:15, 16:17, 16:19, 16:20, 16:22, 17:15, 18:5, 19:11, 19:12, 19:13, 19:14, 19:15, 20:2, 20:11, 20:13, 20:15, 21:12, 23:5, 23:6, 23:15, 23:16, 26:25, 27:4, 27:7, 27:13, 29:13, 30:19, 31:7, 32:16, 33:14, 36:3, 36:5, 37:9, 38:3, 39:25, 40:14, 40:24, 41:5, 41:7, 41:18, 41:19, 43:15, 43:16, 43:17, 44:2, 44:4, 44:15, 44:16, 47:5, 51:3, 51:6, 51:12, 55:13, 55:17, 56:15, 56:22, 57:6, 57:11, 57:22, 57:23, 57:24, 58:19, 58:20, 60:1, 60:2, 62:1, 62:4, 62:8, 62:20, 63:3, 63:8, 63:12, 65:2, 65:11, 67:21, 68:22, 68:23, 69:4, 69:6, 69:17, 69:21, 69:22, 70:3, 70:4, 72:11, 73:9, 74:2, 74:7, 74:8, 75:11, 75:19, 75:20, 76:8, 79:12, 80:25, 81:1, 81:25, 82:9, 82:11, 82:23, 85:22, 90:3, 90:7, 90:18, 91:3, 91:4, 91:11, 91:22, 91:24, 91:25, 92:2, 92:9, 92:12, 92:22, 92:24, 92:25, 93:9, 93:10, 93:11, 93:12, 93:21, 93:24, 94:4, 94:9, 95:19, 95:20, 95:24, 95:25, 96:9</p> <p>party's [20] - 8:12, 12:13, 29:2, 29:22, 29:24, 30:14, 32:15, 32:16, 33:14, 33:19, 34:18, 36:18, 37:9, 57:3, 57:4, 57:15, 57:17, 58:25, 61:22, 63:6</p> <p>pass [1] - 77:1</p> <p>passed [3] - 58:12, 67:9, 67:10</p> <p>passing [1] - 77:4</p>	<p>PECKHAM [1] - 97:18</p> <p>pending [1] - 9:8</p> <p>people [21] - 8:1, 11:20, 17:5, 17:16, 17:18, 19:17, 19:24, 19:25, 21:7, 21:13, 21:14, 27:2, 41:9, 46:24, 49:24, 57:15, 58:25, 63:1, 63:21, 75:25, 93:15</p> <p>people's [1] - 35:23</p> <p>per [6] - 18:5, 20:5, 20:11, 20:13, 49:15, 80:25</p> <p>perceived [1] - 85:22</p> <p>percent [1] - 72:12</p> <p>perfect [1] - 79:21</p> <p>perfectly [1] - 40:2</p> <p>period [4] - 9:20, 40:16, 65:13, 84:5</p> <p>permanent [1] - 95:17</p> <p>permission [1] - 21:10</p> <p>permissive [1] - 69:22</p> <p>permitted [3] - 47:18, 78:17, 78:18</p> <p>permitting [1] - 35:4</p> <p>perplexed [1] - 68:24</p> <p>person [12] - 12:10, 19:21, 20:1, 21:22, 41:17, 45:13, 45:14, 45:23, 51:15, 76:2, 91:16, 91:18</p> <p>Persons [1] - 29:21</p> <p>persons [2] - 30:13, 36:17</p> <p>perspective [1] - 66:18</p> <p>persuasions [1] - 32:8</p> <p>pertinent [1] - 27:21</p> <p>petition [15] - 16:4, 16:7, 16:8, 16:9, 22:2, 41:22, 42:16, 42:18, 42:21, 50:3, 63:20, 81:20, 90:22, 90:25, 93:14</p> <p>petitions [3] - 43:10, 50:6, 52:6</p> <p>phone [1] - 77:25</p> <p>phones [1] - 78:2</p> <p>pick [6] - 7:7, 7:11, 56:19, 56:20, 56:22, 57:3</p> <p>picked [5] - 15:14, 44:3, 80:13, 80:14, 83:11</p>	<p>picking [4] - 49:18, 49:21, 83:9, 94:18</p> <p>pinpoint [1] - 38:20</p> <p>place [15] - 15:10, 17:10, 17:20, 21:2, 23:14, 23:25, 46:23, 47:9, 48:15, 49:5, 69:3, 79:4, 79:17, 82:11, 90:7</p> <p>placed [8] - 17:24, 35:12, 59:25, 61:10, 82:9, 82:10, 94:9, 94:14</p> <p>placement [3] - 59:10, 82:7, 94:4</p> <p>placing [5] - 4:20, 59:17, 60:14, 83:13, 95:18</p> <p>plain [14] - 38:13, 39:24, 40:5, 40:7, 65:1, 66:21, 66:24, 67:2, 67:19, 67:24, 68:4, 68:14, 93:4</p> <p>plaintiff [2] - 68:9, 80:1</p> <p>Plaintiffs [1] - 1:9</p> <p>plaintiffs [17] - 3:6, 5:3, 5:19, 40:13, 47:16, 49:14, 52:1, 54:19, 57:12, 58:14, 61:15, 62:25, 64:10, 71:3, 71:16, 74:4, 95:17</p> <p>PLAINTIFFS [1] - 2:2</p> <p>plaintiffs' [6] - 33:8, 42:1, 50:15, 61:2, 66:22, 68:11</p> <p>play [1] - 78:18</p> <p>plight [1] - 69:5</p> <p>plural [3] - 17:17, 18:2, 18:3</p> <p>plurality [1] - 64:2</p> <p>point [14] - 9:23, 28:13, 41:4, 41:13, 47:19, 49:5, 61:1, 63:13, 68:21, 70:8, 75:13, 79:5, 85:5, 85:9</p> <p>pointed [1] - 74:4</p> <p>points [5] - 38:15, 66:15, 76:11, 84:22, 84:23</p> <p>policy [2] - 63:9, 73:4</p> <p>political [51] - 7:9, 8:12, 12:11, 12:17, 13:16, 16:15, 20:11, 28:25, 29:13, 30:19, 31:12, 31:21, 33:14, 34:1, 43:15, 43:16,</p>	<p>43:17, 44:2, 44:4, 44:14, 55:16, 55:17, 57:6, 58:20, 65:11, 67:21, 75:6, 79:11, 82:9, 82:11, 84:3, 90:3, 90:7, 90:18, 91:3, 91:4, 91:11, 91:22, 91:25, 92:1, 92:9, 92:11, 92:21, 92:24, 92:25, 93:9, 95:11, 95:19, 95:20, 95:24, 95:25</p> <p>portion [1] - 36:8</p> <p>portions [1] - 94:19</p> <p>posit [1] - 76:10</p> <p>posited [1] - 76:22</p> <p>position [8] - 7:16, 20:5, 45:15, 47:11, 66:23, 67:6, 82:24, 91:18</p> <p>positions [1] - 55:2</p> <p>possible [7] - 47:6, 49:6, 49:8, 63:5, 85:4, 85:9, 92:13</p> <p>Power [1] - 92:15</p> <p>power [3] - 62:3, 62:8, 63:12</p> <p>practicable [1] - 49:8</p> <p>precedent [1] - 27:20</p> <p>precise [1] - 87:20</p> <p>preclear [1] - 72:19</p> <p>precluded [1] - 27:2</p> <p>precludes [2] - 59:9, 75:6</p> <p>predicate [1] - 86:13</p> <p>predicated [1] - 65:9</p> <p>preempted [2] - 52:4, 54:13</p> <p>preemption [1] - 83:20</p> <p>preference [3] - 36:3, 36:5</p> <p>prejudice [1] - 27:9</p> <p>preliminary [2] - 22:9</p> <p>prepare [3] - 52:18, 77:16, 96:4</p> <p>prepared [2] - 27:20, 54:6</p> <p>preparing [1] - 29:7</p> <p>prescribe [1] - 83:21</p> <p>prescribed [11] - 29:17, 30:21, 40:16, 40:20, 65:14, 67:23, 79:13, 79:14, 81:16, 89:22, 90:5</p> <p>present [5] - 5:4, 28:23, 71:11, 72:5, 97:6</p> <p>presented [2] - 26:3,</p>	<p>72:2</p> <p>presents [1] - 28:24</p> <p>presidential [2] - 69:16, 69:19</p> <p>PRESIDING [1] - 1:16</p> <p>press [3] - 26:4, 26:5, 26:6</p> <p>Press [1] - 24:25</p> <p>presume [1] - 88:6</p> <p>presumed [1] - 61:5</p> <p>presumption [1] - 83:19</p> <p>presuppose [1] - 30:6</p> <p>pretty [5] - 11:17, 20:22, 22:8, 87:24, 87:25</p> <p>prevent [3] - 4:19, 41:17, 47:20</p> <p>primaries [3] - 9:1, 11:5, 61:24</p> <p>primarily [2] - 39:12, 42:6</p> <p>primary [47] - 7:22, 8:16, 8:18, 9:23, 9:24, 10:1, 10:3, 10:4, 11:6, 11:7, 11:22, 12:15, 19:2, 19:22, 29:22, 31:6, 31:8, 31:19, 37:7, 37:8, 37:15, 37:22, 41:16, 44:6, 46:10, 47:2, 47:6, 47:18, 55:19, 55:20, 55:23, 56:21, 56:22, 57:2, 57:14, 57:18, 59:9, 62:1, 73:5, 89:17, 95:1, 95:4, 95:5</p> <p>principle [1] - 51:2</p> <p>principles [2] - 68:4, 68:18</p> <p>print [2] - 26:10, 77:21</p> <p>privilege [1] - 53:21</p> <p>pro [1] - 66:13</p> <p>problem [6] - 34:7, 53:13, 57:3, 57:6, 57:7, 82:18</p> <p>problems [6] - 34:25, 35:1, 35:2, 78:22, 83:25, 85:22</p> <p>Procedure [1] - 87:8</p> <p>procedures [1] - 65:5</p> <p>proceed [4] - 4:24, 5:14, 39:7, 75:2</p> <p>PROCEEDINGS [1] - 1:8</p> <p>proceedings [2] -</p>
---	--	--	---	---

<p>97:7, 97:12 Proceedings [1] - 96:14 process [26] - 7:1, 10:7, 16:21, 19:1, 19:2, 19:3, 19:4, 20:20, 20:25, 27:7, 27:8, 30:11, 31:22, 35:11, 47:6, 56:8, 69:1, 73:5, 85:22, 86:1, 86:3, 86:7, 92:22, 94:11, 94:22, 95:12 processes [2] - 26:18, 79:3 proclamation [1] - 59:8 programmed [1] - 56:6 prohibited [1] - 33:12 promise [3] - 66:14, 76:11, 79:6 promulgate [2] - 14:12, 24:11 promulgated [2] - 14:18, 18:17 promulgation [1] - 6:5 proper [5] - 6:11, 7:16, 8:6, 10:22, 21:3 properly [6] - 6:10, 15:5, 15:6, 24:12, 60:11, 70:6 propose [3] - 5:12, 45:13, 91:16 proposed [1] - 74:14 proposition [5] - 38:19, 53:20, 73:11, 73:14, 73:25 prove [1] - 32:6 provide [13] - 18:1, 18:2, 27:11, 34:13, 36:11, 36:17, 40:24, 58:11, 69:15, 82:25, 83:21, 96:5, 96:7 provided [19] - 18:7, 18:14, 18:15, 23:3, 25:20, 29:23, 30:3, 32:1, 39:11, 42:7, 42:9, 43:7, 44:13, 52:8, 69:25, 89:18, 89:20, 91:7, 93:10 provides [18] - 34:23, 36:1, 39:25, 40:18, 42:8, 42:21, 50:13, 51:3, 88:9, 89:2, 89:4, 89:10, 89:16, 90:16, 90:21, 90:24, 91:6, 91:20</p>	<p>providing [5] - 24:17, 34:19, 47:24, 60:8, 60:11 provision [12] - 13:21, 14:6, 46:20, 52:4, 59:18, 67:20, 68:15, 81:14, 83:18, 88:14, 94:3 provisions [18] - 11:16, 14:21, 15:19, 17:5, 17:11, 25:15, 34:13, 42:19, 49:18, 49:19, 52:25, 60:15, 67:19, 80:16, 80:17, 88:12, 89:5, 89:11 public [2] - 63:9, 69:15 publicize [1] - 76:6 purpose [4] - 56:13, 56:15, 56:22, 57:2 purposes [4] - 25:6, 28:15, 30:9, 34:15 pursuant [21] - 3:10, 4:23, 12:24, 25:11, 25:15, 27:14, 30:22, 52:25, 65:14, 67:24, 79:14, 81:6, 87:6, 87:7, 88:12, 89:5, 89:23, 90:6, 90:25, 93:3, 95:21 put [23] - 11:8, 15:10, 15:13, 17:7, 17:10, 18:19, 19:12, 19:13, 19:14, 19:16, 20:7, 21:1, 23:20, 41:8, 47:9, 70:23, 77:18, 80:22, 84:1, 87:15, 92:12, 94:12 puts [3] - 50:10, 52:18, 61:13 putting [2] - 8:6, 49:5</p>	<p>71:24, 72:23, 73:1, 73:24, 76:18, 77:5 quote [16] - 8:11, 29:9, 29:12, 29:17, 32:9, 32:12, 36:10, 37:13, 37:16, 38:1, 38:4, 38:6, 67:21, 68:12, 79:11, 94:22 quoting [2] - 31:19, 32:3</p>	<p>recess [2] - 65:20, 65:23 recognized [4] - 35:4, 35:10, 61:9 record [10] - 3:5, 4:17, 29:20, 43:21, 65:25, 70:7, 70:21, 70:24, 74:3, 87:16 Recorder [1] - 7:3 reduced [1] - 97:8 redundant [1] - 40:21 refer [1] - 34:20 referred [3] - 30:18, 35:24, 73:8 refers [1] - 38:2 regard [8] - 9:5, 11:17, 15:11, 17:1, 18:4, 50:15, 59:20, 61:21 regarding [1] - 70:21 regardless [3] - 36:5, 51:6, 72:11 regards [49] - 6:13, 6:14, 6:25, 7:16, 7:20, 8:17, 10:2, 10:14, 10:22, 11:12, 13:1, 13:9, 14:12, 16:8, 18:22, 20:2, 20:6, 20:19, 20:20, 22:17, 22:24, 22:25, 23:4, 23:12, 24:3, 24:5, 24:7, 26:10, 27:12, 43:14, 45:11, 46:7, 48:13, 48:15, 48:16, 51:24, 52:8, 52:9, 53:15, 66:8, 80:21, 83:16, 83:17, 88:19, 89:9, 89:15, 94:5, 94:10 registered [3] - 57:5, 91:1, 93:14 registrar [1] - 43:2 registrars [2] - 77:19, 83:8 regular [5] - 41:20, 41:23, 44:6, 54:3, 54:5 regularly [1] - 78:21 regulation [1] - 10:16 regulations [9] - 25:11, 25:14, 25:18, 33:7, 52:24, 53:2, 53:3, 53:13, 88:11 related [1] - 60:11 relates [2] - 70:8, 79:5 relating [1] - 60:8 relatively [1] - 76:7</p>	<p>relied [1] - 26:16 relief [7] - 4:19, 5:8, 6:1, 27:12, 64:14, 84:14 rely [1] - 31:4 remainder [1] - 41:1 remaining [1] - 41:2 remand [3] - 58:9, 74:4, 74:20 remove [2] - 62:7 removes [1] - 31:11 RENO [1] - 97:18 repeatedly [1] - 38:1 replace [3] - 34:13, 63:18, 71:6 replaced [1] - 75:3 replacement [1] - 33:24 reply [1] - 10:12 REPORTED [1] - 1:25 reporter [1] - 60:18 Reporter [1] - 97:4 Reporting [1] - 1:25 REPORTING [1] - 97:17 represent [1] - 56:17 representation [1] - 46:25 Representative [1] - 60:9 representative [3] - 46:21, 47:11, 62:20 Representative's [1] - 29:6 represented [4] - 3:13, 3:23, 4:7, 58:18 REPUBLICAN [1] - 1:8 Republican [18] - 3:6, 3:13, 4:18, 5:25, 12:12, 20:8, 21:8, 23:8, 33:18, 35:22, 63:1, 66:1, 69:3, 73:19, 75:10, 75:16, 75:21, 76:7 Republican- endorsed [1] - 76:7 Republicans [2] - 19:22, 57:9 require [1] - 62:1 required [6] - 15:16, 15:21, 16:1, 25:11, 43:10, 64:18 requirement [4] - 15:17, 16:7, 16:9, 93:22 requirements [2] - 16:16, 77:22 requires [3] - 14:16,</p>
R				
<p>rare [2] - 77:4, 77:5 rather [7] - 44:2, 52:19, 62:1, 62:4, 63:11, 67:1, 77:11 reach [1] - 62:12 reaching [1] - 32:2 read [20] - 11:24, 17:1, 32:12, 36:24, 46:9, 48:11, 66:22, 72:25, 76:18, 78:22, 81:5, 81:6, 81:8, 82:3, 82:7, 84:10, 92:10, 92:17, 95:2 reading [4] - 47:8, 49:4, 74:23, 76:15 reads [2] - 30:18, 71:23 ready [3] - 4:24, 39:7, 66:5 real [1] - 72:3 really [25] - 7:12, 7:13, 8:24, 10:3, 11:1, 14:8, 17:2, 21:13, 21:14, 22:18, 24:15, 38:16, 41:22, 49:3, 51:1, 51:8, 59:16, 66:10, 72:3, 76:20, 85:8, 85:20, 88:3, 88:4, 93:16 reargue [1] - 66:9 reason [6] - 26:3, 46:22, 58:6, 60:17, 81:14, 85:11 reasonable [5] - 23:1, 54:1, 68:13, 68:17, 79:25 reasoned [1] - 82:4 reasoning [1] - 47:17 reasons [3] - 46:19, 64:13, 72:13 rebuttal [1] - 80:10 receive [4] - 22:6, 43:9, 45:2, 53:17 recent [1] - 63:24 recently [2] - 52:14, 63:16</p>				
Q				
<p>qualification [1] - 55:5 qualifications [1] - 54:25 qualifies [1] - 51:5 questioning [1] - 66:20 questions [8] - 24:3, 39:4, 43:19, 43:20, 45:19, 54:16, 68:1, 80:3 quicker [1] - 24:1 quickly [1] - 49:6 quite [12] - 39:20, 53:9, 63:5, 71:2,</p>				

