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IN THE SUPREME COURT OF THE UNITED STATES

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REBECCA McDOWELL COOK, :
Petitioner, :
v. : No. 99-929
DON GRALIKE, :
Respondent. :
- - - - - x

Washington, D.C.
Monday, November 6, 2000

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:59 a.m.

APPEARANCES:

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of the Respondent.
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Respondent

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CHIEF JUSTICE REHNQUIST: Mr. McAdams.

ORAL ARGUMENT OF JAMES R. McADAMS

ON BEHALF OF PETITIONER

MR. McADAMS: Mr. Chief Justice, and may it please the Court: There are three Democratic principles at stake in this case. First, the people may instruct their legislators. Second, the people may request information and receive information on the ballot about candidate behavior. And third, the people may put the information called for by Article 8 on the ballot. None of these activities violate any provision of the United States Constitution.

With regard to the instruct provision first, this is the issue that divided the panel opinion from the dissent. The instructional provisions are contained in Sections 15, 16, and 17, paragraph one, of Missouri's Article 8. The Eighth Circuit said these instructions violated Article 5 because the voters were third parties to the amendment process. Article 5 doesn't say that.

Article 5 provides a specific mechanism by which the Constitution can be amended, and it allocates functions in Article 5 for certain branches of the government to perform. The exclusion of the people from

1 any specific one of those functions does not exclude the
2 people from the right to communicate to their
3 representatives that they want the Constitution amended.

4 QUESTION: Mr. McAdams, precisely what is the
5 instruction provision? You say this is the first of the
6 three you are talking about?

7 MR. McADAMS: Yes. This is the first of the
8 three principles that I'm talking about, Your Honor.

9 QUESTION: Okay.

10 MR. McADAMS: And the instruction is physically
11 contained in Section 17, paragraph one of the proposed
12 amendment, and it relates to Sections 15 and 16 of the
13 amendment, Your Honor, Section 15 stating the intention of
14 the Missouri voters, and Section 16 specifically stating
15 the proposed constitutional amendment that the voters
16 support.

17 QUESTION: Well, are you arguing to us now on
18 the assumption that the instruction standing alone has no
19 teeth, no enforcement part, and you are going to get to
20 the enforcement part, the teeth part later?

21 MR. McADAMS: That is correct, Your Honor.
22 Standing alone, the instructions provisions, these three
23 sections, have no teeth. They are a nonbinding
24 instruction. And as we were instructed by then-Justice
25 Rehnquist's opinion in Kimble, the nonbinding instructions

1 and advice by the voters to a legislature does not violate
2 Article 5.

3 QUESTION: And this is the provision that Judge
4 Hansen voted to uphold?

5 MR. McADAMS: That is correct.

6 QUESTION: In doing his dissent?

7 MR. McADAMS: That is correct, Your Honor.
8 Although I should say, he did not specifically mention
9 Section 17.1. He only specifically mentioned 15 and 16.
10 The instruction provision of 17.1 would be included in his
11 logic.

12 QUESTION: But part 2 of the Missouri
13 constitutional Article 8, Section 17, is severable, is it?

14 MR. McADAMS: Yes, Your Honor.

15 QUESTION: The ballot proposition?

16 MR. McADAMS: Yes, Your Honor. Pursuant to
17 Section 22 of Article 8, any provision the Court would
18 find unconstitutional in Article 8 is severable from the
19 remainder.

20 QUESTION: And your point is just that
21 disregarding for the moment the provision that has to
22 appear on the ballot by a candidate's name, that the rest
23 of it doesn't violate Article 5?

24 MR. McADAMS: That would be correct, Your Honor.

25 Moving on to the second principle, Missourians

1 may request information and may receive information on the
2 ballot about congressional candidate behavior. This Court
3 has indicated and respondents do not contest that states
4 may provide information on the ballot.

5 QUESTION: I think their argument is that it
6 goes beyond information to the point of putting the thumb
7 on the scale, because essentially it uses pejorative
8 language. It's doing more than informing. It's saying,
9 you know, these people have, or this person has violated a
10 trust. And that's more than information. That's a kind
11 of conclusion of fault. That seems to be one of the points
12 of their objection. How do you respond to that?

13 MR. McADAMS: Well, Your Honor, there is nothing
14 that really goes to point three that I made in my opening,
15 that it goes to the specific ballot information and I
16 respond to that by saying, there is nothing that provides
17 voters valuable information that couldn't be used by those
18 voters as the basis for a decision to vote against a
19 candidate. There is no indication in this case, no
20 evidence in this case, that voters will be so overwhelmed
21 by the information contained in the ballot information
22 that they will have the will --

23 QUESTION: Well, it's not -- I don't know that
24 they have to make the case that the voters are going to be
25 overwhelmed. The case that they are making is simply that

1 the voters are being given something more than
2 information. The voters are being given in effect a
3 judgment by the state that the particular candidates have
4 referred to, have done something wrong, and that is more
5 than information.

6 MR. McADAMS: I simply disagree with that, Your
7 Honor. The voters are not being given any more than
8 information. The State of Missouri --

9 QUESTION: Mr. McAdams, can you point to any
10 other example? There have been examples in briefs
11 certainly of instructions that were given at the time of
12 the Constitutional Convention, but this has been labelled
13 a Scarlet Letter label. It's not the same as Democrat and
14 Republican. It says, disregarded voters' instruction. It
15 says, declined to pledge to support. Are there any other
16 such labels that go on a ballot at a time when the
17 candidate has no opportunity to answer back?

18 MR. McADAMS: Well, I would say that party
19 labels go on the ballot at a time when voters have, I mean
20 candidates have no opportunity to respond back. The
21 history of the country is such that party labels were
22 outcome determinative in numerous congressional districts,
23 Your Honor.

24 QUESTION: Well, I asked you, you gave the party
25 labels example. Is there anything comparable to

1 disregarded voters' instruction on issue X, declined to
2 pledge?

3 MR. McADAMS: Yes, Your Honor.

4 QUESTION: I don't know of anything comparable
5 to that.

6 MR. McADAMS: There is something comparable,
7 Your Honor. In the State of Nebraska, in the early 1900s
8 as the people became disaffected with Congress'
9 unwillingness to amend the Constitution to provide for the
10 direct election of senators, they placed labels on the
11 ballot about whether state legislative candidates --

12 QUESTION: Oh, but that's state legislative
13 candidates, and that's different. There is no federal
14 Constitutional control, except perhaps there might be a
15 First Amendment argument, but we are talking about here --
16 whatever the state wants to do vis-a-vis state
17 legislatures is different from what they can do, vis-a-vis
18 people who are in a national body and when they are there,
19 they are representing all the people.

