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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

SCOTT A. KOHLHAAS, THE ALASKAN INDEPENDENCE PARTY, ROBERT M. BIRD, AND KENNETH P. JACOBUS, Plaintiffs, v. STATE OF ALASKA; STATE OF ALASKA: DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR KEVIN MEYER, in his official capacity as Supervisor of Elections; and GAIL FENUMIAI, in her official capacity of Director of the Division of Elections Defendants.	Case No. 3AN-20-09532 CI
ALASKANS FOR BETTER ELECTIONS, INC. Intervenor.	

INTERVENOR ALASKANS FOR BETTER ELECTIONS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiffs filed a facial challenge seeking to invalidate the entirety of Ballot Measure 2 after voters approved its comprehensive election reforms. But six months after filing this lawsuit, Plaintiffs — who themselves concede that policy arguments alone cannot render a law unconstitutional[1] — nevertheless in their joint opposition to the State and ABE rely almost exclusively on policy arguments that are not relevant to this court's decision.[2] These irrelevant policy arguments, along with a host of key concessions and omissions by Plaintiffs, leave little that requires a response.

Plaintiffs fail to identify a single way Ballot Measure 2 violates the Alaska or United States Constitutions. Critically, Plaintiffs repeatedly concede that "the State does not have to operate a state-run nominating process,"[3] and they recognize that, under *Washington State Grange v. Washington State Republican Party*, the U.S. Constitution does not grant such a right.[4] Plaintiffs also concede that, under that case, nonpartisan primary systems do

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1 Plaintiffs' Joint Opposition to Motions for Summary Judgment of the State of Alaska and Alaskans for Better Elections and Cross-Motion for Summary Judgment at 3 (May 17, 2021) [hereinafter Plaintiffs' Opposition] ("This Court is not to determine whether the system is good or bad, but only whether it is Constitutional.").

2 *See generally id.* (arguing against reduced barriers to entry for candidates and opposing the notion that Alaska should be a laboratory of democracy).

3 *Id.* at 11; *see also id.* at 2 ("[T]here is no legal requirement that the State pay for primary elections to select party candidates.").

4 *Id.* at 14-16 (attempting to distinguish Ballot Measure 2 from the law at issue in *Washington State Grange*); *see id.* at 15 ("This case, in summary, held that the record did not support a facial challenge.").

not facially burden the associational rights of political parties under the U.S. Constitution because they do not interfere with parties' internal affairs.[5]

Instead, Plaintiffs now argue that political parties have greater associational rights under Alaska's Constitution; specifically, that it gives political parties an affirmative right to identify their nominees on the ballot.[6] But there is no such special constitutional right in the Alaska Constitution.

As to Plaintiffs' claims about the races for governor and lieutenant governor, on which Plaintiffs separately moved for summary judgment and ABE opposed in separate briefing, Plaintiffs now concede that ABE and the State's position that Ballot Measure 2 "does not violate the principle of 'one person, one vote' . . . is well taken."[7] This concession resolves this claim.

Because none of Plaintiffs' arguments have merit, this court should grant ABE's motion for summary judgment.[8]

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5 *See id.* at 14-16.

6 *See id.* at 11 (arguing that voters should "be able to identify the party candidate"); *see also id.* at 12 ("There is no way that a 'party candidate' can prevail . . . because there is no identified party candidate."), 14 ("[P]olitical parties . . . can no longer have their candidates identified as their candidates on the ballots.").

7 *Id.* at 18 n.10. Plaintiffs' only apparent remaining concern with ranked-choice voting ("RCV") now appears to be that voters will be ranking candidates "without knowing who the remaining candidates are." *Id.* at 17; *see id.* at 17-18. ABE's Opposition to Plaintiffs' Motion for Partial Summary Judgment (May 17, 2021) [hereinafter ABE's Opposition] is adopted herein, to the extent Plaintiffs repeat their summary judgment arguments in Plaintiffs' Opposition.

8 Plaintiffs titled their brief as an opposition and cross-motion. Plaintiffs' Opposition at 1. But because the parties have already agreed to a simultaneous

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I. Political Parties Do Not Have A Constitutional Right To Designate Their Nominees On The Ballot Under The Alaska Constitution.