<p>53:16, 83:12 requiring [3] - 41:9, 60:10, 90:25 residency [1] - 55:3 resignation [5] - 33:23, 33:25, 67:14, 77:9, 83:1 resignations [1] - 35:16 resigned [1] - 29:6 resolution [2] - 29:12, 52:9 resolve [1] - 54:22 respect [33] - 5:15, 6:18, 25:7, 25:22, 26:1, 35:15, 39:13, 41:7, 43:5, 43:23, 45:21, 46:8, 48:12, 48:16, 48:18, 55:14, 55:15, 59:11, 65:25, 66:8, 68:21, 69:2, 70:11, 71:10, 71:11, 88:21, 88:22, 90:19, 93:16, 94:4, 95:4, 95:9, 96:10 respondent [1] - 37:4 Respondent's [1] - 36:13 response [1] - 7:18 rest [1] - 79:21 restrictions [2] - 31:5, 31:16 restrictive [1] - 85:13 result [6] - 13:5, 17:2, 32:2, 55:10, 81:9 result-based [1] - 17:2 results [2] - 37:1, 92:14 retain [1] - 93:23 reversed [1] - 37:3 review [2] - 34:8, 96:6 reviewed [2] - 6:16, 88:4 reviewing [1] - 95:6 reviser's [1] - 60:4 REW [1] - 2:2 Rew [2] - 3:14, 5:2 rewriting [1] - 6:2 Rights [1] - 72:20 rights [25] - 6:6, 32:23, 32:25, 33:8, 33:19, 34:18, 36:14, 56:19, 57:10, 61:8, 61:9, 61:10, 61:22, 62:13, 62:15, 62:21, 64:11, 68:24, 68:25,</p>	<p>69:3, 69:4, 69:24, 69:25, 75:16, 76:9 rises [1] - 79:2 risk [1] - 57:18 road [1] - 6:21 role [3] - 31:12, 36:22, 63:5 room [2] - 21:12, 40:6 Ross [2] - 3:7, 66:2 ROSS [1] - 1:12 rule [4] - 27:13, 32:25, 69:8, 87:1 Rule [1] - 87:7 rules [7] - 14:12, 14:17, 14:19, 14:24, 24:11, 50:12, 69:22 Rules [1] - 87:7 ruling [1] - 70:25 run [10] - 20:15, 27:6, 27:8, 41:15, 63:19, 70:3, 72:10, 73:21, 73:22, 78:11 running [3] - 19:24, 23:15, 27:3 runs [1] - 81:1 RUSSELL [1] - 1:16</p>	<p>88:17, 88:18 Secretary [105] - 2:7, 3:7, 3:22, 4:5, 4:20, 6:2, 6:4, 8:2, 10:14, 12:8, 14:11, 14:15, 15:1, 15:14, 15:24, 20:23, 21:19, 21:23, 22:3, 22:5, 22:13, 22:18, 23:3, 23:14, 24:6, 24:10, 24:18, 24:25, 25:10, 25:13, 26:6, 26:17, 26:24, 28:16, 28:17, 29:3, 29:5, 29:8, 29:10, 29:17, 29:21, 30:1, 30:14, 30:22, 31:1, 31:11, 33:16, 33:22, 36:17, 36:20, 36:21, 36:25, 38:25, 39:2, 40:10, 40:16, 40:20, 42:4, 42:25, 48:2, 48:3, 49:15, 49:18, 52:23, 64:19, 65:6, 65:14, 66:2, 66:10, 67:4, 67:23, 68:6, 68:10, 68:16, 68:19, 72:7, 74:3, 74:15, 78:9, 78:12, 78:16, 79:14, 79:25, 81:16, 82:5, 82:13, 83:7, 83:16, 84:12, 85:6, 86:10, 86:11, 88:10, 89:22, 90:6, 90:11, 92:20, 93:2, 93:7, 93:8, 94:18, 95:18, 95:23, 96:2 Secretary's [16] - 30:8, 30:10, 30:12, 39:23, 40:2, 40:9, 42:11, 43:5, 50:9, 52:3, 58:15, 58:16, 58:19, 58:24, 61:3, 64:15 section [13] - 16:2, 18:15, 34:21, 35:3, 35:6, 40:13, 42:20, 44:6, 44:11, 44:12, 59:16, 72:19, 94:15 sections [2] - 19:2, 42:12 see [8] - 4:6, 7:18, 13:9, 13:14, 15:4, 15:14, 23:10, 71:24 seeking [3] - 4:19, 6:1, 70:3 seem [3] - 30:6, 70:19, 84:4 select [3] - 7:23, 33:19, 56:14 selected [2] - 31:8,</p>	<p>44:9 selecting [3] - 31:23, 57:8, 75:19 selection [1] - 31:5 self [3] - 29:21, 36:2, 86:12 self-designated [1] - 36:2 self-nominate [1] - 29:21 self-nomination [1] - 86:12 Senator [3] - 9:7, 46:10, 46:19 senatorial [1] - 69:19 senators [2] - 9:21, 34:14 sense [11] - 14:9, 22:4, 43:6, 44:6, 45:25, 47:6, 48:25, 56:21, 57:2, 88:7, 93:25 sent [2] - 24:11, 53:17 sentence [17] - 12:21, 12:22, 13:3, 13:4, 13:10, 30:5, 30:18, 40:14, 40:18, 40:21, 42:2, 48:25, 65:10, 80:13, 82:8, 94:7 September [5] - 4:21, 14:15, 20:21, 31:14, 67:11 serious [1] - 23:11 service [1] - 53:25 set [12] - 14:15, 15:4, 15:19, 16:2, 17:4, 24:12, 49:10, 69:20, 78:14, 80:1, 84:8, 94:11 sets [2] - 18:25, 94:2 seven [1] - 20:7 Seventh [1] - 91:15 several [3] - 46:18, 54:10, 73:8 severe [2] - 33:8, 64:11 severely [3] - 36:13, 62:12, 62:15 shall [5] - 25:13, 36:2, 52:23, 88:10, 95:23 share [1] - 32:8 shelves [1] - 67:15 shift [2] - 56:11, 62:8 shifting [1] - 62:3 shoes [1] - 71:17 short [3] - 6:21, 74:13, 79:3</p>	<p>short-cutting [1] - 79:3 shortly [1] - 47:2 shortness [1] - 5:5 shot [3] - 79:20, 79:21, 79:22 show [2] - 27:24, 61:6 shown [1] - 23:2 shows [2] - 10:21, 24:16 sic [4] - 6:11, 15:15, 38:24, 80:13 side [2] - 16:13, 74:14 sides [2] - 5:17, 43:20 sign [3] - 15:23, 29:23, 78:1 signatures [12] - 15:17, 15:18, 16:23, 17:12, 18:22, 41:10, 42:23, 43:3, 43:4, 63:20, 83:12, 93:23 signed [1] - 91:1 significant [1] - 56:8 similar [3] - 9:6, 94:23, 94:24 simple [2] - 26:12, 74:17 simply [6] - 47:24, 49:2, 71:2, 71:4, 71:5, 75:2 single [4] - 21:7, 41:5, 72:10, 75:20 sit [2] - 67:15, 85:7 situation [7] - 8:13, 47:2, 47:10, 47:21, 53:11, 82:1, 94:23 situations [1] - 47:14 skip [1] - 6:12 slack [1] - 78:11 slate [2] - 64:4, 64:6 slight [1] - 62:22 small [1] - 63:6 smoke [1] - 21:12 smoke-filled [1] - 21:12 so.. [3] - 6:22, 45:21, 60:22 sole [1] - 73:21 solely [1] - 31:4 solution [1] - 76:8 solve [2] - 35:2, 76:23 someone [2] - 8:7, 27:6 sometimes [1] - 86:20 somewhat [2] - 5:6,</p>
---	---	--	--	---

<p>68:24 sooner [1] - 60:10 sorry [1] - 56:1 sort [3] - 30:6, 57:20, 58:11 space [1] - 78:25 special [43] - 4:22, 6:7, 9:11, 9:13, 9:14, 9:17, 9:25, 10:5, 14:5, 14:24, 15:8, 15:20, 18:18, 20:14, 20:16, 27:5, 29:1, 29:14, 31:2, 31:10, 31:13, 46:22, 47:17, 49:15, 50:7, 53:18, 56:14, 56:15, 57:8, 58:21, 60:8, 62:7, 63:16, 63:17, 78:20, 79:1, 82:14, 82:15, 89:3, 89:12, 90:12, 90:13, 93:19 Special [1] - 24:25 specific [7] - 26:23, 26:25, 43:13, 47:10, 47:12, 47:19, 81:3 specifically [13] - 7:4, 7:8, 7:14, 8:5, 8:16, 17:21, 17:25, 18:12, 34:20, 43:14, 45:10, 80:15, 83:13 specimen [1] - 71:11 speculation [1] - 32:14 spouses [1] - 53:25 squarely [2] - 28:23, 73:25 ss [1] - 97:1 stand [2] - 73:11, 73:14 standard [10] - 11:7, 11:8, 41:11, 41:12, 50:11, 56:19, 73:10, 75:20, 80:1, 95:9 standing [1] - 69:4 standpoint [2] - 6:18, 8:9 stands [2] - 35:25, 73:24 start [5] - 7:19, 66:12, 66:19, 71:6 State [106] - 3:7, 3:8, 3:11, 4:5, 4:7, 4:20, 8:2, 8:20, 9:10, 14:12, 14:15, 15:1, 15:14, 15:24, 18:9, 20:23, 21:19, 21:23, 22:3, 22:5, 22:14, 22:19, 23:3, 23:14, 24:6, 24:10, 24:25, 25:10, 25:13, 26:6, 26:17,</p>	<p>26:24, 28:16, 29:4, 29:17, 30:1, 30:14, 30:22, 31:1, 33:1, 33:16, 33:22, 35:19, 35:21, 35:22, 36:17, 36:20, 36:21, 36:24, 38:8, 38:14, 38:25, 40:16, 40:20, 43:1, 48:3, 49:18, 52:23, 63:4, 64:19, 65:6, 65:14, 66:2, 66:3, 66:10, 67:23, 68:7, 68:10, 68:16, 68:19, 72:7, 74:15, 76:22, 77:1, 77:3, 77:11, 77:13, 77:24, 78:7, 78:10, 78:12, 79:2, 79:14, 80:11, 81:2, 81:14, 81:17, 82:5, 82:13, 83:5, 83:17, 84:12, 85:6, 88:10, 89:23, 90:6, 90:11, 92:21, 93:7, 93:8, 94:18, 95:18, 95:23 state [42] - 7:24, 15:3, 21:8, 25:23, 27:5, 28:24, 29:1, 31:5, 32:21, 33:9, 33:25, 35:12, 35:18, 55:2, 58:14, 61:21, 62:6, 62:11, 63:2, 65:8, 68:2, 68:6, 69:1, 72:7, 72:8, 72:23, 73:3, 74:1, 76:13, 85:3, 85:4, 85:9, 85:12, 85:14, 85:18, 86:12, 88:17, 88:18, 89:6, 91:25, 92:23 STATE [6] - 1:6, 1:12, 1:12, 2:5, 2:8, 97:1 State's [22] - 3:22, 6:2, 6:5, 10:14, 12:8, 24:18, 28:17, 29:10, 31:11, 32:24, 33:2, 37:1, 39:2, 49:16, 61:25, 67:4, 74:4, 78:16, 79:25, 86:11, 93:2, 96:2 state's [1] - 7:25 statement [3] - 7:4, 71:22, 84:7 States [6] - 28:12, 28:20, 31:15, 34:8, 35:10, 48:16 states [11] - 7:21, 34:23, 35:1, 50:19, 53:24, 54:11, 54:20, 60:2, 64:3, 64:9, 79:22</p>	<p>statute [108] - 6:7, 6:9, 8:10, 8:25, 9:3, 9:25, 10:11, 11:15, 12:21, 12:22, 12:23, 13:6, 13:13, 13:23, 14:3, 14:16, 15:1, 17:16, 17:21, 17:23, 18:11, 19:5, 19:10, 19:11, 21:7, 22:21, 23:18, 23:19, 24:7, 27:1, 27:3, 28:11, 29:23, 30:13, 30:16, 33:12, 34:10, 34:12, 34:16, 34:17, 35:3, 35:8, 35:11, 35:13, 35:18, 36:16, 36:19, 37:1, 38:12, 39:24, 40:3, 40:4, 40:5, 40:8, 40:18, 41:1, 41:13, 42:1, 42:2, 44:19, 46:13, 47:12, 47:19, 48:11, 49:8, 50:6, 53:9, 54:12, 58:17, 58:23, 59:16, 59:22, 60:5, 61:3, 61:4, 64:20, 64:24, 64:25, 65:2, 66:21, 66:23, 66:24, 67:8, 71:3, 71:5, 72:23, 75:3, 77:2, 77:4, 81:3, 82:25, 83:11, 83:21, 84:9, 85:11, 86:10, 87:18, 88:17, 89:9, 91:8, 92:7, 92:13, 94:19, 96:1 statutes [34] - 8:16, 15:15, 17:6, 18:18, 18:20, 18:21, 20:3, 20:13, 22:22, 33:19, 38:17, 39:13, 49:14, 49:16, 49:22, 49:23, 53:5, 61:5, 67:9, 67:16, 69:15, 80:13, 80:15, 80:19, 81:3, 81:5, 89:15, 91:2, 92:14, 92:17, 92:19, 93:5, 94:11, 95:14 statutorily [1] - 30:3 statutory [12] - 5:9, 6:15, 9:2, 22:25, 34:6, 39:22, 41:25, 51:23, 54:17, 59:14, 80:16 statutory.. [1] - 24:3 stay [1] - 17:15 STE [1] - 97:18 stenotype [1] - 97:6 steps [1] - 94:10 still [3] - 18:4, 54:15, 84:1 stood [1] - 71:17</p>	<p>straight [3] - 74:18, 74:19 strict [1] - 32:17 strikes [1] - 69:2 striking [1] - 31:18 strong [1] - 76:17 struck [2] - 33:18, 86:6 style [1] - 23:11 sub [6] - 18:6, 64:18, 89:10, 89:18, 90:24, 93:3 subject [1] - 5:12 submit [2] - 10:15, 17:22 submitted [1] - 63:19 subsection [5] - 17:23, 18:24, 35:9, 89:19, 91:7 subsequent [1] - 72:12 subsequently [3] - 58:9, 73:12, 74:3 substantial [1] - 64:2 sued [1] - 54:10 suffer [1] - 70:21 suffered [1] - 37:5 sufficient [5] - 23:24, 24:21, 83:5, 83:22, 89:24 suggest [4] - 34:5, 38:13, 77:13, 85:24 suggesting [1] - 35:1 suggestion [1] - 70:10 suggests [1] - 38:25 support [1] - 63:11 supported [1] - 93:14 supporting [1] - 75:9 supposed [7] - 9:15, 9:16, 24:11, 50:4, 78:1, 78:2, 81:6 Supreme [21] - 9:2, 20:4, 20:10, 27:19, 31:15, 31:25, 32:19, 35:21, 37:2, 38:21, 43:21, 46:11, 58:5, 61:9, 71:16, 74:19, 86:5, 86:25, 88:7, 94:24 surgery [2] - 74:12, 74:14 surprise [2] - 71:20, 76:18 sweep [2] - 38:14, 71:5 sweeping [2] - 71:4, 71:21 system [12] - 11:11,</p>	<p>20:12, 31:6, 31:19, 70:2, 72:10, 72:16, 78:11, 78:18, 78:19, 85:7, 85:17</p>
T				
<p>table [1] - 3:18 tailored [1] - 33:9 talks [3] - 19:19, 82:10, 94:6 Tashjian [2] - 33:17, 86:5 tearing [1] - 74:13 temporary [1] - 46:20 ten [1] - 65:20 tend [1] - 60:18 term [3] - 34:15, 44:24, 68:11 terms [3] - 37:16, 37:23, 46:2 tested [1] - 56:7 testimony [1] - 70:20 testing [1] - 56:8 text [4] - 35:13, 66:24, 67:2, 68:14 thank [1] - 66:12 THE [79] - 1:6, 1:16, 3:4, 3:16, 3:18, 3:20, 3:22, 3:25, 4:2, 4:6, 4:10, 4:13, 4:16, 5:1, 5:15, 6:16, 8:8, 8:22, 12:16, 16:1, 16:11, 18:6, 20:18, 21:25, 22:11, 25:2, 25:5, 25:9, 25:20, 25:25, 27:16, 28:1, 28:5, 28:8, 28:10, 39:6, 39:9, 41:3, 42:5, 43:13, 44:10, 45:6, 45:9, 46:6, 48:2, 48:5, 48:8, 48:10, 49:17, 51:19, 52:7, 52:20, 53:5, 55:11, 55:19, 55:21, 59:3, 60:16, 60:25, 63:22, 64:16, 64:18, 65:8, 65:19, 65:24, 66:7, 75:5, 75:24, 77:25, 80:4, 80:7, 84:16, 84:23, 84:25, 86:16, 87:11, 87:13, 87:15 themselves [5] - 12:11, 12:12, 23:8, 62:9, 62:23 thereafter [1] - 97:8 thereby [2] - 87:21, 96:2</p>				