20 MR. McADAMS: Well, First Amendment is one of
21 the claims that they make, Your Honor, and the First
22 Amendment claim would equally be evadable to a situation
23 like the State of Nebraska did. We would not have, for
24 example, a Qualifications Clause analysis that would apply
25 to the state.

1 QUESTION: Well, do you have any other example
2 of someone running for federal office, the House or the
3 Senate, where there is such a label?

4 MR. McADAMS: I believe there -- not exactly
5 like this label, Your Honor. There are situations where
6 federal candidates have, for example, their address
7 disclosed.

8 QUESTION: I think in Arizona, at least at one
9 time, candidates for the Senate and the House of
10 Representatives had to say they were pledged to recall,
11 which meant that if the state legislature recalled them,
12 they would have to resign. Because they all pledged, and
13 of course, it never happened, so --

14 MR. McADAMS: I was not aware of that example,
15 Your Honor.

16 QUESTION: Excuse me. And that was shown on the
17 ballot in Arizona as well?

18 MR. McADAMS: I'm not aware of that, Your Honor.

19 The rules would seem to provide states, the
20 election clause would seem to provide states an
21 opportunity to place information on the ballot.

22 QUESTION: Well, doesn't the information, given
23 the courts' cases here anyway, have to be generally
24 applicable and evenhanded, like all the regulation because
25 if it's not, that's -- I mean, that phrase comes from a

1 case called Anderson, but there are many of like tenor, it
2 seems to me, that if it's not generally applicable and
3 evenhanded, the state, for no legitimate regulatory
4 interest, is biasing the election, which, which hurts the
5 First Amendment rights of all those who happen to think
6 that term limits is not the most important issue in the
7 election, that would prefer the election were decided on
8 the basis of other issues.

9 MR. McADAMS: Well --

10 QUESTION: Whatever. The economy. The
11 environment. Whatever.

12 MR. McADAMS: There is nothing about providing
13 information that dictates that it is the basis upon which
14 voters will choose.

15 QUESTION: Well, of course, that's generally
16 true, and it's for that reason that when we get down to
17 the ballot itself, which normally, regulation of the
18 ballot is not for information providing purposes. It is
19 for fair vote purposes. And that's why it seems to me that
20 these cases have held when we come down to ballot
21 regulation, what we are interested in is whether the
22 state's regulation is generally applicable and evenhanded.

23 MR. McADAMS: Well, I think Timmons used the
24 phrase reasonable. The state could enact reasonable
25 regulations.

1 QUESTION: Yes. Reasonable in terms of such
2 purposes as the integrity of the electoral process,
3 preventing voter confusion, ensuring orderliness, and
4 ensuring fairness. Now, not, I haven't seen anything that
5 says reasonable in terms of providing information about
6 one issue but not other issues.

7 MR. McADAMS: Well, Your Honor, right now, we
8 have a situation where the state only provides information
9 about party affiliation.

10 QUESTION: Party affiliation is not -- the
11 candidate, I take it, voluntarily associates himself with
12 that and wants that on the ballot.

13 MR. McADAMS: Some do and some don't. In the
14 history --

15 QUESTION: Well, are there instances where the
16 affiliation was put on the ballot over the objection of
17 the candidate?

18 MR. McADAMS: There are no cases in that regard,
19 Your Honor.

20 QUESTION: I suppose in most of the south, until
21 maybe 25 years ago, I'm sure the Republican would not have
22 wanted his name on the ballot.

23 MR. McADAMS: I'm quite certain in the south.

24 QUESTION: For his party affiliation on it.

25 MR. McADAMS: I'm quite certain that is true,

1 Your Honor, and I think that's true for third party
2 candidates today as well. In the example that the
3 respondents give about the one time this was done in
4 California, they give an example where a state legislative
5 candidate who had won a plurality in the party primary
6 came back in the run-off election and lost to someone who
7 did not have a label. It seems that what respondents are
8 offended by there is that the party label designation was
9 not the piece of information that controlled the electoral
10 result.

11 QUESTION: You can argue about whether a party
12 label is generally applicable and evenhanded. So my
13 question is, are you accepting the principle, but saying
14 that this label is just as evenhanded as a party label, or
15 are you denying the principle?

16 MR. McADAMS: I'm not denying the principle that
17 the state cannot mislead voters.

18 QUESTION: That wasn't the principle. The
19 principle I'm reading from the cases, which I have said a
20 lot of times, I just want to see if you accept it,
21 generally applicable and evenhanded.

22 MR. McADAMS: And I believe this is generally
23 applicable.

24 QUESTION: You accept the principle and the
25 issue of whether this is evenhanded?

1 MR. McADAMS: I am not aware of any basis for
2 disputing that principle, Your Honor.

3 QUESTION: Do you say that it's evenhanded?

4 MR. McADAMS: I do, Your Honor.

5 QUESTION: Could you call it the Scarlet Letter?

6 MR. McADAMS: I don't call it the Scarlet
7 Letter, Your Honor. People who apply a pejorative label
8 to this enactment call it a Scarlet Letter.

9 QUESTION: Could a Republican state label a
10 Democrat dirty Democrats?

11 MR. McADAMS: No, Your Honor.

12 QUESTION: No? Well, isn't that about what they
13 are doing here. Disregarded. Refused to pledge or
14 declined to pledge. That's why we get into the Scarlet
15 Letter analysis. We would be in a Scarlet Letter analysis
16 if the Republicans said dirty Democrats. I don't see
17 where you are going to draw the line.

18 MR. McADAMS: Well, in that situation the state
19 is expressing a judgment on the candidate that actually
20 invades the province of the voter. Here we are not doing
21 that. There are eight specific behaviors that are being
22 evaluated.

23 QUESTION: How does that invade the province of
24 the voter in a way that is not true here? I mean, what's
25 the distinction?

1 MR. McADAMS: Well, the distinction is that that
2 amounts to, in my mind, a recommendation to vote against
3 the candidate. It would be as if in this case we instead
4 of using the label disregarded voters' instructions
5 concerning term limits for this same behavior, we use the
6 phrase traitor. That is misleading. It would essentially
7 take away, I believe, and overbear the will of the voter
8 if they believe they were voting for a candidate who was a
9 traitor.