Plaintiffs concede off the bat that "the State does not have to operate a state-run nominating process" for party candidates.[9] Plaintiffs also concede that the U.S. Supreme Court in *Washington State Grange* held that a similar statute providing for a nonpartisan primary does "not support a facial challenge," because "[p]rimary voters were not choosing a parties[']' nominee."[10] These concessions are determinative.

Parsing through Plaintiffs' policy arguments, the only conceivable constitutional injury that Plaintiffs appear still to allege is that, under Ballot Measure 2, a political party is unable to specifically identify the party's chosen nominees on the ballot.[11] But this is not a constitutionally protected right. In fact, courts have thoroughly rejected the notion that parties have a right to the type of electioneering on the ballot that Plaintiffs now seek,

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responsive briefing schedule, Plaintiffs are not entitled to an additional reply beyond what this court has already ordered. *See* Order Granting Motion to Set Briefing Schedule for Summary Judgment Motions (Apr. 11, 2021); *see also* Order Granting Non-Opposed Motion for Time Extension (May 14, 2021).

9 Plaintiffs' Opposition at 11; *see also id.* at 2 ("[T]here is no legal requirement that the State pay for primary elections to select party candidates.").

10 *Id.* at 15 ("[T]he [U.S. Supreme] Court observed that a non-partisan blanket primary has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters were not choosing a parties[']' nominee.").

11 *Id.* at 11 (arguing that voters should "be able to identify the party candidate"); *see id.* at 12 ("There is no way that a 'party candidate' can prevail . . . because there is no identified party candidate."), 14 (lamenting that "political parties . . . can no longer have their candidates identified as their candidates on the ballot"); *see also id.* at 8-17.

and history from recent elections confirms the constitutionality of Ballot Measure 2's provisions.

At the outset, the parties agree on the four-part inquiry for determining whether an elections statute violates the Alaska Constitution:

> When an election law is challenged the court must first determine whether the claimant has in fact asserted a constitutionally protected right. If so we must then assess "the character and magnitude of the asserted injury to the rights." Next we weigh "the precise interests put forward by the State as justifications for the burden imposed by its rule." Finally, we judge the fit between the challenged legislation and the [S]tate's interests in order to determine "the extent to which those interests make it necessary to burden the plaintiff's rights."[12]

As Plaintiffs recognize, nothing in Ballot Measure 2 prevents a political party from holding a convention or election to determine its nominees.[13] Nor does Ballot Measure 2 prevent a political party from either promoting or disavowing candidates who may choose to list their affiliation with that political party.[14] And nothing prevents a political party from engaging in free speech during a political campaign.

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12 *State v. Alaska Democratic Party*, 426 P.3d 901, 907 (Alaska 2018) (alteration in original) (quoting *State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005)).

13 Plaintiffs' Opposition at 7, 11 n.6.

14 *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 (2008) ("[P]arties may now nominate candidates by whatever mechanism they choose.").

But no one, including a political party, has a constitutional right to engage in free speech *on the ballot itself*, and this conclusion is neither surprising nor new.[15] The U.S. Supreme Court has repeatedly held as much: "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot."[16] Further, "[p]arties do not gain such a right simply because the State affords candidates the opportunity to indicate their party preference on the ballot. 'Ballots serve primarily to elect candidates, not as forums for political expression.' "[17] Circuit courts have repeated this clear refrain since *Washington State Grange*.[18]

There is no reason to think that the Alaska Supreme Court would or could reach a different conclusion under the Alaska Constitution. The text of the Alaska Constitution

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15 *Id.* at 453 n.7 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63 (1997)).

16 *Id.* (citing *Timmons*, 520 U.S. at 362-63); *see also id.* at 461 (Roberts, C.J., concurring) ("[T]he State controls the content of the ballot, which we have never considered a public forum." (citing *Timmons*, 520 U.S. at 363)).

17 *Id.* at 453 n.7 (quoting *Timmons*, 520 U.S. at 363).