<p>therefore [19] - 8:20, 10:7, 10:10, 14:10, 15:21, 17:18, 19:4, 19:16, 20:9, 38:11, 52:4, 53:13, 62:11, 62:20, 73:4, 80:2, 87:1, 95:6, 95:16</p> <p>thereto [1] - 60:12</p> <p>they've [5] - 11:3, 20:24, 51:18, 58:18, 93:23</p> <p>thin [1] - 40:10</p> <p>thinking [1] - 7:1</p> <p>third [7] - 13:10, 19:15, 40:14, 40:21, 42:2, 48:25, 70:8</p> <p>Thirty [1] - 75:24</p> <p>thirty [1] - 75:25</p> <p>Thirty-five [1] - 75:24</p> <p>thirty-five [1] - 75:25</p> <p>Thomas [2] - 37:12, 37:13</p> <p>thoroughly [1] - 36:24</p> <p>three [9] - 9:22, 16:15, 19:2, 31:17, 52:17, 70:14, 76:1, 84:22, 84:23</p> <p>throughout [2] - 35:25, 68:3</p> <p>throw [1] - 72:23</p> <p>THURSDAY [1] - 3:1</p> <p>timetables [1] - 87:3</p> <p>timing [4] - 40:17, 63:24, 85:10, 85:13</p> <p>Timmons [4] - 32:18, 33:11, 33:12, 33:21</p> <p>title [2] - 60:6, 60:7</p> <p>today [12] - 4:17, 6:1, 28:23, 32:13, 36:16, 47:10, 48:13, 48:21, 53:12, 55:10, 66:13, 71:19</p> <p>together [1] - 92:10</p> <p>took [6] - 30:4, 66:22, 73:23, 79:20, 85:25, 97:6</p> <p>top [2] - 36:4, 56:21</p> <p>totally [2] - 42:10, 95:14</p> <p>towards [1] - 11:25</p> <p>tradition [10] - 10:25, 11:1, 11:9, 12:14, 31:9, 50:16, 50:18, 50:23, 51:2, 51:15</p> <p>traditional [1] - 57:2</p> <p>traditions [1] - 67:1</p> <p>transcript [1] - 97:10</p> <p>TRANSCRIPT [1] - 1:8</p>	<p>transcription [2] - 97:9, 97:11</p> <p>treat [2] - 38:3, 46:13</p> <p>treated [3] - 69:11, 69:12, 93:15</p> <p>treating [1] - 41:22</p> <p>treats [1] - 70:2</p> <p>tried [2] - 6:19, 84:21</p> <p>trouble [1] - 52:21</p> <p>troubled [1] - 94:17</p> <p>troubles [1] - 95:10</p> <p>true [10] - 11:13, 12:20, 17:19, 50:5, 58:6, 74:5, 76:6, 78:20, 79:9, 97:11</p> <p>truly [1] - 75:19</p> <p>try [5] - 43:20, 43:22, 51:23, 60:23</p> <p>trying [7] - 17:17, 20:24, 44:18, 76:22, 77:1, 84:3, 84:4</p> <p>turn [5] - 30:16, 43:11, 78:2, 93:20</p> <p>Twin [1] - 32:18</p> <p>two [21] - 5:8, 13:1, 13:14, 19:17, 19:25, 22:15, 34:11, 36:4, 45:14, 51:3, 51:16, 54:23, 56:21, 70:14, 76:11, 77:15, 77:17, 79:4, 81:1, 91:17, 94:10</p> <p>types [2] - 41:2, 54:23</p> <p>typewriting [1] - 97:8</p> <p>typically [1] - 55:1</p>	<p>7:12, 13:21, 14:6, 15:18, 15:19, 18:24, 21:2, 22:11, 24:17, 27:1, 28:19, 28:22, 30:13, 41:11, 44:11, 45:23, 46:5, 46:17, 50:9, 51:2, 52:2, 55:1, 64:18, 68:18, 69:13, 69:21, 72:19, 78:9, 78:10, 80:15, 81:19, 83:2, 86:14, 94:13, 94:23</p> <p>underlie [1] - 32:8</p> <p>understood [1] - 87:17</p> <p>undesired [4] - 73:8, 73:16, 73:17, 75:17</p> <p>unexceptional [1] - 70:5</p> <p>unfair [1] - 69:1</p> <p>unfortunately [1] - 35:14</p> <p>United [6] - 28:12, 28:19, 31:15, 34:8, 35:10, 48:16</p> <p>unless [5] - 20:13, 54:16, 66:10, 80:3, 93:13</p> <p>unlike [4] - 10:18, 37:14, 37:21, 67:8</p> <p>unmistakable [1] - 40:6</p> <p>unnecessarily [1] - 61:12</p> <p>unreasonable [2] - 84:13, 92:14</p> <p>unrelated [1] - 72:14</p> <p>unsuccessful [1] - 74:5</p> <p>unusual [6] - 77:5, 77:6, 77:12, 77:15, 77:23, 78:11</p> <p>UOCAVA [5] - 34:25, 52:17, 53:15, 53:23, 77:22</p> <p>up [19] - 5:6, 7:4, 9:7, 10:12, 21:5, 32:12, 45:20, 48:24, 53:11, 60:20, 63:3, 63:7, 66:16, 69:20, 76:12, 76:19, 78:1, 78:19, 80:9</p> <p>upheld [5] - 58:7, 58:9, 62:10, 62:16, 80:2</p> <p>uphold [1] - 64:14</p> <p>upholding [1] - 32:20</p> <p>urge [1] - 38:22</p> <p>uses [5] - 30:15,</p>	<p>30:16, 49:16, 90:8, 90:15</p> <p>usual [3] - 41:14, 55:14, 77:11</p>	<p>93:14</p> <p>votes [2] - 23:10, 64:7</p> <p>Voting [1] - 72:19</p> <p>voting [7] - 23:24, 53:20, 56:3, 56:9, 77:19, 78:14, 78:15</p> <p>vs [19] - 1:11, 8:22, 8:25, 10:24, 11:3, 11:4, 28:22, 31:16, 32:18, 33:16, 33:17, 35:22, 46:7, 47:17, 47:22, 53:19, 61:19, 92:15, 94:24</p>
W				
<p>wake [1] - 67:11</p> <p>walk [1] - 30:25</p> <p>wants [4] - 15:15, 19:25, 23:7, 81:2</p> <p>Washington [8] - 11:3, 35:18, 35:19, 35:21, 35:22, 36:24, 38:14, 74:1</p> <p>WASHOE [1] - 97:2</p> <p>Washoe [1] - 52:14</p> <p>water [2] - 11:18, 69:13</p> <p>ways [1] - 85:13</p> <p>website [1] - 24:19</p> <p>weeks [1] - 52:17</p> <p>weigh [1] - 32:23</p> <p>welcome [2] - 28:9, 66:14</p> <p>well-reasoned [1] - 82:4</p> <p>whatsoever [4] - 12:11, 42:3, 49:25, 85:25</p> <p>whereas [1] - 17:5</p> <p>whole [4] - 20:12, 28:13, 46:22, 49:5</p> <p>win [1] - 41:18</p> <p>winds [1] - 76:19</p> <p>winnow [1] - 56:23</p> <p>Wisconsin [1] - 54:11</p> <p>wishes [2] - 82:11, 90:7</p> <p>withdraw [1] - 12:4</p> <p>won [2] - 63:22, 64:1</p> <p>word [5] - 45:6, 45:25, 90:8, 90:15, 91:15</p> <p>wording [2] - 43:13, 92:22</p> <p>words [4] - 43:15, 62:2, 92:6, 92:8</p>				

<p>worry [1] - 77:19</p> <p>worthwhile [1] - 72:17</p> <p>write [1] - 54:3</p> <p>write-in [1] - 54:3</p> <p>writes [1] - 76:16</p> <p>writing [2] - 37:12, 40:9</p> <p>wrongly [1] - 64:20</p> <p>wrote [2] - 37:12, 37:13</p>
Y
<p>years [6] - 31:17, 34:11, 47:7, 53:22, 77:16, 79:4</p> <p>York [2] - 28:22, 54:11</p>
§
<p>§ [4] - 34:12, 34:13, 34:21, 35:9</p>

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1 Case No. 11 OC 00147 1B
2 Dept. No. I

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ALAN GLOYER
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6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY
8

9	NEVADA REPUBLICAN PARTY, and)	
	DAVID BUELL, an INDIVIDUAL,)	
10)	FINDINGS OF FACT, CONCLUSIONS
	Plaintiffs,)	OF LAW AND ORDER
11)	
12	vs.)	
)	
13	STATE OF NEVADA, SECRETARY OF)	
	STATE ROSS MILLER)	
14)	
	Defendants.)	

15 On Thursday, May 5, 2011, Plaintiffs, the Nevada Republican
16 Party ("NRP") and Mr. David Buell ("Mr. Buell") (collectively,
17 "Plaintiffs") filed a Verified Complaint and Application for a
18 Preliminary and Permanent Injunction. Additionally, Plaintiffs
19 filed an ex parte motion for an order shortening time to respond to
20 Plaintiffs' application. This Court granted Plaintiffs ex parte
21 motion and heard the matter in an expedited manner.

22 On May 12, 2011, Defendant, Ross Miller, Secretary of State
23 ("State/Defendant") filed an opposition to Plaintiffs' application.
24 Additionally, on the same day, the Nevada State Democratic Party
25 ("NSDP/Intervenor") filed a motion to intervene, and Answer, and an
26 opposition to Plaintiffs' application. Plaintiffs' acknowledged
27 that they do not object to NSDP's motion to intervene and thus,
28 this Court granted such request, on Tuesday, May 17, 2011.

1 On Monday, May 16, 2011, Plaintiffs' filed a reply in support
2 of their application for preliminary and permanent injunction.¹
3 Before the hearing, the parties met and set the date of Thursday,
4 May 19, 2011, for this Court to conduct an evidentiary hearing.
5 The parties both consented to consolidate the preliminary
6 injunction hearing with a trial on the merits. See NRCP 65(a)(2).

7 On May 19, 2011, the matter of Plaintiffs' request for a
8 preliminary and permanent injunction came on for hearing.
9 Plaintiffs appeared by and through their respective counsel, David
10 O'Mara, Esq, of The O'Mara Law Firm, P.C. and Rew R. Goodenow,
11 Esq., of Parsons Behle & Latimer. Defendant Secretary of State
12 Miller appeared by and through his counsel Kevin Benson, Esq.,
13 Deputy Attorney General, and Scott F. Gilles, Deputy Secretary of
14 the Elections for the State of Nevada. Defendant Nevada State
15 Democratic Party appeared by and through its counsel Marc E. Elias,
16 Esq., Matthew M. Griffin, Esq., and Bradley Scott Schrager, Esq.

17 **ISSUE**

18 Plaintiffs have filed this action seeking declaratory and
19 injunctive relief in order to require the Secretary of State to
20 construe NRS 304.240(1) in a manner that provides for full
21 compliance with NRS Chapter 293 and to prevent the Secretary of
22 State from placing on the special election ballot the names of
23 individuals that have not been designated by their respective major

24

25

26 ¹Attached to the respective parties' briefs were various exhibits.
27 There were no objections by any of the three parties to the filing
28 of these exhibits or the evidence introduced at the hearing. As
such, the Court has reviewed and considered such exhibits in its
findings.

1 or minor political party as the specific party's candidate for the
2 special election.²

3 As such, the issue before this Court is whether or not the
4 nomination of a major political party candidate or minor political
5 party candidate is governed by the Secretary's interpretation of
6 one sentence contained in NRS 304.240, or if a correct reading of
7 the statutory language in Chapter 304, incorporating by reference
8 the election laws contained in Chapter 293, including NRS 293.165,
9 provides that each major or minor political party is entitled to
10 designate its respective candidate that is placed on the special
11 election ballot.

12 ///

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26 ² Even though the general election laws of this State apply to a
27 special election, the term "general election" is used to describe
28 the normal election process, while the term "special election" is
used to describe the pending election process, unless otherwise
stated.

1 FINDINGS OF FACTS AND CONCLUSIONS OF LAW³

2 After reviewing the respective parties' briefs, the relevant
3 statutes governing elections, reviewing case law, and having heard
4 extensive oral argument, and good cause appearing, this Court finds
5 as follows:

6 This Court finds that Plaintiffs are entitled to declaratory
7 relief. See Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 264
8 (1948).⁴ First, a justiciable controversy, that is, a controversy
9 in which a right is asserted against one who has an interest in
10 contesting it. In this case, Plaintiffs' interest are adverse to
11 the Secretary of State and Intervenor NSDP regarding the procedure
12 for the designation and nomination of major/minor party candidates
13 for the pending special election. Second, the parties are adverse
14 and the controversy is ripe for judicial determination because all
15 parties have an interest in the manner in which the Secretary of

16 _____
17 3 In light of the Court's decision today, it is unnecessary for
18 the Court to address the constitutional issues raised by
19 Plaintiffs in this case. Indeed, under the Court's decision
20 today, NRS 304.240 can be interpreted in a way that is
21 constitutional. However, if the Court were to reach the
22 constitutional issues, then the Secretary's interpretation would
23 present challenges. For example, the Court is troubled by the
24 Secretary of State's interpretation that provides for different
25 treatment by the Secretary that allows the minor political
26 parties and independents to designate their respective
27 candidates, while denying the major political parties any access
28 or involvement in the process of designating their candidates.

24 ⁴ In the case of Kress v. Corey, supra, the requirements for
25 declaratory relief were summarized as follows: "(1) there must be
26 a justiciable controversy; that is to say, a controversy in which a
27 claim of right is asserted against one who has an interest in
28 contesting it; (2) the controversy must be between persons whose
interests are adverse; (3) the party seeking declaratory relieve
must have a legal interest in the controversy, that is to say, a
legally protectable interest; and (4) the issue involved in the
controversy must be ripe for judicial determination."