10 QUESTION: Well, if you are trying to tell us
11 that this does not disadvantage the candidate in any way,
12 I just find that very difficult to accept.

13 MR. McADAMS: And that is not what I'm saying,
14 Your Honor. This may disadvantage some candidates with
15 some voters.

16 QUESTION: But on your theory, I suppose --

17 QUESTION: But then it's not neutral.

18 MR. McADAMS: Well, it's just as neutral as
19 party labels, because party labels disadvantage
20 candidates. It is the equivalent --

21 QUESTION: Do you know any state that requires
22 you to put your party affiliation on the ballot when your
23 party affiliation is not the reason you are on the ballot?

24 MR. McADAMS: I do not know of any state that
25 does that, Your Honor.

1 QUESTION: In other words, you can get on the
2 ballot without a party affiliation, if you acquire enough
3 signatures, right?

4 MR. McADAMS: Yes. That's correct, Your Honor.

5 QUESTION: But the state ballots have lines for
6 the major parties that in the last election got enough
7 votes, so the reason they show that is they are showing
8 you why you are on the ballot, and if you are on the
9 ballot for some other reason, you think they could make
10 somebody who got on the ballot by popular referendum or
11 signatures, you think they could make him declare a party
12 affiliation shown next to his name?

13 MR. McADAMS: No, Your Honor. I don't believe I
14 could.

15 QUESTION: That's right.

16 QUESTION: I'd like to ask you whether if we
17 were to uphold this kind of a provision, whether it
18 wouldn't then be possible for a state to have by
19 initiative or referendum a similar provision saying that
20 we instruct our members of Congress that they are to
21 support a constitutional amendment allowing prayer in
22 schools, or a constitutional amendment reversing an
23 abortion decision, or any other hot button issue where the
24 voters of the state decide they are going to instruct
25 members of Congress, and then under your theory, I

1 suppose, a provision could be inserted on the ballot
2 opposite the name of any candidate who refuses to express
3 a position or disavow that position that --

4 MR. McADAMS: That is --

5 QUESTION: -- informs the voters; is that
6 right?

7 MR. McADAMS: I'm sorry, Your Honor. Yes. That
8 is correct, if they did it through this mechanism, they
9 set forth the specific Constitutional provision that they
10 wanted enacted and the behaviors that they wanted to be
11 evaluated, so that there was no --

12 QUESTION: It certainly would change the
13 election process as we have known it, wouldn't it?

14 MR. McADAMS: Well, in footnote four of Foster
15 versus Love, this Court left open the question of whether
16 or not states must use conventional means to hold
17 elections. But I submit to you that we already know the
18 answer to that question. And we know it because the way
19 in which ballots have been distributed has changed
20 throughout history. Initially, we started out with nothing
21 but write-in ballots. Then parties were actually around
22 printing up ballots for people to cast and using that
23 mechanism to control and buy elections, and the states
24 came up with a mechanism which allowed the states to
25 prepare the ballot. So there is nothing that requires us

1 to use the conventional method.

2 QUESTION: But Mr. McAdams, the point has been
3 made very forcefully that this is a national legislature.
4 And you are saying you could freight down someone from a
5 state with all kinds of policies that may be preferred by
6 that state and that person would be laden with those
7 obligations, even though he or she is now a member of a
8 national, as opposed to a state body.

9 MR. McADAMS: Well, Your Honor, first of all, I
10 don't think they are obligations. I think they are
11 instructions, and they are nonbinding instructions.

12 QUESTION: But the list of things that the
13 person is supposed to do if you are going to be faithful
14 to that pledge, you have to do all those things. You have
15 to sponsor these measures, and you have to urge other
16 people to join you, and you have to take a very active
17 role.

18 MR. McADAMS: Your Honor, you only have to
19 propose if it's not otherwise been proposed. You only
20 have to sponsor if it's not otherwise been sponsored. And
21 there is nothing in the instructions that require you to
22 speak in favor of this proposed amendment.

23 QUESTION: But that interferes with the basic
24 point, that the relation between the congressmen and the
25 people is one that's direct and does not involve

1 intervention by the state. We have two sets of relations
2 in the federal system, each with its own duties and
3 responsibilities. One is between the Federal Government
4 and the citizen without the intervention of the state.
5 The other is between the state and the citizen without the
6 intervention of the Federal Government, except in certain
7 instances where an accommodation has to be made like
8 regulation of time, place and manner of elections, but
9 those are neutral.

10 MR. McADAMS: But this doesn't interfere with
11 that relationship, Your Honor. The only thing this does
12 is allows voters --

13 QUESTION: But it seeks to alter and to regulate
14 it.

15 MR. McADAMS: I disagree, Your Honor. This only
16 allows the people to evaluate candidate behavior. We have
17 in our country a tradition now where legislative
18 candidates obfuscate their record to the point where it is
19 difficult for the electorate to determine what they have
20 done.

21 QUESTION: But the purpose of doing this is to
22 control the conduct of the Congressman in office, and I
23 submit to you, there is simply no authority for the state
24 to do that. The voters can certainly do that.

25 MR. McADAMS: The last sentence of Section 16,

1 we, the people of the State of Missouri, have chosen to
2 amend the state Constitution to inform the voters
3 regarding incumbent and nonincumbent federal candidate
4 support for the proposed amendment. This is an
5 informational provision to the voters, so that they can
6 evaluate candidate behavior, and this is information they
7 have asked for. This is the kind of information that
8 could seriously improve the ability of the citizens to
9 engage in an educated electoral decision, and could
10 combat, I think rather effectively, voter disillusionment
11 with the system.

12 QUESTION: What about, there are a number of
13 districts within Missouri where the people were not in
14 favor of this proposition. And if the person is supposed
15 to represent, disregard voters' instruction, he might not
16 have disregarded the voters' instructions from his
17 district. His district may have been overwhelmingly
18 against this proposal.

19 MR. McADAMS: This proposal passed in every
20 congressional district in the State of Missouri. Now
21 there are 28 counties that it did not pass in.

22 QUESTION: All right. Someone is from one of
23 those counties.

24 MR. McADAMS: Well, the Federal Government
25 through the elections clause tells the states that the

1 state regulates the ballot. It is not inappropriate,
2 then, for the state to have consistent regulations across
3 the state regarding that proposal, Your Honor.

