IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

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| STATE OF ALASKA, DIVISION OF ELECTIONS, and Gail Fenumiai, Director of the Division of Elections<br><br>Petitioners,<br><br>v.<br><br>ALYSE S. GALVIN,<br><br>Respondent. | Superior Court Case No. 3AN-20-07991 CI<br><br>Supreme Court Case No. S-17887 |

**OPPOSITION TO PETITION FOR REVIEW**

Petitioners have filed an emergency petition asking the Court to intervene in an ongoing Superior Court proceeding to prevent alleged "chaos" *they* created when they altered the 2020 general election ballot without any notice. The only chaos that will result here is if the Division of Elections mails out ballots that violate Alaska Statutes and the Constitutional rights of all Alaskans, potentially calling the entire election into question. Petitioners have created a tough situation for themselves by printing thousands of improperly altered ballots *before* posting the sample ballot for candidate and public review. But the hard work that it will take to correct the situation does not justify allowing this wrong to go uncorrected. Too much is at stake.

This case concerns the fundamental and constitutionally-protected right to freedom of political association as guaranteed by Article I, Section 5 of the Alaska

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Constitution—a right even more robust than that guaranteed by the First Amendment of the U.S. Constitution—as well as Petitioners' obligations to follow Alaska Statutes and the rule of law. Contrary to their claims of a "design" change, the State has substantively altered the general election ballot by removing important identifying information about each candidate, and has taken this radical step without any notice to impacted parties (such as Respondent) and after ballots have already been printed, in a clear effort to avoid legitimate legal challenges such as this one. To protect the rights of all Alaskans, Respondent respectfully requests that this Court deny Petitioners' Petition for Review and preclude them from violating the Alaska Constitution and the plain terms of AS 15.15.030(5). Petitioners must not be permitted to mail any ballots that do not comply with the law.

## BACKGROUND

In 2018, this Court held that the Division of Elections violated Article I, Section 5 of the Alaska Constitution when it prohibited the Alaska Democratic Party from allowing independent voters to participate as candidates in Democratic primary elections. *See generally State v. Alaska Democratic Party*, 426 P.3d 901 (Alaska 2018) ("*ADP*"). Since then, independent, non-partisan, and unaffiliated voter candidates have been permitted to participate in Democratic primaries, thereby allowing candidates to essentially hold two separate political associations: (1) their "party affiliation," which

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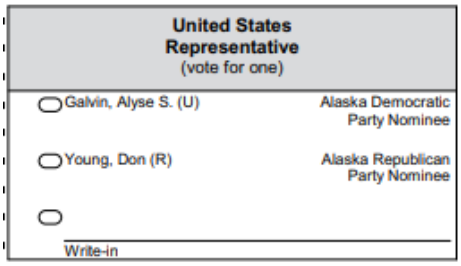
identifies the party with which they affiliate as a voter (if any), and (2) their "party designation," which identifies the political party whose nomination they have received.

***Ballot design since 2018***

In all elections since *ADP* was decided, Petitioners have prepared and printed ballots consistent with AS 15.15.030(5) to indicate the party affiliation (if any) of the candidate and the primary the candidate is running in, or party by which the candidate was nominated, as shown in the excerpt from the 2018 general election sample ballot below:



[1]

The same was true in the 2018 primary election, as reflected by the sample ballot:

[1] *State of Alaska (Sample) Federal Election Ballot, November 6, 2018*, https://elections.alaska.gov/election/2018/General/SampleBallots/GEN%2018%20FEDERAL%20Sample.pdf.



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| United States Representative (vote for one) | |
|---|---|
| Cumings, Christopher C. (N) | Alaska Democratic Party Primary |
| Galvin, Alyse S. (U) | Alaska Democratic Party Primary |
| Hafner, Carol (D) | Alaska Democratic Party Primary |
| Shein, Dimitri (D) | Alaska Democratic Party Primary |

[2]

And Petitioners took the same, consistent approach again in the 2020 Primary election, held just a few months ago:

| United States Senator (vote for one) | |
|---|---|
| Blatchford, Edgar - D | Democratic |
| Cumings, Chris C. - N | Democratic |
| Gross, Al - N | Democratic |
| Howe, John Wayne - A | AK Indep. |
| **United States Representative (vote for one)** | |
| Galvin, Alyse S. - N | Democratic |
| Hibler, William "Bill" - D | Democratic |
| Tugatuk, Ray Sean - D | Democratic |

[3]

However, on September 14, without warning or explanation, Petitioners published the below sample ballot for the 2020 general election. Without warning or clear

[2] *State of Alaska Official (Sample) Ballot, Primary Election, August 21, 2018*, https://www.elections.alaska.gov/election/2018/Primary/SampleBallots/HD1%20ADL%20Sample.pdf.

[3] *State of Alaska Official (Sample) Ballot, August 18, 2020, Alaska Democratic Party Primary, Alaskan Independence Party Primary*, https://www.elections.alaska.gov/election/2020/Primary/SampleBallots/FED%20AD.pdf.



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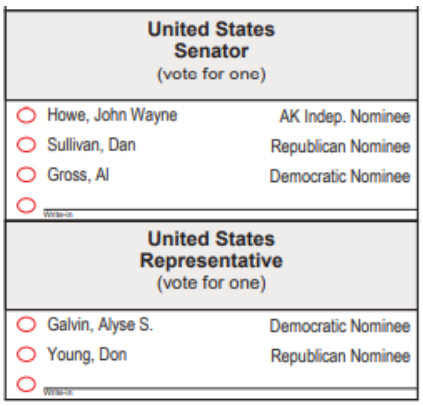
explanation and in direct violation of the clear language of AS 15.15.030(5), Petitioners have pivoted to *omitting* party affiliation information from the ballot entirely. The 2020 sample federal ballot, which Petitioners published on Monday of this week, lists candidate names as follows:



| United States Senator (vote for one) | |
|---|---|
| Howe, John Wayne | AK Indep. Nominee |
| Sullivan, Dan | Republican Nominee |
| Gross, Al | Democratic Nominee |
| Write-in | |
| **United States Representative (vote for one)** | |
| Galvin, Alyse S. | Democratic Nominee |
| Young, Don | Republican Nominee |
| Write-in | |

[4]

Galvin first learned of Petitioners' abrupt and unexplained change only three days ago, the same day that the sample ballot was first released, through a report first published on Twitter.[5] Her campaign then reviewed the sample ballot published that same day on the Division of Elections website and confirmed that it was consistent with the sample ballot posted on Twitter. The Anchorage Daily News reported that Defendant Fenumiai

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[4] *State of Alaska Official (Sample) Ballot, General Election, November 3, 2020*, https://www.elections.alaska.gov/election/2020/General/SampleBallots/FED.pdf.

[5] @alaskalandmine, TWITTER (Sept. 14, 2020), https://twitter.com/alaskalandmine/status/1305590538314289152?s=21.



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said she "unilaterally" decided, on Monday, September 14, to make the change.[6]

This last-minute decision was announced perilously close to the federal deadline for mailing absent stateside and overseas uniformed service member and overseas civilian ballots, which is no later than 45 days before election day. *See* 52 U.S.C. § 20302(a)(8). For the November 3, 2020 general election, that deadline is this Saturday, September 19. Petitioners now argue that there is no time for them to change the ballot and still comply with this law.

***Party affiliation***

Party affiliation is a uniquely important facet of Alaska demographics, since few Alaskans formally affiliate with any political party. More than half of all Alaska voters are registered as Non-Partisan or Undeclared.[7] Only 13% of Alaska voters identify and are registered as Democrats in voter registration records, and only 24% identify and are registered as Republicans. In contrast, and unlike in most other states, over 58% of Alaska

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[6] James Brook and Aubrey Weiber, *A late change to the 2020 General Election ballot sparks outcry from Alaska Democrats*, Anchorage Daily News (Sept. 14, 2020), https://www.adn.com/politics/2020/09/14/a-late-change-to-the-2020-general-election-ballot-sparks-outcry-from-alaska-democrats/ (reporting that "[l]ooking at the ballot alone, there's no way to tell that [candidates are] independents or non-partisan").

[7] State of Alaska, Division of Elections, Number of Registered Voters by Party within Precinct (Sept. 3, 2020), https://www.elections.alaska.gov/statistics/2020/SEP/VOTERS%20BY%20PARTY%20AND%20PRECINCT.htm#STATEWIDE.



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voters identify and are registered as Non-Partisan or Undeclared. *Id.* In other words, more than half of Alaska voters choose not to affiliate with any political party and to exercise their freedom of association by explicitly registering with the State as *not* affiliated.

Galvin was registered and identified as an Undeclared voter for well over a decade. Verified Compl. ¶ 25. In 2019, she changed her registration from Undeclared to Non-Partisan. Galvin changed her registration because Non-Partisan best represents her beliefs and political objectives, and it is how she self-identifies and chooses to associate as a voter. *Id.* at ¶¶ 26-27.

That Galvin has won her Democratic Primary election and, for the second time, is running as the nominee of the Alaska Democratic Party has not changed or altered how Galvin identifies as a voter. *Id.* at ¶ 28. Galvin's personal voter registration affiliation as Non-Partisan, and formerly as Undeclared, is and has been an important part of her identity, her campaign platform, and her relationship with her supporters. *Id.* at ¶¶ 28-29.

**THE COURT SHOULD DENY THE PETITION FOR REVIEW**

The Superior Court entered a well-reasoned temporary restraining order based upon a plain reading of an Alaska Statute. Recognizing the time-sensitive nature of the issues raised, the Superior Court also ordered additional legal briefing (now filed) and a hearing scheduled for tomorrow at 10:30am. Instead of taking immediate action to print the estimated 8,000 corrected ballots they allege are required to be mailed by 6pm

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tomorrow, the State has elected to seek Supreme Court review at the risk of compromising the rights of all Alaskans.

In support of their petition, Petitioners allege that the Division of Elections will miss a federal deadline and will be forced to divert enormous resources in a desperate scramble to comply with the Superior Court's order. The State also argues that postponement of review will result in "injustice" because of "unnecessary delay, expense in hardship." Pet. at 4. In addition to being vague, the State's assertion is incorrect. The fact that the State will need to expend "money, time, and energy" to comply with the relief granted is irrelevant to the propriety of the relief, and does not warrant setting it aside. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). The only injustice is allowing altered ballots to be mailed in violation of the law, and allowing the State's last-minute actions to compromise the electoral process. Finally, as explained herein, the State has the clear option of obtaining an exemption to this Saturday's federal deadline to provide additional time to get things right.

The temporary restraining order was properly entered, and immediate review is not necessary or warranted. The merits likewise support the verified complaint filed by Alyse Galvin.

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## THE TEMPORARY RESTRAINING ORDER WAS PROPERLY GRANTED

### I. Legal standard for temporary restraining order.

Under Alaska Rule of Civil Procedure 65, this Court applies two different tests, depending on the "the nature of the threatened injury," to determine whether a Respondent is entitled to a temporary restraining order or preliminary injunction. *State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

> If the Respondent faces the danger of irreparable harm and if the opposing party is adequately protected, then we apply a balance of hardships approach in which the Respondent must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit. If, however, the Respondent's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the Respondent the heightened standard of a clear showing of probable success on the merits.

*Id.* (internal quotation marks and citations omitted). "The balance of hardships is determined by weighing the harm that will be suffered by the Respondent if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction." *State v. Kluti Kaah Native Village*, 831 P.2d 1270, 1273-73 (Alaska 1992), *quoting A.J. Industries, Inc., v. Alaska Public Service Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects*, 483 P.2d 198 (Alaska 1971).

Under either the "balance of the hardships" or "probable success on the merits"

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test, Respondent should prevail because the requirements of AS 15.15.030(5) are clear and are not met on Petitioners' current ballot, as detailed below.

## II. The TRO should stand because Galvin is at risk of immediate irreparable harm.

There is little doubt that Galvin is at severe risk of irreparable harm, as the Superior Court's Temporary Restraining Order confirms. She is deprived of the right to fully express her political affiliation—and thus, political association—on the ballot, and non-partisan voters who wish to affiliate with a like-minded candidate are denied this opportunity by Petitioners' arbitrary, eleventh-hour action. *See Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."). Galvin's irreparable harm derives from the fact that freedom of political association is a fundamental right under the Alaska Constitution. *See* Alaska Const. art. I, § 5; *State, Div. of Elec. v. Green Party of Alaska*, 118 P.3d 1054,1064-65 (Alaska 2005); *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982). Indeed, the Alaska Constitution is more protective of political associational rights than even the federal constitution. *ADP*, 426 P.3d at 911.

The deprivation of such a right undoubtedly constitutes irreparable injury. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (*citing Elrod v. Burns*, 427 U.S.

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347, 373 (1976)); *see also Mat-Su Coal. for Choice v. Valley Hosp.*, No. 3PA-92-1207, 1993 WL 13013293, at *3 (Alaska Super. Ct. Feb. 9, 1993) ("Respondents also cite significant authority for the proposition that they will suffer per se harm from the denial of a fundamental constitutional right."). Such harm is particularly problematic and irreparable in the electoral context, as "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

## III. The TRO should stand because any risk of harm to Petitioners is of their own making, and is, in any event, not irreparable.

Galvin's risk of irreparable harm stands in stark contrast to any putative harm facing Petitioners, which Petitioners themselves conceded, in argument before the Court yesterday, is negligible. Not only has Galvin posted a bond as ordered by the Court to indemnify any injury, *see Alaska Pub. Utilities Comm'n*, 534 P.2d at 554, but Petitioners *admitted* that the monetary cost of reprinting ballots poses no significant harm to the state. *See* Ex. A, *Log notes of Hearing on Motion for TRO*, September 16, 2020, 12:30 p.m. Indeed, the only potential injury that Petitioners articulated was that the federal deadline to send its 11,000 Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") ballots is fast approaching and that the Division of Elections *may* need more time to determine its printer's software capabilities. Ex. B at 4; *see also* 52 U.S.C. § 20302(a)(8)

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(UOCAVA deadline). But any hypothetical technological hurdles associated with reprinting 11,000 ballots by the end of the week are "inconsiderable" when compared to the harm of mailing legally defective ballots to Alaska voters. *Alaska Pub. Utilities Comm'n*, 534 P.2d at 554. In the prior words of the State, a ballot that only lists the candidate's nominating party with "mislead voters." Ex. B, Brief of Appellant State of Alaska, *State v. Alaska Democratic Party*, Supreme Court No. S-16875 (Dec. 18, 2017) ("State's 2018 Brief"), at 39.

In addition to the fact that the State, if pushed, could print corrected ballots before the deadline without significant harm, Petitioners are more than adequately protected from any injury associated with a failure to comply with the federal deadline by the hardship exemption *that is built into that federal deadline itself*. *See* 52 U.S.C. § 20302(g)(1). Under that exemption, "[I]f the chief State election official determines that the State is unable to meet the [45-day requirement] with respect to an election for Federal office due to an undue hardship described in paragraph (2)(B), the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection." This hardship exemption specifically contemplates litigation as justification for such delay. 52 U.S.C. § 20302(g)(2)(B) (listing as an undue hardship that "[t]he State has suffered a delay in generating ballots due to a legal contest").



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In sum, Petitioners are clearly protected against even potential and inconsiderable injury by exemptions built into the very federal statute that they invoke, whereas Galvin faces grave and permanent harm to her constitutional rights. Thus, the balance of hardships test establishes that injunctive relief is proper.

## IV. Galvin should succeed on the merits of both claims.

Even if the balance of the harms did not favor Galvin, she should succeed on the merits of both of her claims, which are supported by the plain language of AS 15.15.030(5) and precedential decisions of this Court.

### A. Petitioners' intended ballots violate AS 15.15.030(5).

Alaska law mandates that the Director of the Division of Elections "prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections." AS 15.15.030. To that end, the statute provides: "The names of the candidates and their *party designations* shall be placed in separate sections on the state general election ballot under the office designation to which they were nominated. The *party affiliation*, if any, shall be designated after the name of the candidate." AS 15.15.030(5) (emphasis added). The statute clearly contemplates two separate and distinct party indicators, and is to be "followed when applicable." AS 15.15.030.

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Omitting candidates' party affiliation constitutes a clear violation of this directive. There is no statutory or legal basis for including only the nominating party (that is, the party designation), particularly when the statute specifically mandates that the "party affiliation, if any, shall be designated after the name of the candidate." AS 15.15.030(5).

### 1. Other references to "party affiliation" in Alaska law recognize that the term refers to a person's registration of choice.