1 State conducts the special election under Nevada law and the issue
2 is ripe for review because the election process has already begun.

3 Additionally, injunctive relief is appropriate in this case in
4 aid of the declaratory judgment sought. See Nevada Management
5 Company v. Jack, 75 Nev. 232, 236, 338 P.2d 71 (1959) citing, Kress
6 v. Corey, 65 Nev. 1, 189 P.2d 352, 364 (1948); see also, Woods v.
7 Bromley, 69 Nev. 96, 241 P.2d 1103 (1952).

8 The evidence presented in this case leads this Court to
9 conclude that Plaintiffs have met their burden and are entitled to
10 permanent injunctive relief because they have shown that they are
11 not only successful on the merits, but would suffer irreparable
12 harm if the conduct was allowed to continue. See University and
13 Community College Systems of Nevada v. Nevadans for Sound Gov't.,
14 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); Dangberg Holdings v.
15 Douglas County, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999).

16 The Secretary of State and NSDP assert that the Secretary of
17 State's interpretation deserves deference while Plaintiffs contend
18 that the Secretary of State erred because he went beyond the plain
19 meaning of the statute in construing the statute. This Court
20 agrees with Plaintiffs.

21 Additionally, in this case, resolution of the issue rests
22 solely on statutory construction principles, a question of law, and
23 deference to the Secretary of State's interpretation is not
24 absolute. See State v. State Farm, 116 Nev. 290, 293, 995 P.2d 482
25 (2000) ("[A] court will not hesitate to declare a regulation invalid
26 when the regulation violates the constitution, conflicts with
27 existing statutory provisions or exceeds the statutory authority of
28 the agency or is otherwise arbitrary and capricious.") Even

1 reasonable agency interpretation of an ambiguous statute may be
2 stricken by a court when a court determines that the agency
3 interpretation conflicts with legislative intent. Id.

4 While this Court has considered the Secretary of State's
5 interpretation for its persuasive value, this Court does not find
6 the Secretary of State's interpretation to be controlling, and thus
7 because the matter is purely a legal question, will not give
8 deference to the Secretary of State's interpretation, and has
9 undertaken an independent review of the construction of Nevada's
10 election statutes. See Bacher v. State Engineer, 122 Nev. 1110,
11 1117, 146 P.3d 793 (2006).

12 The Nevada laws that are at issue in the case are Chapter 304
13 and Chapter 293 of the Nevada Revised Statutes. Unfortunately, the
14 cross-referencing of these two chapters has resulted in some
15 confusion.

16 In discerning the meaning of the statutory provisions
17 regarding the special election for Nevada's Representative to the
18 United States House of Representatives, the Court has relied on
19 well-established precepts of statutory construction. "Unless
20 ambiguous, a statute's language is applied in accordance with its
21 plain meaning." See, e.g. We the People Nevada v. Miller, 124 Nev.
22 874, 881, 192 P.3d 1166, 1170 (2008). However, if the statute "is
23 ambiguous, the plain meaning rule of statutory construction" is
24 inapplicable and the drafter's intent "becomes the controlling
25 factor in statutory construction." See Harvey v. District. Ct. 117
26 Nev. 754, 770, 32 P.3d 1263, 1274 (2001). An ambiguous statutory
27 provision should also be interpreted in accordance "with what
28 reason and public policy would indicate the legislature intended."

1 See McKay v. Bd. of Supervisors, 102 Nev. 644, 649, 730 P.2d 438
2 (1986). Additionally, the Court construes statutes to give meaning
3 to all of their parts and language and has read each sentence,
4 phrase, and word to render it meaningful within the context of the
5 purpose of the legislation. See Coast Hotels v. State, Labor
6 Comm'n, 117 Nev. 835, 841, 34 P.3d 546 (2001). Further, no part of
7 the statute should be rendered meaningless and its language "should
8 not be read to produce absurd and unreasonable results." See
9 Banegas v. SIIS, 117 Nev. 222, 228, 19 P.3d 245 (2001).

10 NRS 304.240 is ambiguous. The Court has reviewed the scant
11 legislative history and finds that it does not assist the Court in
12 resolving the particular matter. NRS 304.230 clearly states that
13 the Nevada Legislature was concerned with a special election, yet,
14 it is clear that the Nevada Legislature intended for the election
15 to be conducted pursuant to the provisions of Chapter 293 of NRS.
16 See NRS 304.240.

17 Thus, the Nevada Legislature's intentions and the reasons and
18 public policy indicate that the general election laws of the State
19 of Nevada, Chapter 293 of NRS, apply to this election.

20 When possible, the interpretation of a statute or
21 constitutional provision will be harmonized with other statutory or
22 provisions to avoid unreasonable or absurd results. See Nevada
23 Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870 (1999).
24 Additionally, all statutes are to be read *in pari materia*. See
25 Farm Mut. v. Comm'r of Ins., 114 Nev. 535, 541, 958 P.2d 733, 737
26 (1998). When this is done, in this instance, the result is that a
27 major or minor political party designates its candidate to be
28 placed on the special elections ballot.

1 The Secretary of State's reliance on a single sentence within
2 NRS 304.240 without considering other statutes within Chapter 293
3 produces an unreasonable and absurd result. Indeed, the Secretary
4 of State has provided argument that the general election laws apply
5 in every case, yet it is clear that the Secretary of State is
6 picking and choosing from different portions of the general
7 election statutes to support its interpretation. The Court is
8 troubled by this method. Indeed, even under the Secretary of
9 State's own Interpretation, he has chosen not to apply the general
10 election laws such as NRS 293.165 and NRS 293.260, yet the
11 Interpretation makes reference to NRS 293.1715(2) in paragraphs 3
12 and 4; NRS 293.1276 through NRS 293.1279 in paragraphs 3, 4 and 5;
13 and incorrectly makes reference to NRS 193.200, which should be NRS
14 293.200. Each of these statutes referenced in his Interpretation
15 is specifically excluded under the provisions of NRS 293.175 in
16 special elections.

17 If the Court were to follow the Secretary of State's
18 arguments, it would allow any individual to file under a major
19 political party, yet limit the same individual from filing as a
20 minor party candidate or an independent candidate because that
21 individual would either have to be placed on the minor party's list
22 or file a petition of candidacy supported by 100 registered voters.
23 This is an unreasonable and absurd result; and results in unfair
24 treatment.

25 Further, the State's argument that NRS 304.240 supercedes the
26 provisions of Chapter 293 of NRS because NRS 304.240 is a specific
27 statute while NRS 293.165 is a general statute is incorrect.
28 Indeed, "when statutes are potentially conflicting, [the Court]

1 will attempt to construe both statutes in a manner to avoid
2 conflict and promote harmony." See Beazer Homes Nevada, Inc. v.
3 Eighth Judicial Dist., 120 Nev. 575, 587, 97 P.3d 1132 (2004).

4 The Nevada Legislature adopted the statutory provision at
5 issue in this case during the 2003 legislative session. See AB 344
6 (Statutes of Nevada 2003). The legislative history cited by
7 Plaintiffs evidences an intent to adjust the election timeframes
8 required by NRS Chapter 293, not to adopt a new election process.
9 There are two steps in regards to the process for an individual to
10 be nominated and then placed on the ballot as a candidate for the
11 position. First, under NRS 304.240, the language sets forth that:

12 [e]xcept as otherwise provide in this subsection, a
13 candidate must be nominated in the manner provided in
14 Chapter 293 of NRS and must file a declaration or
15 acceptance of candidacy within the time prescribed by the
Secretary of State pursuant to NRS 293.204, which must be
established to allow a sufficient amount of time for the
mailing of election ballots."

16 See NRS 304.240(1) (emphasis added).

17 NRS 293.165 provides,

18 [e]xcept as otherwise provided in NRS 293.166, a vacancy
19 occurring in a major or minor political party nomination
20 for a partisan office may be filled by a candidate
21 **designated by the party central committee** of the county
or State, as the case may be, of the major political
party or by the executive committee of the minor
political party..

22 See NRS 293.165(1) (emphasis added). Here, in reading the two
23 statutes in harmony with each other, the important words in each
24 particular statute are, NRS 304.240, "a candidate of a major
25 political party" and NRS 293.165, "a candidate designated by."
26 Further, there is no language in NRS 304.240 that conflicts with
27 the right of a major political party to designate its candidate.
28 Thus, NRS 293.165 is applicable.

1 Under the Secretary of State's Interpretation, he would
2 eliminate any involvement of the major political parties in the
3 nomination process, while allowing the minor political party to
4 preclude an individual from nominating themselves for this office,
5 which is unreasonable. The language of NRS 304.240 does not state,
6 "a member of a major political party." The language specifically
7 states, "a candidate of a major political party." Additionally,
8 Black's Law Dictionary, Seventh Edition, defines the word,
9 "nominate" to mean, "1. [t]o propose (a person) for election or
10 appointment"; or, "2. [t]o name or designate (a person) for a
11 position." This language sets forth that an action must be taken
12 for a designation or nomination of a candidate, which in this case,
13 is pursuant to NRS 293.165 for major and minor party candidates.
14 Every member of a major party is certainly not a candidate of that
15 party. There must be a process to designate a candidate, namely
16 NRS 293.165.

17 Second, in reading the statutory laws in harmony, it is clear
18 that the language in the third, fourth and fifth sentences of NRS
19 304.240 sets forth the process of how the major/minor party
20 candidate is placed on the ballot after being designated. Indeed,
21 the provisions in respect to the minor party candidate indicates
22 placement on the ballot. The language in regards to independent
23 candidates indicates an appearance on the ballot. In order to give
24 effect to the third sentence regarding major party candidates, the
25 language provides the method for placing a major party candidate on
26 the ballot.

27 This process conforms with the general election statutes
28 regarding placement of candidates on the ballot and that in most

1 cases, only one candidate per major or minor party is placed on the
2 ballot for each position. See NRS 293.260; see also, State ex rel.
3 Cline v. Payne, 59 Nev. 127, 86 P.2d 32 (1939); NRS
4 293.1714(4) ("The name of only one candidate of each minor political
5 party for each partisan office may appear on the ballot for a
6 general election.")

7 Finally, the resignation of former Congressman Dean Heller
8 created a vacancy in the nomination. Indeed, like Nevada's
9 election in 1954, which did not allow for a primary, a vacancy was
10 created. At the time, a similar Nevada law provided,

11 The provisions of § 25 of the primary election law, as
12 amended 1947 p. 478, § 2429 N.C.L. 1943-1949 Supp.,
13 relate to the filling of a vacancy where a person
14 nominated at the preceding primary election has died,
resigned or for some other reason ceased to be a
candidate.

15 See Brown v. Georgetta, 70 Nev. 500, 507, 275 P.2d 376, 380 (1954).
16 In citing State ex inf. Barrett ex rel. Shumard v. McClure, 299 Mo.
17 688, 253 S.W. 743, the Nevada Supreme Court rejected the contention
18 that the death of Senator McCarran created only a vacancy in the
19 office and not a vacancy in the nomination. Like Brown, NRS
20 293.165 is broad enough to permit the designation and nomination of
21 a candidate in this situation, and thus, there is a vacancy in the
22 nomination.

23 As such, had this Court allowed the Secretary of State's
24 Interpretation to stand, Plaintiffs would suffer irreparable harm.
25 Indeed, under the Secretary's Interpretation, the major parties
26 would be specifically excluded from any involvement in the
27 designation and nomination process, for which compensatory relief
28 is inadequate.

1 Based upon the foregoing findings, and good cause appearing,
2 IT IS HEREBY ORDERED as follows:

3 1. This Court finds in favor of Plaintiffs' and against
4 Defendant and Intervenor.

5 2. Plaintiffs' claim for a permanent injunction is granted
6 and the Secretary of State is enjoined from placing the names of
7 members of a majority political party or a minority political party
8 on the ballot until the candidates are designated by their
9 respective major or minor political party pursuant to NRS 293.165.

10 3. The time frames established by the Secretary of State
11 regarding the designation of a party's candidate and the filing of
12 the declaration or acceptance of candidacy shall be extended up to,
13 and including, June 30, 2011,⁵ so as to allow the respective
14 political parties an opportunity to comply with NRS 293.165.

15 4. This Order is nunc pro tunc to the date the Court issued
16 its Order from the bench on May 19, 2011.

17 5. Each party shall bear their own attorney's fees and costs
18 in respect to this matter.

19

20 DATED: May 23, 2011

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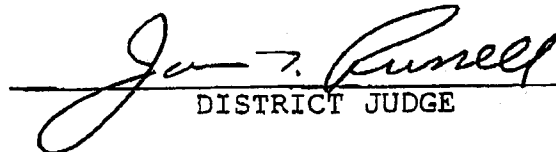
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DISTRICT JUDGE

27 ⁵ The Secretary of State acknowledged that the Registrar of Voters
28 would need to submit the ballot to the printers by July 8, 2011
which is after the June 30, 2011, date requested by Plaintiffs.

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this date I served a true and correct copy of the foregoing document by:

Depositing for mailing, in a sealed envelope, U.S. Postage prepaid, at Reno, Nevada

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DATED: May 23, 2011.



1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 NEVADA STATE DEMOCRATIC PARTY;
4 AND ROSS MILLER, IN HIS CAPACITY AS
5 SECRETARY OF STATE FOR THE STATE
6 OF NEVADA,

7 Appellants.

8 vs.

9 NEVADA REPUBLICAN PARTY, and
10 DAVID BUELL, an individual,

11 Respondents,

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May 31 2011 04:05 p.m.
Tracie K. Lindeman

Supreme Court No. 58404

District Court No. 11 OC 00147 1B

12 **JOINT APPENDIX**

13 **VOLUME 3**

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TABLE OF CONTENTS

DOCUMENTS

PAGE

TRANSCRIPT OF PROCEEDINGS HEARING May 19, 2011 148-260

CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada and on this 31st day of May, 2011, I served a copy of the foregoing Joint Appendix Volume 3, by Nevada Supreme Court CM/ECF Electronic filing to:

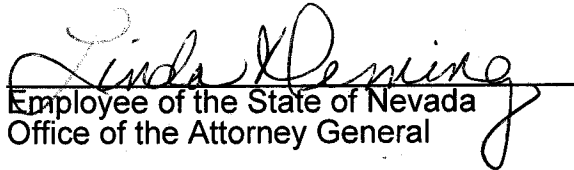
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1 CASE NO. 11 OC 00147 1B

2 DEPT. NO. 1

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6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR CARSON CITY

8 NEVADA REPUBLICAN PARTY,
9 and DAVID BUELL, an
individual,
Plaintiffs,

TRANSCRIPT OF PROCEEDINGS

Hearing

May 19, 2011

10
11 vs.

12 STATE OF NEVADA, SECRETARY
13 OF STATE ROSS MILLER,
Defendants.
14 _____/

15
16 THE HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE PRESIDING

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25 REPORTED BY: Julietta Forbes, CCR #105, NV Reporting, LLC

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 Attorney at Law

-o0o-

1 CARSON CITY, NEVADA, THURSDAY, MAY 19, 2011, 1:25 P.M.

2 -oOo-

3

4 THE COURT: Please be seated.

5 For the record, this is Case No. 11 OC 00147 1B,
6 Nevada Republican Party and David Buell, plaintiffs, versus
7 the State of Nevada, Secretary of State Ross Miller, the
8 defendant, and the Nevada State Democratic Party,
9 Intervenors.

10 Pursuant to an order issued by this Court on
11 May 17th, 2011, the Court allowed the Nevada State
12 Democratic Party to intervene.