4 QUESTION: But I -- Justice Ginsburg posed a
5 hypothetical that I'm interested in. Suppose that,
6 hypothetical case, in a congressional district, the voters
7 are overwhelmingly against a certain proposition and a
8 state Constitution has this label providing they be
9 notified that they have voted to the contrary. What
10 result?

11 MR. McADAMS: The same result would apply
12 because the elections --

13 QUESTION: So you are, you are allowing the
14 state as an entity to interfere with the relations between
15 the Congressman, the Congresswoman, and those people in
16 the district.

17 MR. McADAMS: That's not true, Your Honor.
18 Because if the people in that district voted against term
19 limits, they will take a look at this ballot information
20 and they will not use it as a rational basis to vote
21 against a candidate unless their opinion has changed. If
22 their opinion has changed, then they will use this
23 information. But it does not interfere with the
24 relationship.

25 QUESTION: Certainly state legislatures before

1 the 17th amendment, if that was the one that provided for
2 direct election of senators, communicated a great deal
3 with their senators.

4 MR. McADAMS: Absolutely, Your Honor. There is a
5 lot of historical evidence that state legislators
6 instructed the state senators. In fact, the first --

7 QUESTION: You mean federal senators, well,
8 senators from the state.

9 MR. McADAMS: Yes. Senators from the state
10 impacted federal senators, and in fact, that is the
11 mechanism in large part which propelled the first 10
12 amendments and the 11th amendment to passage. After the
13 enactment of Article 5, the states directed that those be
14 passed. Eight of the original 13 colonies issued such
15 instructions for one of those 11 amendments.

16 QUESTION: This just applies to Congress
17 persons, though, doesn't it? It doesn't apply to
18 senators.

19 MR. McADAMS: No. It applies to both, Your
20 Honor.

21 QUESTION: Oh, it does.

22 QUESTION: There is something about this, the
23 perception, say, of a voter. We very carefully limit the
24 speech that's possible as you are approaching the poll.
25 No electioneering by the polls. And this Court has upheld

1 that against First Amendment challenge, and yet when they
2 get into the voting booth, this thing juts out at them in
3 capital letters, and that somehow seems inconsistent with
4 our notion that the voters should not be bombarded with
5 slogans for or against whatever issue when they go into
6 that ballot.

7 MR. McADAMS: Well, we have -- we have -- the
8 Court has held that elections -- pardon me -- people
9 cannot politic within so many feet of the polling place,
10 Your Honor. That is true. But the Court has never held
11 that the people cannot have the information in the voting
12 booth with them that they want.

13 QUESTION: We haven't held that people can't
14 politic. We have held that if a state doesn't want people
15 to politic, it's okay.

16 MR. McADAMS: That is true, Your Honor.

17 QUESTION: In your view, could they, in addition
18 to what's in the capital letters, could they add in the
19 following respects, and then quote the paragraphs that
20 were the failures, the basis for it?

21 MR. McADAMS: Yes. I believe they could, Your
22 Honor.

23 QUESTION: Does, in Missouri, do congressmen
24 take an oath to uphold the state Constitution?

25 MR. McADAMS: Do federal congressmen take such

1 an oath?

2 QUESTION: No. Do congressmen and senators in
3 Missouri take an oath to uphold the state Constitution?

4 MR. McADAMS: I'm not aware that federal
5 representatives and senators do that, Your Honor.

6 QUESTION: I would be very surprised if the
7 state could impose that requirement.

8 MR. McADAMS: I think that is true.

9 QUESTION: Well, doesn't that prove the point
10 here? That the state simply cannot interfere with the
11 relation between the congressmen and the voters directly?

12 MR. McADAMS: Absolutely not, Your Honor. There
13 is nothing that would suggest that the state couldn't ask
14 federal congressmen to take such a pledge, and if they
15 failed to do so, report that they declined to take such a
16 pledge. The federal candidates --

17 QUESTION: You think that the, that the state
18 can require congressmen and senators to support the state
19 Constitution by an oath?

20 MR. McADAMS: I think they can ask them if they
21 will. If I could reserve the remainder of my time.

22 QUESTION: Very well, Mr. McAdams. Mr. Franklin,
23 we will hear from you.

24 ORAL ARGUMENT OF JONATHAN S. FRANKLIN

25 ON BEHALF OF RESPONDENT

23

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1 MR. FRANKLIN: Mr. Chief Justice, and may it
2 please the Court. The State of Missouri has attempted to
3 use its control over the ballot to determine the issues
4 upon which federal elections will be decided and to
5 influence voters to vote against candidates who do not
6 support a state preferred political viewpoint.

7 QUESTION: I don't know that that's true about
8 simply the 17-1 provision that Judge Hansen thought was
9 permissible, where it's simply the legislature instructs
10 members of Congress to try to push for a term limits
11 amendment. Nothing appears on the ballot at all.

12 MR. FRANKLIN: Two points, Your Honor. First,
13 clarification. Judge Hansen did not find that to be
14 constitutional.

15 QUESTION: Oh, I thought he did.

16 MR. FRANKLIN: No. On page A-23 of the appendix
17 to the petition, Judge Hansen clearly stated that he
18 agreed with the majority that Sections 17, 18, and 19 were
19 unconstitutional. He differed as to whether 15 and 16,
20 which is essentially the preamble, could be severed. The
21 severance question, Your Honor, is not before the Court.
22 It was addressed by the Court of Appeals. It has been
23 waived. The petitioner could have chosen if it had wanted
24 to present that issue in its petition or its brief. It
25 did not, and perhaps the reason it did not is the question

1 of severability is predominantly one of state law as to
2 whether under Missouri state law various provisions would
3 be severable from one another, whether the voters would
4 have voted for a preamble that didn't do anything. That
5 is a question of state law.

6 It was not presented in the petition. It was
7 not presented in the brief. If the Court had been
8 presented with it, it's likely the Court would decline to
9 consider a question of state law such as that one.

10 QUESTION: Well let me ask you this, then. Do
11 you think that the provision that instructs members of
12 Missouri's congressional delegation to use their powers to
13 pass an amendment is, stands on the same footing as the
14 ones that are, that are printed on the ballot?