Unlike a candidate's "party designation"—which is, as the phrase suggests, designated by a party—a candidate's "party affiliation" is chosen by the candidate when the candidate registers to vote. The Alaska Statutes' several references to party affiliation make this clear. *See* AS 15.07.050 (providing rules for who may designate a voter's "choice of party affiliation on the voter registration application form"); AS 15.07.070(k)(1)(C) (requiring notification of the process to "adopt a political party affiliation"); AS 15.07.075 (recognizing a voter's affiliation as "undeclared" or "other" based on what the voter declares on a voter registration form); AS 15.25.010 (allowing voters to participate in primary elections according to their registered affiliation); AS 15.25.060 (explaining that "for purposes of determining which primary election ballot a voter may use, a voter's party affiliation is considered to be the affiliation" chosen during registration). And, although the State suggested before the Superior Court yesterday that voters cannot register to vote as "Nonpartisan" or "Undeclared" (and thus that those



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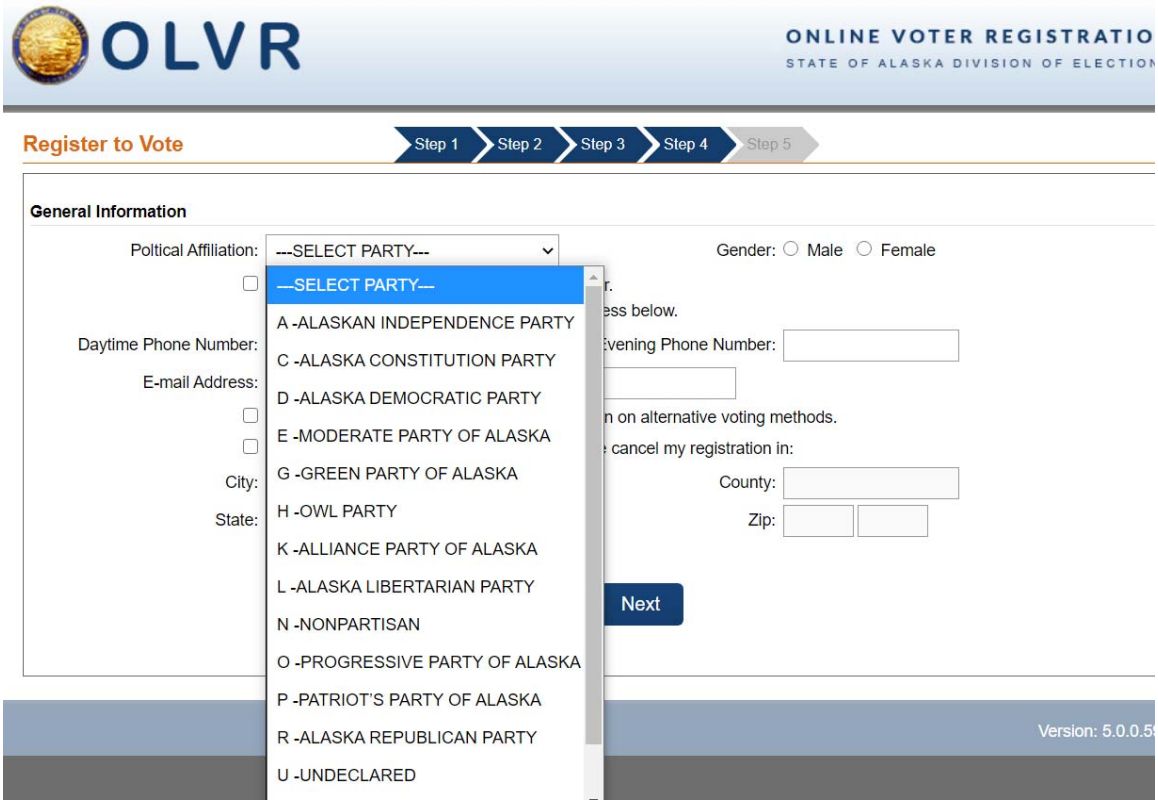
identifiers have no place on the ballot even if "party affiliation" as used in AS 15.15.030(5) did carry some weight), that is demonstrably untrue, as a quick check of https://voterregistration.alaska.gov/ confirms:




By requiring the ballot to list both a candidate's party designation and party affiliation, the statute plainly contemplates two different indicia. AS 15.15.030(5). While Alaskans themselves select whether and with whom to affiliate, "party designation" is necessarily undertaken by an entity *other* than the voter or candidate. Indeed, AS 15.15.030(5) illustrates the plain meaning of this term: "The party affiliation, if any, *shall*



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*be designated* after the name of the candidate" (emphasis added). A candidate's "party affiliation" is chosen by herself, and "designations" are assigned by other actors: a political party may designate its candidates through a primary election, and the Director of Elections is required to make designations on the ballot. Crucially, AS 15.15.030(5) requires the ballot to include *both* Galvin's self-selected affiliation as Nonpartisan, and the Democratic Party's designation of her as its nominee.

Moreover, the State's assertion that AS 15.15.030(5) is merely a positional directive indicating that party information should be listed after the candidate's name fails to account for why the legislature would distinguish between "party designations" and "party affiliations" at all. *See* Pet. at 6. Because the State's conclusory assertions regarding the legislative history do not account for this distinction, they should not be considered determinative of legislative intent. Any other reading would render either "party designation" or "party affiliation" as mere surplusage, against this Court's "rule of construction that 'each section of a statute is presumed to serve some useful purpose.'" *Priest v. Lindig*, 583 P.2d 173, 176 n.8 (Alaska 1978) (quoting *Isakson v. Rickey*, 550 P.2d 359, 364 (Alaska 1976)).

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### 2. *ADP* does not undermine the plain language of AS 15.15.030(5) and does not support the State's new ballot design.

This Court's 2018 decision in *ADP* required Petitioners to permit independent, non-partisan, and unaffiliated voter candidates to participate in Democratic primary elections. In no way did it suggest that once a candidate has been designated by a political party as its candidate of choice that the candidate is then affiliated with that party, as the Alaska Statutes define the term "party affiliation." Party affiliation remains a separate and distinct element—and, importantly, a separate and distinct consideration for voters—which the State has previously recognized, and continued to recognize until the alleged "design" change at issue here.

Petitioners contend that AS 15.15.30(5) cannot possibly require two separate pieces of information because, while the law has gone unchanged for decades, ballots only began including both pieces of information in 2018. But contrary to Petitioners' assertion, this makes perfect sense. Before *ADP* was decided, ballots only needed to include "party designation" to satisfy AS 15.15.30(5), because at that time "party designation" and "party affiliation" were required to be the same. In other words, before *ADP*, there was no possibility for a candidate to affiliate with, or be registered as, a member of a party other than the one that nominated them. AS 15.15.30(5) has always required that Petitioners indicate both pieces of information, it is just that, before 2018,

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the "party affiliation rule" prevented the possibility of those pieces of information not aligning and thereby requiring separate indicators.

Similarly, Petitioners assert that primary ballots are irrelevant here because AS 15.15.30(5) only applies to general elections. Again, before *ADP*, there could be no candidate on the general election ballot whose "party designation" did not match her "party affiliation," because only those with a matching "party designation" and "party affiliation" could ever have been nominated (through a primary) at all. To the extent that Petitioners concede that including both "party affiliation" and "party designation" *is* required to meet the statutory mandate that all ballots, including primary ballots, are prepared to "facilitate fairness, simplicity, and clarity in the voting procedure," the same is true here. *See* Pet. at 10 (citing AS 15.15.030). The State cannot deprive voters of statutorily and constitutionally required information in the name of "fairness, simplicity, and clarity." The State has not and cannot point to anything unfair, unclear or complicated about the 2018 ballots and the 2020 primary ballot that required removal of party affiliation from the 2020 general election ballot.

Petitioners rely on a single sentence in *ADP* to support their new ballot design, *see* Pet. at 14, but that sentence is taken out of context. The full paragraph reads (with the sentence Petitioners highlight underlined):

On the primary election ballot, the State could simply print next to each



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> candidate's name the political party whose primary election the candidate is running in. On the general election ballot, the State could simply print the nominating party's name next to the candidate's name. The State appears to concede that the primary election ballot can be redesigned, but it is unsatisfied with the resulting general election ballot. The State argues that the possible descriptors for a candidate's party affiliation — such as "nonpartisan," "undeclared," "non-affiliated," or "independent" — are by definition inaccurate, and that whichever word is chosen will cause voter confusion or deception. But we believe the State's concerns underestimate the Division of Elections and Alaska voters' common sense.

*ADP*, 426 P.3d at 913. *ADP* only speaks to one of the two separate and distinct pieces of identifying information required by the plain terms of AS 15.15.030(5), since only one of those identifiers—party designation—was at issue in *ADP*. *Nothing* in the sentence on which Petitioners rely, nor in the paragraph or even decision as a whole, speaks to or erases AS 15.15.030(5)'s plain language requirement that "party affiliation" *also* appear next to a candidate's name on the ballot.

Simply put, *ADP* did not address the precise issue here, nor look at the ballot as a whole. To suggest that the Court overruled the clear requirements of AS 15.15.030(5) in dicta is nonsensical. *ADP* is thus inapposite to Petitioners' position.

### 3. As Petitioners argued in *ADP*, non-compliance with the two separate requirements of AS 15.15.030(5) risks voter confusion.

In 2018, Petitioners argued before this Court in *ADP* that *not* having *both* party affiliation and party designation appear on ballots would "mislead voters by providing

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them with incomplete information." Ex. B, State's 2018 Brief, at 39. The State recognized that, unless both pieces of information are on the ballot, "[v]oters will reasonably assume that the nominee of the Democratic Party is a registered Democrat who identifies with the Party, not a person who refuses to register with it." *Id.* Respondent agrees. But now, it is the State that is forcing that misapprehension upon voters, and unless that is rectified by this Court, there will be no way to determine which voters made decisions in the voting booth based on the false assumption that the State now invites voters to make. The Court should decline to accept any argument that the State now attempts to make to explain away its prior reasoning, which still stands with just as much force today as it did in 2018.

Since *ADP*—up to and including the very recent 2020 primary—the Division of Elections has consistently followed the plain language of AS 15.15.030(5) by indicating party designation in a "separate section[]" from a candidate's chosen party affiliation with a parenthetical "after the name of the candidate," AS 15.15.030(5). As the Court noted, Petitioners have not "asserted any meaningful or cogent reason for not including this information on the current general election ballot" now. TRO Order, Sept. 17, 2020.

In their pending Petition for Review, Petitioners argue that "AS 15.15.030(5) applies only to the general election by its plain terms." Pet. at 10. This, of course, does not undermine plain language of that statute, which clearly requires both party affiliation and party designation. Petitioners go on to suggest that there should be some distinction



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between the primary and general election because, in a primary, "without the candidate's voter registration [party affiliation], voters are likely to be misled into thinking that candidates running in a party's primary are party members." *Id.* The State then asserts that "[t]hese considerations do not exist for the general election ballot." *Id.*

The State is wrong. There is no cogent reason to conclude that voters will make one assumption in the primary and an entirely different assumption in the general election. Simply put, it defies logic to suggest that a general election ballot that says "Democratic Nominee" next to a candidate's name does not risk voters being "misled into thinking" that the candidate is a "party member[]."

To wit: if a candidate walks into a polling booth and knows nothing about any of the candidates running for Dog Catcher, but *does* have a party affiliation preference, logic suggests that the voter will endeavor to vote for the candidate that reflects their party affiliation—regardless of whether any particular party has designated that candidate as its nominee. This is particularly true in Alaska where so many voters choose not to affiliate with one of the two major parties. The converse is also true, since some Alaska voters refuse to vote for candidates who affirmatively affiliate with certain political parties. The current ballot design robs Galvin of the opportunity to reduce voter confusion by confirming to voters that, despite being nominated by the Democratic party, she herself does not affiliate as a Democrat, as the plain terms of AS 15.15.030(5) allow her



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to do.[8]

### B. Petitioners' intended ballots violate both Galvin and Alaska voters' constitutional right to freedom of political association.

The Alaska Constitution grants every person the right to "freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Alaska Const. art. I, § 5. This inherently guarantees the rights of people—and political parties—to associate together to achieve their political goals. *See State, Div. of Elec. v. Green Party of Alaska*, 118 P.3d 1054,1064-65 (Alaska 2005); *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982).

When an election law or procedure is challenged, Alaska courts first determine whether the claimant has in fact asserted a constitutionally protected right. *Green Party I*, 118 P.3d at 1061 (footnotes omitted) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)). Next, the court must weigh and assess "the character and magnitude of the asserted injury to the rights," against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, courts must "judge the fit between the challenged legislation and the [S]tate's interests in order to determine 'the

---

[8] To the extent Petitioners rely on non-Alaska case law to suggest that including party affiliation on a ballot is a form of advertising for a candidate, and thus should be disallowed, that directly conflicts with the plain language of AS 15.15.030(5), which unquestionably requires candidates' party affiliations to appear on ballots. "Statutory interpretation in Alaska begins with the plain meaning of the statute's text," which here is plain as day on this point. *M.M. through next friend Kirkland v. Dep't of Admin., Office of Pub. Advocacy*, 462 P.3d 539, 544 (Alaska 2020).



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extent to which those interests make it necessary to burden the Respondent's rights.'" *Id.* "This is a flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the [S]tate's interest must be closer." *Id.*; *see also ADP*, 426 P.3d at 907 (applying test to hold that burden imposed by Division of Elections' prohibition on allowing independent and unaffiliated voters to run in Democratic primary elections was not justified given the Alaska Democratic Party's right to freedom of association pursuant to Alaska Const. Art. I, § 5).

As this Court has clarified, the Alaska Constitution is more protective of political associational rights than the federal constitution. *Id.* at 911. And this Court has struck down election laws that impinged upon the freedom of association in the political context on multiple occasions. For example, in striking a law requiring voters to "fully affiliate themselves with a single political party or to forgo completely the opportunity to participate in that party's primary," the Court found that this "place[d] a substantial restriction on the political party's associational rights." *Green Party*, 118 P.3d at 1065.

Article I, Section 5 of the Alaska Constitution also protects a candidate's right to have their "party affiliation" as well as their "party designation" indicated on the ballot. As this Court has noted regarding voters, requiring that one "fully affiliate themselves with a single political party or to forgo completely the opportunity to participate in that

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party's primary . . . place[d] a substantial restriction on the political party's associational rights." *Green Party*, 118 P.3d 1054, 1065 (Alaska 2005); *see also ADP*, 426 P.3d at 909. The same is true here. Omitting Galvin's "party affiliation" from the ballot places a substantial burden on her right to associate, because it means that the state is casting her as being affiliated only with her "party designation," which is simply not true.

While Petitioners now argue in their Petition for Review that Galvin has no constitutional right to have this information printed on the ballot, because the ballot is not "a forum for Galvin's campaign expression," Petitioners misstate the right that Galvin asserts. Petition at 13. Galvin is not seeking to vindicate her rights to speech or expression, but rather her rights to associate with (and the interrelated right *not* to associate with) certain political parties as a voter and an individual.

Moreover, the impact of misrepresenting Galvin—and all other candidates who, like Galvin, do not necessarily affiliate with the same party by which they have been designated—forces the voter to make the same choice that this Court found improper in both *Green Party* and *ADP*: "The choice that the [S]tate forces a voter to make means that a political party [or candidate] cannot appeal to voters who are unwilling to limit their . . . choices to the relatively narrow ideological agenda advanced by any single political party." *ADP*, 426 P.3d at 909 (quoting *Green Party*, 118 P.3d at 1065).

As this Court has recognized, associational rights of parties and candidates directly

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impact the associational rights of Alaska voters, who are entitled to know not only which party ultimately nominated a particular candidate, but also "the ideological cast of the nominated candidates." *ADP*, 426 P.3d at 909 (quoting *Green Party*, 118 P.3d at 1065). It similarly impacts the well-established associational rights of the political parties as well, as "the Democratic Party does not just want primary election candidates who happen to be independent voters, it wants candidates because they are independent voters. Even if federal law does not recognize this burden as substantial, it does not change the magnitude of the burden under the Alaska Constitution." *ADP*, 426 P.3d at 909.

On the one hand, Petitioners' actions in omitting Galvin's voter registration affiliation from the ballot impinge upon Galvin's constitutionally protected right to associate politically as a voter as well as through her party nomination. Petitioners' actions also burden the associational rights of the non-partisan and independent Alaska voters who support Galvin, or who prefer to support other non-partisan or unaffiliated candidates based on their own political associations and affiliations.

And on the other hand, Petitioners have failed to offer any justification for their actions except that their new ballot design will reduce voter confusion. Ex. B at 5 (Petitioners arguing that the only benefit to the State in adopting this new ballot design was to "clean up the ballot" by taking "out unnecessary information" to reflect "[t]he view this would not be too confusing to the voter"). But this Court has already rejected



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that argument, and for good reason. Alaska voters are competent voters deserving of our courts' confidence. *ADP*, 426 P.3d at 913.