13 The Nevada Republican Party is being represented by
14 Rew -- Mr. Goodenow.

15 MR. GOODENOW: Yes, Your Honor.

16 THE COURT: And Mr. O'Mara.

17 MR. O'MARA: Yes. Good afternoon, Your Honor.

18 THE COURT: And who else is with you at the table?

19 MR. O'MARA: This is Mr. Buell.

20 THE COURT: Okay, thank you.

21 MR. BUELL: Good afternoon, Your Honor.

22 THE COURT: And the Secretary of State's being
23 represented by Kevin Bacon.

24 MR. BENSON: Benson, Your Honor.

25 THE COURT: Benson. Excuse me. Kevin Benson.

1 MR. BENSON: Yes.

2 THE COURT: Is anybody here with you, Mr. Benson?

3 MR. BENSON: My client, Scott Gilles.

4 MR. GILLES: Yes, Your Honor, Scott Gilles on
5 behalf of the Secretary of State.

6 THE COURT: Nice to see you.

7 The Nevada State Democratic Party being represented
8 by Matt Griffin, Bradley Schrager --

9 MR. SCHRAGER: Schrager, Your Honor.

10 THE COURT: Schrager. Excuse me. Schrager. And
11 Marc Elias?

12 MR. ELIAS: Yes, Your Honor. Thank you.

13 THE COURT: And who is going to make the argument
14 on your behalf?

15 MR. ELIAS: I will. I will, Your Honor.

16 THE COURT: Thank you.

17 Just for the record, we're here today for a hearing
18 on the verified complaint filed by the Nevada Republican
19 Party and David Buell, seeking injunctive relief to prevent
20 the Secretary of State of Nevada from placing names of
21 candidates on the ballot for the September 13th, 2011,
22 special election for the 2nd Congressional District, who are
23 not nominated pursuant to NRS 293.

24 Counsel, are you ready to proceed?

25 MR. GOODENOW: Yes, Your Honor.

1 THE COURT: Go ahead.

2 MR. GOODENOW: Rew Goodenow, appearing on behalf of
3 the plaintiffs.

4 Your Honor, I wanted to cover how we would present
5 the argument. Due to the time, shortness of time and the
6 issues being somewhat complex, we've decided to divide up
7 the issues.

8 We have two independent bases for relief, one of
9 them being the statutory interpretation basis. Mr. O'Mara
10 has agreed to argue that basis, and then I would address the
11 constitutional issues.

12 And so what we propose to Your Honor, subject to
13 your better direction, is that Mr. O'Mara would go first,
14 and then I would proceed after him.

15 THE COURT: I have no objection to that, in respect
16 to that, so you can go ahead and make your argument.

17 We'll allow equal time to both sides, and then
18 we'll come back and maybe allow you one final comment, being
19 the plaintiffs in this particular action.

20 So, with that, Mr. O'Mara, go ahead.

21 MR. O'MARA: Great. Thank you very much, Your
22 Honor.

23 Thank you for hearing this matter on such an
24 expedited basis.

25 The Nevada Republican Party and Mr. Buell are here

1 today seeking declaratory and injunctive relief from the
2 Secretary of State's interpretation and rewriting the Nevada
3 election laws.

4 In order to fully understand the Secretary of
5 State's promulgation of new laws under his claimed
6 interpretation rights, we must look at the history of the
7 special election statute, as well as Nevada's election
8 history.

9 Now, if the statute had been interpreted clearly,
10 or interpreted properly, then the language would be clear;
11 but because it wasn't interpreted [sic] in the proper
12 method, we're going to go and skip through and just give you
13 a little bit of analysis in regards to the interpretation,
14 or the legislative history that's happening in regards to
15 the -- the statutory framework.

16 THE COURT: Well, the Court reviewed the
17 legislative history. There isn't any legislative history in
18 respect to the Legislature, from the standpoint of when they
19 adopted NRS 304.240. I went through and tried to find the
20 legislative history; it didn't help at all. There wasn't
21 much at all. There was one short meaning, and down the road
22 we were, so...

23 MR. O'MARA: Well, I think if we go back into the
24 first committee hearing, you'll find that there is some
25 distinct discussions in regards to how the Legislature was

1 thinking about going about in the nomination process, and
2 how everything was going to happen. Because if you look at
3 the -- Alan Glover, the Carson City Clerk-Recorder, and you
4 look at his statement, he specifically brings up the issue
5 of whether or not major or minor parties have the ability
6 to -- to, or the authority for their executive committee, or
7 another committee of that, to pick their candidates. And
8 what he specifically said was, "I don't know how that
9 affects the minor political parties, whether they have the
10 authority for their executive committee, or one," meaning
11 their executive committee, "of those to pick their
12 candidates." So, he did what -- he was not really under the
13 impression of what the law really was.

14 I mean, obviously, the law was specifically there
15 in NRS 293.165, that when there is a vacancy, that that is
16 the proper method in regards to filling a position in -- in
17 the congressional district.

18 And, also, in response, you'll see the legislative
19 history goes on, and they start talking about another issue.
20 But Ms. Hansen then comes on and says, in regards to the
21 minor parties, she states, "The minor party -- the minor
22 parties don't have a primary, they have a convention, where
23 they select their candidates. What we did last time, I
24 think, will work. The state convention, which is the
25 highest authority of the party, authorized the state's

1 executive committee to add any people to the list that we
2 had to file with the Secretary of State. We could -- we
3 could do that again."

4 Obviously, they can do that, because NRS 293.165
5 specifically allows, if there is a vacancy in an election,
6 that that is the proper method of going about putting
7 someone on the ballot.

8 THE COURT: But isn't there an argument in that
9 case, from the standpoint that if you look at that
10 particular statute, NRS 293.165, that it only applies where
11 there is a, quote, "a vacancy occurring in a non -- in a
12 major or a minor political party's nomination"? Is that
13 limited just to a nomination situation?

14 MR. O'MARA: But there isn't -- there is an actual
15 vacancy in the nomination, and the vacancy occurs because
16 our statutes specifically apply for a primary. It's almost
17 the exact same scenario that we had in regards to the
18 election of 1954, where there was no primary, so there was
19 no nominees in that, in that case either, and that,
20 therefore, we had to nominate through the State Central
21 Committee, which happened in that case, where --

22 THE COURT: The *Brown vs. Georgetta* case.

23 MR. O'MARA: That's correct, Your Honor. And that
24 case really expands upon what -- what we're looking at. And
25 if you look at the *Brown vs. Georgetta* case, the statute for

1 vacancies actually said primaries, but that's been taken out
2 of the statutory language, because in that case, the Supreme
3 Court actually said our statute is broad enough to include
4 other areas where there is an actual vacancy, and so they
5 were -- allowed that to happen in that regard.

6 And the 1954 case is -- is similar in the fact
7 that, you know, Senator McCarran died. He wasn't even up
8 for election, so there was no pending election, in that
9 case, that happened. So, what they had to do was, they had
10 to nominate through the State Central Committee and then
11 have a special election.

12 Now, I know that the defendants want to say that
13 that wasn't a special election because it was held on the
14 same day as another general election, but it was a special
15 election. It wasn't supposed to be held that day, it was
16 supposed to be held in 1956, but because of his death, that
17 we now needed to have a special election.

18 And if you look at the -- you look at the history
19 of what's happened, the -- in other elections, the election
20 did occur, and you look back in 19 -- during a period of
21 time during the 1940s and 1950s, we lost a lot of senators;
22 I think we lost three. And in those cases, when it got to a
23 point where there was a primary, those -- those individuals
24 were appointed, and then there was a primary. Because there
25 was no statute like 293.175 that says in special elections

1 there is a primary. There is no primary.

2 So, the -- the analysis in regards to there is a --
3 that 304.240 says there is no primary is really irrelevant,
4 because NRS 293.175 also makes the primary nonexistent in
5 any special election. It also not only does that, but it
6 takes away the ability of a minor party to do their normal
7 nomination process. And, therefore, you look at when they
8 are going to have to nominate, and you look at where you
9 look -- you look at NRS 293.165 because there is a
10 nomination vacancy, and, therefore, the only way of them to
11 get a nomination is through that statute.

12 And we -- and we brought that up in our reply
13 brief, Your Honor, is that this interpretation of the
14 Secretary of State's, in regards to minor party candidates
15 just have to submit lists, well, how does the minor party
16 get their nominees? There's no regulation of that.

17 Well, they get their nominee by going forward and
18 looking at 293.165. They -- they have the right, unlike the
19 major parties, where they do their executive -- their
20 central committee, the minor parties have an executive
21 committee, which clearly shows Ms. Hansen's correct in
22 regards to that's the proper method in regards to filling a
23 vacancy through the legislative history.

24 So, *Brown vs. Georgetta* is -- is a good case to
25 look at, it's a good tradition of Nevada. We -- we follow

1 that tradition, and that's -- that's really one of the
2 things that we have to look at, because when you analyze the
3 defendants' arguments, they've used *Grange, Washington vs.*
4 *Grange*; they use the *American Liberties vs. Alaska*, and they
5 use all of these cases that are all not partisan primaries.
6 They're all either a blanket open primary, or they're a
7 partial open primary, which is not the standard that Nevada
8 has come to enjoy, and that's the standard that we put.

9 We have a tradition in Nevada to make sure that our
10 nominees in the -- in an office are nominated through the
11 party system. And that will also be an argument with
12 Mr. Goodenow in regards to the constitutional issue of why
13 that is true.

14 So, when -- when we allow this to happen, we have
15 to go and look at the statute and look at how to construct
16 it and how to make sure that we don't nullify any provisions
17 in that regard, and that -- and that's pretty -- excuse me,
18 Your Honor. If I can get a glass of water.

19 So, if we look at the history of how we nominate,
20 we have an acceptance of candidacy form, and those people
21 file their acceptance of candidacy forms when -- prior to
22 the primary.

23 Now, it's interesting to note in that, in that
24 document, because if you read it, you'll find that Nevada,
25 clearly, is looking forward towards a nomination by the

1 party, because it says, farther down, it says:

2 "That if nominated as a candidate of the blank
3 party at the ensuing election, I will accept the
4 nomination and not withdraw."

5

6 And so we're looking at this candidacy form that
7 says that they are going to accept a nomination.

8 Now, if we allow the Secretary of State's
9 interpretation to go forward, it means that an individual
10 person, without -- maybe without any connection to any
11 political party whatsoever, is able to nominate themselves
12 and assert themselves in an election as the Republican Party
13 or the Democratic Party, or any minor party's candidate, and
14 I think that is outside of what our Nevada tradition is,
15 where we have a closed primary.

16 THE COURT: What about NRS 304.240, which clearly
17 indicates "a candidate of a major political party is
18 nominated"? That language clearly kind of contemplates some
19 kind of nomination going on.

20 MR. O'MARA: And that's true, but in order to get
21 to that sentence, you have to construct the statute to not
22 nullify another sentence in the statute. And so you look at
23 the first statute, and the first statute clearly says that
24 the nomination must be conducted pursuant to NRS 290 --
25 Chapter 293, and they must file a declaration. So there's

1 two things in regards to, to what happens.

2 Now, the argument is, is that it says that except
3 for, and so that next sentence, take out all of that
4 sentence, because it -- it means the nomination is done by
5 that. But that -- that would create an absurd result,
6 because it would make that statute completely nullified.

7 But if you look at it, and you look at, and you
8 actually look at Chapter 293.165, which is the nomination
9 method in regards to a vacancy, you will see that it is --
10 it is necessary for that third sentence in that -- in that,
11 in NRS 304.240, for that to be in there, because we need to
12 have different time frames.

13 Now, if you look at the statute, the 304, you'll
14 see that there's two different mechanisms of how -- how we
15 go about nominating vacancies. And the first one is for --
16 excuse me. The first one is for major political parties in
17 a nomination for a partisan office, and that's 293.165(1).

18 But if you look at number (2), they talk about a
19 vacancy occurring in a nonpartisan nomination after the
20 close of filing for a nonpartisan. And what -- what is the
21 next provision? The next provision, under (a), is that they
22 must file a declaration of candidacy or acceptance of
23 candidacy. So, what this statute of 304.240 is doing is
24 it's filling in the blanks of what needs to happen once the
25 nomination from the party occurs.

1 So, because what we have in 20 -- in 293(1) is that
2 a vacancy occurred, but then they want you to follow these
3 times. Well, that, that statute of 304.240, takes those
4 time frames out of 293.165, because it would be impossible
5 in any election from now on, any special election, for us to
6 use this, this provision, because under the analysis of the
7 defendants, they want to say that these, these time frames
8 are absolute, and that doesn't -- that really doesn't make
9 any sense that a vacancy can occur at any time, and,
10 therefore, a nomination can occur at any time. And we need
11 to have the ability of the Legislature -- or the Secretary
12 of State to promulgate those rules in regards to when things
13 need to be filed.

14 For example, Your Honor, this -- this case is -- is
15 set for September 13th. The Secretary of State was given
16 this date by the governor. Now, the statute requires that
17 he has to do it within 180 days, so those rules that need to
18 be promulgated are going to be different when, if, God
19 forbid, a catastrophe happens, because the rules for a
20 180-day election could be different than a 90-day election,
21 because we have certain provisions that we need to figure
22 out.

23 Now, what would happen if the governor said a
24 hundred days on the next special election? Well, the rules
25 are going to have to change there. And that's what the

1 statute gives the Secretary of State the authority to do, is
2 to look at these time frames, to -- to look at what goes on
3 in this state, to go to the bylaws of the major parties and
4 see how it -- they need to nominate their parties, to set
5 deadlines so that everybody has the opportunity to properly
6 vet their candidates, to properly nominate their candidates,
7 and get their candidates on the general ballot for the
8 special election. And that just didn't occur in this case,
9 because what happens is, is you had arbitrary dates being
10 put in place, and the dates that did not mean anything in
11 that regard.

12 And what happens is, is that you -- in furtherance
13 of that, when you look at how other candidates are put on
14 there, you see that the Secretary of State has picked and
15 choosed [sic] different statutes that he wants to apply.

16 Now, for example, an independent is now required to
17 get a hundred signatures. Where is the requirement for a
18 hundred signatures? Well, it's under 290 -- it's under
19 NRS 293.200. But under NRS 293.175(5), the provisions set
20 forth in NRS 293.175 are not applicable for special
21 elections; so, therefore, independents are not required to
22 find these 100 candidates -- or these hundred individuals to
23 sign their form. All they need to do is file their forms
24 with the Secretary of State. They're an independent party.
25 They're an independent candidate.

1 THE COURT: But isn't that required, because the
2 section set forth in NRS 304.240 clearly indicates that
3 the -- excuse me -- that the independent party candidate
4 must, basically, file the application? Petition for
5 candidacy? Excuse me.

6 MR. O'MARA: That's correct, they -- they have to
7 just file the petition of candidacy. But the requirement in
8 regards to a petition -- the -- of a hundred -- there's no
9 requirement in this for a petition of candidacy with 100
10 names.

11 THE COURT: Well, how do you differentiate, then,
12 between an independent -- this is a question I have for that
13 side -- you have an independent candidate, and you basically
14 have a minority party candidate, and then you have a major
15 political party candidate, and they have all three different
16 requirements for each one of them.

17 You have, basically, the majority party
18 candidate -- anybody can go file. Any member, filed member
19 of that party can go down and file; yet, if you're a
20 minority party candidate, you have to go through, basically,
21 the process indicated, being on a list. Or, if you're an
22 independent party candidate, you have to, basically, go out
23 and get a hundred signatures.

24 MR. O'MARA: And I think that that's -- that's an
25 analysis that I think is the crux of their argument, that

1 you can't do that in regard -- and if you -- if you read
2 that in there, it's a result, it's really a result-based
3 argument for them to say "we want everybody to be on this
4 ballot, but we're going to set all these different
5 provisions for -- for different people," whereas the
6 statutes are there already to say that these are nominees,
7 which will be put forth by Mr. Goodenow on the
8 constitutional issue.

9 But that's why -- that's why NRS 293.175 has been
10 put into place, Your Honor; it takes away all of those
11 provisions. It takes away -- the minority parties do not
12 have to get signatures; they just have to go to their
13 executive committee and get a nominee.

14 Now, what they -- when you look at the -- let's
15 just stay on the minority party. When you look at the
16 statute, people think lists of candidates, and they're
17 trying to say, oh, "lists of candidates" is plural, and,
18 therefore, they get to nominate as many people as they want.
19 But that's just not true, because you've got to look back
20 into how they nominate in the first place, and you look at
21 their nomination statute, and it specifically says that
22 minority parties submit their lists of candidates. But then
23 if you look at subsection (5) of that same statute, it says
24 that only one candidate may be placed on the ballot.

25 So, it specifically, the "lists of candidate" means

1 that major parties can provide, you know, minor parties,
2 plural, can provide a -- lists of their candidates. It's a
3 plural of both, of all of it. So I don't think that that
4 should be the analysis in regard, it should still be one
5 candidate per minor party.

6 THE COURT: What about NRS 304.240, sub (2), which
7 clearly indicates, "Except as otherwise provided in
8 NRS 304.200 to NRS 304.250," that "the general election laws
9 of this State apply to the election"?

10 MR. O'MARA: That's exactly -- exactly right, so
11 the general election laws apply to this, this statute. They
12 don't -- there's nothing specifically in here that says that
13 NRS 293.165 is excluded. It says "except as otherwise
14 provided."