15 MR. FRANKLIN: We believe first that it stands
16 together with this law. If, in a hypothetical --

17 QUESTION: I mean constitutionally.

18 MR. FRANKLIN: The answer is if there were a,
19 just instruction, nothing else, which is not what this
20 case is about, if there were, we would argue in such a
21 case that it would be in that case an impermissible
22 chilling effect on speech.

23 QUESTION: Well, but why can't that provision be
24 severed from the other two?

25 MR. FRANKLIN: The principal reason is because

1 the severance question is not before the Court. If --

2 QUESTION: Well, but the Petitioner argues here
3 that the Court of Appeals was wrong right across the board
4 in throwing these out. Now, if we were to conclude that
5 the Court of Appeals was wrong on one, but right on the
6 other two, that certainly is fairly raised by the
7 petition.

8 MR. FRANKLIN: I would say not, Your Honor, and
9 for the reason that the severability issue is one of state
10 law. However, if --

11 QUESTION: Well, why couldn't we say the
12 dissenter was right on that point. He said Article 15 and
13 16. Not 17.1, as you pointed out. But why wouldn't it be
14 open to us to say the dissenter was right on that point?

15 MR. FRANKLIN: I think it would be open to the
16 Court, had the issue been raised and briefed and we had
17 briefed the question under Missouri state law as to what,
18 what is or is not severable. However, one also needs to
19 look at the remedy in this case. The remedy is not that
20 certain provisions are excised from the Constitution.
21 What the remedy says is the State of Missouri is enjoined
22 from implementing or enforcing the provisions of the
23 Constitution, including Section 17, which contains both
24 the instructions and the labels through which they are
25 enforced. This Court need only affirm that judgment.

26

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1 QUESTION: But if we agree with some of the
2 reasons they gave, that is, that some of the provisions
3 are bad, but we think that some of the other ones are
4 good, why -- we don't necessarily have to reach the
5 severability point ourselves. Why couldn't we remand and
6 leave it to the lower court to decide the severability
7 question in light of our disagreement with them that all
8 the provisions they said were unconstitutional were?

9 MR. FRANKLIN: Because the Court would be
10 reaching the severability issue in that case and remanding
11 it to --

12 QUESTION: No, we wouldn't. We would be saying
13 that we find that this is a difficult case. Some of these
14 provisions withstand constitutional attack. Others don't.
15 Let me remand it for you and then can you figure out the
16 state law.

17 MR. FRANKLIN: But the Court of Appeals did
18 address the severability question. In the last footnote
19 of its appeal, it held --

20 QUESTION: But I think several of us feel that
21 it isn't really an issue of severability that we would
22 decide here. We would simply say we disagree with one
23 phase of the Court of Appeals opinion on the
24 constitutional issue, we agree on two others or three
25 others, and send it back to the Court of Appeals. You

1 affirm in part and reverse in part without necessarily
2 getting to severability here.

3 MR. FRANKLIN: Well, let me then get into why
4 the Court, if the Court were just to consider the
5 instruction provision standing alone, which I understand
6 is the issue that was raised, we would argue, for the
7 first time today, if the Court were to, just to consider
8 that, it would have to hold that contrary to Judge
9 Bartlett's decision in this case, the instructions
10 provisions can be implemented or enforced, which is the
11 injunction that this Court, we are asking the Court to
12 affirm.

13 QUESTION: No. Would you tell us whether in
14 your view --

15 MR. FRANKLIN: Yes.

16 QUESTION: In a hypothetical case.

17 MR. FRANKLIN: Yes.

18 QUESTION: A state can simply instruct its
19 federal representatives, congressmen and senators, that it
20 wants them to work for a particular objective. That's all
21 it says. It seems to me that's a classic right of
22 petition on the part of the people.

23 MR. FRANKLIN: No, it is not. And it would be
24 in our view a violation of the Constitution. It would be
25 unprecedented and we have uncovered no historical evidence

1 to show that any, it has ever been tried before that an
2 instruction to a representative to vote and take other
3 legislative activities in a particular manner --

4 QUESTION: But certainly there was much
5 instruction to the senators at one time.

6 MR. FRANKLIN: The difference here, and it's an
7 important difference, is this instruction is codified as
8 law, is given the force of legal command, it is in the
9 Missouri Constitution. Every person in this --

10 QUESTION: Let's say they use the word advice.
11 We wish, we, the legislature of the State of Missouri,
12 wish our representatives to know that we think they should
13 work for the following objectives, term limits, whatever.

14 MR. FRANKLIN: It would be different, Your
15 Honor. And we have a quote from George Washington in our
16 brief in which --

17 QUESTION: So the difference is between
18 instruction and advice?

19 MR. FRANKLIN: Yes, Your Honor. And George
20 Washington said, and it's quoted at page 29 of our brief,
21 he said the sense -- with regard to instructions
22 specifically, he said the sense, but not the law of the
23 district may be given. It is different to say we advise
24 that you do this.

25 QUESTION: In what capacity was George

1 Washington speaking?

2 MR. FRANKLIN: He was in that case writing a
3 letter to his nephew who was a future justice of this
4 Supreme Court, Bushrod Washington. But he said that, and
5 we are not saying that that is a principle of law, but the
6 reasoning applies here and it applies for the following
7 reason. People take seriously their obligations to follow
8 the law. And I think that applies perhaps even more
9 strongly to members of Congress. A member of Congress who
10 is faced with a law that says we hereby instruct you as a
11 matter of Missouri constitutional law, codified as a
12 provision of law, given the force of legal command to do
13 this act in Congress.

14 QUESTION: But it's not a legal command. I mean,
15 if you are -- you don't have to say it's binding. If it's
16 a nonbinding instruction, it's not an instruction. I
17 mean, you can call it an instruction. Is that the vice of
18 this thing, misusing the word instruct, as opposed to
19 advise, even though everybody knows and they acknowledge
20 here that there is no enforceable mechanism on the
21 instruct?

22 MR. FRANKLIN: And all we are asking this Court
23 to do is to, as Judge Bartlett did, say that the state may
24 not implement or enforce the provision.

25 QUESTION: May I get -- the only implementation

1 or enforcement that I'm aware of is the implementation or
2 enforcement in the form of the ballot statements; is that
3 correct?

4 MR. FRANKLIN: That is correct. And they are --

5 QUESTION: So that our case boils down to
6 whether in the whole context, all the provisions in the
7 Constitution, may the state include these, as you put it,
8 ballot disparagements. That's the only issue before us?