Specifically, this Court has rejected Petitioners' similar arguments when they opposed Alaska's use of combined primary ballots, and in rejecting Petitioners' arguments when they opposed allowing the Democratic Party to permit independent candidates to run for their nomination. *See id*. Now, Petitioners seek to recycle that same failed argument in asserting that the ballot design Petitioners themselves created and voters have successfully used in at least three statewide elections, including most recently this past April, have somehow and suddenly become too confusing for Alaska voters to comprehend. But, as our courts have always held, Alaska voters deserve more trust and confidence than that. *See id.* ("We are confident the Division of Elections will be able to design a ballot that voters can understand."). And "[t]he State provides no basis for predicting that Alaska voters will be unable to understand a Democratic Party nominee who nonetheless is, for voter registration purposes, an independent voter." *Id.*

While the this Court did note that the State might otherwise "include prominent disclaimers [along with ballots] explaining that a candidate's party affiliation denotes only the candidate's voter registration and nothing more," it was Petitioners who first elected to include that information on the ballots directly, and in so doing have effectively shown that any putative risk of voter confusion rings hollow. *See supra* at II.A.3.



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Because Petitioners' justifications for omitting Galvin's voter registration affiliation from the ballot have long been rejected by our courts and, to the extent legitimate, are outweighed by the burdens Petitioners' actions impose on the rights to freedom of political association guaranteed to Galvin, Petitioners' intended ballot design is unconstitutional.

## V. Courts regularly grant the precise remedy that Galvin now seeks, finding that any burden imposed on Petitioners is outweighed by the interest in ballots being correct and lawful.

Galvin seeks an order enjoining Petitioners from printing and mailing any ballots that violate AS 15.15.030(5) and Article I, Section 5 of the Alaska Constitution, along with a permanent mandatory injunction requiring Petitioners to print, or re-print, ballots so they comply with constitutional and statutory requirements. This follows *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1216 (Alaska 1993), in which this Court remanded a case to the Superior Court envisioning this precise relief.

Nor is this remedy novel elsewhere. Courts regularly order election officials to reprint ballots under similar situations, and sometimes even to re-transmit amended absentee ballots. *See, e.g.*, *Erlandson, et al. v. Kiffmeyer, et al.*, C7-02-1879 (Minn. 2000) (ordering state to print new ballots printed after Paul Wellstone died and Walter Mondale replaced him as the Democratic-Farmer-Labor Party's nominee for U.S. Senate in October, mere weeks before the upcoming election); *Tsosie v. Navajo Bd. of Election*

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*Sup'rs*, No. SC-CV-68-14, 2014 WL 7251147 (Navajo Oct. 23, 2014) (requiring Navajo Election Administration to immediately re-print ballots to comply with election code and remove name of disqualified candidate); *LaRouche v. Hannah*, 822 S.W.2d 632 (Tex. 1992) (ordering reprinting of primary ballots to include candidate's name); *Taylor v. Kobach*, 300 Kan. 731, 738–39, 334 P.3d 306, 311 (2014) (requiring ballots be reprinted so candidate, who had timely withdrawn his candidacy, would not be included on the ballot); *State ex rel. Peacock v. Latham*, 170 So. 475 (1936) (compelling county boards of elections to re-print ballots in compliance with writ of mandamus); *see also Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. 2018) (requiring 32 of Florida's 67 counties to reprint *sample* ballots to include a Spanish language sample ballot), *order enforced*, No. 1:18-CV-152-MW/GRJ, 2018 WL 7506109 (N.D. Fla. Nov. 5, 2018). In fact, a court ordered a remedy that will require the widespread reprinting of ballots in Texas earlier this week. *See In re Green Party*, No. 20-0708 (Texas Sept. 15, 2020).

Courts have clarified that the means of a state being ordered to reprint new ballots, or even send out amended ballots to correct a material error or deficiency in their initial ballot design, is more than justified by the ends. *See Lenehan v. Township Officers Electoral Bd. of Schaumburg Tp.*, 988 N.E.2d 1003, ¶ 37 (Ill. App. Ct. 2013) ("While [ordering ballots to be reprinted] undoubtedly inconvenienced the election authority, it was early enough that the election day paper ballots could be reprinted in time for election



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day."); *Lenehan v. Township Officers Electoral Bd. of Schaumburg Tp.*, 945 N.E.2d 1175, 1180-81 (Ill. App. Ct. 2011) (noting that, regardless of fact that relief "would require the ballots to be reprinted," any prejudice to state was not the result of any delay on Respondent's part, and burden of reprinting is therefore not relevant); *Brian v. Fawkes*, 2014 WL 5409110, *24 (V.I. 2014) (noting "[t]he sole cost incurred would be the costs associated with printing a new general election ballot, which . . . cannot form a valid basis for declining to enforce [a court order], given that [defendant's] decision not to comply with [a separate] order is precisely the reason why those costs would need to be incurred in the first place.").[9]

Courts have also specifically rejected arguments by states to assert that reprinting ballots would affect the timing of sending ballots to military and overseas voters, even when challenged ballots had already been mailed. For example, in *New Jersey Democratic Party, Inc. v. Samson*, 175 N.J. 178 (2002), the New Jersey Supreme Court held:

> Believing that substantial numbers of overseas ballots already may have been mailed, defendant Forrester claims

[9] *See also* Doug Chapin, *Candidate's Death Prompts Last-Minute Montana Ballot Scramble*, Election Academy (Sept. 23, 2016), https://editions.lib.umn.edu/electionacademy/2016/09/23/candidates-death-prompts-last-minute-montana-ballot-scramble/ (in response to candidate death during the week that military and ballots were required to be mailed, Montana was required to (and did) reprint thousands of ballots in time to meet the deadline).



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> that military and civilian absentee voters may be disenfranchised by the late mailing of new ballots.
>
> *The short answer to defendant's concern is that the expeditious handling of amended absentee ballots will assure that the voters who use those ballots will have their votes counted in the general election*. If [the court] concludes at some point that it is necessary to extend the time for certifying the election to allow absentee ballots to be tabulated, that remedy is also available. *See Harris v. Florida Elections Canvassing Commission*, 122 F.Supp.2d 1317, 1325 (2000) (holding ten-day extension allowing State to count overseas absentee ballots in federal elections to be valid); *see also U.S. v. Wisconsin*, 771 F.2d 244, 245 (1985) (upholding district court order requiring election officials to count certain late-arriving ballots).

*Id.* at 199 (emphasis added). In other words, the remedy Galvin seeks is far from unprecedented, particularly here, where any administrative burden and cost associated with reprinting ballots would be the sole result of *Petitioners' calculated delays* in failing to publicize their change to the ballot design until the week that military and overseas ballots must be sent out. The State appears to be asking this Court to allow the altered ballot to stand uncorrected because it would be too hard to correct a mistake of their own making. The people of Alaska deserve better.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court allow

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Superior Court's order to stand and permit it to enter injunction in due course.

DATED: September 17, 2020.

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Attorneys for Respondent
Alyse S. Galvin

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I hereby certify that on September 17, 2020 a true and correct copy of the foregoing document was sent via Email to:

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In the Superior Court at Anchorage Alaska

| | | | |
|---|---|---|---|
| **Courtroom:** | 402 | **Judge:** | J. Henderson |
| **Date:** | Wednesday, September 16, 2020 | **Clerk:** | E. Plumb |
| **Case No:** | 3AN-20-07991CI | | |
| **Case Title:** | Alyse Gavin Vs. | | Gail Fenumiai & State of Alaska |
| **Type of Proceeding:** | Temporary Restraining Order Hearing | | |
| **Counsel Present:** | | | |
| Plaintiff: | Kevin Feldis | Present | Telephonic |
| | Pat Galvin | Present | Telephonic |
| Defendant: | Margot Payne Walsh | Present | w/ Client Telephonic |
| **Court Orders:** | **Will Take Matter Under Advisement** | | |

---

**Summary of Proceedings:**

12:40:47 PM

On record
Court identifies case and parties

**COURT**:
- This is a very newly filed case and the case information in the complaint and motion work before the court came up to chambers when I was in a separate proceeding which ended at 12:15
- Given information contained in the motion for temporary restraining order about timing anticipated when it comes to mailing of ballots and ability to proceed immediately under the rules with request for temporary restraining order
- I have scheduled the hearing for today during a time when my calendar could accommodate it
- I will be looking for guidance in your remarks
- Have counsel had opportunity to confer?

12:44:11 PM

**Mr. Feldis**
We have heard and don't think there is a need to confer further
Mailing the ballot as is

12:45:09 PM

**Ms. Payne Walsh**
I don't think a conference is going to accomplish anything at this point

12:45:26 PM

**COURT**:
- Did not appear there would be a need for court to hear evidence
- This was more legally based decision being requested of the court

12:45:56 PM

**Mr. Feldis**
Do not and don't think it necessary to put on any evidence
Design of the ballot has been posted publically
I think we can handle this today with argument

12:46:25 PM

**Ms. Payne Walsh**
I think the question of balance of hardship I plan to make representations about what will be

involved
I will provide an affidavit in support of that
That could be an issue if you are concerned about realities of what would be involved and what that means for the election and you might want to take evidence on that

12:47:47 PM **COURT:**
- Probably wise to proceed to argument
- I can notify parties

12:48:10 PM **Mr. Feldis**
State has altered the ballot to move party affiliation and we have no dispute
Violates the Alaska state statue

12:48:45 PM **Clerk change to Eplumb**

12:49:05 PM **Kevin Feldis**
You don't have to be democratic to vote democratic
Both are required
Ballot removes and ignores the party affiliation
Candidate selected their party
This is disingenuous
This is not a design change but a removal of statutory requirements
We are within the law
The state took the exact opposite standing in 2017
This was in appeal
Reads the statement
Their position today is completely opposite
They are removing the information
Pretty straightforward matter
We are asking to put that information back on
Consequences could be dramatic
This is a self-resolving issue for the state
State created this burden when they didn't need to
Not outweighed by the interest of the public
Any harm is far greater than the reprinting of the ballots
We are talking mostly about the ballots that need to go out the door this week
Not a highly burdensome
Can be easily fixed by adding the party affiliation
There is ample support
We are asking for the reprinting of ballots
That is what the law requires
12:54:12 PM There is nothing they can provide that will outweigh the need
That is critical
Also want to touch on a couple other points
This happened at the last minute
Ms. Mills sent an email yesterday
About cleaning up some things from the 2018 election
They have had years to legally consult on this matter
That didn't happen
That really matters
Many people look for party affiliation
They might not know the names of all the parties

The law requires that these are listed
They want to know the selected party affiliation
The ballot now is misleading
Her party affiliation is missing from the ballot
With only the nominated parties and not their personal designation
We ask that no ballots be mailed out before this is changed

12:58:06 PM **COURT**:
A portion of the motion references posting an appropriate bond
What is the appropriate amount?

12:58:50 PM **Kevin Feldis**
If it goes into the thousands of dollars
That would be appropriate
$5,000 to 10,000 would be appropriate

12:59:28 PM **COURT:**
Would there be any further authority outside of the motion?

12:59:43 PM **Kevin Feldis**
Supreme Court...
That would cover the order
State of Alaska v. Alaska Democratic party also
That case has been cited by the...
That is being used to support the case here
They were discussing having both of those pieces of information on the ballot
There are other cases that reference from other jurisdictions
The ability to require ballots be reprinted

1:01:54 PM **Margot Patton-Walsh**
This decision was not made in the last week or so
The ballots were with the ballot printer at the beginning of September
Want to address his suggestion that the ballot in 2018 shows a consistent
There has only been one year with both pieces of information
Before 2018 ballots included a parties affiliation
Non-affiliated or unaffiliated
Indicates that the candidate reached the ballot through means other than party registration
There is no practice here that party affiliation appears their affiliation
Registration status
If you look at the historical practice was to show the method of how a candidate reached the ballot
1:04:53 PM I think the problem with his argument is that
It describes what should be on the ballot
Reads the statute
When this was drafted those things could not be different
Affiliation and designation could not be different
Was required by statute to be the same
They couldn't be separate information
That party affilitation was for the purpose of running in that election
They will have registered as something
That is not typically what was put on the ballot
Makes sense to read the second sentence
Affiliation and designation are not separate things

That is the only way this sentence makes sense
Legislature could not have predicted the appeal decision 2 years ago
Could not have possibly meant two different things
There is no discrepancy between historical
There was an order in April 2018
They didn't issue an opinion until August
1:09:14 PM Wanted to address the disingenuous
Could confuse voters if their affiliation
Is reasonable for the state to abandon that view
He said little about the constitutional claims
They are just as without merit
To calculate the burden
We weigh the character and value of the burden
It is not clear how the lack of affiliation
She claims from her motion
Reads motion
Complaint becomes clearer that
Reads motion
But her nonpartisan identity
That is the stuff her campaign must show
While there is no denying the necessity of the ballot
It is a ballot not a bumper sticker
Not a billboard for selecting
Reads page 913
Those are campaign materials that they can put in with the ballot
None of this information needs to be in the ballot
She has to explain her political outside the 4 corners of the ballot
There is no clear constitutional harm in our position
Want to talk about the harm to the state
1:15:30 PM We are scheduled to send out 11,000 ballots on Friday
This is a federal deadline we are abiding by
We don't know if the printer has the ability to reprint
There is an issue if the ballots are different
Everyone has to have the same ballot
We have a concern about how ballots are handled or counted
Each ballot is counted by machine
Those are generated by the software
We don't know if the reprint would cause the machines need to be...
Every voter has to have the same ballot
We would have to reprint 800,000 ballots that have already been printed
Not sure that would be able to be completed within the time
We would strongly advocate a different solution to be able to give voters the information about her affiliation status

1:18:57 PM **COURT**:
Alternative ways to address
What else is available in terms of relief if not reprinting the ballot

1:19:38 PM **Margot Patton-Walsh**
Additional information could go out with the ballots
Or have signage at the polling locations
There is a problem because we are not allowed to campaign in any kind of way
Because her status is part of her literature

That is not really proper information for us to be promoting

1:21:01 PM **COURT:**
Problematic that all candidates

1:21:14 PM **Margot Patton-Walsh**
We would have to do it for all candidates
Comes perilously close to campaigning
We could put it in her campaign statement
We could potentially post in the polling places

1:22:06 PM **COURT:**
What benefit to the state would be a design change
I would like to be aware of the notice as to the design

1:23:25 PM **Margot Patton-Walsh**
The September 5 was the date that the ballot was sent to the printer
Believe the design was set...
The ballots were posted last weekend and that was the first time people saw it
The statute gives direction to create the ballot
There is a slightly narrower ballot
To clean up the ballot we took out unnecessary information
The view was the this would not be too confusing for the voter

1:25:32 PM **COURT:**
Any additional authority?

1:25:46 PM **Margot Patton-Walsh**
There are no Alaskan cases that they are entitled to argue their position on the ballot
She is not entitled to indicate something other than how she got on the ballot

1:26:35 PM **Kevin Feldis**
They have outlined here
That doesn't overcome the actual harm to the voters
What was done in 2018 and what was done in the primary in 2020
Was done up and until just now
It is completely proper and legal
Their position is very questionable
Go with what is legal
ADN reported Monday that they agreed to change the ballot on Monday
Per a unilateral decision
Their statute claim makes no sense
There is a distinction made
Has always existed
Want to address the red herring here
This should not be compared to the state that this is a billboard
This is what was done in 2018
Both under the first amendment and ...to band together
By taking this action at the last minute it makes no sense
They said they needed time after 2018 to make sure of the change
This was really a last minute decision
The Supreme Court didn't reject their position
It voted against them

| | |
|---|---|
| | No where did they say that they didn't agree with the<br>It doesn't suggest that a ballot is sufficient<br>Was not undermining the ballot |
| 1:31:32 PM | **COURT:**<br>Thank you for the argument you have provided<br>Will take this under advisement<br>Requires some additional time<br>Do plan to have something out to parties by the end of the day<br>May provide for further instructions<br>Heard as much argument |
| 1:32:45 PM | **Kevin Feldis**<br>The order lays out our position |
| 1:33:02 PM | **Margot Patton-Walsh**<br>No questions |
| 1:33:16 PM | **COURT:**<br>Will let you go so I can get to the task of reviewing the laws sighted |
| 1:33:35 PM | **Off record** |

I hereby certify that this is a true and correct copy of the original on file in my office
ATTEST: Clerk of the Trial Courts
By: Deputy
Date: 9/16/2020

**IN THE SUPREME COURT OF THE STATE OF ALASKA**

| | | |
|---|---|---|
| **State of Alaska,** | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | Supreme Court No. **S-16875** |
| | ) | |
| **Alaska Democratic Party,** | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |

Case No.: **1JU-17-00563CI**

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
THE HONORABLE PHILIP M. PALLENBERG, JUDGE

**BRIEF OF APPELLANT**
**STATE OF ALASKA**

JAHNA LINDEMUTH
ATTORNEY GENERAL

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Filed in the Supreme Court
of the State of Alaska
on December ~~15~~ 18, 2017

MARILYN MAY, CLERK
Appellate Courts

By: _____
Deputy Clerk

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## AUTHORITIES PRINCIPALLY RELIED UPON

### UNITED STATES CONSTITUTION:

**U.S. Const. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### ALASKA CONSTITUTION:

**AK Const. Art. 1, § 5. Freedom of Speech**

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

### ALASKA STATUTES:

**AS 15.25.010. Provision for primary election**

Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter. The director shall prepare and provide a primary election ballot for each political party. A voter registered as affiliated with a political party may vote that party's ballot. A voter registered as nonpartisan or undeclared rather than as affiliated with a particular political party may vote the political party ballot of the voter's choice unless prohibited from doing so under AS 15.25.014. A voter registered as affiliated with a political party may not vote the ballot of a different political party unless permitted to do so under AS 15.25.014.