15 So, if it's not provided in this section, then
16 NRS 293.165 is applicable, because if that would be the
17 case, why didn't the Legislature, when it promulgated
18 293.175, say "none of these statutes apply to special
19 elections"? They didn't do that. They only put NRS 293.175
20 says that statutes from 293.175 to 293.203, 2-0-3, are not
21 applicable. And those are statutes like the filing fees, or
22 100 -- 100 signatures in regards to the independent
23 candidate.

24 Or, under -- or if you look at subsection (2) of
25 that, it sets forth what the minority parties do. But since

1 293.175 is not applicable, neither is the nominating process
2 of all three sections. The primary process is not
3 applicable, the minority process is not applicable, and the
4 independent process is not applicable, and, therefore, you
5 have to look at another statute, which is 293.165, that
6 allows for a vacancy in the nomination.

7 So, we look at that, and that's -- that brings us
8 to the next question. If you go look at 293.260, which is
9 the method in which the general election is conducted, that
10 statute is also not excluded. But we have to follow it.
11 And that's a statute that allows for one major party
12 candidate to be put on the ballot if another major party
13 candidate is put on the ballot; or, one major party is put
14 on the ballot, and a minor party is put on the ballot; or,
15 the third issue is when there is a major party and an
16 independent is put on the ballot. Therefore, there would be
17 two people.

18 And that's because, if you look at the case law, it
19 talks about that the legislative intent wanted, in the
20 general election, wanted to have at least an election,
21 because if you -- if you notice there, if one person is in
22 the primary, say -- say the Republicans have a primary for
23 the U.S. Congress and only one of them is the nominee, and
24 there's no other people running, well, the Nevada
25 Legislature wants to have two people in the general

1 election, and so that next person gets to be the next
2 votegetter in regards to the major party.

3 So, the statutes have been clear. In fact, this --
4 the Nevada Supreme Court has looked at that and said that
5 you're only entitled to one candidate per position. In
6 regards to a case down in Las Vegas where the Democratic
7 Party wanted to put in seven of their candidates for the one
8 Republican, because there were four open seats, and,
9 therefore, they believed that there should be eight
10 candidates, the Supreme Court said, "No. Your major
11 political party gets one candidate per opening." And
12 that's -- that's the whole system of our -- of our election
13 statutes is one candidate per party, unless there is some --
14 by some special circumstances, that no independent
15 candidate, no Democrat, and no minor party is going to run
16 in this special election, and we know that that's not going
17 to happen.

18 THE COURT: Say I accept your argument. Then,
19 essentially, what has to happen in regards to going back in
20 regards to the process that's going forward for the
21 September 13th, 2011 election?

22 MR. O'MARA: Well, I think it's pretty easy to
23 accomplish for the Secretary of State. In fact, it's a lot
24 easier than what they've been trying to do.

25 It's clear, the nomination process has to be

1 conducted by the major parties. We have already put that
2 motion into place. We've asked for 45 days, which is, under
3 our bylaws, the proper notice that we need to give to our
4 central committee.

5 Now, our central committee is made up of hundreds
6 of individuals, and as the Court would -- would know, in the
7 statute, that -- that amount of people could be every single
8 Republican in the state, or it could be the 17 delegates
9 from -- one from each county, so that the Legislature has
10 given us that permission to do it that way.

11 So, the notion that it's just going to be this
12 smoke-filled room of party elite is not correct, and it's
13 really disingenuous to say that, because these people are
14 hard-working people that are working really hard for their
15 association.

16 But we go into that issue, and they -- they will
17 nominate their candidate, and that candidate will be able to
18 go and file an application -- a declaration or an acceptance
19 of candidacy with the Secretary of State.

20 Now, the minor parties, they would go and they
21 would have their executive committee meet, and they would
22 get their list of candidates, which is one person on their
23 list, and they would file that with the Secretary of State.

24 And then, there would be --

25 THE COURT: What about the independent?

1 MR. O'MARA: The independents. The independents
2 would need to file a declaration -- a petition of candidacy
3 with the Secretary of State.

4 Now, it makes sense, too, if you look at No. 8 of
5 the interpretation, because in No. 8, the Secretary of State
6 says that they're not going -- they're not going to receive
7 any challenges.

8 I'm pretty sure that that was attached as Exhibit 1
9 to our preliminary hearing injunction, or preliminary
10 injunction hearing, Your Honor.

11 THE COURT: But under the law, there's a -- you
12 know, the case law clearly indicates that, essentially, I'm
13 to give deference to the interpretation by the Secretary of
14 State. Isn't that correct?

15 MR. O'MARA: Well, I think that we have two issues
16 here, Your Honor. And I think that we -- there is a
17 deference in regards to the interpretation. But this is not
18 really an interpretation, if you look at what the Secretary
19 of State has done, because he's actually created law. It's
20 not an actual interpretation where he's looked at the
21 statute and said "this statute applies this way." He's
22 actually created law and said that "these statutes that are
23 not applicable also are applicable," and so the deference
24 should not be given to him. But that's only in regards to
25 the statutory -- statutory construction issue in regards to

1 that, and it has to be reasonable.

2 Now, we've already shown that there are so many
3 different scenarios that the Secretary of State has provided
4 are things that could happen in this case, in regards to one
5 party gets to nominate freely -- actually, no -- the
6 majority party doesn't get to nominate at all; they just
7 allow their -- any member, or anybody that wants to be a
8 Republican or a Democrat to nominate themselves, and minor
9 parties have to nominate a candidate, and the independents
10 have to actually go out and get votes. And so you see that
11 there's some serious concerns with that style.

12 So, when -- if we go back to my analysis in regards
13 to what would happen, after these, these documents are filed
14 with the Secretary of State, they're -- they're in place.
15 You have the major party candidates running, you have the
16 minor party candidates on the list, and you have the
17 independents. And that should be open until 32 days before
18 the election, by statute. The statute allows for
19 independents, and the statute allows for -- allows for minor
20 parties to put their names and their candidates on the
21 ballots until the 32nd day before the election, and that's
22 what the Legislature wanted.

23 And so we go forward with that, and that, there's
24 sufficient time to do that. We have -- electronic voting
25 machines now, these days, will allow anybody to -- to place

1 that on the ballot a lot quicker, and so we move forward.

2 So, Your Honor, let me just -- if you have any
3 other questions in regards to the statutory...

4 Oh, let me just -- and I know Mr. Goodenow will
5 address this -- but in regards to the constitutional issue,
6 we don't believe that the Secretary of State gets deference
7 in regards to whether or not a statute is constitutional,
8 and I think Mr. Goodenow will address that a little bit for
9 you.

10 In closing, Your Honor, the Secretary of State is
11 supposed to promulgate rules so that the ballots can be sent
12 out properly, and things of that nature. And he set a
13 May 23rd to 25th deadline in which all of those nominees
14 must be filed within, and we think that that's an abuse of
15 discretion. It's arbitrary and capricious, and it really
16 shows the lack of understanding of what the committees, the
17 central committees are all about, by not providing, under
18 our bylaws -- the bylaws are on the Secretary of State's
19 website; they're 45 days.

20 Their argument against that is that there would be
21 no challenges, or we wouldn't -- we would need sufficient
22 time for the challenges. Well, there are no challenges, so
23 that's a dead issue. The 45 days should be included.

24 What I would like to do, Your Honor, is I have the
25 Secretary of State Special Election Press Conference on CD.

1 I'd like to admit this into evidence.

2 THE COURT: That's fine. Any objection?

3 I don't know what it says or contains, but it --

4 MR. BENSON: No objection, Your Honor.

5 THE COURT: Mr. Benson? Thank you.

6 We'll mark it as Exhibit 1 for purposes of this
7 hearing, in respect to this matter.

8 (Exhibit 1 marked and admitted.)

9 THE COURT: I did have one other question.

10 Are you aware whether or not the Secretary of State
11 adopted any regulations, as required pursuant to NRS
12 304.250, which indicates:

13 "The Secretary of State shall adopt such
14 regulations as are necessary for conducting
15 elections pursuant to the provisions of
16 NRS 304.200 to NRS 304.250, inclusive?"

17

18 MR. O'MARA: We are unaware of any regulations,
19 Your Honor.

20 THE COURT: Yeah. Nobody provided any, so I didn't
21 know if -- whether or not they ever adopted any, in
22 respect -- and, again, this law goes back to 2003, so it's
23 not intended to be disparaging to any secretary of state.

24 MR. O'MARA: Right.

25 THE COURT: I think there's been a couple since

1 then, in respect to that, so it's not my intent to do that.
2 But I --

3 MR. O'MARA: What -- the reason why we've presented
4 the Court with and asked for the admittance of the press --
5 with no objection -- the press conference, during this,
6 during this press conference, the Secretary of State was
7 giving information about deadlines. And the one deadline
8 that is apparent in this case is that he said that July 15th
9 is the date that he would need to have everything in
10 regards -- so that the clerks would be able to print the
11 ballots and mail the ballots.

12 There are no challenges, so it's a simple filing.
13 So, we've asked for -- we've asked for June 30th, Your
14 Honor, in our briefing, to be extended, so that all parties,
15 minor parties, major parties -- obviously, because of the --
16 maybe some parties have relied upon the improper
17 interpretation of the Secretary of State, they have not --
18 they have not moved forward with their processes, so they
19 need that additional time to -- to fully vet their
20 candidates.

21 And so we ask that, at the very minimum, July -- or
22 June 30th be the date in which the parties get to nominate
23 their -- their specific candidate, and that candidate can
24 file -- can file with the Secretary of State that they are
25 the nominee of the specific party.

1 It goes to say, Your Honor, that under the statute,
2 it doesn't mean that people are going to be precluded from
3 running in this election, because the statute says that you
4 can change your party affiliation. It's not -- it's not
5 applicable in this state, in this special election, so if
6 someone does want to run, and they're not -- they're not
7 nominated through the party process, then they can become an
8 independent and run during that process. And so there's
9 no -- there's no prejudice to any of those individuals, and
10 that's something that we need to look at.

11 So we ask that the Court provide declaratory
12 relief, injunctive relief in regards to the improper
13 interpretation. We ask for the Court to rule that party
14 nominees should be done pursuant to 293.165.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. O'Mara.

17 Mr. Goodenow?

18 MR. GOODENOW: Thank you, Your Honor.

19 I'm going to work methodically through the Supreme
20 Court constitutional precedent, and I've prepared a binder
21 with a couple of the pertinent cases in it. And I do have
22 it for the Court's ease in being able to follow along with
23 my argument.

24 I wanted to show it to opposing counsel before I
25 bring it forward.

1 THE COURT: That's fine.

2 MR. GOODENOW: Thank you.

3 (Discussion held between counsel.)

4 MR. GOODENOW: May I approach, Your Honor?

5 THE COURT: You may.

6 MR. GOODENOW: Thank you.

7 (Counsel approached the bench.)

8 THE COURT: Thank you.

9 MR. GOODENOW: You're welcome.

10 THE COURT: Go ahead, Mr. Goodenow.

11 MR. GOODENOW: We think the statute can be
12 interpreted consistently with the United States
13 Constitution. That was the whole point of Mr. O'Mara's
14 argument.

15 For the purposes of my argument, Your Honor, I'm
16 going to give the Secretary of State deference and assume
17 that the Secretary of State's interpretation is that
18 interpretation with which we're working.

19 There is a right of association under the United
20 States Constitution, the First Amendment to the
21 Constitution, incorporated through the Fourteenth Amendment,
22 under the case of *Gitlow vs. New York*, in 1925.

23 The present case before the Court today squarely
24 presents the issue whether the state may take from the major
25 political parties the right to determine who their nominees

1 will be in a special election, and whether the state action
2 violates the party's right of association.

3 This is an applied challenge. The Nevada Secretary
4 of State issued Interpretation 112801, dated May 2nd, 2011.
5 Oddly enough, that was before Secretary -- House of
6 Representative's member Heller resigned on May 9th, 2011. I
7 assume they were preparing for this day.

8 In paragraph 2 of the interpretation, the Secretary
9 determined that -- and I'm going to quote here from it,
10 because the language of the Secretary of State's
11 interpretation is important and determinative of the
12 resolution of this case. I quote:

13 "Major political party candidates are nominated and
14 will appear on a special election ballot by filing
15 a declaration of candidacy or acceptance of
16 candidacy within the time, and on the form
17 prescribed by the Secretary of State," end quote.

18
19 That interpretation is attached to our moving
20 papers, and I believe it's already in the court's record.

21 So, the Secretary says, "Persons who self-nominate
22 will be the party's nominees." There is no primary. In the
23 form they sign, that's provided by statute, that's
24 NRS 293.177, the nominees agree to accept the party's
25 nomination.

1 Now, I don't know whether the Secretary of State
2 will or will not change that form, but that's the form
3 that's statutorily provided.

4 And I -- I took note of Your Honor's question for
5 Mr. O'Mara, and that was: Doesn't the sentence that we're
6 talking about in 304.240 seem to presuppose some sort of
7 nomination? And I think that's right. If you believe that
8 the Secretary's interpretation is correct -- and, again, I'm
9 assuming -- I'm giving deference, and for the purposes of my
10 constitutional argument, to the Secretary's
11 interpretation -- that's the nomination process, that's what
12 the interpretation, Secretary's interpretation says. Those
13 persons who file their form, under the statute, with the
14 Secretary of State, are the party's nominees. That's the
15 language that it uses. That is the language that the
16 statute, 240, uses. And if we turn to 240, which we can do,
17 we'll find that.

18 That sentence that Your Honor referred to reads:
19 "A candidate of a major political party is
20 nominated by filing a declaration or acceptance of
21 candidacy within the time prescribed by the
22 Secretary of State pursuant to NRS 293.204."

23
24 And that's critical for the constitutional analysis
25 that I'm going to walk through in a moment.

1 The Secretary of State and the Nevada Democratic
2 Party argue that open-access special election does not
3 violate the freedom of association. That's their argument.
4 They rely solely on the cases that discuss the effect of
5 state restrictions on the selection of nominees through the
6 primary system.

7 Again, Nevada's party nominees for the general
8 election are selected through a closed primary. That is our
9 tradition. That is Nevada's election law.

10 Here, we are dealing with a special election. The
11 the Secretary of State's interpretation removes the major
12 political parties from any role in nominating their
13 candidates in this special election scheduled for
14 September 13th.

15 The United States Supreme Court disapproved of such
16 restrictions in *California Democratic Party vs. Jones*,
17 530 U.S. 567, a 2000 case, about three years before NRS
18 304.240 was adopted. In striking down California's blanket
19 primary system, the Court stated that, and I'm quoting here
20 from the Court's decision:

21 "In no area is the political association's right to
22 exclude more important than in the process of
23 selecting its nominee."

24
25 That's page 575 of the Supreme Court's decision, or

1 page 8 of 24 in the bench copy that I provided.

2 In reaching this result, the Court observed that,
3 and I'm quoting here from the decision:

4 "A corollary of the right to associate is the right
5 not to associate. Freedom of association would
6 prove an empty guarantee if associations could not
7 limit control over their decisions to those who
8 share the interest and persuasions that underlie
9 the association's being," end quote.

10

11 That's found on page 574 of the Court's decision.
12 That's just up above the quote that I read a moment ago.

13 In our case here at bar today, this is not merely
14 speculation, but fact. The fact is that we will have
15 candidates that are not the party's choice voted into office
16 as the party's nominees by voters who are not party members.

17 This Court should apply strict scrutiny. In
18 *Timmons vs. Twin Cities New Area -- Area New Party*,
19 520 U.S. 351, a 1997 Supreme Court case, the Supreme Court
20 was upholding Minnesota's anti-fusion laws. It said that:

21 "When deciding whether a state election law
22 violates First and Fourteenth Amendment
23 associational rights," it "must weigh the
24 character and magnitude of the burden the State's
25 rule imposes on those rights against the interests

1 the State contends justify that burden, and
2 consider the extent to which the State's concerns
3 make the burden necessary."

4
5 That's page 358 of the Court's opinion.

6
7 Then it goes on to say: "Regulations imposing
8 severe burdens" on plaintiffs' rights "must be narrowly
9 tailored and advance a compelling state interest," as I've
10 mentioned in our briefing.