9 MR. FRANKLIN: Yes. No. The issue, the issue
10 before the Court is whether as the Court of Appeals held,
11 Article 8 of the Constitution may not be implemented or
12 enforced. Again, the Court held that.

13 QUESTION: Right. The only implementation or
14 enforcement that we are dealing with, and that the court
15 below dealt with, was the ballot statements?

16 MR. FRANKLIN: That is correct. And Judge
17 Bartlett was correct when he said that the remedy is, we
18 hereby enjoin the state from implementing or enforcing
19 Article 7, Section 17, which contains both the
20 instructions and the enforcement. To take a hypothetical,
21 if a law came before this Court where at Section whatever
22 of the statute and Section -- subsection A said no person
23 may criticize the president, subsection B said anyone who
24 violates subsection A will be given a \$1,000 fine. The
25 remedy of such a case would be, as the remedy was here, to

1 enjoin or enforce, to enjoin the enforcement or
2 implementation of such a statute. That is all we are
3 asking the Court to affirm in this case.

4 QUESTION: Let me get this straight because
5 apparently, something may turn up that I don't fully
6 understand. Was there an injunction against -- was the
7 part that simply we have been talking about, instructs or
8 advise, was that declared invalid?

9 MR. FRANKLIN: There was no declaratory judgment
10 in this case. There was simply an injunction.

11 QUESTION: Well then, does the injunction have
12 any consequence with respect to that provision of the
13 Missouri Constitution?

14 MR. FRANKLIN: Which provision, Your Honor? I'm
15 sorry.

16 QUESTION: The provision that simply says the
17 legislature instructs.

18 MR. FRANKLIN: Yes. It is a consequence that
19 they may not implement or enforce that provision. The way
20 they do it, as Justice Souter mentioned, was -- is through
21 the instructions, through the labels. And the labels we
22 believe are unconstitutional for the principal reason that
23 they exceed the state's limited delegated authority under
24 the elections clause to regulate only the times, places
25 and manners of holding federal elections.

1 QUESTION: And I suppose you would say that the
2 injunction has importance and continuing significance in
3 the event the legislature attempts some other means of
4 enforcement?

5 MR. FRANKLIN: Certainly, Your Honor. A
6 decision by this Court that an instruction to a sitting
7 member of Congress to vote in a certain way may be
8 implemented or enforced, we believe would be contrary to
9 the Constitution. It would violate the First Amendment.
10 It would be a chilling effect on speech.

11 QUESTION: But what if Missouri had done nothing
12 but pass that part which said we instruct senators and --
13 there is no known prospect of enforcement at all.

14 MR. FRANKLIN: We would argue in such a case
15 that it would contravene the First Amendment because it
16 would be a chilling effect on speech for the reasons
17 essentially that George Washington stated, which is that
18 the sense, but not the law of the district, may be given.
19 This is unprecedented. We are not aware of any --

20 QUESTION: But it wouldn't be the law. There is
21 no enforcement mechanism.

22 MR. FRANKLIN: It would still be the law, Your
23 Honor.

24 QUESTION: It seems to me, though, we get a lot,
25 we used to get a lot of things that we call upon our

1 delegation in Congress to declare this National Pork Week.
2 I mean, there are a lot of those. They are always passing
3 things like that in state legislatures. Are all those
4 unconstitutional?

5 MR. FRANKLIN: No. But they do not as --

6 QUESTION: But if they said we insist that you
7 call this National Pork Week, I don't know if it's
8 National Pork Week or National Port Week, but regardless,
9 a lot of them come in. Now you're saying if they use the
10 word insist, that it's unconstitutional?

11 MR. FRANKLIN: We are saying if they use the
12 word instruct. But the word, the instructions are just,
13 are not --

14 QUESTION: You don't have to reach that in this
15 case?

16 MR. FRANKLIN: No. No. We do not. And the
17 reason is because the instructions are part and parcel of
18 the law which the Court of Appeals has said stand or falls
19 on its own, and the principal reason that the law as a
20 whole falls is because it does exceed the state's neutral
21 power to serve as a, an administrator of federal elections
22 and instead has the state putting its thumb on the
23 electoral scale.

24 QUESTION: Tell us about party labels, Democrat
25 and Republican?

1 MR. FRANKLIN: Yes. The reason that party
2 labels would be permissible generally speaking is because
3 they are integrally related to the conduct, the orderly
4 conduct of an election which itself is organized around
5 party lines. In Missouri, as in elsewhere, one does not
6 come to be on the ballot strictly as an individual, but
7 rather as the nominee in most instances of a party. It
8 would be a different case if the state, and I understand
9 it to be conceded here, if the state said to an individual
10 who had achieved a ballot spot as an independent, that
11 nevertheless, that person must disclose that they are, for
12 example, a member of the communist party or the socialist
13 party. That would not be related to the orderly conduct
14 of an election organized around party lines because that
15 would not have anything to do with how the person got on
16 the ballot.

17 Second, a party label unlike the labels in this
18 case, a neutral requirement that all party labels be
19 listed is not related to the content of any individual's
20 views on an issue. Any connotation that the voters draw
21 between parties and viewpoints is imperfect at best, but
22 more important, it's a connotation that the party and the
23 candidate voluntarily associate themselves with in the
24 process of running in an election which itself is
25 organized around party lines.

1 Here, by contrast, the labels are both content
2 and viewpoint based. They are content based because they
3 single out only one issue, term limits, and say to the
4 voters, that is the issue that we deem to be most
5 important of your consideration, most worthy of your
6 consideration. And second, even worse, they are viewpoint
7 discriminatory. They are viewpoint discriminatory because
8 the state is singling out one side of the issue and is
9 labeling only one side and it is doing it in such a way
10 that it is telling the voters that this person has
11 disregarded or failed, pledged to follow a policy which
12 the state deems to be the correct one. And --

13 QUESTION: I take it your First Amendment
14 argument is an alternative argument to the first argument
15 that the state simply lacks the power to do this?

16 MR. FRANKLIN: Yes. The first argument is the
17 state lacks the power. It is an alternative argument
18 under the First Amendment. It relies on many of the same
19 principles, however. The elections clause is a limited
20 delegation of authority to regulate only the times, the
21 places, the manners of holding federal elections.

22 QUESTION: That particular argument wasn't put
23 before Judge Bartlett. It was before the Eighth Circuit.
24 Am I right about that?