18 *Marcellus v. Virginia State Bd. of Elections*, 849 F.3d 169, 176 (4th Cir. 2017) ("The jurisprudence of *Timmons* and *Washington State Grange* thus makes clear that even though a statute . . . may prevent political parties from indicating on the ballot which local candidates are their nominees, it does not impose a constitutionally cognizable burden on those parties' associational rights because '[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot.'" (second alteration in original) (quoting *Washington State Grange*, 552 U.S. at 453 n.7)); *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) ("The Supreme Court has twice concluded that political parties do not have a First Amendment right to party designation of their nominees on a ballot." (citing *Washington State Grange*, 552 U.S. at 453 n.7; *Timmons*, 520 U.S. at 362-63)).

creates no affirmative rights for political parties; indeed, political parties are not even mentioned in Article V on elections, or anywhere else in the Constitution.[19] And although "the Alaska Constitution is more protective of political parties' associational interests than . . . the federal constitution" in some contexts,[20] those greater protections do not apply here.[21]

The Alaska Supreme Court has interpreted the Alaska Constitution to be more protective *only* with respect to the rights of political parties to determine their own *internal* processes for nominating candidates. Specifically, the Court has given political parties the latitude to determine who selects their nominees,[22] and who may be a candidate for nomination.[23] But as was discussed in ABE's opening brief, because Alaska's top four

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19 Notably, Nebraska has had nonpartisan statewide elections since 1934 when its state constitution was amended. *See* Neb. Const. art. III, § 7 ("Each member shall be nominated and elected in a nonpartisan manner and without any indication on the ballot that he or she is affiliated with or endorsed by any political party or organization."). The absence of any related language in the after-adopted Alaska Constitution, either for or against nonpartisan elections, should therefore be construed in ABE's favor. *See Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) ("We are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result." (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994))); *see also* Alaska Const. art. V, § 3 ("Methods of voting, including absentee voting, shall be prescribed by law.").

20 *Alaska Democratic Party*, 426 P.3d at 909 (citing *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982)).

21 *See* Alaska Const. art. V, § 3 ("Methods of voting, including absentee voting, shall be prescribed by law.").

22 *Green Party of Alaska*, 118 P.3d at 1060.

23 *Alaska Democratic Party*, 426 P.3d at 909.

nonpartisan primary in no way interferes with who can participate in the political parties' process for selecting their nominees, the greater protection offered by the Alaska Constitution is inapplicable here.[24] And contrary to the Plaintiffs' arguments, the Alaska Supreme Court actually held in *State v. Green Party of Alaska*, that "[s]tates do not have a valid interest in manipulating the outcome of elections, in protecting the major parties from competition, or in stunting the growth of new parties."[25] Accordingly, there is no constitutional right to communicate partisan information on the ballot as Plaintiffs appear to request.

Plaintiffs' speculation about voter confusion under Ballot Measure 2 also does not rise to the level of a constitutional violation. A party can publicly endorse its preferred candidate during the campaign, but this is not constitutionally required to extend onto a ballot. In fact, recent elections in Alaska show that this is possible. For example, in 2016, the winner of the Democratic primary for U.S. Senate (Ray Metcalf) was "abandoned" by

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[24] Intervenor Alaskans for Better Elections' Motion for Summary Judgment at 22-25 (Apr. 2, 2021) [hereinafter "ABE's Motion"].

Indeed, Plaintiffs concede that political parties have the right to conduct their own primary elections or to have their party leaders choose a nominee. *See* Plaintiffs' Opposition at 11 n.6. By their own admission, their real concern is that their particular political party allegedly cannot afford to conduct such a primary, and Plaintiffs would prefer not to have their party's nominees chosen through another method. *Id.* These are policy, not constitutional, concerns.

[25] *Green Party of Alaska*, 118 P.3d at 1068 (quoting *Clingman v. Beaver*, 544 U.S. 581, 609 (2005) (Stevens, J. dissenting)).

the Democratic party.[26] The Democratic Party was free to — and in fact did — distance itself from its nominee, but that did not change its nominee's party affiliation on the ballot.[27] Additionally, in the recent mayoral runoff election in Anchorage, neither candidate had a party affiliation or nominee status listed, because all elections within the Municipality of Anchorage are nonpartisan.[28] Anchorage's decision — like many other local governments in Alaska — to hold nonpartisan elections clearly does not violate the associational rights of political parties under the Alaska Constitution. And Ballot Measure 2's top four nonpartisan primary similarly raises no constitutional infirmity under the Alaska Constitution based on Plaintiffs' hypothetical concerns of voter confusion.

