IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA DEMOCRATIC PARTY, Plaintiff, v. STATE OF ALASKA, Defendant.	)	**FILED IN CHAMBERS** STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: Oct. 17, 2017 Case No. 1JU-17-563CI

ORDER GRANTING ALASKA DEMOCRATIC PARTY'S MOTION FOR SUMMARY JUDGMENT AND DENYING STATE'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On February 21, 2017, the Alaska Democratic Party filed suit against the State of Alaska challenging the constitutionality of AS 15.25.030(a)(16). This statute requires primary election candidates to be registered members of the party in whose primary they run. The Party alleges that the statute places an undue burden on its constitutional right to associate with candidates of its choosing. The parties both moved for summary judgment on June 19, 2017. Each party opposed the other's motion on July 17, 2017, and oral argument was held on September 21, 2017.

For reasons provided below, the court finds that AS 15.25.030(a)(16) substantially burdens the Party's associational rights, and the burden is not outweighed by any significant state interests. As a result, the court grants the Party's motion for summary judgment, and denies the State's motion for summary judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Alaska Democratic Party is the second largest political party in Alaska, with more than 75,000 members. It is a "recognized" political party under state law.[1] The Party has chosen to have "open" primary elections, in which any registered voter is free to vote, regardless of his or her political affiliation. While state law opens parties' primaries to all non-partisan or undeclared voters, it also allows parties to either limit or expand this pool of primary voters by way of their bylaws.[2] Accordingly, although a registered Alaskan voter is limited to voting in a single primary each election cycle,[3] the Party has opened its primary to all registered voters, including members of other parties.

The Party's decision to have an open primary is apparently motivated by a desire to attract the support of non-affiliated voters for its candidates. More than half of Alaska's registered voters have selected "Non-Partisan" or "Undeclared" as their political affiliation. This leaves Alaska with one of the country's highest percentages of unaffiliated voters.[4] Thus there is a significant political advantage gained by a party that can attract non-affiliated voters.

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[1] AS 15.80.008.
[2] AS 15.25.010 and 15.25.014(b).
[3] AS 15.25.060(b).
[4] According to the Independent Voter Project, 54% of registered Alaska voters are not affiliated with a political party. Only Arkansas reports a higher percentage. *See* https://ivn.us/2016/02/24/independent-voter-registration-by-state/ (viewed October 1, 2017). The Pew Research Forum reports that 29% of registered Alaska voters lean toward no political party, more than any other state. *See* http://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/state/ (viewed October 1, 2017).

Last year, the Party decided that it would open its primary election to non-affiliated candidates, in addition to non-affiliated voters. On January 25, 2016, before the Party had formally amended its bylaws, the Party chair asked the State to consider the constitutionality of AS 15.25.030(a)(16), which permits only registered members of a party to run as candidates in that party's primary. The State declined to address the constitutionality of the statute, as a result of which the Party filed suit challenging the constitutionality of AS 15.25.030(a)(16). However, Superior Court Judge Louis Menendez dismissed the case because it was not ripe for decision, since the Party had not yet formally adopted a rule opening its primary to non-affiliated candidates.[5]

Although the State initially also contended in that lawsuit that the Party did not have standing to challenge AS 15.25.030(a)(16), it withdrew its standing argument once the Party presented an affidavit by an independent voter stating that she would run in the Party's 2016 United States Senate primary if permitted to do so.[6]

The Party formally adopted the new rule at its biennial State Convention in May 2016, and incorporated it into its amended Party Plan of organization. The rule permitted voters who are registered as "undeclared" or "non-partisan" to participate as candidates in the Party's primary election. On December 12, 2016, the Party's Executive Director, Kay Brown, petitioned the State to adopt a regulation allowing independent and unaffiliated candidates to run in the

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[5] *Alaska Democratic Party v. State*, Case Number 1JU-16-533 CI (decision dated April 18, 2016).
[6] *Id.* at 2.

Party's primary election. The Director of the Alaska Division of Elections denied the Party's petition on January 18, 2017 and affirmed the State's intention to enforce the party membership requirement posed by AS 15.25.030(a)(16). The Party now files this suit challenging the constitutionality of the statute.