25 MR. FRANKLIN: No, Your Honor. It was put

1 before Judge --

2 QUESTION: The election clause was put before --

3 MR. FRANKLIN: Yes. Yes.

4 QUESTION: He didn't rule -- Bartlett didn't
5 rule on that?

6 MR. FRANKLIN: Yes, he did, Your Honor. One can
7 find the ruling at pages A-42 and 43 of the appendix of
8 the petition, and A-45 and 46.

9 QUESTION: Was an issue ever -- just a technical
10 point. Was an issue ever made of the fact that the, what
11 was objected to here was done by a constitutional
12 amendment rather than by the legislature which the clause
13 itself refers to?

14 MR. FRANKLIN: No, Your Honor. That was not
15 raised below, but it has been raised by all parties in
16 this Court and has been briefed by all parties in this
17 Court, but it was not raised below.

18 QUESTION: May I ask before you are finished, is
19 a threshold standing question with respect to the initial
20 Plaintiff here. In short, he said in the end, I'm getting
21 out because of Gephardt, I don't want to be a competitor
22 of Gephardt, so this is beside the point as to Gralike?

23 MR. FRANKLIN: Gralike. Yes. The Court, we
24 believe that that case would still be capable of
25 repetition, yet evading review under this Court's

1 precedents. However, Mr. Harman did intervene as a
2 respondent on appeal. Mr. Harman has the same interests
3 as Mr. Gralike.

4 QUESTION: I noticed in his affidavit that he is
5 running for the election in 2000. I assume that's
6 tomorrow. He doesn't -- or am I wrong? But he doesn't
7 say that he, as in Golden versus Wickler, that he intends
8 to run again and it's likely that he will run again.

9 MR. FRANKLIN: Two points. First, Your Honor,
10 he did run. He was not successful in the primary. He
11 does intend to run again. He has run in the past. He
12 intends to run again. But the Court's --

13 QUESTION: But is that in the affidavit before
14 the Court? That's your representation to us now?

15 MR. FRANKLIN: It's my representation, but the
16 Court's elections cases make clear that that is not a
17 requirement in the Court's elections cases, and those are
18 the cases that we have cited in our brief at footnote one,
19 I believe in this context. But in any event, I will
20 represent to you that he does intend to run again.

21 The state, as this Court has held, has the
22 authority under the elections clause to enact procedural
23 or mechanical regulations that are nondiscriminatory,
24 evenhanded and politically neutral. It does not have the
25 delegated power to single out one issue which it deems

1 more worthy of voter consideration than others or to
2 disadvantage candidates who hold disfavored views on that
3 issue.

4 The State of Missouri, purportedly to maintain
5 the integrity and the neutrality and the sanctity of the
6 electoral process, prohibits candidates and their
7 supporters from expressing any views to the voters within
8 25 feet of the polling place. Yet the state itself now
9 seeks to be inside the voting booth to inject its own
10 preferred views and viewpoints on the ballot. Such a
11 manipulation of the ballot would in our view, if upheld,
12 seriously undermine the system of free and fair Democratic
13 elections that sets this nation apart from so many others
14 in the world. Thank you.

15 QUESTION: Thank you, Mr. Franklin. Ms.
16 Underwood, we'll hear from you.

17 Ms. Underwood, Section 1 of Section 17 says we
18 the voters of Missouri hereby instruct each member of our
19 congressional delegation to use all of his or her
20 delegated powers to pass the congressional term limits
21 amendment set forth above. If that stood by itself, would
22 that have any constitutional flaw?

23 ORAL ARGUMENT OF BARBARA D. UNDERWOOD
24 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
25 SUPPORTING THE RESPONDENT

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1 MS. UNDERWOOD: Mr. Chief Justice, that would
2 depend on the meaning of instruct. If it were binding law
3 and unlawful for a Congressman to disobey it, then it
4 would have many of the same flaws as this statute. If it
5 were advisory, then it would not, but we know --

6 QUESTION: How do you determine whether it --

7 MS. UNDERWOOD: Well, one of the problems --

8 QUESTION: I mean, suppose there is just no
9 sanction for it. We instruct you to do it, but there is
10 no sanction whatever.

11 MS. UNDERWOOD: Well, the question would be
12 whether it was meant to have binding effect, and whether,
13 for instance, the legislature might, somebody might seek
14 mandamus to enforce it, whether it was seen as enforceable
15 or not.

16 QUESTION: Not enforceable. It's not
17 enforceable.

18 MS. UNDERWOOD: Well, if it's completely
19 unenforceable, I think you are saying it is advisory, in
20 which case --

21 QUESTION: Well, but it says instruct.

22 MS. UNDERWOOD: Instruct is a word that can have
23 many meanings and if it means advisory, then I think it
24 would not be objectionable, but we --

25 QUESTION: It doesn't mean advisory. I mean, we

1 really mean it. We instruct you, but you know, if you
2 don't do it, there is nothing we can do about it.

3 MS. UNDERWOOD: Well, if you can say that the
4 legislator was a lawbreaker, violated the law, did
5 something unlawful, if that's the meaning of instruct --

6 QUESTION: Well, you can say he didn't take the
7 instructions, if you consider that to be a violation of
8 the law.

9 MS. UNDERWOOD: That's a different point. In
10 Prince, this Court looked to instructions to sheriffs, for
11 which there was no enforcement, and treated those as
12 binding. I think the question would be what that
13 hypothetical statute, which we don't have before us,
14 means. This statute we know Missouri meant to make
15 enforceable. We know that because it created an
16 enforcement mechanism, and so the difficult question that
17 you put, which would require determining what that
18 hypothetical statute meant, isn't here.

19 QUESTION: Is it accurate to call it an
20 enforcement mechanism? I mean, usually you enforce laws
21 by punishing people who break them. You send them to
22 jail. You do this or that. Here, the punishment is
23 simply telling people that you ignored the instruction.
24 Is that a punishment? I mean, leaving aside the, you
25 know, the pejorative manner in which the announcement is

1 made, if all you are doing is telling the people he chose
2 not to take on instructions.