**AS 15.25.030. Declaration of candidacy**

(a) A member of a political party who seeks to become a candidate of the party in the primary election shall execute and file a declaration of candidacy. The declaration shall be executed under oath before an officer authorized to take acknowledgments and must state in substance

(1) the full name of the candidate;

(2) the full mailing address of the candidate;

(3) if the candidacy is for the office of state senator or state representative, the house or senate district of which the candidate is a resident;

(4) the office for which the candidate seeks nomination;

(5) the name of the political party of which the person is a candidate for nomination;

(6) the full residence address of the candidate, and the date on which residency at that address began;

(7) the date of the primary election at which the candidate seeks nomination;

(8) the length of residency in the state and in the district of the candidate;

(9) that the candidate will meet the specific citizenship requirements of the office for which the person is a candidate;

(10) that the candidate is a qualified voter as required by law;

(11) that the candidate will meet the specific age requirements of the office for which the person is a candidate; if the candidacy is for the office of state representative, that the candidate will be at least 21 years of age on the first scheduled day of the first regular session of the legislature convened after the election; if the candidacy is for the office of state senator, that the candidate will be at least 25 years of age on the first scheduled day of the first regular session of the legislature convened after the election; if the candidacy is for the office of governor or lieutenant governor, that the candidate will be at least 30 years of age on the first Monday in December following election or, if the office is to be filled by special election under AS 15.40.230--15.40.310, that the candidate will be at least 30 years of age on the date of certification of the results of the special election; or, for any other office, by the time that the candidate, if elected, is sworn into office;

(12) that the candidate requests that the candidate's name be placed on the primary election ballot;

(13) that the required fee accompanies the declaration;

(14) that the person is not a candidate for any other office to be voted on at the primary or general election and that the person is not a candidate for this office under any other declaration of candidacy or nominating petition;

(15) the manner in which the candidate wishes the candidate's name to appear on the ballot; and

(16) that the candidate is registered to vote as a member of the political party whose nomination is being sought.

(b) A person filing a declaration of candidacy under this section, other than a person subject to AS 24.60 who is filing a declaration for a state legislative office, shall simultaneously file with the director a statement of income sources and business interests that complies with the requirements of AS 39.50. A person who is subject to AS 24.60 and is filing a declaration of candidacy for state legislative office shall simultaneously file with the director a disclosure statement that complies with the requirements of AS 24.60.200.

(c) An incumbent public official, other than a legislator, who has a current statement of income sources and business interests under AS 39.50 on file with the Alaska Public Offices Commission, or an incumbent legislator who has a current disclosure statement under AS 24.60.200 on file with the Alaska Public Offices Commission, is not required to file a statement of income sources and business interests or a disclosure statement with the declaration of candidacy under (b) of this section.

**AS 15.25.100. Placement of nominees on general election ballot**

The director shall place the name of the candidate receiving the highest number of votes for an office by a political party on the general election ballot.

**AS 15.25.140. Provision for no-party candidate nominations**

Candidates not representing a political party are nominated by petition.

**AS 15.25.180. Requirements for petition**

(a) The petition must state in substance

(1) the full name of the candidate;

(2) the full residence address of the candidate and the date on which residency at that address began;

(3) the full mailing address of the candidate;

(4) the name of the political group, if any, supporting the candidate;

(5) if the candidacy is for the office of state senator or state representative, the house or senate district of which the candidate is a resident;

(6) the office for which the candidate is nominated;

(7) the date of the election at which the candidate seeks election;

(8) the length of residency in the state and in the district of the candidate;

(9) that the subscribers are qualified voters of the state or house or senate district in which the candidate resides;

(10) that the subscribers request that the candidate's name be placed on the general election ballot;

(11) that the proposed candidate accepts the nomination and will serve if elected, with the statement signed by the proposed candidate;

(12) the name of the candidate as the candidate wishes it to appear on the ballot;

(13) that the candidate is not a candidate for any other office to be voted on at the primary or general election and that the candidate is not a candidate for this office under any other nominating petition or declaration of candidacy;

(14) that the candidate meets the specific citizenship requirements of the office for which the person is a candidate;

(15) that the candidate will meet the specific age requirements of the office for which the person is a candidate; if the candidacy is for the office of state representative, that the candidate will be at least 21 years of age on the first scheduled day of the first regular session of the legislature convened after the election; if the candidacy is for the office of state senator, that the candidate will be at least 25 years of age on the first scheduled day of the first regular session of the legislature convened after the election; and if the candidacy is for the office of governor or lieutenant governor, that the candidate will be at least 30 years of age on the first Monday in December following election or, if the office is to be filled by special election under AS 15.40.230--15.40.310, that the candidate will be at least 30 years of age on the date of certification of the results of the special election; or, for any other office, by the time that the candidate, if elected, is sworn into office;

(16) that the candidate is a qualified voter; and

(17) if the candidacy is for the office of the governor, the name of the candidate for lieutenant governor running jointly with the candidate for governor.

(b) A person filing a nominating petition under this section, other than a person subject to AS 24.60 who is filing a petition for a state legislative office, shall simultaneously file with the director a statement of income sources and business interests that complies with the requirements of AS 39.50. A person who is subject to AS 24.60 and is filing a nominating petition for state legislative office shall simultaneously file with the director a disclosure statement that complies with the requirements of AS 24.60.200.

(c) An incumbent public official, other than a legislator, who has a current statement of income sources and business interests under AS 39.50 on file with the Alaska Public Offices Commission, or an incumbent legislator who has a current disclosure statement under AS 24.60.200 on file with the Alaska Public Offices Commission, is not required to file a statement of income sources and business interests or a disclosure statement with the nominating petition under (b) of this section.

**AS 15.25.190. Placement of names on general election ballot**

The director shall place the names and the political group affiliation of persons who have been properly nominated by petition on the general election ballot.

**AS 15.15.030. Preparation of official ballot**

The director shall prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections. The following directives shall be followed when applicable:

(1) The director shall determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law.

(2) The director shall number ballots in series to ensure simplicity and secrecy and to prevent fraud.

(3) The director shall contract for the preparation of ballots under AS 36.30 (State Procurement Code).

(4) The director may not include on the ballot, as a part of a candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate.

(5) The names of the candidates and their party designations shall be placed in separate sections on the state general election ballot under the office designation to which they were nominated. The party affiliation, if any, shall be designated after the name of the candidate. The lieutenant governor and the governor shall be included under the same section. Provision shall be made for voting for write-in and no-party candidates within each section. Paper ballots for the state general election shall be printed on white paper.

(6) The names of the candidates for each office shall be set out in the same order on ballots printed for use in each house district. The director shall randomly determine the order of the names of the candidates for state representative for each house district. The director shall rotate the order of placement of the names of candidates for governor, lieutenant governor, United States senator, United States representative, and state senator on the ballot for each house district.

(7) The general election ballot shall be designed with the names of candidates of each political party, and of any independent candidates qualified under AS 15.30.026, for the office of President and Vice-President of the United States placed in the same section on the ballot rather than the names of electors of President and Vice-President.

(8) The general or special election ballot shall be designed with the title and proposition for any initiative, referendum, or constitutional amendment formulated as prescribed by law and placed on the ballot in the manner prescribed by the director. When placed on the ballot, a state ballot proposition or ballot question shall carry the number that was assigned to the petition for the proposition or question. Provision shall be made for marking the proposition "Yes" or "No."

(9) The general or special election ballot shall be designed with the question of whether a constitutional convention shall be called placed on the ballot in the following manner: "Shall there be a constitutional convention?" Provision shall be made for marking the question "Yes" or "No."

(10) A nonpartisan ballot shall be designed for each judicial district in which a justice or judge is seeking retention in office. The ballot shall be divided into four parts. Each part must bear a heading indicating the court to which the candidate is seeking approval, and provision shall be made for marking each question "Yes" or "No." Within each part, the question of whether the justice or judge shall be approved or rejected shall be set out in substantially the following manner:

(A) "Shall ..... be retained as justice of the supreme court for 10 years?";

(B) "Shall ..... be retained as judge of the court of appeals for eight years?";

(C) "Shall ..... be retained as judge of the superior court for six years?"; or

(D) "Shall ..... be retained as judge of the district court for four years?"

(11) When the legislature by law authorizes a state debt for capital improvements, the director shall place the question of whether the specific authorization shall be ratified by placing the ballot title and question on the next general election ballot, or on the special election ballot if a special election is held for the purpose of ratifying the state debt for capital improvements before the time of the next general election. Unless specifically provided otherwise in the Act authorizing the debt, the ballot title shall, by the use of a few words in a succinct manner, indicate the general subject of the Act. The question shall, by the use of a few sentences in a succinct manner, give a true and impartial summary of the Act authorizing the state debt. The question of whether state debt shall be contracted shall be assigned a letter of the alphabet on the ballot. Provision shall be made for marking the question substantially as follows:

"Bonds..... Yes" or "Bonds ..... No," followed by an appropriate oval.

(12) The director may provide for the optical scanning of ballots where the requisite equipment is available.

(13) The director may provide for voting by use of electronically generated ballots by a voter who requests to use a machine that produces electronically generated ballots.

**AS 15.80.010. Definitions**

In this title, unless the context otherwise requires,

...

(26) "political group" means a group of organized voters which represents a political program and which does not qualify as a political party;

(27) "political party" means an organized group of voters that represents a political program and

(A) that nominated a candidate for governor who received at least three percent of the total votes cast for governor at the preceding general election or has registered voters in the state equal in number to at least three percent of the total votes cast for governor at the preceding general election;

(B) if the office of governor was not on the ballot at the preceding general election but the office of United States senator was on that ballot, that nominated a candidate for United States senator who received at least three percent of the total votes cast for United States senator at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States senator at that general election; or

(C) if neither the office of governor nor the office of United States senator was on the ballot at the preceding general election, that nominated a candidate for United States representative who received at least three percent of the total votes cast for United States representative at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States representative at that general election;

...

## PARTIES

The appellant is the State of Alaska. The appellee is the Alaska Democratic Party.

## JURISDICTION

This is an appeal from an order of the superior court, the Honorable Philip M. Pallenberg, granting summary judgment to the Alaska Democratic Party. The superior court issued final judgment on October 27, 2017. This Court has authority to consider this appeal under AS 22.05.010 and Appellate Rule 202(a).

## INTRODUCTION

Like many other states, Alaska requires that a candidate affiliate with a political party before running for that party's nomination in the primary election. In other words, to get onto the general election ballot as the Democratic nominee, a candidate must be a registered Democrat. The Court should uphold this sensible rule because it barely burdens associational rights and is an integral part of Alaska's electoral system.

The party affiliation rule barely burdens associational rights because the plaintiff—the Alaska Democratic Party ("the Party")—remains free to associate with voters and candidates in almost every way, including by nominating any candidate that it can convince to actually become a Democratic candidate. Registering as a Democrat is easy, and a small step to ask of a candidate who wishes to represent the Democratic Party in the general election. Although some types of election laws—such as those that restrict ballot access or voter participation—may create severe burdens on associational rights, courts generally hold that mere candidate eligibility rules such as this one do not.

Where—as here—an election law does not severely burden associational rights, the State's regulatory interests need only be "sufficiently weighty to justify the limitation."[1] But even strict scrutiny is not a "death knell" for an elections statute.[2]

The party affiliation rule is justified by at least three compelling state interests. First, it is an integral part of the State's system for ensuring that candidates and political parties enjoy sufficient public support before gaining access to the general election ballot. The State uses public support for a candidate as a proxy for public support for that candidate's party, and vice versa. Without the party affiliation rule, this system loses its coherence and is subject to exploitation. Second, the party affiliation rule helps prevent voter confusion and deception. The superior court opined that the State could simply redesign its ballots, but no ballot redesign could clarify the meaning of a purportedly "nonpartisan" Democratic Party candidate. Third, the party affiliation rule furthers the State's interest in the stability of its political system by protecting the integrity of the State's two routes to the general election ballot, preserving party labels as meaningful sources of information, and maintaining political parties as viable and coherent entities.

For these reasons, this Court should reverse the superior court's grant of summary judgment to the Party and uphold the party affiliation rule.

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1 *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (quoting *Norman v. Reed*, 502 U.S. 279, 288 (1992)).

2 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 980 (Alaska 2005).

## ISSUES PRESENTED

1. *Burden on rights.* The party affiliation rule leaves the Party free to express itself and associate with candidates and voters in most ways. The rule restricts only one type of association with one hypothetical type of candidate—a candidate who refuses to register with the Party but nonetheless wants to use its primary. The Party remains free to try to convince such a candidate to take the easy step of registering to become a party candidate. Does the party affiliation rule severely burden associational rights?

2. *State interests.* Without the party affiliation rule, the State will no longer be able to use public support for a candidate as a proxy for public support for that candidate's party, and vice versa; any general election ballot design the State uses will be confusing, deceptive, or both; and party labels will lose value as a source of information for voters. Is the party affiliation rule supported by sufficiently weighty state interests?

## STATEMENT OF THE CASE

### I. Alaska limits the advantages of political party status to groups that have demonstrated a minimum level of public support.

A "political party" is an organized group of voters that represents a political program and that has special status within Alaska's election system.[3] Only political parties use the state-run primary election process to nominate candidates to the general election ballot.[4] Political parties may also make and receive larger political contributions than other political groups.[5] Political parties nominate members of the election boards

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[3] AS 15.80.010(27).

[4] AS 15.25.010.

[5] AS 15.13.070; AS 15.13.116; AS 15.13.400.

who count ballots[6] and appoint poll watchers who are posted at precincts and counting centers.[7] And two seats on the Alaska Public Offices Commission go to the two political parties whose candidates received the most votes in a recent general election.[8]

Alaska law limits these advantages of political party status to groups that have demonstrated a minimum level of public support. A group can demonstrate the necessary public support to qualify as a party either directly, through its voter registration numbers, or indirectly, through votes for its candidates.[9] Every registering voter has a choice of whether to declare an affiliation with a political party or political group, choose the label "nonpartisan," or remain "undeclared."[10] A group qualifies as a political party if it has registered voters equal to at least three percent of the total votes cast for governor (or another statewide office) in the last general election.[11] Alternatively, a group can demonstrate the necessary public support through votes for its candidates, qualifying as a political party if it nominates a candidate receiving at least three percent of the vote for governor (or another statewide office) in a recent general election.[12]

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6 AS 15.10.120(b) & (c); AS 15.10.180; AS 15.20.190.

7 AS 15.10.170.

8 AS 15.13.020.

9 AS 15.80.010(27).

10 *See* AS 15.07.050; AS 15.07.075.

11 AS 15.80.010(27).

12 *Id.*

## II. Alaska provides two routes to the general election ballot: a petition process for no-party candidates and a primary election for political party candidates.

Alaska's election laws provide two ways in which a political candidate can get a spot on the general election ballot—the petition process and the party primary process. Both are designed to ensure that the candidate has a minimum level of public support so that the general election ballot will not be crowded with unpopular candidates.

A candidate not representing a political party may be nominated to the general election ballot by petition.[13] A petition candidate demonstrates the requisite level of public support to earn a place on the general election ballot by gathering a specified number of voter signatures.[14] A petition candidate may be supported by a political group that does not qualify as a political party; if so, the candidate must list the supporting group on her petition.[15] The State must list the name and "political group affiliation" of a successful petition candidate on the general election ballot.[16] If a petition candidate affiliated with a political group wins enough votes in the general election, that political group may qualify for political party status in future elections.[17]

A candidate seeking to represent a political party, by contrast, may be nominated to the general election ballot by winning the state-run party primary election.[18] Like most states, Alaska implemented a state-run direct party primary "during the Progressive Era,

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13 AS 15.25.140.

14 AS 15.25.160-.170.

15 AS 15.25.180(a)(4).

16 AS 15.25.190.

17 AS 15.80.010(27).

18 AS 15.25.030.

seeking to remove party nominating decisions from the infamous 'smoke-filled rooms' and place them instead in the hands of a party's rank-and-file, thereby destroying ' "the corrupt alliance" between wealthy special interests and the political machine.' "[19] Only a recognized political party may nominate candidates via primary—other political groups must use the petition process instead.[20] A party may choose whether to open its primary election to all voters regardless of party affiliation, close it to all but registered party members, or choose an option in between.[21] The State must list the name and "party designation" of a winning party primary candidate on the general election ballot.[22]

A winning party primary candidate need not receive any minimum number of votes to earn her place on the general election ballot—indeed, the primary may be uncontested and the voter turnout may be very low. But a winning primary candidate nonetheless enjoys a presumption of public support based on her association with the nominating party, which has itself already demonstrated public support in order to attain the State's recognition as a political party. Thus, public support for the party serves as a proxy for public support for the party's candidate (for purposes of getting on the general election ballot), just as public support for the party's candidate serves as a proxy for public support for the party (for purposes of attaining party recognition).