Finally, by (incorrectly) claiming that the constitutional rights of political parties may be violated, Plaintiffs ignore the constitutional rights of a more important group: voters. The Alaska Supreme Court has consistently held that the constitutional rights of voters are paramount.[29] And the will of Alaska's voters, in choosing to enact election

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26 Erica Martinson, *Alaska Democrats Face Internal Strife Over US Senate Candidate*, ANCHORAGE DAILY NEWS (Oct. 22, 2016), https://www.adn.com/politics/2016/10/22/alaska-democrats-face-internal-strife-over-u-s-senate-candidate/.

27 *See id.*

28 *See* Anchorage Municipal Code (AMC) 28.40.010(A) (noting that "municipal elections [shall] be nonpartisan"); *see also* AMC 28.30.030 (omitting party affiliation as a required component of a declaration of candidacy).

29 *See Dansereau v. Ulmer*, 903 P.2d 555, 559 ("The right to vote encompasses the right to express one's opinion and is a way to declare one's full membership in the political community. Thus, it is fundamental to our concept of democratic government. Moreover, a true democracy must seek to make each citizen's vote as meaningful as

reforms — as they have done here through Ballot Measure 2 — should be given more weight than Plaintiffs' personal musings or policy preferences.[30] Political parties do not have greater constitutional protections than voters, and there is nothing unconstitutional about voters deciding to change how elections are conducted in the State of Alaska.

II. Plaintiffs' Apparent Concern With The State's Ballot Design Cannot Be Considered As Part Of This Facial Challenge.

Even if this Court were to hold that political parties have a right to have their chosen candidate so designated on the ballot, that would be a ballot design issue, not a constitutional infirmity with Ballot Measure 2. The same would be true for Plaintiffs' complaint that the ballot disclaimer is not sufficiently prominent.[31] Facial challenges, including this case, can *only* succeed if "there is *no* set of circumstances under which the statute can be applied consistent with the requirements of the constitution."[32] Furthermore,

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every other vote to ensure the equality of all people under the law."); *see also* ABE's Motion at 24-25.

30 *See Green Party of Alaska*, 118 P.3d at 1068 ("States do not have a valid interest in manipulating the outcome of elections, in protecting the major parties from competition, or in stunting the growth of new parties." (quoting *Clingman*, 544 U.S. at 609 (Stevens, J., dissenting))).

31 *See* Plaintiffs' Opposition at 16.

32 *State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009) (emphasis added) (citing *State, Dep't of Revenue, Child Support Enf't Div. v. Beans*, 965 P.2d 725, 728 (Alaska 1998)); *see also Washington State Grange*, 552 U.S. at 455 ("[T]hese cases involve a facial challenge, and we cannot strike down [the law] on its face based on the mere possibility of voter confusion.").

"[a] presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[33]

Plaintiffs cannot somehow convert their lawsuit into an "as-applied" challenge based on one example of a possible ballot design. In fact, Plaintiffs' own suggestions about how the State could improve its ballot design only support the argument that Ballot Measure 2 is, in fact, facially constitutional.[34] Thus, none of Plaintiffs' complaints about the State's example ballot can or should be used to question Ballot Measure 2's facial constitutionality.

III. Plaintiffs Have Waived Most Of Their Objections to RCV, And Their Remaining Objection Is Based On A Fundamental Misunderstanding Of How RCV Works.

Despite their earlier arguments, Plaintiffs now concede that ranked-choice voting ("RCV") does not violate the constitutional principle of "one person, one vote."[35] Plaintiffs also seem to have abandoned their inaccurate statement that RCV acts as a series of separate runoff elections. Plaintiffs' only remaining concern with

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33 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019) (quoting *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001)).

34 Plaintiffs' Opposition at 16 (suggesting that the disclaimer required by Ballot Measure 2 should be more prominently displayed on the ballot); *see ACLU of Alaska*, 204 P.3d at 372.