III. SUMMARY JUDGMENT STANDARD

Under Alaska Rule of Civil Procedure 56(c), a party is entitled to summary judgment when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."[7] Both parties concede that there are no disputes as to any genuine issues of material fact and that summary judgment is therefore appropriate.

IV. DISCUSSION

A. The matter is ripe, whether or not the Party has identified a candidate who is prevented from running under AS 15.25.030(a)(16):

The State argues that the Party's challenge to the statute is not ripe, because the Party has not identified any nonaffiliated candidate who wishes to run in the Democratic primary in 2018. Following oral argument, the Party submitted an affidavit from an independent voter who claims that he wishes to run in the Democratic primary in 2018 for a Legislative seat. Whether or not

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[7] Alaska Rule Civ. Proc. 56(c). *See also, e.g., Achman v. State*, 323 P.3d 1123, 1126 (Alaska 2014).

the court considers this affidavit, I conclude that the Party's challenge to AS 15.25.030(a)(16) is ripe.

The ripeness doctrine limits a court's jurisdiction to "actual controvers[ies]."[8] A plaintiff must be able to claim either that a legal injury has been suffered or will be suffered in the future.[9] Although there is no bright-line rule as to the required degree of immediacy for an issue to be ripe, abstract disagreements and advisory opinions are generally to be avoided.[10] Pre-enforcement challenges to laws are generally more susceptible to such faults, in that it is not yet clear that a plaintiff can actually claim to be "affected" by the statute in question.[11] The Alaska Supreme Court, however, has repeatedly recognized that Alaska's standing doctrine favors "relative openness."[12] Thus, an "actual controversy" still exists when a statute dissuades individuals who would otherwise act from doing so.[13]

In *Jacko v. State,* residents of the Lake and Peninsula Borough proposed an initiative which would have prohibited the local planning commission from issuing a resource extraction permit when a project would impact a specified acreage of land and would "have a Significant Adverse Impact on existing anadromous waters."[14] Before the election, Pebble Limited Partnership brought suit against the Borough, challenging the initiative on a number of grounds.

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[8] *Brause v. State*, 21 P.3d 357, 358 (Alaska 2001).
[9] *Id.*
[10] *Id.*
[11] *See State v. Native Village of Tanana*, 249 P.3d 734, 749 (Alaska 2011).
[12] *See, e.g., Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 942 (Alaska 2004).
[13] *See Jacko v. State*, 353 P.3d 337, 341 (Alaska 2015).
[14] *Id.* at 338.

After the voters approved the initiative, the State brought a separate suit challenging the initiative.[15]

The initiative's sponsors argued that the challenge to the law was not yet ripe, since Pebble had not yet applied for a resource extraction permit.[16] The Alaska Supreme Court, however, upheld the superior court's determination that the issue was in fact ripe.[17]

The Supreme Court noted that there is no set formula for determining whether a case is ripe. The court must "examine the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" in an effort to "balance[ ] the need for decision against the risks of decision."[18] The court noted a number of factors in concluding that the Borough and the State's challenge to the initiative was ripe. The passage of the initiative would have a "dissuasive effect" on Pebble's potential investors. Furthermore, the ability of local governments to impede resource development by adopting permitting ordinances would have a "profound effect" on the regulatory climate in Alaska.[19] Against these factors, the court balanced the "decisional risks" of hearing the case. The decisional risks were found to be slight, because the issues presented in the case were "relatively straightforward and purely legal."[20]

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[15] *Id.* at 339.
[16] *Id.*
[17] *Id.* at 341.
[18] 353 P.3d at 340, *State v. ACLU of Alaska*, 204 P.3d 364, 369 (Alaska 2009).
[19] *Id.* at 341.
[20] The straightforward nature of the dispute in *Jacko*, and the absence of factual disputes, enabled the court to distinguish *State v. ACLU of Alaska*, in which significant decisional risks were presented, because the court was required to decide hypothetical questions in an abstract context, which involves grappling with hypothetical possibilities rather than immediate facts. *See, ACLU of Alaska,* 204 P.3d at 371-72.

As in *Jacko,* this case involves relatively straightforward issues of law, which require little or no factual development. Furthermore, it seems clear that the statute would have a significant dissuasive effect upon an independent candidate who would, if permitted to do so, run in the Democratic primary.