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19 *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173, 1177 (9th Cir. 2008) (quoting *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992)).

20 AS 15.25.140.

21 AS 15.25.010; AS 15.25.014(b).

22 AS 15.15.030(5).

The statute challenged in this case, AS 15.25.030(a)(16), requires a candidate who wants to compete in a party's primary to file a declaration asserting "that the candidate is registered to vote as a member of the political party whose nomination is being sought." Meeting this requirement is not very difficult because a person who is not registered to vote as a party member but who wants to run in the party's primary can simply submit a new voter registration form at any time to become a party member.[23] Although some states require a primary candidate to be registered with the party well in advance of the primary filing deadline, Alaska law does not contain any such time restriction on changes in affiliation.[24] This means a candidate can fulfill the party affiliation rule by filing a declaration of candidacy and registering with the party on the same day. [Exc. 96]

## III. The Alaska Democratic Party sued to challenge the rule that a person must be a registered member of a party to run in that party's primary.

The Alaska Democratic Party recently decided that it wants to allow candidates to run in its primary election and compete for the Democratic nomination without having to register as Democrats. [R. 170] So the Party seeks to strike down AS 15.25.030(a)(16)—Alaska's party affiliation rule for candidates—as unconstitutional. [Exc. 37-42] The Party first brought suit to challenge the party affiliation rule in 2016, but Superior Court Judge

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23 *See* AS 15.07.040.

24 *See, e.g., Vulliet v. Oregon*, No. 6:12-cv-00492-AA, 2013 WL 867439 (D. Or. 2013) (upholding Oregon statute making candidate ineligible to run in a major party primary election unless affiliated with that party at least 180 days before the primary filing deadline).

Louis Menendez dismissed the case on ripeness grounds because the Party had not yet formally opened its primary to non-Democratic candidates.[25]

After its first lawsuit was dismissed, the Party amended its bylaws to allow candidates who are registered as nonpartisan or undeclared to run in its primary. [R. 170] The new bylaws also purport to dictate how the State must list the party affiliations of the Democratic Party's non-Democrat candidates on the primary and general election ballots. [Exc. 4] The bylaws provide that "Undeclared and Non Partisan candidates may be listed using the category in which they are registered (U or N), or they may be listed as 'Independent' or 'Non Affiliated' " on both ballots. [Exc. 4]

After amending its bylaws, the Party filed this new lawsuit in February 2017. [Exc. 37-42] The State and the Party agreed that this case does not involve any disputes of material fact, and they simultaneously briefed cross-motions for summary judgment. [R. 174; Exc. 43-189] The State initially argued that the Party's case still was not ripe because although the Party had changed its rules, no actual candidate had yet expressed any desire to run in the Party's primary without registering as a Democrat. [Exc. 65-68] But shortly before oral argument on summary judgment, the Party produced a candidate, Paul Thomas, a registered nonpartisan who says he intends to compete for a state house seat in 2018 and will run in the Party's primary if allowed. [Exc. 201-04]

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[25] *Alaska Democratic Party v. State*, Case Number 1JU-16-533 CI (decision dated April 18, 2016).

## IV. The superior court struck down the party affiliation rule.

After briefing and argument, Superior Court Judge Philip Pallenberg granted summary judgment to the Party, striking down the party affiliation rule. [Exc. 205-37] The court ruled that the Party "possesses the same right to associate with candidates of its choosing as it does to participate with voters of its choosing" and "has a constitutionally protected right to allow individuals of varying political affiliations to participate in its primary." [Exc. 218, 222] The court concluded that the party affiliation rule "imposes a substantial burden on the Party's right of association because it restricts the Party's ability to determine the best means of achieving its political goals and limits the Party's right to associate with candidates of its choosing." [Exc. 222-25]

Having decided that the challenged law substantially burdened the Party's constitutional rights, the court then looked at the interests put forward by the State as justifications for the law and concluded that "none of the interests relied upon by the State have a strong fit with the challenged statute." [Exc. 236] First, the court decided that the party affiliation rule does not further the State's interest in ensuring that candidates and parties enjoy sufficient public support to merit ballot access and recognition. [Exc. 226-30] Next, the court rejected the State's arguments about political stability as "vague and abstract." [Exc. 230-31] And finally, the court concluded that the State's interest in avoiding voter confusion and deception does not justify the rule because if the ballots are redesigned, voters will not be misled or deceived by a non-Democrat running in the Democratic primary. [Exc. 231-35] The court therefore struck down the rule. [Exc. 236]

## V. The superior court rejected the Party's proposed ballot design as "highly misleading" but refused to approve the State's proposed ballot design.

Although the superior court ruled in the Party's favor, the court rejected the Party's view on how the State should design the primary and general election ballots in the absence of the party affiliation rule. [Exc. 232, 236] The Party's bylaws say that on both ballots, "Undeclared and Non Partisan candidates may be listed using the category in which they are registered (U or N), or they may be listed as 'Independent' or 'Non Affiliated.' " [Exc. 4] The Party also advocated this position at oral argument. [Exc. 231-32] But the court agreed with the State that without a party affiliation rule, listing candidates this way "would be highly misleading to voters." [Exc. 232, 236]

The superior court said that to prevent voter confusion and deception, the primary ballot must "make clear to primary election voters which nomination is being sought by a nonaffiliated voter who runs in a party primary" and the general election ballot must "clarify for voters, should a non-affiliated individual receive the Party's nomination for any race, that that candidate is the nominee of the Democratic Party." [Exc. 236-37]

Because the superior court's decision to strike down the party affiliation rule rested on the court's assumption that ballots could be redesigned to avoid voter confusion and deception, the State filed a motion asking the court to approve a proposed ballot redesign as consistent with the court's order. [Exc. 238-46] The State's proposed primary election ballot design listed both the candidates' party affiliations (or lack thereof) and the primaries in which they are running, and its proposed general election ballot design listed the nominating party for party-nominated candidates. [Exc. 243, 245]

The Party opposed the State's motion, arguing that approving a ballot design would be premature. [R. 248-51] The Party said it had "some concerns" with the State's proposed general election ballot design, but did not explain those concerns. [R. 249]

The superior court denied the State's motion, refusing to rule on ballot design. [Exc. 248-51] The court said that its "discussion of ballot design in the [summary judgment] order was included only to make clear that the order should not be construed as approval of the specific ballot design which had been put forward by the Party." [Exc. 249] The court said that its order "did not purport to specify how the ballot should be designed" and that "[t]here are likely a number of possible ballot designs which would comply with AS 15.15.030 and constitutional requirements. Which ballot design best carries out those requirements is a policy question in which the court has no role." [*Id.*]

## STANDARD OF REVIEW

The proper standard of review is de novo, both because this case was decided on summary judgment and because it presents only issues of law.[26]

## ARGUMENT

### I. In an elections case like this, the Court weighs the challenged law's burden on associational rights against the state interests justifying that burden.

"[A] duly-enacted statute is entitled to a presumption of constitutionality."[27] And not every law regulating elections is subject to strict scrutiny—such an inflexible rule

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[26] *See ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc.*, 322 P.3d 114, 122 (Alaska 2014) ("We review rulings on motions for summary judgment de novo."); *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) ("Questions of constitutional and statutory interpretation, including the constitutionality of a statute, are questions of law to which we apply our independent judgment.").

[27] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 980 (Alaska 2005).

"would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[28] So the Court has recognized that "states must be granted some leeway," and has adopted the U.S. Supreme Court's "flexible standard" for examining election laws, which "involves a careful balancing" of the relevant interests.[29]

Under this Court's formulation of the test, it must (1) "determine whether the claimant has in fact asserted a constitutionally protected right," (2) "assess 'the character and magnitude of the asserted injury to the rights,' " (3) "weigh 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' " and (4) "judge the fit between the challenged legislation and the state's interests in order to determine 'the extent to which those interests make it necessary to burden the plaintiff's rights.' "[30]

## II. The party affiliation rule does not severely burden the Party's rights.

Because Alaska's party affiliation rule leaves the Party free to promote its ideas and associate with voters and candidates in almost every conceivable way—including by nominating any candidate that it can convince to actually be a Democratic candidate—the law burdens the Party's freedom of association only minimally, if at all.

### A. The party affiliation rule does not restrict ballot access.

Laws restricting ballot access are sometimes subjected to heightened scrutiny as severe burdens on associational rights. Such laws affect both the aspiring candidates who

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[28] *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996) (quoting *Burdick v. Takushi*, 504 U.S. 428 (1992)).

[29] *State, Div. of Elections v. Green Party of Alaska (Green Party I)*, 118 P.3d 1054, 1059-60 (Alaska 2005).

[30] *Id.* at 1061.

are prevented from running for office and the voters who may have wanted to vote for them, and thus implicate both "the right to vote and the right to associate freely in pursuit of political beliefs."[31] But Alaska's party affiliation rule does not restrict ballot access.

The party affiliation rule does not prevent any aspiring candidate from running for office because every candidate has two options for getting on the general election ballot: (1) registering with a political party and running in (and winning) its primary, or (2) gathering enough signatures to qualify for the ballot by petition. Any candidate may easily register with a party at any point. And any candidate who does not want to register with a party is still not barred from the ballot because the petition process provides another option. Unlike a ballot access case, this case was not brought by an aspiring candidate who was prevented from running for office by the challenged law.[32]

Likewise, unlike a ballot access case, this case was not brought by a political party denied a place for its candidates on the general election ballot by the challenged law.[33] "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[34]

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31 *Metcalfe*, 110 P.3d at 979.

32 *Cf. Storer v. Brown*, 415 U.S. 724, 727 (1974) (suit brought by would-be candidates challenging law that denied them access to the general election ballot); *Vogler v. Miller* (*Vogler I*), 651 P.2d 1, 2 (Alaska 1982) and *Vogler v. Miller* (*Vogler II*), 660 P.2d 1192, 1193 (Alaska 1983) (suit brought by a would-be candidate and his party challenging laws that denied him access to the general election ballot).

33 *Cf. Williams v. Rhodes*, 393 U.S. 23, 26 (1968) (suit brought by minor political parties challenging laws that denied them official recognition and therefore access to the general election ballot for its candidates); *Green Party of Alaska v. State, Div. of Elections (Green Party II)*, 147 P.3d 728, 733 (Alaska 2006) (same).

34 *Williams*, 393 U.S. at 31.

But the Alaska Democratic Party has had no trouble meeting the requirements for official party recognition. As long as the Party maintains its party status, it will always have easy access to the general election ballot. The party affiliation rule does not change this.

Because the party affiliation rule does not stop anyone from running for office and does not shrink the universe of candidates that voters may choose from, it is not subject to heightened scrutiny as a ballot access restriction like the laws reviewed in many other cases.[35] The laws challenged in *Vogler v. Miller*[36] and *State, Division of Elections v. Metcalfe*,[37] for example, prevented the plaintiffs in those cases from running for office. The law challenged here, by contrast, does not stop anyone from running for office. To be sure, Alaska does have ballot access restrictions that stop some people from running for office,[38] but the plaintiffs in this case have not challenged those laws.

### B. The party affiliation rule does not infringe on the Party's associational right to promote its agenda or select a standard-bearer.

Not only does the party affiliation rule not restrict anyone's ballot access, but it also does not restrict political parties from promoting their ideas and associating with voters and candidates in almost every conceivable way. The only thing the party affiliation rule prevents is a candidate competing for a party's slot on the general election

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35 *See, e.g.*, *Metcalfe*, 110 P.3d at 978 (suit brought by third-party political candidate denied ballot access).

36 This case resulted in *Vogler I*, 651 P.2d at 2, and *Vogler II*, 660 P.2d at 1193.

37 110 P.3d at 978.

38 AS 15.25.160-.170; AS 15.80.010(27).

ballot while affirmatively refusing to affiliate with that party. This sensible rule is barely a restriction at all, and does not substantially burden associational rights.

The party affiliation rule leaves a political party's freedom of expressive association[39] intact. A party can weigh in on any issue and support any candidate it chooses, through either speech or financial contributions.[40] It can exchange ideas, and form and break political alliances, with candidates and voters of any political stripe. It can even help non-member candidates reach the general election ballot by campaigning for them in their primaries (if they are members of another party) or circulating petitions

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[39] *See Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 352 (Alaska 2011) ("[I]ndividuals have a First Amendment right to associate in two situations: (1) 'intimate association,' when individuals 'enter into and maintain certain intimate human relationships,' and (2) 'expressive association,' when individuals 'associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.' " (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984))).

[40] *Cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361 (1997) ("The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen."); *id.* at 363 ("The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate."); *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173, 1180 (9th Cir. 2008) ("The burden on parties' associational rights is further lessened because the Supreme Court has long protected the party's First Amendment right to 'state[ ] whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought,' which protects the party's right to distance itself from undesired candidates and urge party voters to choose the nominee who the party feels best represents the party platform." (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))); *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012) (noting that challenged law "does not inhibit [the plaintiff's] ability freely to write, speak, organize campaigns, or promote any set of political beliefs that he wishes.").

for them (if they are unaffiliated).[41] And it can nominate via its party primary any candidate that it can convince to run as a *party* candidate—i.e., to register with the party.

The party affiliation rule thus restricts only one very specific type of "association" that is not a true expressive association at all, but rather an end-run around the State's system of two distinct routes to the general election ballot. The State has created one route to the ballot for party candidates and one for other candidates. The State grants each recognized political party a designated slot on the general election ballot in each race for party-affiliated candidates, thereby relieving them of the need to gather thousands of petition signatures for every race. The State confers this benefit on a party by virtue of the party's demonstrated popular support. The party affiliation rule simply prevents a candidate who refuses to affiliate with a party from taking undue advantage of a benefit the State grants to the party based on its popular support.

This restriction on one specific type of association with one hypothetical type of candidate—a candidate who refuses to register with the Party but nonetheless wants to use its primary—is not an appreciable burden on the Party's expressive association. By refusing to register with the Party despite the ease of doing so, a candidate is expressly disavowing personal identification with the Party. The party affiliation rule prevents the Party from selecting such a person as the "standard bearer" who will "speak for them to the broader public" and "lead their political party in advancing its interests."[42] But this barely burdens the Party because a candidate who affirmatively *refuses* to bear the

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41 A party may have internal rules to prohibit this, but the State does not prohibit it.

42 *See Green Party I*, 118 P.3d at 1064.

Party's standard cannot truly be its "standard-bearer." The Party remains free to try to convince such a candidate to change her mind.[43] And the candidate remains free to register with the Party if she wishes to compete for the Party's slot—a slot reserved for recognized *party* candidates—on the general election ballot.[44] The party affiliation rule prevents only the use of a party's primary to leapfrog the petition requirement by a candidate who so rejects the party that she is unwilling to take even the simplest step of public affiliation. Even if the Party would like to cooperate in such strategic exploitation of its primary, that does not mean that preventing it is a substantial burden on the Party's expressive association.

The party affiliation rule does not create nearly as severe a burden on associational rights as the statute the Court struck down in *State v. Green Party of Alaska*.[45] In that case, state law required each voter to choose only one primary ballot containing only one political party's candidates.[46] This made it impossible for any voter, regardless of her registration status, to vote for—for example—a Green Party candidate in the primary for governor and a Democratic Party candidate in the primary for state senate. No matter how a voter registered and what rules the parties adopted, state law was an

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43 *Cf. Clingman v. Beaver*, 544 U.S. 581, 591 (2005) ("[T]he LPO need only persuade voters to make the minimal effort necessary to switch parties.").

44 *Cf. S.D. Libertarian Party v. Gant*, 60 F. Supp. 3d 1043, 1050 (D.S.D. 2014) ("Because a potential candidate is free to join the Libertarian Party with nominal effort, [a party affiliation rule] does not impede the ability of the Libertarian Party or its potential candidates to participate meaningfully in the political process.").

45 118 P.3d 1054 (Alaska 2005) (*Green Party I*).

46 *See id.* at 1058.

insurmountable obstacle to the voter voting for her desired candidates. There was nothing any voter, candidate, or party could do to accomplish their mutual associational goal.

Here, by contrast, all that must happen for a party and a candidate to accomplish their mutual associational goal is for the candidate to register with the Party. This is not a serious burden on the candidate because—practically speaking—registering with the Party is very easy and—symbolically speaking—registering with the Party is not a large step for an aspiring party nominee. The expressive implications of registering with the Party are similar to those of seeking its nomination, so requiring the former as a prerequisite for the latter does not seriously burden the candidate. And it does not seriously burden the Party either because association is a two-way street. The Party cannot nominate a candidate without the candidate's cooperation, and having to convince a candidate to register is no more of a burden than having to convince the candidate to run. And in this case, any burden is even less severe because the Party is not actually seeking to associate with a particular candidate, but only a hypothetical one.[47]

### C. Other courts recognize that candidate eligibility requirements do not severely burden a political party's associational rights.