11 And in that case, *Timmons*, the Court contrasted the
12 statute in *Timmons*, which prohibited candidates from
13 appearing on the ballot as a candidate for more than one
14 political party, and did not involve control of a party's
15 nominating mechanisms with the following cases: *Eu*, the
16 former Secretary of State of California, *vs. San Francisco*
17 *County Democratic Central Committee*, and *Tashjian vs.*
18 *Republican Party of Connecticut*, both of which struck down
19 statutes interfering with a party's rights to select or
20 nominate its candidates. And that can be found at pages 359
21 through 360 of the *Timmons* decision.

22 This Court should ask the Secretary of State, in
23 this case of a resignation from office -- because that's
24 what we're considering here is a replacement after
25 resignation -- what is the compelling state interest that

1 justifies depriving the major political parties of their
2 right to nominate candidates?

3 Neither the legislative history of NRS 304.240, as
4 Your Honor and Mr. O'Mara just observed, nor the briefs,
5 suggest anything other than time constraints.

6 A couple of statutory comparisons are very helpful
7 when analyzing this problem, Your Honor. First, it is
8 helpful to review what the United States Congress did to
9 address the same issues addressed in NRS 304.240, the
10 statute that we've been concerned with this afternoon.

11 In 2005, two years after Nevada adopted our
12 statute, Congress enacted amendments to 2 U.S.C. § 8.
13 2 U.S.C. § 8. These provisions provide a method to replace
14 U.S. senators and congressmen in extraordinary
15 circumstances. That's a defined term for the purposes of
16 this statute.

17 Congress was very careful to draft this statute in
18 a way that does not infringe the party's rights of
19 association, by providing, first, for nominations by
20 parties. Specifically, Your Honor, if you -- I'll refer the
21 Court to section (b)(3) of 2 U.S.C. § 8, that lists
22 nominations by parties as the first method. It also
23 provides the option for states to enact their own
24 legislation.

25 Congress also anticipated the UOCAVA problems, the

1 overseas ballot problems, by suggesting the states consider
2 electronic means to solve those problems, and that's in
3 section (b)(5) in the statute. Thus, the Congress
4 recognized the importance of permitting the parties to
5 exercise their right to nominate.

6 Next, section 8 only applies in extraordinary
7 circumstances. Such circumstances are defined by the
8 statute as where there are a hundred vacancies in the House.
9 And that's subsection (b)(4) of 2 U.S.C. § 8. Thus,
10 Congress recognized, the United States Congress recognized
11 that this statute that changes the election process needed a
12 compelling state interest to justify it and placed that
13 interest within the text of the statute.

14 Unfortunately, NRS 304.240 is overinclusive in this
15 respect, since it addresses not only catastrophe, an
16 extraordinary circumstance, but also, resignations.

17 Next, Your Honor, a second very helpful comparison
18 is the Washington state statute that was at issue in
19 *Washington State Grange*. I've given you a copy in the bench
20 binder of that case.

21 The Supreme Court considered, in *Washington State*
22 *Grange vs. Washington State Republican Party*, 552 U.S. 442,
23 a 2008 case, a facial challenge to the people's choice
24 initiative of 2004. It was described and referred to
25 throughout the case as "I-872." It stands for

1 Initiative 872. That provides that candidates for office
2 shall be identified on the ballot by their self-designated
3 party preference -- party preference; that voters may vote
4 for any candidate, and the top two votegetters for each
5 office, regardless of party preference, advance to the
6 general election.

7 Going to, moving to page 458 to 459 of the
8 decision, Your Honor, this is a critical portion of the
9 court's decision. Its concluding paragraph of the majority
10 decision says, and I quote:

11 "Because I-872 does not, on its face, provide for
12 the nomination of candidates, it does not, on its
13 face, severely burden Respondent's associational
14 rights."

15
16 Our case, today, involves the statute interpreted
17 by the Secretary of State to provide that the persons who
18 file nomination forms are the party's nominees. That is the
19 end of the hunt. Nevada statute NRS 304.240, as interpreted
20 by the Secretary of State, is facially unconstitutional. It
21 says, according to the Secretary of State, that the parties
22 have no role in nominating the candidates. They are
23 nominated by filing their declaration.

24 It is important to thoroughly read *Washington State*
25 *Grange* in order to understand fully that the Secretary of

1 State's interpretation results in Nevada's statute being so
2 clearly unconstitutional. In that case, the Supreme Court
3 reversed the Ninth Circuit, which had enjoined enforcement
4 of the initiative. The respondent, who opposed the
5 initiative, argued that I-872 suffered from the same
6 constitutional infirmity that doomed California's blanket
7 primary that we talked about a little while ago. It allowed
8 primary voters, who are unaffiliated -- unaffiliated with a
9 party, to choose the party's nominee.

10 You will find this at the decision at page 452,
11 page 11 of 21 of your bench copy.

12 Justice Thomas wrote for the Court. Writing for
13 the majority, Justice Thomas wrote that the, and I quote:

14 "The flaw in this argument is that, unlike the
15 California primary, the I-872 primary does not, by
16 its terms, choose parties' nominees," end quote.

17
18 That's at, found at page 453, or at page 11 of 21
19 of your bench copy.

20 He says:

21 "The flaw in this argument is that, unlike the
22 California primary, the I-872 primary does not, by
23 its terms, choose parties' nominees."

24
25 In the opinion, the Court takes great pains to note

1 this repeatedly, saying again later, and I quote:

2 "The law never refers to the candidates as nominees
3 of any party, nor does it treat them as such," end
4 quote.

5
6 That quote can be found on the same page, page 453
7 of the Court's opinion, page 11 of 21 of your bench copy.

8 Here, we have an actual election, and the State had
9 the opportunity to implement 204 -- excuse me -- 304.240,
10 and it has done so in a way that violates the First
11 Amendment. Therefore, this Court's evaluation of the
12 statute does not involve an evaluation, as the defendants
13 suggest, of whether it has some hypothetically plain,
14 legitimate sweep; it doesn't, as *Washington State Grange*
15 points out.

16 As Your Honor is no doubt aware, and it's really
17 beyond contradiction, statutes must be construed to be
18 constitutional, and that citation for, authority for that
19 proposition is *Citizens First for Honest Government*,
20 116 Nev. 939, pinpoint cite is 946, a 2000 case from our
21 Supreme Court.

22 Your Honor, we urge that the Court find that
23 NRS 304.240 can be interpreted constitutionally. If it is
24 not and it is interpretated [sic] in -- excuse me --
25 interpreted as the Secretary of State suggests, then it is

1 unconstitutional in its application and facially
2 unconstitutional should the Secretary of State's
3 interpretation be found to be correct.

4 Your Honor, I'm happy to answer any questions that
5 you may have.

6 THE COURT: That's fine. Thank you.

7 Mr. Benson, are you ready to proceed?

8 MR. BENSON: Yes, I am, Your Honor.

9 THE COURT: Well, let me ask you, does anybody
10 have -- first of all, does anybody have any objection to the
11 documents being provided being admitted into evidence? It's
12 just, primarily, cases that the Court looked at, and some
13 statutes in respect to that. So, I'm not sure we even need
14 to admit it, so I'm not going to admit it; there's no need
15 to, so -- after I looked at it again, don't think there's
16 any basis for that.

17 So, Mr. Benson, why don't you go ahead.

18 MR. BENSON: Thank you, Your Honor.

19 We've seen you a lot lately, Mr. Benson.

20 MR. BENSON: Yes, Your Honor. I've made it quite a
21 habit to be here.

22 Going back to the beginning with the statutory
23 interpretation, the Secretary's interpretation is directly
24 in line with what the plain language of the statute
25 provides, which is that a major party candidate is nominated

1 by filing the declaration of candidacy.

2 The Secretary's interpretation is perfectly
3 consistent with this statute, if not compelled by this
4 statute. And, as you're well aware, the language of a
5 statute, where it's plain and unambiguous and clear and
6 unmistakable, there is no room for construction, and the
7 Court should give effect to the plain language of the
8 statute.

9 The Secretary's not writing new laws here or
10 inventing anything out of thin air. All the Secretary is
11 doing is giving an effect to what is already stated in the
12 law.

13 The plaintiffs argue that 304.240, the section, the
14 third sentence that says that major party candidates are
15 nominated by filing the declaration of candidacy within the
16 time period as prescribed by the Secretary of State, they
17 argue that that's merely a timing issue. But the second
18 sentence of that same statute provides that all candidates
19 have to file the declaration of candidacy within the time
20 prescribed by the Secretary, Secretary of State. So, the
21 third sentence would be completely redundant and
22 meaningless, if that's all it was intended to do. Instead,
23 I think that it was intended to do what it says, which is
24 provide that a major party candidate is nominated by filing
25 the declaration of candidacy.

1 The remainder of the statute goes on to describe
2 how the remaining types of parties are nominated.

3 THE COURT: Isn't there a distinction being made --
4 my point, and I made it to them as well -- that somehow we
5 allow every single member of a major party to go ahead and
6 go down and file and become a candidate, where we limit the
7 minority party candidates in respect to coming down and
8 filing. Then we put another onus on those independent
9 people that are coming down to file, by requiring them to go
10 get -- go get a hundred signatures? Doesn't that create a
11 different standard under that interpretation?

12 MR. BENSON: Your Honor, that's the standard that's
13 laid out in the statute. And also, I'd point out that
14 that's basically business as usual in any election.

15 In any given election, anybody can file to run in
16 the primary for either of the major parties, and the parties
17 can't prevent them from doing so. And that person might
18 even win, because it's the voters of the party that choose
19 the nominee, not the leadership of the party.

20 In a regular election, the minor parties file a
21 list, and so, too, do the independent candidates file a
22 petition for candidacy. So, we're really treating them as
23 much to the same way as we can, as we do in a regular
24 election.

25 Again, on the statutory construction argument, the

1 plaintiffs' construction of the statute would have the Court
2 completely ignore that third sentence in the statute, of
3 304.240, and it would have no meaning whatsoever. The
4 Secretary --

5 THE COURT: Well, doesn't your argument, then,
6 ignore the language that said -- says, primarily, that "a
7 candidate must be nominated in the manner provided in
8 Chapter 293," I know, and this provides "except as otherwise
9 provided" in this. But I just have to ignore NRS 293
10 totally, then?

11 MR. BENSON: No. And the Secretary's
12 interpretation takes account of those sections of 293
13 where -- where they are necessary.

14 For example, we talked about the independent
15 candidates already. 20 -- 304.240 says that they have to
16 "file a petition of candidacy with the appropriate filing
17 officer." Well, what does that mean? 304 says nothing
18 about what a petition of candidacy is or who the appropriate
19 filing officer is. For those provisions, you have to go
20 look at section -- at Chapter 239 -- or, excuse me -- 293.
21 That provides what a petition of candidacy is, what its form
22 is; as you're familiar with, with how it has to have the
23 signatures on it; that it has to have the name of the
24 county.

25 The appropriate filing officer is not the Secretary

1 of State. The appropriate filing officer is the county
2 clerk, or the voter registrar in whatever county you gather
3 those signatures in, because that's who has to verify those
4 signatures.

5 So, in that respect, the Secretary's interpretation
6 gives effect to all parts of 304.240, because in that sense,
7 the candidates are nominated in the manner provided in
8 203 -- or, excuse me -- 293, because you have to look at
9 those to receive guidance on how you fill out these
10 petitions of candidacy, what the forms required, who you
11 turn it into, all of those things that are not directly
12 addressed in 304.

13 THE COURT: What about the specific wording -- and,
14 again, I'm narrowing in very specifically in regards to the
15 following words "a candidate of a major political party."
16 It doesn't say "a member of a major political party," it
17 says "a candidate of a major political party."

18 To me, that -- that -- and, again, I haven't made
19 any -- don't taking anything by my questions. I ask lots of
20 questions of both sides, just to try to make sure we have an
21 appropriate record for the Supreme Court, because I'm sure
22 that's where we're going. So, I try to -- I try to make
23 sure we get as much information as we can in respect to
24 these matters.

25 So -- so, basically, my question is, you know,

1 where is -- wouldn't it have said "a member of a major
2 political party is nominated," rather than "a candidate,"
3 which implies that this is their candidate picked by the
4 major political party? I mean, what about that argument?

5 MR. BENSON: Well, I would direct you, also, to the
6 regular primary section. It's the same in that sense, it's
7 you're a candidate for the nomination. So, to be called a
8 candidate doesn't imply that you've been nominated or
9 selected by anybody else.

10 THE COURT: But what about NRS 293.165, which
11 clearly indicates, in that section, it says, under the first
12 section, it indicates:

13 "Except as otherwise provided in NRS 293.166, a
14 vacancy occurring in a major or minor political
15 party nomination for a partisan office may be
16 filled by a candidate designated by the party."
17

18 And, again, I -- I'm just trying to understand the
19 statute, Mr. Benson. I, if I go back and forth between
20 them, how do I give credence to that?

21 You're saying that doesn't apply, and I understand
22 that, and I just have to look at 304.240. Is that correct?

23 MR. BENSON: That's correct. And I don't think
24 that the use of the term "candidate," as it's used in both
25 of those cases, it could, essentially, mean a member,

1 because in either case, you haven't been nominated by
2 anybody in particular until you receive either the
3 endorsement of the central committee, in the case of
4 293.165, or you file your declaration of candidacy in the
5 case of 304.240.

6 THE COURT: What does the word "nominate" mean?

7 MR. BENSON: It's an excellent question, Your
8 Honor.

9 THE COURT: Well, I looked in Black's Law
10 Dictionary, and let me tell you what it means, specifically,
11 in regards to this matter. It kind of indicates that it
12 means to, essentially:

13 "To propose a person for election or appointment;
14 or, two, to name or designate a person for a
15 position."

16

17 And so "nominate" has to be given some -- some
18 interpretation.

19 And, again, don't take anything by my questions,
20 because I just want to beat up on you a little bit anyway,
21 in respect to this matter, so...

22 MR. BENSON: I appreciate that, Your Honor.

23 And under 304.240, it says a person is nominated.
24 So, that's a good question: What does it mean to be
25 nominated? If we give it the ordinary sense of the word,

1 then you are nominated just by filing your declaration of
2 candidacy, in which case 293.165, by its own terms, does not
3 apply, because it only applies when there is a vacancy in
4 the nomination.

5 Under --

6 THE COURT: But wasn't that taken care of in
7 regards to that matter in the *Brown vs. Georgetta* case, in
8 respect to the matter where it's almost an identical issue,
9 when you go read it, because in that particular case, we had
10 a U.S. Senator that died, and there wasn't any primary in
11 that particular case, and yet the Supreme Court said,
12 basically, "We're going to go ahead and look at that
13 particular statute, and we're going to treat that as being a
14 vacancy"? Isn't that what that case says?

15 MR. BENSON: In that case, the Court did hold that
16 the vacancy in the office also created a vacancy in the
17 nomination, under the particular circumstances of that case.

18 That case is distinguishable for several different
19 reasons. One, in the case of a U.S. Senator, there is a
20 provision where a temporary appointment can be made. There
21 is no such availability for a representative in Congress,
22 which is the whole reason why we have to have a special
23 election in the first place; because otherwise, you can't
24 make an appointment, and people just go without any
25 representation.

1 Also, in the *Georgetta* case, again, it involved the
2 situation where it was after the primary, it was shortly
3 before the general election, and ordinarily, because you
4 would have an appointment to fill the vacancy, you would
5 have a party nominate their candidates through the ordinary
6 primary process, but that wasn't possible in that sense.

7 That case was decided about 50 years before 304.240
8 was enacted. And 304.240, as you know from reading the
9 legislative history, was put in place to deal with the very
10 specific situation that we have here today, which is a
11 vacancy in only a representative in Congress position. And
12 that statute, being the more specific statute, controls in
13 this case.

14 There's no other situations that I've -- or any
15 other case law or authority that I've been able to find, nor
16 that the plaintiffs have cited, that have applied the
17 reasoning of *Brown vs. Georgetta* to a special election,
18 where there is no primary permitted, and where -- and where
19 there is a specific statute on point that is apparently
20 designed exactly to prevent vacancies in nomination from
21 happening. That is the situation we have here.

22 So, I think in that case, that *Brown vs. Georgetta*
23 does not apply in this case, and that 304.240, itself, takes
24 care of the vacancy and the nomination by providing simply
25 that you are nominated by filing your declaration of

1 candidacy.

2 THE COURT: Do you think the Secretary -- I -- not
3 the Secretary of State -- do you think the Legislature
4 should have done a better job in drafting NRS 304.240?