If the statute remains in force, such a candidate would have to decide whether to change his or her registration to Democrat, in order to run in the Party primary, or alternatively to pursue the more difficult process of running as an independent candidate. There may well be political costs for such a candidate to announce his or her intention to challenge the statute and run in the Democratic primary as an independent, if that challenge is ultimately unsuccessful. If the candidate is unsuccessful in his or her challenge, and then chooses to run as an independent, that candidate may pay a political price for declaring for the Democratic primary, and then instead running as an independent. As a result, it seems clear that the existence of the statute, and the uncertain outcome of a challenge to the statute, would dissuade some candidates from announcing their desire to run in the Democratic primary, or from expending their time and resources in preparing a run for office in 2018.

Furthermore, the Party has its own interest in recruiting a broad field of candidates to run in its primaries. The Party stands to benefit from having its duly adopted rule go into effect for the upcoming 2018 primary election, and in knowing what the rules will be for that primary at the earliest possible date.

Given these concerns, it seems clear that this case presents an actual controversy, even in the absence of an actual candidate declaring his or her desire to run as an independent in the Democratic primary.

Alaska's relatively relaxed standing doctrine also favors finding this issue ripe, because the need for a decision outweighs any benefit that may come from declining jurisdiction and because further factual development is unlikely to aid in deciding this issue. The justiciability of an issue is largely contingent on the urgency of the need for a decision: if the rights or obligations at issue are of extreme significance, a more relaxed approach is deemed appropriate. In *State v. ACLU of Alaska*, the court considered in dicta that an imposition on speech would rank relatively high in terms of justiciability.[21]

Considering the imposition on associational rights that stems from AS 15.25.030(a)(16), as discussed below, the issue is deserving of "special consideration."[22] But even without stretching the boundaries of justiciability to consider the constitutionality of AS 15.25.030(a)(16), this issue simply is not "purely hypothetical," as characterized by the State.[23] AS 5.25.030(a)(16) prohibits over half of Alaska's registered voters from participating as candidates in primary elections. Unlike in *ACLU of Alaska*, where the constitutionality of the State's ban on marijuana use was determined not ripe because marijuana use was still proscribed by federal law, AS 15.25.030(a)(16) is the single obstacle impeding the political aspirations of many Alaskans, and thus presents itself as a "concrete factual situation."[24]

Although the State suggests that such a complex balancing of interests should await the need to do so, there is no benefit to be had from delaying resolution of this issue. The "risks of

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[21] *Id.* at 369.
[22] *Id.*
[23] State of Alaska's Motion for Summary Judgment at 11 [hereinafter *State's Motion*].
[24] 204 P.3d at 369.

decision" are not substantial, and awaiting a named candidate would not provide "further factual development to aid decision."[25] Hence, Alaska's traditional stance on the ripeness doctrine also favors finding this issue justiciable. For these reasons I conclude that the Party's challenge to AS 15.25.030(a)(16) is ripe for decision.

B. The Party has standing to challenge the statute:

The State asserts that the Party lacks standing to challenge the constitutionality of AS 15.25.030(a)(16), since the statute prevents prospective candidates, and not the Party itself, from taking certain actions. I find that the Party's interest in opening its primary to non-affiliated candidates provides it with sufficient standing to challenge this candidacy restriction.

A party has sufficient interest-injury standing in Alaska when it can show an "identifiable trifle" of harm and it has a direct interest in the outcome of the litigation.[26] This is true regardless of whether or not the party is the intended "target" of the harm.[27] This inquiry recognizes a gradient of degrees by which a party can be impacted, ranging from economic to

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[25] *Brause v. State*, 21 P.3d 357, 360 (Alaska 2001).
[26] *Kanuk v. State*, 335 P.3d 1088, 1092-93 (Alaska 2014), *quoting Larson v. State*, 284 P.3d 1, 12 (Alaska 2012), *quoting Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097 (Alaska 1988) (holding that Alaskan children had "direct injur[ies]" as a result of climate change's impact on Alaska's glaciers and wildlife) .
[27] *See State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001); *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010) (finding that the "fundamental question" in a standing inquiry is whether an entity is "a proper party" to bring suit).

intangible harms, and is satisfied by the presence of most any adversely affected cognizable interest.[28] This conclusion is substantiated by the United States Supreme Court's approach to standing in its consideration of similar associational interests of political parties with regard to their primaries.[29]