Other courts have held that a political party's associational rights are not severely burdened by laws—like Alaska's party affiliation rule—that restrict a party's choice of candidates by imposing candidate eligibility requirements.

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[47] This lawsuit was not filed to allow the candidacy of Paul Thomas; he was not mentioned until after completion of briefing on summary judgment. [Exc. 201-04]

As a class, candidate eligibility cases are much more directly analogous to this case than the voter participation cases the Party relies on—*Green Party*,[48] *Tashjian v. Republican Party of Connecticut*,[49] and *California Democratic Party v. Jones*.[50] [Exc. 47-56, 118-36] Those voter participation cases all concerned laws governing which voters may vote in a party's primary. But this case does not involve a voter participation law, and a party's right to decide which voters can vote in its primary is not at stake here. Rather, this case involves a candidate eligibility requirement. So cases involving candidate eligibility requirements—like anti-fusion laws (e.g., *Timmons v. Twin Cities Area New Party*[51]), sore-loser laws (e.g., *South Carolina Green Party v. South Carolina State Election Commission*[52]), and party affiliation and disaffiliation laws (e.g., *South Dakota Libertarian Party v. Gant*[53])—all provide closer analogies.

**i. Anti-fusion laws do not severely burden association.**

In *Timmons*, the U.S. Supreme Court held that an anti-fusion law—which prohibited a party from nominating a candidate who was already running in another party's primary—did not severely burden the party's associational rights even though it prevented the party from nominating its favored candidate.[54] The Court reasoned that the

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48 118 P.3d 1054 (Alaska 2005).

49 479 U.S. 208 (1986).

50 530 U.S. 567 (2000).

51 520 U.S. 351 (1997).

52 612 F.3d 752 (4th Cir. 2010).

53 60 F. Supp. 3d 1043 (D.S.D. 2014).

54 520 U.S. 351, 359-64 (1997).

law did "not restrict the ability of the [party] and its members to endorse, support, or vote for anyone they like," did "not directly limit the party's access to the ballot," and was "silent on parties' internal structure, governance, and policymaking."[55] All the law did was "reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party."[56] The Supreme Court considered this not to be a severe burden on the party.[57] Just as the law restricting a party's choice of candidates did not create a severe burden in *Timmons*, the law having the same effect in this case does not either.

*Timmons*—because it is a candidate eligibility case—is much more on point here than it was in *Green Party*, which was a voter participation case.[58] In *Green Party*, this Court distinguished *Timmons* on the basis that "the statute in *Timmons* imposed an eligibility requirement upon candidates," whereas the statute in *Green Party* "directly limit[ed] who may participate in choosing a political party's candidates."[59] But unlike *Green Party*, this case is a candidate eligibility case just as *Timmons* was.

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55 *Id.* at 363.

56 *Id.*

57 *Id.* at 359 ("That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights."); *see also Gant*, 60 F. Supp. 3d at 1049 ("*Timmons* teaches that such a requirement is only a slight burden on the party's associational rights and does not justify strict scrutiny of the law.").

58 *See* 118 P.3d 1054.

59 *Id.* at 1062.

For the same reason, *Timmons*—as a candidate eligibility case—is much more on point here than is *Tashjian*—which was a voter participation case. In *Tashjian*, the Supreme Court struck down a law requiring that voters in a party primary be registered party members.[60] In dicta discussing various hypotheticals that were not before the Court, the Court theorized that a law requiring that "only Party members might be selected as the Party's chosen nominees for public office . . . would clearly infringe upon the rights of the Party's members."[61] But in *Burdick v. Takushi*, decided six years after *Tashjian*, the Court noted—with no apparent disapproval—that Hawaii had just such a law.[62] And in *Timmons*, decided eleven years after *Tashjian*, the Supreme Court disregarded the *Tashjian* dicta and distinguished *Tashjian*, reasoning that a voter registration requirement "involve[s] regulation of political parties' internal affairs and core associational activities" whereas a fusion ban does not because the party "may nominate any candidate that the party can convince to be *its* candidate."[63] *Timmons* is more recent, more relevant, and more precedential than the *Tashjian* dicta.

The superior court nonetheless distinguished *Timmons*, but its reasoning was flawed in two ways. [Exc. 219-20] First, the law at issue in *Timmons* did not, as the superior court wrote, "prevent a single individual from participating in multiple parties'

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60 479 U.S. at 225.

61 *Id.* at 215.

62 *Burdick*, 504 U.S. at 440 ("While voters may vote on any ticket in Hawaii's primary, the State requires that party candidates be 'member[s] of the party,' . . . and prohibits candidates from filing 'nomination papers both as a party candidate and as a nonpartisan candidate.' ") (first alteration in original, citations omitted).

63 520 U.S. at 360 (quoting *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991)).

primaries." [Exc. 219] Rather, it prevented a candidate running in one party's primary from being nominated by petition as another party's candidate.[64] So it was not just a limit on the number of primaries a candidate could run in. Second, regardless of the details of that particular anti-fusion law, it burdened the party's associational rights in exactly the same way as Alaska's party affiliation rule—by preventing the party from nominating a candidate by virtue of that candidate's refusal to choose that party over other interests. In the words of the Seventh Circuit—quoted from approvingly in *Timmons*[65]—such a law "does not substantially burden the 'availability of political opportunity,' . . . because a party may nominate any candidate that the party can convince to be *its* candidate."[66]

Generalized platitudes about free association do not provide a logical basis for distinguishing *Timmons*. A party's freedom to determine "the boundaries of its own association," "associate with candidates of its choosing," and "determine the best means of achieving its political goals"—the interests mentioned by the superior court—are burdened to exactly the same extent by a law preventing it from nominating non-party-affiliated candidates and a law preventing it from nominating candidates who are also seeking (or have already obtained) the nomination of other parties. [Exc. 222-23] If the latter is not a severe burden—as the Supreme Court held in *Timmons*—the former is not

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64 *Id.* at 354 (explaining that the New Party, a minor party not eligible to have a primary, sought to nominate Dawkins as its candidate by petition—with his consent—but was prohibited from doing because Dawkins was already running in the primary for the nomination of the Minnesota Democratic–Farmer–Labor Party).

65 *See id.* at 360 (quoting *Swamp*, 950 F.2d at 385).

66 *Swamp*, 950 F.2d at 385 (citation omitted; emphasis in original).

either. And if the latter does not infringe on "parties' internal structure, governance, and policymaking"—as the Supreme Court held in *Timmons*—the former does not either.

In addition to distinguishing *Timmons* for unpersuasive reasons, the superior court read into *Timmons* a proposition that the case does not support. [Exc. 220] Noting that the Supreme Court in *Timmons* said the New Party was free to try to convince its desired candidate—whom the superior court describes as "a registered member of the Democratic Farmer-Labor Party"[67]—to become its candidate, the superior court reasoned that "[a]pparently the Court saw no reason why a registered member of the Democratic-Farmer-Labor Party could not be the candidate of the New Party." [Exc. 220] The superior court concluded that this revealed a "basic assumption" by the Court that a party's associational rights encompass the "ability to invite candidates who have not yet decided to seek the nomination of another party to vie for the support of its constituents." [Exc. 220] But this conclusion does not follow. There is a major analytical difference between a party being free to engage in such cross-nomination when the state has not prohibited it and a state being constitutionally required to allow such cross-nomination. So the fact that Minnesota law may have allowed such cross-nomination at the time of *Timmons* does not mean that the *Timmons* court operated on a "basic assumption" that political parties have a constitutional right to do it. And if Minnesota law had included a party affiliation law like Alaska's when *Timmons* was decided, the New Party would still

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[67] Nothing in the *Timmons* decision makes clear whether the candidate was "registered" with that party, so this assumption by the superior court may be incorrect.

have been just as "free to try to convince" its desired candidate to be its candidate—the candidate would have simply had to take the easy step of changing his registration.

Thus, *Timmons* shows that a candidate eligibility rule does not severely burden a party's associational rights even if it restricts the party's choice of candidates.

**ii. Sore-loser laws do not severely burden association.**

Courts have similarly held that so-called "sore loser" laws—which prevent a candidate who has lost one party's primary from running in the general election as the nominee of another party—also do not severely burden associational rights.[68]

In *South Carolina Green Party v. South Carolina State Election Commission*, the Fourth Circuit upheld South Carolina's sore-loser law, finding that the law "imposed only a modest burden on the Green Party's association rights."[69] The court observed that the law "did not affect the Green Party's right to nominate its own candidate, but only affected the Green Party's right to nominate Platt as its preferred candidate," a burden "no greater than the modest burden imposed by the fusion ban at issue in *Timmons*."[70]

Similarly, in *Libertarian Party of Michigan v. Johnson*, the Sixth Circuit upheld Michigan's sore-loser law, adopting the district court's ruling that the law did not severely burden either the candidate or the party.[71] The district court observed that the

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68 *See, e.g.*, *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 759 (4th Cir. 2010).

69 *Id.*

70 *Id.*

71 *Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013) (affirming the district court's judgment for the reasons stated in its opinion, referring to *Libertarian Party of Mich. v. Johnson*, 905 F. Supp. 2d 751 (E.D. Mich. 2012)).

plaintiff party was not "prevented from nominating the candidate of its choice, but only prevented from nominating one of the handful of candidates who chose to run for a different political party in the primary race."[72] Thus, "[l]ike the Minnesota laws approved by the Supreme Court in *Timmons*, Michigan's law does not directly limit the Libertarian Party's access to the ballot"—instead, it merely "reduces 'the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who . . . have already agreed to be another party's candidate.' "[73]

Like a sore-loser law, Alaska's party affiliation rule does not limit the Democratic Party's access to the ballot, it merely reduces the universe of potential candidates who may be the Party's nominee only by ruling out a handful of hypothetical people who are unwilling to prioritize becoming the Party's nominee over other interests.

**iii. Party affiliation laws do not severely burden association.**

Courts have also upheld party affiliation and disaffiliation laws that are similar to—or even more burdensome than—Alaska's party affiliation rule, reasoning that such laws do not severely burden associational rights.[74]

In *Van Susteren v. Jones*, the Ninth Circuit upheld a California law requiring that a partisan candidate be disaffiliated from membership in other political parties for one year before filing to run in a party's primary.[75] The law upheld in *Van Susteren* was more

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72 *Libertarian Party of Mich.*, 905 F. Supp. 2d at 766.

73 *Id.* at 767 (quoting *Timmons*, 520 U.S. at 363).

74 *See, e.g.*, *Gant*, 60 F. Supp. 3d at 1050.

75 331 F.3d 1024, 1026 (9th Cir. 2003).

burdensome than Alaska's, because a candidate could not simply change registration to satisfy it, but instead had to wait for the next election. But the court rejected arguments that this law created a greater burden on associational rights than other laws, distinguished *Tashjian*, and concluded that the law "[did] not regulate political parties' internal affairs"[76] even though it restricted a party's choice of candidates.

Similarly, at least two courts have reviewed party affiliation requirements like Alaska's and concluded that they do not severely burden associational rights. In *Vulliet v. Oregon*, the Oregon District Court held that a law requiring an individual to be a member of a political party for at least 180 days before running in the party's primary did not severely burden associational rights.[77] The law in *Vulliet* was more burdensome than Alaska's, because a candidate could not change registration at the last minute to satisfy it, but instead had to plan 180 days in advance. But the court reasoned that the plaintiff, who had not registered as a Democrat in time to run in the primary, could still associate with the party as a member or voter, could seek its nomination after complying with the 180-day requirement, or could pursue its nomination via a write-in campaign.[78]

The South Dakota District Court came to the same conclusion in *South Dakota Libertarian Party v. Gant*, declining to preliminarily enjoin a state law that required a candidate seeking a party's nomination to be affiliated with the party.[79] Distinguishing

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76 *Id.*

77 No. 6:12-cv-00492-AA, 2013 WL 867439 (D. Or. 2013) (unreported).

78 *Id.* at *7.

79 60 F. Supp. 3d at 1044.

*Tashjian* and relying on *Timmons*, the court concluded that South Dakota's party affiliation law "only minimally burden[ed] Plaintiffs' associational rights" because "a potential candidate is free to join the Libertarian Party with nominal effort" and the party remained free to "nominate anyone who is eligible for office."[80]

Alaska's party affiliation rule is indistinguishable from the South Dakota law in *Gant* and more lenient than the California and Oregon laws in *Van Susteren* and *Vulliet*—none of which were held to substantially burden constitutional rights.

In sum, because the party affiliation rule leaves the Party free to nominate any candidate it can convince to be *its* candidate, the rule does not severely burden the Party.

## III. The minimal burden that the party affiliation rule places on associational rights is justified by several important state interests.

The last parts of the test look at "the precise interests put forward by the State as justifications for the burden imposed by its rule" and "the fit between the challenged legislation and the state's interests."[81] " '[A] particularized showing' is not required" because "[t]o require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies . . . would invariably lead to endless court battles . . . and would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action."[82] So instead, legislatures may "respond to

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80 *Id.* at 1049-50.

81 *Green Party I*, 118 P.3d at 1061.

82 *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

potential deficiencies in the electoral process with foresight," so long as "the response is reasonable and does not significantly impinge on constitutionally protected rights."[83]

Where—as here—an election law does not severely burden associational rights, "the State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation' imposed on the party's rights."[84] But even if the party affiliation rule needed to be narrowly tailored to serve compelling state interests, it would pass that test as well. In the elections context, strict scrutiny is not a "death knell" for a statute.[85]

The party affiliation rule serves at least three compelling state interests: First, it is an integral part of the State's system for ensuring that candidates and political parties enjoy sufficient public support before gaining ballot access. Second, it helps prevent voter confusion and deception. Third, it furthers the State's interest in the stability of its political system. Finally, Alaska's party affiliation rule is within "the mainstream of the practices of other states," a factor this Court considers relevant in assessing a law's fit.[86]

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83 *Id.*

84 *Timmons*, 520 U.S. at 364 (quoting *Norman*, 502 U.S. at 288); *see also O'Callaghan*, 914 P.2d at 1254 ("[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (quoting *Burdick*, 504 U.S. at 434)); *see also Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) ("Nondiscriminatory restrictions that impose a lesser burden on speech rights need only be reasonably related to achieving the state's 'important regulatory interests.' " (quoting *Burdick*, 504 U.S. at 434)).

85 *Metcalfe*, 110 P.3d at 980.

86 *See Green Party II*, 147 P.3d at 735-36 ("[I]n *Metcalfe* we recognized that the state could satisfy its burden of determining whether less restrictive alternatives exist by showing that its actions remain 'in the mainstream of the practices of other states.' ").

### A. The party affiliation rule helps ensure that support for the candidate is a fair proxy for support for the party, and vice versa.

The party affiliation rule is an integral part of the system the State uses to ensure that candidates enjoy sufficient public support before getting on the general election ballot and that political groups enjoy sufficient public support before obtaining party status. Without the party affiliation rule, the State cannot meaningfully use support for a candidate as a proxy for support for that candidate's party, and vice versa.

The Court has recognized a compelling state interest in limiting ballot access to candidates who have a "significant modicum of support" so that general election ballots are not overcrowded and present voters with only serious candidates worthy of their time and attention.[87] Likewise, the Court has recognized a compelling state interest in "requiring potential political parties to demonstrate a 'significant modicum of support,' " and "drawing a line in order to establish a standard for the 'modicum of support' required for official party status"[88] given the "lasting implications" of party status.[89]

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[87] *See Vogler I*, 651 P.2d at 4 ("The federal cases uniformly accept a state interest in restricting the ballot to those able to muster a 'significant modicum of support.' . . . We agree with that view.") (citations omitted); *see also Munro*, 479 U.S. at 194 (stating that cases "establish with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot . . . .' " (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-789, n.9 (1983))); *Lubin v. Panish*, 415 U.S. 709, 715 (1974) ("That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion.").

[88] *Green Party II*, 147 P.3d at 734-35 (quoting *Metcalfe*, 110 P.3d at 980); *see also Munro*, 479 U.S. at 193 ("[I]t is . . . clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office.").

[89] *See Metcalfe*, 110 P.3d at 981-82.

To further these interests, the State uses support for a candidate as a proxy for support for that candidate's party, and vice versa. A group qualifies as a political party if it nominates a candidate receiving at least three percent of the vote for governor (or another statewide office) in a recent general election.[90] Thus, votes for a candidate serve as a proxy for public support for the candidate's party (or group that aspires to be a party). Likewise, public support for a recognized party serves as a proxy for public support for the candidate who wins the party's primary. A winning primary candidate benefits from a presumption of support based on her affiliation with the nominating party, which has demonstrated public support in order to attain party recognition. A candidate not affiliated with a political party may demonstrate support by petition instead.[91]

Without the party affiliation rule, support for a candidate is no longer a meaningful proxy for support for the nominating party. When a Democrat wins the Democratic primary, is listed on the general election ballot as a Democrat, and wins over voters as a Democrat, those votes reasonably—albeit roughly—approximate public support for the Democratic Party. But votes for a candidate who affirmatively *refuses* to register as a Democrat do not represent even a rough measure of public support for the Party. Implicit in the candidate's refusal to register as a Democrat is either the candidate's personal rejection of the Party's platform or the candidate's belief that the Party label would repel voters—or both. The superior court theorized that "[i]f an unaffiliated or independent voter sees another unaffiliated or independent individual running in the general election

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90 AS 15.80.010(27).