3 MS. UNDERWOOD: Well, it's still the case that
4 it's, that it's an enforcement, one, because of the
5 pejorative language, which you have asked me to set aside,
6 but is present here. Two, because it is a decision by the
7 state legislature to focus the attention of the voters and
8 judge candidates on a single issue. And three, because it
9 is done in the voting booth and not in a public forum
10 where there is an opportunity to respond and to debate, so
11 it is an effort, it has the intended purpose and the
12 effect of disadvantaging a class of candidates, and that's
13 something this Court said in term limits that the state
14 cannot use its elections clause authority to do. It
15 interferes with, as Justice Kennedy said, the direct
16 relationship between the national government and its
17 citizens.

18 There is no other example of an effort to
19 enforce an instruction with ballot labels in the case of a
20 federal senator or representative, except for the -- the
21 only one we have been able to find is the Arizona recall
22 pledge. That went off the ballot in 1973. There is still
23 a request to pledge, but it is no longer enforced by a
24 ballot instruction. And of course, it doesn't involve a
25 position on an issue. It doesn't involve a commitment to

1 take a position on a particular issue in the legislature.

2 QUESTION: No. But it involves a commission to
3 simply give up your job if the legislature recalls it.

4 MS. UNDERWOOD: It does. It's unique, as far as
5 we have been able to tell, in the, in the history and the
6 laws of this country, and it has never come before the
7 Court.

8 QUESTION: Mr. McAdams' point was that the First
9 Amendment arguments would apply equally to any state
10 election. So then if, if that's important, the
11 distinction you just drew, then I guess we are left with a
12 time, place and manner clause.

13 MS. UNDERWOOD: Yes, I think the principal, the
14 principal concern of the United States in this case is
15 that the state has a limited authority under the elections
16 clause and has improperly or either abused, misused its
17 authority or exceeded its authority.

18 QUESTION: Then how would you draw the word
19 manner? How would you explicate that? Which I take it
20 what you would want to do is eliminate this, but then not
21 reach the First Amendment question. You see?

22 MS. UNDERWOOD: It's not necessary to reach the
23 First Amendment --

24 QUESTION: Yes. But how do you explicate the
25 word manner?

1 MS. UNDERWOOD: The word manner, in the context
2 of the Time, Place and Manner clause, means the mechanics,
3 the procedures of an election, neutral, evenhanded
4 regulations that enable the orderly election process to
5 occur, and what it particularly doesn't mean is putting a
6 thumb on the scale to influence the result.

7 QUESTION: Of course that refers to the
8 legislature, too, and not to this, not to this process,
9 the state legislature?

10 MS. UNDERWOOD: Yes. There is a question as you
11 have noted, about whether the time, place and manner
12 authority that the Constitution gives to the state
13 legislatures goes to any entity that the state gives
14 legislative authority to, or whether it actually only goes
15 to legislatures. We haven't -- in either case, even
16 assuming that it isn't restricted to the legislature as
17 such, it's our position that the power has simply been
18 exceeded, doesn't go, doesn't authorize the making of
19 nonneutral regulations that are designed to and have the
20 effect of attempting to influence the outcome.

21 With respect to other labels that do sometimes
22 appear on ballots, party labels and incumbency
23 designations, those have, those are all understood as
24 helping the voter identify the candidates. They are
25 objective, identifying information. They don't, for one

1 thing, involve a state official in assessing whether the
2 label should apply or not, as this regulation does here.
3 The secretary of state, subject to a state review process,
4 has to determine whether the label applies, and the label
5 is a judgmental label, not simply an identifying piece of
6 information.

7 The other thing about parties, of course, is
8 that party labels recognize the role political parties
9 play in the electoral process, provide candidates with a
10 reasonable level of community support, provide voters with
11 a means of exercising their First Amendment right of
12 political association, and the party label therefore
13 reflects that the party is the mechanism that put the
14 candidate on, on the ballot. It's quite different from a
15 label that is designed to influence the election and also
16 to constrain the behavior of the legislator after having
17 been elected as this, as this provision does.

18 I think, if there are no further questions --

19 QUESTION: May I ask, if you have a minute, the
20 Court of Appeals gave us a whole bunch of reasons to come
21 out the way they did. Which one do you think is the
22 strongest?

23 MS. UNDERWOOD: The elections clause. The Court
24 of Appeals actually didn't -- well, the elections clause
25 has been in the case from the beginning because it is the

1 provision that the state has used to defend its authority
2 against all other attack. That is the argument, when the
3 argument is made that this is a qualification, or this is
4 an improper this or that, the state has said it's a proper
5 exercise of its authority under the elections clause, and
6 we say it is not. I think that's the simplest way to
7 decide this case, even though there are a number of other
8 issues that could also be reached.

9 QUESTION: Thank you, Ms. Underwood. Mr.
10 McAdams, you have five minutes remaining.

11 REBUTTAL ARGUMENT OF JAMES R. McADAMS
12 ON BEHALF OF PETITIONER

13 MR. McADAMS: Thank you, Your Honor. It
14 Tashjian, this Court said, any claim that we enhance the
15 ability of the citizenry to make wise decisions by
16 restricting the flow of information to them must be viewed
17 with some skepticism. This is precisely respondent's
18 claim, and it should be viewed with considerable
19 skepticism. As to the elections clause claim made by the
20 respondent, the Court said in Smiley that the time, place
21 and manner language are comprehensive words that embrace
22 authority to provide a complete code for congressional
23 elections. And in Tashjian they said state control over
24 the election process for state officers is co-extensive
25 with that grant to the states under the elections clause.

1 It is a broad power.

2 The alleged damage done to congressional
3 candidates because of the ballot label is something that
4 needs to be analyzed under a punishment analysis. There
5 is no evidence in the record that suggests this language
6 is punishing, and that was respondent's burden. Under the
7 qualifications clause, it was Respondent's burden to show
8 that the sole basis for putting this on was to add a
9 qualification indirectly. The language of the amendment
10 itself indicates that it is not the sole basis to add a
11 qualification indirectly. It is the sole purpose to one,
12 inform the voters, and two, to amend the Constitution.

13 It was argued that the severance issue was
14 waived. This is not so. This is contained in the
15 response to the, or pardon me, to the reply to the cert.
16 In point four, we say specifically because we use the word
17 or in the first question, we preserve the severance
18 question and we have already dealt with that in the reply
19 suggestions.

20 If there are no further questions?

21 QUESTION: Thank you, Mr. McAdams. The case is
22 submitted.

23 (Whereupon, at 12:00 noon, the case in the
24 above-entitled matter was submitted.)

25