35 *See id.* at 18 n.10 (conceding that the State's and ABE's position that RCV "does not violate the principle of 'one person, one vote' . . . is well taken").

RCV is that voters will have to rank candidates "without knowing who the remaining candidates are."[36]

The first problem with this argument is that it is nothing more than a policy argument (which cannot prevail in a facial challenge), not an allegation of constitutional harm. Second, as previously explained, this argument is falsely grounded in a fundamental misunderstanding of how RCV actually works.[37]

Under Ballot Measure 2, there will be a maximum of only four candidates listed on the general election ballot. Voters who rank one of the top two finishers first will *never* have their first vote transferred to another choice because those candidates will never be eliminated.[38] For voters whose first choice ends up with the fewest votes and is eliminated, those voters still know — contrary Plaintiffs' suggestion — who the remaining candidates are, and those voters have an equal opportunity to rank them when they cast their ballots.[39] Thus, the hypothetical situation is not complex. Voters simply have to ask themselves, "if my preferred candidate is eliminated, which of the remaining three candidates (if any) do I want to support?"[40] RCV is really no more

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36 *See id.* at 17.

37 *See* ABE's Motion at 5-7; *see also* ABE's Opposition at 3-6.

38 *See* ABE's Motion at 5-7; *see also* ABE's Opposition at 3-6.

39 *See* ABE's Motion at 5-7; *see also* ABE's Opposition at 3-6.

40 *See* Rob Richie et al., *Instant Runoffs: A Cheaper, Fairer, Better Way to Conduct Elections*, 89.1 NAT'L CIVIC REV. 95, 105 (Spring 2000) ("Consider asking a small child about her favorite ice cream. Chocolate, she might say. And what if there is no chocolate[,] you ask. Then she will have strawberry. And if there is no

complicated than asking voters whether, in the event their preferred candidate ends up in last place, they wish to express a preference among the remaining candidates. Indeed, studies regarding other jurisdictions have demonstrated that voters have very little problem understanding RCV when put into practice.[41]

In short, Plaintiffs' "voter confusion" argument has no constitutional basis and is utterly bereft of logical or empirical support.

IV. Plaintiffs Do Not Challenge Ballot Measure 2's Dark Money Provisions, Which Are Constitutional.

Plaintiffs' Opposition confirms that they do not challenge the Dark Money provisions in Ballot Measure 2.[42] Indeed, Plaintiffs argue that "[i]t might be possible to sever dark money disclosure from the remainder of [Ballot Measure 2], and uphold [Ballot Measure 2's] dark money disclosure [provisions]."[43] Thus, Plaintiffs concede both the

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strawberry, she will settle with vanilla. The child just ranked three candidates: chocolate, strawberry, vanilla. That is all there is to [RCV].").

41 *See, e.g.*, Sarah John & Andrew Douglas, *Candidate Civility and Voter Engagement in Seven Cities with Ranked Choice Voting*, 106.1 NAT'L CIVIC REV. 25, 26 (Spring 2017) (explaining that, in a 2013 survey of American cities using RCV, 90% of respondents found the ballot easy to understand); Michael Lewyn, *Two Cheers for Instant Runoff Voting*, 6 PHOENIX L. REV. 117, 132 (2012) (noting that, in survey of voters in Minneapolis, Minnesota after the city's first election using RCV, 90 percent of respondents indicated that they understood RCV "perfectly well" or "fairly well").

42 Plaintiffs' Opposition at 7, 20.

43 *Id.* at 7; *see also id.* at 20.

constitutionality of these provisions and their severability, if the Court were to find a violation in other parts of Ballot Measure 2.[44]

V. Conclusion

At the end of the day, Plaintiffs have not articulated any valid reason for this court to declare any component of Ballot Measure 2's comprehensive election reforms facially unconstitutional. Plaintiffs' chief complaint, the lack of a political party nominee designation on the ballot, simply does not violate any right under the U.S. or Alaska Constitutions or statutes. Because none of Plaintiffs' complaints about Ballot Measure 2 have merit, this court should grant ABE's motion for summary judgment.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 28 day of May 2021.

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[44] The same severability analysis would also apply just as easily to any provision of Ballot Measure 2. *See* ABE's Motion at 34-38.