91 AS 15.25.140.

as the Party's candidate, the Party may have a better chance of earning that voter's support." [Exc. 215] But that would not be *the Party* earning that voter's support—it would be the candidate earning it. The votes of voters who would be turned off by the Democratic Party label and voters who prefer candidates who deliberately distance themselves from the Party's platform simply do not reflect support for the Party.

Conversely, without the party affiliation rule, support for a party is no longer a meaningful proxy for support for a candidate. The State grants each political party a dedicated slot on the general election ballot for each office in recognition of the party's demonstrated public support. A party candidate need not win any threshold number of primary votes or collect any petition signatures to use one of these slots—instead, such a candidate gets to ride her party's coattails, credited with the public's baseline support for her party. This makes sense, because voters place some meaning on party labels, and the State can reasonably (albeit not conclusively) infer from the Democratic Party's level of public support that a registered Democrat candidate will enjoy similar support in the general election. But the public support that the Democratic Party enjoys is no guide at all to the public support a candidate who *rejects* the Democratic Party will enjoy.

The party affiliation rule is thus justified as an integral part of the State's system for furthering its dual compelling interests in ensuring that candidates and political groups enjoy sufficient public support to warrant access to the general election ballot.

The superior court disagreed, but it focused on the interest in ensuring support for the candidate and largely ignored the parallel interest in ensuring support for the party. [Exc. 227-30] The superior court thought it unlikely that the Democratic Party would

ever be on the brink of losing its official party status, and thus found this interest irrelevant. [Exc. 228] But although this case was brought by a well-established party, the State's laws apply to all parties, including those with more marginal public support. The Court has recognized that party status has serious implications[92] and that the State has a compelling interest in creating a workable standard for such status.[93] And the Court has approved the State's use of election results to draw the line.[94] Eliminating the party affiliation rule ruins this system by breaking the link between a party and a candidate. Votes for a candidate who *refuses* to register with a party do not represent even a rough measure of public support for that party. Eliminating the party affiliation rule thus transforms a sensible system into an incoherent one. And it opens up the possibility that a marginal party could unjustifiably retain party status on the basis of votes for a popular independent candidate who disclaims any affiliation with that party. Indeed, a marginal party and an independent candidate might even be incentivized to team up simply to circumvent the State's dual compelling interests, with the candidate using the party to avoid the petition requirement and the party using the candidate to retain its party status.

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92 *See Metcalfe*, 110 P.3d at 981-82 ("[T]he recognition of a political party has lasting implications—that party, among other things, obtains increased powers under the campaign-finance laws, gains access to primary elections, and earns automatic placement on general election ballots (permitting it to freely field slates of candidates for several years). It seems entirely reasonable, in light of these benefits, for the state to demand more from a political party than an individual candidate.") (citations omitted).

93 *See Green Party II*, 147 P.3d at 734-35 ("[T]he state's interest here in drawing a line in order to establish a standard for the 'modicum of support' required for official party status is compelling.").

94 *See, e.g., id.* at 735 ("Given the more reliably competitive nature of the race, it was not unreasonable for the legislature to conclude that the governor's race offers a better gauge for popular support of a political party.").

And although the superior court did consider the State's interest in ensuring support for the candidate, its analysis of that interest was flawed. [Exc. 227-30] The court opined that "[t]he need to assure a modicum of support is assured if a candidate wins the primary election, whether the candidate is a registered Party member or not." [Exc. 227] But simply winning a primary is not an adequate demonstration of public support, because the primary may be uncontested and turnout may be very low. Not every party fields a candidate in every race, so a primary victory may be easy to come by.[95] The superior court theorized that "the presence of an unpopular independent candidate on the Party's primary ballot" would "embolden other candidates who better embrace the Party's principles to also run." [Exc. 228] But this assumption is unwarranted, because candidates are free to wait until the filing deadline to declare their candidacies, leaving no opportunity for other candidates to become "embolden[ed]" in this way.

A winning primary candidate gets a slot on the general election ballot not just because she has won a primary, but because she is imputed with the support that her party enjoys among the voting public. The State assumes that because the Democratic Party has public support, so will a candidate who is labeled as a Democrat. The State sensibly requires a candidate to actually adopt the Party's label before she can trade on its public support in this manner. The superior court misunderstood this as a desire to "to protect the integrity of the Party against the Party itself" and ensure that the Party's candidate

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[95] For example, no candidate sought the nomination of either the Alaska Libertarian Party or the Alaskan Independence Party for State Senate District B in the 2016 primary. [Exc. 191] A single candidate sought the Alaska Democratic Party's nomination. [*Id.*]

"supports the ideals of the Democratic Party." [Exc. 228-29] But this is just about assessing likely public support for the candidate. If the candidate refuses to adopt the Party's label, the State cannot infer support for the candidate from support for the Party, and can require that the candidate demonstrate support by petition instead. The superior court observed that "[t]he only difference between the candidates is a label." [Exc. 228] But party labels are significant, and voters rely on them as a source of information about a candidate's views.[96] So when a candidate publicly identifies as a Democrat, the assumption that she will enjoy a level of public support similar to that of the Democratic Party—while certainly not foolproof—is reasonable. By contrast, when a candidate refuses to identify as a Democrat, such an assumption is not reasonable at all. Thus, the party affiliation rule helps ensure that candidates and parties have public support.

### B. The party affiliation rule helps protect against voter confusion and deception from unclear ballots and inconsistent party labels.

The party affiliation rule also helps prevent voter confusion and deception.[97] The superior court correctly found that without the party affiliation rule, voters will be seriously confused and misled if the State keeps using the current design of the primary and general election ballots, as the Party desires. [Exc. 232, 236] The superior court said

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[96] *See Tashjian*, 479 U.S. at 220 ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.").

[97] *See Metcalfe*, 110 P.3d at 980 (stating that an interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election" is "sufficiently important under the constitutional test" (quoting *Vogler II*, 660 P.2d at 1195)); *see also Storer*, 415 U.S. at 729 (noting that "providing the electorate with an understandable ballot" is a compelling state interest).

the State could simply redesign the ballots to fix this, but it refused to address how. [Exc. 232-35; 248-51] In reality, no ballot redesign could prevent all confusion and deception that would be caused by a purportedly "nonpartisan" Democratic candidate.

The State's current ballot design for the primary and general election ballots assumes that candidates' party affiliations will match up with the parties whose nominations they seek (or have obtained). Both ballots just list each candidate's name and his or her party or political group affiliation. [Exc. 191-99] The affiliation serves to tell voters both what party or group the candidate identifies with and what party's nomination the candidate seeks (in the case of the primary ballot) or what party or group has nominated the candidate (in the case of the general election ballot).

The Democratic Party's new bylaws provide, and the Party argued below, that this ballot design should stay the same even without the party affiliation rule, with non-party Democratic candidates "listed using the category in which they are registered (U or N)" or "as 'Independent' or 'Non Affiliated.' " [Exc. 4] But as the superior court recognized, this would effect a "bait and switch" that "would be highly misleading to voters" and would "create[] a significant potential to mislead or confuse." [Exc. 232, 236]

The Party's desired primary election ballot design would be confusing because, as the superior court correctly recognized, "a primary voter would not be able to tell from the ballot which primary a non-affiliated [candidate] was running in." [Exc. 232] The Party has chosen to share its primary ballot with two other parties—a choice the State

must accomodate[98]—and this combined ballot must list all candidates running for the nominations of three different parties. This means the Party's desired ballot would provide no indication that example candidate Jane Doe seeks the Democratic nomination:

**State of Alaska Official Ballot**
**Primary Election, August 16, 2016**
Alaska Democratic Party
Alaska Libertarian Party
Alaskan Independence Party

**Instructions:** To vote, completely fill in the oval next to your choice, like this: ●

| **United States Senator** (vote for one) | |
|---|---|
| ○ Metcalfe, Ray | Democrat |
| ○ Stevens, Cean | Libertarian |
| ○ Blatchford, Edgar | Democrat |
| **United States Representative** (vote for one) | |
| ○ Hibler, William D. "Bill" | Democrat |
| ○ Hinz, Lynette "Moreno" | Democrat |
| ○ Doe, Jane | Non Affiliated |
| ○ McDermott, Jim C. | Libertarian |
| ○ Watts, Jon B. | Libertarian |
| **State Representative District 26** (vote for one) | |
| ○ Goodell, Bill | Democrat |

The Party's desired general election ballot design would be similarly problematic, because, as the superior court correctly recognized, "a general election voter would not be able to tell from the ballot whether [a non-affiliated] candidate was the candidate of the Democratic Party, or some other party with a similar rule, or alternatively whether that candidate had qualified for the ballot by petition." [Exc. 232] The ballot would provide no indication that example candidate Jane Doe is the Democratic nominee:

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98 *See Green Party I*, 118 P.3d at 1070 (striking down prohibition on political parties sharing a combined primary election ballot).

| United States Senator (vote for one) | |
|---|---|
| Metcalfe, Ray | Democrat |
| Miller, Joe | Libertarian |
| Murkowski, Lisa | Republican |
| Stock, Margaret | Non Affiliated |
| Craig, Breck A. | Non Affiliated |
| Gianoutsos, Ted | Non Affiliated |
| Write-in | |

| United States Representative (vote for one) | |
|---|---|
| Souphanavong, Bernie | Non Affiliated |
| Young, Don | Republican |
| Doe, Jane | Non Affiliated |
| McDermott, Jim C. | Libertarian |
| Write-in | |

The superior court opined that "if this were actually the ballot design that would result from striking down the statute, I would uphold the statute." [Exc. 232] The court thus explicitly rested its constitutional ruling on its assumption that the ballot could be redesigned in a way that would protect the State's interests. [*Id.*] But despite this critical centrality of ballot redesign to the court's ruling, the State never had a proper opportunity to address it, nor did the court ever fully engage with it.

The State never had a proper opportunity to address ballot redesign because the superior court raised it sua sponte in its order granting summary judgment to the Party. In the briefing, the Party had only advocated for—and the Party's bylaws only contemplate—the unchanged ballot design described above. [Exc. 4, 231-32] So the State's arguments about voter confusion and deception addressed the problems that would result from that design, not other hypothetical designs. The Party never advocated the position that the court ultimately adopted—that the party affiliation rule is unconstitutional because the ballot could be redesigned. [Exc. 231-35]

After the court issued its summary judgment order, the State asked the court to clarify its ruling by approving a proposed ballot redesign. [Exc. 238-46] The Party had "some concerns" with the State's proposed redesign, but did not explain. [R. 249] And the superior court refused to weigh in at all. [Exc. 248-51] The State's primary ballot redesign listed candidates' party affiliations and the primaries in which they are running, and the general election ballot listed party candidates' nominating parties [Exc. 243-45]:

**United States Representative**
(vote for one)
The party primary is indicated to the right of the candidate's name.

| | |
|---|---|
| ◯ Hibler, William D. "Bill" **Democrat** | AK Democratic Party Primary |
| ◯ Hinz, Lynette "Moreno" **Democrat** | AK Democratic Party Primary |
| ◯ Lindbeck, Steve **Democrat** | AK Democratic Party Primary |
| ◯ McDermott, Jim C. **Libertarian** | AK Libertarian Party Primary |
| ◯ Watts, Jon B. **Libertarian** | AK Libertarian Party Primary |

**State Representative District 1**
(vote for one)
The party primary is indicated to the right of the candidate's name.

| | |
|---|---|
| ◯ Kawasaki, Scott J. **Democrat** | AK Democratic Party Primary |
| ◯ Candidate 2 **Non-Partisan** | AK Democratic Party Primary |
| ◯ Candidate 3 **Libertarian** | AK Libertarian Party Primary |

**United States Senator**
(vote for one)
The nominating party is indicated to the right of the candidate(s).

| | |
|---|---|
| ◯ Craig, Breck A. | Non-Affiliated |
| ◯ Gianoutsos, Ted | Non-Affiliated |
| ◯ Metcalfe, Ray | AK Democratic Party Nominee |
| ◯ Miller, Joe | AK Libertarian Party Nominee |
| ◯ Murkowski, Lisa | AK Republican Party Nominee |
| ◯ Stock, Margaret | Non-Affiliated |
| ◯ Write-in _____ | |

**United States Representative**
(vote for one)
The nominating party is indicated to the right of the candidate(s).

| | |
|---|---|
| ◯ Lindbeck, Steve | AK Democratic Party Nominee |
| ◯ McDermott, Jim C. | AK Libertarian Party Nominee |
| ◯ Souphanavong, Bernie | Non-Affiliated |
| ◯ Young, Don | AK Republican Party Nominee |
| ◯ Write-in _____ | |

Although the State proposed this redesign in an attempt to head off future expedited litigation with the Party over the meaning of summary judgment order, the State did not concede that this redesign would protect all of its interests. [Exc. 239] And indeed, there is no way to design a general election ballot that will do so.

Without the party affiliation rule, the State has three possible options for what information to list alongside a candidate's name on the general election ballot: (1) the

candidate's personal affiliation; (2) how the candidate reached the ballot (i.e., the nominating political party, or a designation like "petition candidate"); or (3) both of these things.[99] The superior court correctly ruled out the first option as a deceptive "bait and switch." [Exc. 232] But the other two options are also problematic.

If the general election ballot lists only the candidate's nominating party and not the candidate's personal affiliation—as in the State's proposed redesign, pictured above—it will mislead voters by providing them with incomplete information. Voters will reasonably assume that the nominee of the Democratic Party is a registered Democrat who identifies with the Party, not a person who refuses to register with it.

But if the general election ballot lists both the candidate's personal affiliation and the nominating party, any word the State uses to describe the candidate's affiliation will be linguistically confusing, deceptive, or both. Possible descriptors include the two options used in the registration statute—"nonpartisan" or "undeclared"[100]—as well as similar descriptors like "non-affiliated" or "independent." But none of these words fits a party's candidate. A party's candidate is not "nonpartisan," even if that is what her voter registration says. Nor is she really "non-affiliated," because the party's nomination surely "affiliates" her with it in some sense. Using the word "undeclared" on a ballot would be confusing given that candidates "declare" their candidacies (it also would not reflect the voter registration of a declared "nonpartisan"). And the word "independent" would create

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[99] A fourth option would be to omit affiliation information altogether, but that would be inconsistent with statute. *See* AS 15.15.030(5).

[100] *See* AS 15.07.075.

a risk of confusion given the existence of the Alaskan Independence Party—the Ninth Circuit has recognized a similar risk of confusion.[101] Plus, a party's candidate cannot truly be "independent" from political parties because she is "dependent" on the nominating party for her place on the ballot. And whatever word is chosen, the ballot will be confusing because voters who are used to relying on party labels will be faced with a candidate identified by two mutually exclusive designations.[102]

The superior court disregarded voter confusion and deception as a problem, observing that the Supreme Court in *Tashjian* "was skeptical of the claim that permitting independent voters to participate in a party primary would result in voter confusion." [Exc. 233] But *Tashjian* concerned rules about voter participation, which carry much less potential to confuse and mislead voters than the words they are confronted with on the face of the ballot itself. And *Tashjian* did not hold that party labels are meaningless or could never confuse and mislead voters—it recognized that voters rely on party labels.[103]

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[101] *See Chamness*, 722 F.3d at 1118 ("The term 'Independent,' if listed next to a candidate's name on a ballot, might be confused with the name of a political party, such as the 'American Independent' party—one of California's 'qualified' political parties.").

[102] The State's interest in ensuring that support for the candidate is a fair proxy for support for the nominating party—discussed above—will also suffer. If only the nominating party is listed, the votes of uninformed voters, at least, might be a rough proxy for their support for the nominating party. But this would no longer be the case if both nominating party and personal affiliation are listed.

[103] *See Tashjian*, 479 U.S. at 220 ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.").

Because no ballot redesign could explain for voters the fundamentally confusing presence of a "nonpartisan" Democratic Party candidate in the general election, the party affiliation rule furthers the State's interest in preventing voter confusion and deception.

### C. The party affiliation rule helps safeguard the stability of the political system by protecting the integrity of the different routes to the ballot and the meaning of party labels.

The party affiliation rule also furthers the State's interest in the stability of its political system by protecting the integrity of the State's two routes to the general election ballot, preserving party labels as meaningful sources of information for voters, and maintaining political parties as viable and coherent entities.[104]

The State has created two distinct routes to the general election ballot—one for party candidates and one for non-party candidates—and the party affiliation rule protects the integrity of this structure. In *Storer v. Brown*, the U.S. Supreme Court upheld a disaffiliation law that prevented a candidate from running as an independent if she had been registered with a party within one year before the primary election.[105] The Court acknowledged California's "compelling" interest in the stability of its political system, and remarked that the disaffiliation law was "expressive of a general state policy aimed at

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[104] *See Timmons*, 520 U.S. at 366 ("States also have a strong interest in the stability of their political systems."); *Storer*, 415 U.S. at 736 (recognizing "the State's interest in the stability of its political system" as compelling, and explaining that "[a] State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government").