5 FROM THE AUDIENCE: Yeah.

6 MR. BENSON: May I decline to comment on that, Your
7 Honor?

8 THE COURT: Well --

9 MR. BENSON: It's --

10 THE COURT: Isn't it confusing? I mean, I'm
11 just -- candidly, if you read that statute, and you read it
12 in respect to that, they certainly could have done a better
13 job in regards to bringing us here today on such an
14 important issue. Think how important this issue is in
15 regards to coming forth with somebody to take the place in
16 regards to the United States Congress, in respect to that,
17 and looking at the legislative history. And I know there's
18 a couple of minor comments on the history in respect to
19 that. But don't you think the Legislature should have done
20 a much better job, and maybe somebody over there ought to
21 take a look at this today, and maybe fix it between now and
22 then?

23 MR. BENSON: I think there are certain things that
24 could be cleared up, but I think they did do a good job in
25 the sense that, like I said, the third sentence of 204 -- or

1 304.240 is very clear, and it does say that you are
2 nominated simply by filing your declaration of candidacy.
3 It doesn't really get much clearer than that.

4 As you know from reading the legislative history,
5 the whole point of putting this in place was so that we
6 could get these vacancies filled as quickly as possible.
7 The 180 days, that's the end time. It's also clear in the
8 statute that if possible, if practicable, we should have the
9 election before that. And in this case, the governor, in
10 fact, did set the date for less than 180 days.

11 So, I think that they did address this as clearly
12 as they could have. There might have been -- there's a
13 little bit of confusion, of course, involved because of, as
14 the plaintiffs have mentioned, there's certain statutes that
15 don't apply in special elections per 293, but the Secretary
16 of State's interpretation uses those statutes for guidance.

17 THE COURT: What about Mr. O'Mara's argument the
18 Secretary of State is picking and choosing those provisions
19 they want to apply and not applying other provisions?

20 I mean, this is his argument, so I'm just --

21 MR. BENSON: Sure. And we're not just picking and
22 choosing statutes that we think ought to apply or ought not
23 to. We are drawing on guidance from those statutes, because
24 otherwise, it's very unclear, and people would be without
25 any guidance whatsoever what to do, as I mentioned, in

1 304.240.

2 So, you are an independent candidate, and you look
3 at that and it says "a petition of candidacy with the
4 appropriate filing officer." How are you supposed to know
5 what that means? It's true that 293.200, which is the
6 statute that governs independent candidate petitions for
7 candidacy, does not apply in special elections to fill
8 vacancies.

9 Under the Secretary's interpretation, using that as
10 guidance, what the interpretation does is it puts in, it
11 fills in those gaps by using what is usually the standard
12 rules in an ordinary election for independent candidates.
13 So it provides everybody with some guidance and with some
14 consistency on what they need to do in this election.

15 With regard to the plaintiffs' argument that
16 there's a tradition in Nevada of having only one candidate
17 on the ballot for any -- for each of the parties, first of
18 all, even assuming that there is any such tradition, the
19 Legislature is free to change that any time. The states
20 have broad authority to manage and administer elections, and
21 that's what the Legislature did in this case.

22 Again, by enacting 304.240 to deal with these kind
23 of vacancies, they were free to change that tradition,
24 assuming that that even exists, and that's just what they
25 did here.

1 And, on the other hand, there is really no such
2 tradition, there's no such fundamental principle. Under
3 293.260, that provides for two candidates of the same party
4 to appear on the ballot in certain cases. And, also, in
5 recall elections, you can have anybody who qualifies appear
6 on the ballot, regardless of their party denomination.

7 They argue that recall elections are always
8 nonpartisan. That's not really the case. It all depends on
9 whether the office is partisan or not.

10 Frequent -- frequently, recalls happen in local
11 offices that happen to be nonpartisan, in which case they
12 are correct, there is no party designation in a nonpartisan
13 election.

14 So, this notion that there's some kind of in vital
15 tradition in Nevada law that you can only have one person on
16 the ballot, one, it just isn't so; and, two, the
17 Legislature's free to change that at any time, which I
18 believe they've done in this case.

19 THE COURT: Are you arguing the constitutional
20 issues, or is somebody else going to argue those?

21 MR. BENSON: I will argue the constitutional
22 issues, also. I just want to get by -- through one more
23 statutory thing before I move on to that. And I will try
24 to -- to be as brief as I can. That regards these deadlines
25 and extending the deadlines.

1 The plaintiffs argue that the minor and independent
2 candidates have until 32 days before the election. Under
3 the Secretary's interpretation, we believe that that
4 provision is preempted by federal law; and, therefore, all
5 candidates have the same deadline to file their declarations
6 of candidacy, or the petitions, as the case may be.

7 THE COURT: Let me ask you this. Is Mr. O'Mara
8 correct in regards to Exhibit 1 that was provided, in
9 regards to the date, as long as there's some resolution
10 before the first -- end of June, I guess -- or July 15th, I
11 guess is what he indicated that the -- there wouldn't be any
12 impact on the ballot issues?

13 MR. BENSON: As it happens, we have consulted with
14 the county clerks very recently, and Washoe County, of
15 course, being the one that's the most impacted by the --
16 that -- this, and I believe that their estimation is that
17 they would need three weeks from the UOCAVA deadline to
18 prepare the ballots, which I believe puts us at July 8th,
19 rather than July 15th.

20 THE COURT: You know, and before you leave this
21 issue, and without getting you in trouble with your boss,
22 doesn't NRS 304.250 indicate:

23 "The Secretary of State shall adopt such
24 regulations as are necessary for conducting
25 elections pursuant to the provisions of

1 NRS 304.200 to 304.500"?

2 Were any regulations ever adopted?

3 MR. BENSON: To my knowledge, no regulations were
4 adopted. And, again, of course --

5 THE COURT: Is it one of those statutes that was
6 just kind of "well, we'll never need it, so we aren't going
7 to adopt any," or what happened?

8 MR. BENSON: I -- from our view, we looked at the
9 statute, and it seemed quite clear to us that you are
10 nominated by filing your declaration of candidacy; that
11 seemed clear. Until we end up in the situation we are here
12 today, I don't think anybody anticipated that that would be
13 a problem, and, therefore, that the regulations were not --
14 not necessary.

15 But as regards to the UOCAVA and the MOVE Act, the
16 MOVE Act requires that our military and overseas voters
17 receive their -- are sent their ballots 45 days before a
18 special election in federal office. That's not optional.
19 They cite the *Brown vs. Georgetta* case, also for the
20 proposition that voting by absentee ballot is -- is a
21 privilege and not a right.

22 Now, that might have been the case 50 years ago,
23 but Congress, by enacting UOCAVA and the MOVE Act, has
24 essentially conferred an obligation upon the states to make
25 sure that, you know, our service members and their spouses

1 and their dependents who are overseas have a reasonable
2 chance to vote by getting those ballots out to them in time.
3 And what they get is a regular ballot. It's not a write-in
4 ballot, it's not a ballot that doesn't include all the
5 candidates' names; it's a regular ballot, so we have to have
6 those ballots prepared well in advance, so that we can meet
7 that deadline.

8 The U.S. Department of Justice has been fairly
9 aggressive in enforcing this, this law. And just last
10 election, the last general election, they sued several
11 states: Wisconsin, Guam, New York, New Mexico, and
12 Illinois, to enforce the -- that statute.

13 So, that, those deadlines are preempted by federal
14 law, and we cannot extend the deadline to have those ballots
15 and still meet that, that deadline.

16 So, unless Your Honor has any further questions on
17 the statutory construction argument, I will move on to the
18 constitutional issues, then.

19 Oh, one other mention. The plaintiffs note that
20 our interpretation states that there will be no challenges
21 entertained. The -- and that we also say in our brief that
22 we need some time to resolve challenges. We're talking
23 about two different types of challenges there. The
24 challenges that will not be entertained, according to our
25 interpretation, are challenges to the qualifications of a

1 candidate under 293.182, which are typically brought in
2 state -- for state positions, things like challenges to your
3 residency, whether you live in your district or not, things
4 of that nature. Those are not going to be entertained,
5 because, as you know, Congress determines qualification of
6 its own members. Those are the kinds of challenges that
7 we're not going to entertain.

8 In our brief, of course, the challenges that we
9 were alluding to, the legal challenges are this one we're
10 here on today, and any appeal that might result from that.

11 THE COURT: You made one comment I want to go back
12 to. The comment you made, essentially, the differentiation
13 between the minority party and the independent party, in
14 respect to those matters, it's like "business as usual,"
15 just like any other election in respect to that. But in any
16 other election, we don't allow every member of a political,
17 major political party to go down and file, do we?

18 MR. BENSON: Yes, we do. We allow any member of --

19 THE COURT: In the primary.

20 MR. BENSON: In the primary.

21 THE COURT: But not in the general.

22 MR. BENSON: But not in the general. And in this
23 case, we do not have a primary election, of course. And
24 when we get to the constitutional issues, I'll address that
25 a little bit further, as well.

1 I'm sorry. I have one other note to myself on --
2 on the ballot issues, is they mention that now we have
3 voting machines, and that they're faster, and that it's not
4 such a big deal to change the ballot, and all of that. And
5 I would disagree with that. They're not necessarily faster.
6 They have to be programmed. The ballot has to be designed,
7 and the machines have to be tested for accuracy and logic
8 testing. That's a significant process that has to be done.
9 It's not necessarily any faster to do it with voting
10 machines.

11 Now, I will shift gears to the constitutional
12 arguments. And the key difference in this case is your -- I
13 think your question was alluding to, is that the purpose of
14 this special election is not to select the nominees of the
15 party. The purpose of this special election is for the
16 voters of Congressional District 2 to choose somebody to
17 represent them in Congress.

18 So, what we're doing here does not implicate the
19 associational rights of the parties to pick a standard
20 there, to pick a nominee. This is just like the *Grange*
21 case, in that sense, which is the top two primary, where the
22 purpose of the primary was not to pick party nominees, it
23 was to winnow the field down to a handful of candidates to
24 go on, onto the general election ballot.

25 So, in that case, this is just like the *Grange*

1 case. It's not like the case in *Jones*, where in *Jones*, it
2 was a traditional primary, in the sense that its purpose was
3 to pick a party's nominee. The problem in *Jones* is that
4 anybody could vote for the party's nominee, including
5 nonmembers, including members who were registered of a
6 different opposing political party. That was the problem in
7 *Jones*. We don't have that problem here, because we're not
8 selecting a nominee for this special election, so the fact
9 that multiple Republicans and multiple Democrats appear on
10 the ballot doesn't implicate the associational rights of the
11 party.

12 Additionally, the plaintiffs don't make this
13 argument explicitly, but the challenge that was brought in
14 *Grange* was that because voters normally think of a primary
15 as choosing the party's nominee, that those people who got
16 to the general election, that the voters would necessarily
17 assume that they were the party's nominee. In this case, we
18 don't have that risk, one, because we don't have a primary.

19 And the court also found that any kind of confusion
20 that might be created could be addressed by having some sort
21 of disclaimer, so to speak, on the ballot itself, some
22 information advising the voters that the party affiliation
23 was the candidate's choice of party, and that it did not
24 imply any endorsement by the party.

25 And I don't think it's necessary in this case, but

1 if the Court believes it's necessary, or helpful, I'm sure
2 that we could work with the county clerks to arrange
3 something of that nature, as well.

4 They also mention that *Grange* was a facial
5 challenge. When it came to the U.S. Supreme Court, that's
6 true, it came on a facial challenge, and part of the reason
7 that they upheld it was because there was no evidence at the
8 time that voters actually would be confused by this, and --
9 but when it went down on remand, it was subsequently upheld
10 on an as-applied challenge, and one of the things that they
11 did was provide that sort of disclaimer, as well. And so
12 it's passed muster, both as an applied and as a facial
13 challenge.

14 In this case, the plaintiffs state that they're
15 making an as-applied challenge to the Secretary's
16 interpretation. The Secretary's interpretation essentially
17 mirrors the language of the statute itself.

18 Contrary to what they've represented, the
19 Secretary's interpretation says major party -- major
20 political party candidates are nominated and will appear on
21 the special election ballot by filing a declaration of
22 candidacy or an acceptance of candidacy. That's almost
23 verbatim from the statute itself.

24 The Secretary's interpretation does not say that
25 those people become the party's nominee. There's no such

1 implication in our interpretation. Essentially, they're
2 challenged for --

3 THE COURT: What about the language in NRS 304.240,
4 in the caption? And we don't look at captions. But if you
5 go through the caption, it goes through -- it's kind of an
6 outline of what, basically, is contained in NRS 304.240.

7 It indicates:

8 "Issuance by governor of election proclamation
9 precludes holding a primary election; nomination
10 of candidates; placement of names of candidates on
11 the ballot," in respect to that.

12

13 So, isn't that -- and I'm going back to the
14 statutory interpretation, to some extent. And I know you're
15 on the constitutional law area, but doesn't that mean that
16 part of that section and that particular statute is really
17 there for placing names on the ballot, because there's
18 nothing, no other provision in 293 or anything else, if we
19 accept 293, to do that?

20 MR. BENSON: Well, with regard to that, I think
21 what it, that's intended to do is just to cover, briefly
22 outline everything that the statute does. And nothing in
23 that implies that 293.165 is implicated, because the -- as I
24 discussed in my brief, for example, independent candidates.
25 According to 293.200, their names are placed on the ballot.

1 Minor party candidates, you know, file a list. In this
2 case, it states clearly that major party candidates are
3 nominated by filing declaration of candidacy.

4 And, again, this is the reviser's, kind of outline
5 of what goes into the statute, and it's not binding on what
6 the legislative intent is. The title of the act can be used
7 for legislative intent, and the title of this act is "AN ACT
8 relating to elections; providing for a special election to
9 fill a vacancy in the office of Representative in Congress,"
10 requiring the election be held sooner "in event of certain
11 catastrophes; and providing other matters properly related
12 thereto."

13 It has nothing -- it makes no distinction between
14 nominations or placing on the ballot, or any other
15 provisions of that nature.

16 THE COURT: Do you have a great -- a lot more
17 argument on the constitutional issue? And the reason is,
18 I'm looking at the court reporter, and we tend to give them
19 a break after about an hour and 15 minutes or so. So, if
20 you have, you know, a lot; otherwise, we'll finish up with
21 your argument, and then we'll go on to the other argument.
22 So...

23 MR. BENSON: I will try to conclude it very
24 briefly.

25 THE COURT: Okay.

1 MR. BENSON: My point that I was getting at is, the
2 plaintiffs' challenge in this case is, essentially, a
3 challenge to the statute itself, because the Secretary's
4 interpretation mirrors the statute.

5 As you know, statutes are presumed constitutional,
6 and that the burden is upon them to show that it clearly is
7 not constitutional.

8 And, additionally, the associational rights, the
9 Supreme Court has recognized that the rights of candidates
10 to be placed on the ballots and the rights of the voters to
11 vote for those candidates are intertwined, and that when
12 candidates are unnecessarily excluded from the ballot, that
13 that necessarily impinges upon -- puts a burden on the right
14 to vote, as well.

15 The plaintiffs argue that the right to vote is
16 being burdened in this case. If anything, it appears to us
17 that it's being enhanced by allowing the voters an
18 additional choice of who to vote for in this election. And
19 that is, by the way, the *Lubin vs. Panish* case, 415 U.S.
20 709, at 716.

21 And with regard to the state interest on the
22 party's associational rights, the *Lightfoot* case and the
23 *Alaskan Independent Party* case, those were cases that
24 involved direct primaries, which is what we have in Nevada,
25 basically, where the parties challenge the State's authority

1 to require a primary election, rather than letting the party
2 membership designate who the nominees are; in other words,
3 shifting the power to choose the nominee to the voters, to
4 the members of the party, rather than from the party
5 leadership.

6 And in those cases, the state interest was to
7 remove the influence of special interests, to remove the
8 power of just the party leadership, and to shift that to the
9 more disinterested members themselves to make that decision.

10 And in those cases, the Ninth Circuit upheld those
11 as compelling state interests, and, therefore, it was not
12 necessary to even reach whether or not it severely burdened
13 the associational rights.

14 The Court seemed to entertain doubts about whether
15 it severely burdened the rights or not, but in any event,
16 upheld it, because it found those to be compelling
17 interests.

18 In this case, I think the interest is even more
19 compelling, because, again, we're not choosing a nominee of
20 the party; we're choosing a representative, and, therefore,
21 the associational rights, if they're burdened at all, the
22 burden is very, very slight. And allowing the voters
23 themselves to make those decisions furthers those same
24 interests that were identified in those cases.

25 The plaintiffs mentioned that in their case, the