[105] *Storer*, 415 U.S. at 726-27.

maintaining the integrity of the various routes to the ballot." [106] Although California had previously had a more permissive system, the Court approved of its switch to a stricter system of distinct ballot access routes, under which a party candidate could only run in his own party's primary and could not run as an independent if he lost.[107] Similarly, the en banc Colorado Supreme Court upheld a one-year disaffiliation period for independent candidates, holding that it "preserves the state's compelling interest in 'maintaining the integrity' of its ballot access system . . . and thus promotes the overall stability of the state's election process."[108] The Sixth and Tenth Circuits have held similarly.[109]

This Court has seemingly approved of the State's two distinct routes to the ballot in past cases. For example, in its *Vogler* opinions, the Court fine-tuned those routes by requiring a less demanding signature threshold for petition candidates[110] and a lower vote threshold for political party recognition.[111] And in *Metcalfe*, the Court reasoned that

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106 *Id.* at 735-36.

107 *See id.*

108 *Colo. Libertarian Party v. Sec'y of State of Colo.*, 817 P.2d 998, 1004 (Colo. 1991) (quoting *Storer*, 415 U.S. at 733); *see also Wells v. State ex rel. Miller*, 791 S.E.2d 361, 374-77 (W. Va. 2016) (discussing West Virginia's two distinct routes to the general election ballot and rejecting constitutional challenge to prohibition on registered party member being nominated by petition rather than party primary).

109 *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012) ("By requiring independent candidates to make a good-faith claim of non-affiliation by the day before the primary, Ohio seeks to maintain the integrity of its different routes to the ballot—the partisan primary and the independent petition."); *Curry v. Buescher*, 394 F. App'x 438, 446 (10th Cir. 2010) (unpublished) (concluding that "Colorado's compelling interest in political stability" justified disaffiliation law).

110 *See Vogler I*, 651 P.2d at 6.

111 *See Vogler II*, 660 P.2d at 1196.

"[i]mplicit in the two *Vogler* opinions is the conclusion that these processes are not equivalent and that each is governed by its own inquiry," concluding that it was reasonable for the State to impose a higher threshold for party recognition than for a petition candidate.[112] Although the Court did not address the difference between a party candidate and a petition candidate, the party affiliation rule is an integral part of the same two-route ballot access system that the Court fine-tuned in those cases.

The party affiliation rule also helps foster informed and educated voting choices by maintaining the informational value of party labels for voters. The U.S. Supreme Court has said that there is "no question" that the State has a legitimate interest in "fostering informed and educated expressions of the popular will in a general election."[113] And "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern," they "play[] a role in the process by which voters inform themselves for the exercise of the franchise."[114] With the party affiliation rule in place, a voter who sees that a candidate is the Democratic nominee knows that the candidate personally identifies as a Democrat, and can infer that the candidate generally supports the ideology of the Democratic Party. This provides the voter with relevant, helpful information. The Party's belief that party labels "are a poor

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112 *Metcalfe*, 110 P.3d at 982.

113 *Anderson*, 460 U.S. at 796.

114 *Tashjian*, 479 U.S. at 220; *see also Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) ("Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting. Almost two-thirds of the electorate has some form of party loyalty, and the tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level.").

proxy for ideology" and are not relied upon by voters is inconsistent with a basic premise of its lawsuit—that some candidates might want to run for the Democratic nomination but be unwilling to register as Democrats. [Exc. 135] If party labels were meaningless, a candidate would have no reason to be unwilling to register as a Democrat.

In *Tashjian*, the U.S. Supreme Court rejected a related argument about dilution of party labels, but the Court's reasoning actually supports the State's position here.[115] The state in *Tashjian* argued that if non-member voters could participate in the party's primary, "it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name."[116] The Court disagreed, but not because it thought the state's underlying concern was invalid—rather, it disagreed because other aspects of the electoral system in that case protected the meaning of the party label.[117] That electoral system required that primary candidates obtain at least 20 percent of the vote at a party convention attended by only party members, thereby guaranteeing party involvement in the choice of a nominee and "greatly attenuat[ing] the State's concern that the ultimate nominee will be wedded to the Party in nothing more than a marriage of convenience."[118] Alaska, by contrast, allows open primaries without any such convention approval. So without the party affiliation rule, there would be no mandatory connection between a

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115 *Tashjian*, 479 U.S. at 220.

116 *Id.* (quoting appellant's brief).

117 *See id.* at 220-21.

118 *Id.*

party and its nominee—paving the way for a pure "marriage of convenience." Thus—contrary to the superior court's reasoning—the fact that Alaska allows open primaries makes the party affiliation rule more crucial, not less justified. [Exc. 231]

And two decades after *Tashjian*, the U.S. Supreme Court upheld Oklahoma's semiclosed primary in *Clingman v. Beaver*, crediting the state's interest in "preserv[ing] the political parties as viable and identifiable interest groups."[119] Rejecting a party's argument that it should be allowed to open its primary to voters of other parties, the Court reasoned that "[i]t does not matter that the [party] is willing to risk the surrender of its identity in exchange for electoral success. Oklahoma's interest is independent and concerns the integrity of its primary system."[120] The Court recognized that "[i]n facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations."[121] The same legitimate state interests support Alaska's party affiliation rule.

The superior court reasoned that "there is a significant political advantage gained by a party that can attract non-affiliated voters." [Exc. 206] But if a party appeals to non-affiliated voters by nominating non-affiliated candidates chosen in an open primary, the party's primary loses any meaning as a party primary and the party's label on the general

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119 544 U.S. 581, 594 (2005).

120 *Id.*

121 *Id.* (alterations in original) (quoting *Nader v. Schaffer*, 417 F. Supp. 837, 846 (D. Conn.), *aff'd*, 429 U.S. 989 (1976)).

election ballot loses any value as a source of information for voters.[122] The Democratic nominee would not necessarily be either a Democrat or the choice of Democrats. She could be a non-Democrat chosen without any input from the Democratic Party by a collection of non-Democrat primary voters. Under those circumstances, the Democratic Party's label on the general election ballot would mean nothing.

Although the Democratic Party is always free to endorse a candidate who is not a Democrat,[123] there is a significant difference between an endorsement of a specific candidate and an electoral system under which the Democratic nominee need not have any connection to the Democratic Party at all. The Democratic Party's endorsement of a specific candidate—whether a Democrat or not—reflects a value judgment by the Party that this candidate will promote the Party's ideals. But such a deliberate value judgment about a candidate is precisely the opposite of what the Party seeks here. Here, the Party seeks a system in which any candidate—regardless of how repugnant to the Party—can obtain its nomination without even the need to personally identify with it.

By preventing this, the party affiliation rule helps preserve political parties as viable and coherent entities, contributing to the health of the State's political system. The hope of a representative democracy is that voters will be able to translate their votes into

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122 *Cf. Clingman*, 544 U.S. at 595 ("Opening the LPO's primary to all voters not only would render the LPO's *imprimatur* an unreliable index of its candidate's actual political philosophy, but it also 'would make registered party affiliations significantly less meaningful in the Oklahoma primary election system.' . . . Oklahoma reasonably has concluded that opening the LPO's primary to all voters regardless of party affiliation would undermine the crucial role of political parties in the primary process.").

123 Although the Party's rules might restrict such endorsements, state law does not.

policy action by uniting behind candidates who share their views. The party system helps organize like-minded voters into groups that can combine their votes to elect candidates who share similar views. Grouping voters with shared views around a handful of candidates—one for each party—helps ensure that a candidate who is ultimately elected has a majority, or at least a large share, of votes.[124] The party system also helps organize elected representatives; if a majority of them belong to the same party, they have a mandate to pursue that party's policies. And those who disagree with that majority party can better hold it accountable if they are likewise organized into coherent groups. But the viability of this party system depends on a party representing some identifiable set of views or policies. This is what it means to be a political party—to band together around shared political views. If parties lose this coherence, a party may nominally command a majority but be unable to govern because the party label will not represent shared views. This could erode the functioning of a democracy and undermine voters' faith in it.

All of these important state interests justify Alaska's party affiliation rule.

**D. The party affiliation rule is within the mainstream of other states.**

Finally, this Court has said that the State can "satisfy its burden" of justifying an election regulation as appropriately tailored "by showing that its actions remain 'in the

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[124] *See Storer*, 415 U.S. at 729 (noting "substantial state interest in encouraging compromise and political stability [and] in attempting to ensure that the election winner will represent a majority of the community"); *id.* at 735 ("The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively."); *Williams*, 393 U.S. at 32 ("[T]he State does have an interest in attempting to see that the election winner be the choice of a majority of its voters.").

mainstream of the practices of other states.' "[125] Alaska's party affiliation rule is well within the mainstream, as at least half the states appear to have similar rules: Arizona,[126] Connecticut,[127] Delaware,[128] Florida,[129] Hawaii,[130] Idaho,[131] Illinois,[132] Kansas,[133]

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[125] *Green Party II*, 147 P.3d at 735-36 (quoting *Metcalfe*, 110 P.3d at 981).

[126] *See* Ariz. Rev. Stat. § 16-311 ("Any person desiring to become a candidate at a primary election for a political party and to have the person's name printed on the official ballot shall be a qualified elector of such party . . . .").

[127] *See* Conn. Gen. Stat. § 9-400 ("A candidacy for nomination by a political party to a state office may be filed by or on behalf of any person whose name appears upon the last-completed enrollment list of such party in any municipality within the state . . . .").

[128] *See* Del. Code tit. 15, § 3301 ("[A] candidate for office nominated by a party under this section upon the filing of a certificate of nomination must be a registered member of the party nominating such candidate at the time the certificate of nomination is filed, as shown on the voter rolls . . . ."); Del. Code tit. 15, § 3106 ("At the time of the filing of the notice . . . the person filing such notice shall be a registered member of the party whose nomination such person seeks, as shown on the voter rolls . . . .").

[129] *See* Fla. Stat. § 99.021 ("[A]ny person seeking to qualify for nomination as a candidate of any political party shall, at the time of subscribing to the oath or affirmation, state in writing: 1. The party of which the person is a member. 2. That the person has not been a registered member of any other political party for 365 days before the beginning of qualifying preceding the general election for which the person seeks to qualify.").

[130] *See* Haw. Rev. Stat. Ann. § 12-3 (nominating petition must contain: "A sworn certification by self-subscribing oath by a party candidate that the candidate is a member of the party."); *see also Burdick*, 504 U.S. at 440 ("While voters may vote on any ticket in Hawaii's primary, the State requires that party candidates be 'member[s] of the party,' . . . .") (citations omitted).

[131] *See* Idaho Code § 34-704 ("All political party candidates shall declare their party affiliation in their declaration of candidacy and shall be affiliated with a party at the time of filing.").

[132] *See* 10 Ill. Comp. Stat. 5/7-10 (statement of candidacy "shall state that the candidate is a qualified primary voter of the party to which the petition relates . . . .").

[133] *See* Kan. Stat. § 25-205 (providing that candidate can qualify for primary ballot either by submitting petition signed by party members who nominate the candidate as "representing the principles of such party;" or by submitting a candidate declaration form and fee); https://www.kssos.org/forms/elections/CD.pdf (candidate declaration form requiring primary candidate to affirm that she is "affiliated with the above-stated party").

Kentucky,[134] Maine,[135] Maryland,[136] Massachusetts,[137] Minnesota,[138] Nevada,[139] New Hampshire,[140] New Jersey,[141] New Mexico,[142] North Carolina,[143] Ohio,[144] Oklahoma,[145]

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[134] *See* Ky. Rev. Stat. § 118.125(2)(a) (party primary candidate must declare: "I am a registered ------ (party) voter in ------ precinct; that I believe in the principles of the ------ Party, and intend to support its principles and policies").

[135] *See* Me. Rev. Stat. tit. 21-A, § 334 ("A candidate for nomination by primary election must file a primary petition . . . . The candidate must be enrolled, on or before March 15th, in the party named in the petition.").

[136] *See* Md. Code, Elec. Law § 5-203(a)(2) ("Unless the individual is a registered voter affiliated with the political party, an individual may not be a candidate for: . . . except [for judicial office or education board], nomination by that political party.").

[137] *See* Mass. Gen. Laws ch. 53, § 48 (candidate must certify: "that he has been enrolled as a member of the political party whose nomination he seeks throughout the ninety days prior to the last day herein provided for filing nomination papers.").

[138] *See* Minn. Stat. § 204B.06 ("A candidate who seeks the nomination of a major political party for a partisan office shall state on the affidavit of candidacy that the candidate either participated in that party's most recent precinct caucus or intends to vote for a majority of that party's candidates at the next ensuing general election.").

[139] *See* Nev. Rev. Stat. § 293.177(2)(a) (candidate must certify: "I am registered as a member of the _____ Party . . . . I generally believe in and intend to support the concepts found in the principles and policies of that political party. . . .").

[140] *See* N.H. Rev. Stat. § 655:14 ("The name of any person shall not be printed upon the ballot of any party for a primary unless he or she is a registered member of that party.").

[141] *See* N.J. Stat. § 19:23-7 (candidate must certify: "that he is qualified for the office mentioned in the petition, that he is a member of the political party named therein [and] that he consents to stand as a candidate for nomination at the ensuing primary election of such political party . . . .").

[142] *See* N.M. Stat. § 1-8-18(A)(1) ("No person shall become a candidate for nomination by a political party or have his name printed on the primary election ballot unless his record of voter registration shows . . . his affiliation with that political party on the date of the governor's proclamation for the primary election . . . .").

[143] *See* N.C. Gen. Stat. § 163-106(b) ("No person shall be permitted to file as a candidate in a party primary unless that person has been affiliated with that party for at least 90 days as of the date of that person filing such notice of candidacy. A person

Oregon,[146] South Carolina,[147] South Dakota,[148] West Virginia,[149] and Wyoming.[150] This helps demonstrate that Alaska's party affiliation rule is a reasonable election regulation.

## CONCLUSION

For these reasons, the Court should reverse the superior court's decision and uphold the party affiliation rule set forth in AS 15.25.030(a)(16).

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registered as 'unaffiliated' shall be ineligible to file as a candidate in a party primary election.").

[144] *See* Ohio Rev. Code § 3513.05 (primary candidate for party nomination must file declaration signed by "qualified electors who are members of the same political party as the political party of which the candidate is a member").

[145] *See* Okla. Stat. tit. 26, § 5-105 ("To file as a candidate for nomination by a political party to any state or county office, a person must have been a registered voter of that party for the six-month period immediately preceding the first day of the filing period prescribed by law and, under oath, so state.").

[146] *See* Or. Rev. Stat. § 249.046 ("If a candidate has not been a member of the major political party for at least 180 days before the deadline for filing . . . the candidate shall not be entitled to receive the nomination of that major political party.").

[147] *See* S.C. Code § 7-11-210 (candidate must pledge: "I hereby file my notice as a candidate for the nomination as _____ in the primary election or convention to be held on _____. I affiliate with the _____ Party . . . .").

[148] *See* S.D. Codified Laws § 12-6-3.2 ("No person may sign a declaration of candidacy or be nominated as a political candidate for a party unless that person is a registered voter with that party affiliation.").

[149] *See* W. Va. Code § 3-5-7 (primary candidate must file certificate stating: "For partisan elections, the name of the candidate's political party and a statement that the candidate . . . [i]s a member of and affiliated with that political party as evidenced by the candidate's current registration as a voter affiliated with that party.").

[150] *See* Wyo. Stat. § 22-5-204 ("An eligible person seeking nomination or election for a partisan office shall be registered in the party whose nomination he seeks . . . .").

IN THE SUPREME COURT OF THE STATE OF ALASKA

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|---|---|
| STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, in her capacity as Director of the Division of Elections,<br><br>Petitioners,<br><br>v.<br><br>ALYSE GALVIN,<br><br>Respondent. | Superior Case No. 3AN-20-7991 CI<br><br>Supreme Court No. S-17887 |

**MOTION TO ACCEPT OVERLENGTH OPPOSITION TO PETITION FOR REVIEW**

Respondent, Alyse Galvin, respectfully requests the Court accept the attached overlength Opposition to Petition for Review. This request is warranted given the critical significance of the issue at hand - the design of the 2020 general election ballot and the extraordinarily expedited nature of this matter.

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DATED: September 17, 2020.

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**[PROPOSED] ORDER GRANTING MOTION TO ACCEPT OVERLENGTH OPPOSITION TO PETITION FOR REVIEW**

Upon consideration of the request of Respondent Alyse Galvin, to file and overlength Opposition to Petition for Review, the Respondent's request is GRANTED and the opposition is accepted for filing.

DATED: _____, 2020.

By: _____
Supreme Court for the State of Alaska

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