In *State v. Planned Parenthood of Alaska*, the State challenged the standing of two physicians who regularly provided abortions to contest a state law that required parental consent or judicial authorization before an abortion could be performed on a woman under seventeen years of age.[30] The Alaska Supreme Court determined that although abortion doctors were not the most directly impacted parties by the new law, they were still sufficiently affected by the law in order to be conferred standing. The court determined that the prospective criminal liability that the doctors faced by not abiding by the new law and the requirement that they change their current practices when providing services to minors constituted more than a "trifling or speculative injury."[31]

Although, as in *Planned Parenthood of Alaska,* the Party may not be the entity most directly impacted by AS 15.25.030(a)(16), it is still affected by the law to an extent that it is appropriate to confer on it interest-injury standing. Like the two doctors, the Party is being restricted in what it may impart on individuals: the ability to run in its primary regardless of an

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[28] *See Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987).
[29] *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986).
[30] 35 P.3d at 32.
[31] *Id.* at 34.

individual's political affiliation. This suffices to rise to that level of at least an "identifiable trifle."[32]

In fact, it is very likely that the Party will suffer a much more significant injury under AS 15.25.030(a)(16) than the doctors in *Planned Parenthood of Alaska* suffered. By limiting the Party to candidates who are registered Democrats, the State may be limiting the Party's likelihood of success in the long run. By not allowing unaffiliated and independent candidates to participate in the Party's primaries, the State is restricting the Party's attempt to appeal to Alaska's large population of unaffiliated and independent voters. Individuals register as "undeclared" or "non-partisan" in part because they wish to feel free to support whichever major party they believe best represents their interests during a given election. If an unaffiliated or independent voter sees another unaffiliated or independent individual running in the general election as the Party's candidate, the Party may have a better chance of earning that voter's support. Thus, by limiting access to the Party's primary to only registered Democrats, the State interferes with the Party's chosen strategy to broaden its support in the general election. This suffices to provide the Party with interest-injury standing.

The Democratic Party has essentially the same level of standing as did the Republican Party in *Tashjian v. Republican Party of Connecticut*. In that case, the Republican Party of Connecticut challenged a law that prohibited it from adopting a rule by which it would open its primary to independent voters.[33] The Court ultimately held that the statute infringed upon the

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[32] *Kanuk v. State*, 335 P.3d 1088, 1092-93 (Alaska 2014).
[33] 479 U.S. at 212-13.

Party's associational rights.[34] However, the Court neither held that the Party had standing to challenge the statute in the first place nor that it did not have standing to do so: standing simply was not at issue in *Tashjian.* This was not merely because standing was not made an issue by one of the parties either, since Article III of the United States Constitution requires that standing exist in order for a case to be justiciable in federal court.[35] Nor was there any suggestion that the Party identified any independent voter wishing to vote in the Republican primary. There was simply no question that the Republican Party had standing to challenge the law in that case because of the nature of the injury it sustained from being limited in opening up its primary election to other voters.

If the Republican Party had standing in *Tashjian* under the stricter federal doctrine to challenge a restriction placed on its ability to open its primary election to additional voters, the Alaska Democratic Party must have standing to challenge a restriction on who may participate as a candidate in its primary under Alaska's more lenient doctrine. There is no reason to believe that a political party has any less of an interest in who may run in its primary election than in who may vote in it, and if the latter of these two interests was sufficient to confer standing on a political party in a federal court, the former is sufficient to confer standing on a political party in an Alaskan court.

Finally, the State's concession during the 2016 litigation that standing was no longer at issue after an independent candidate expressed interest in running in the 2016 Democratic

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[34] *Id.* at 216.
[35] *See, e.g., Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 597-98 (2007).

primary suggests that standing should not be an issue now. Upon withdrawing this argument, the State's challenge became limited to the Party's inability to implement the new rule under the timeline for such amendments prior to a primary provided by AS 15.25.014. Since the Party's standing ceased to be an issue in the State's eyes at that point, it makes little sense to withhold standing now, especially considering Paul Thomas's asserted intention to run in the Party's upcoming primary. There is no reason to suppose that Margaret Stock, who expressed in the prior litigation a desire to run as an independent in the 2016 Democratic primary for United States Senate, is the only person who will ever wish to run as an independent in the Democratic primary if permitted to do so.

Regardless of this recent development, if the Party's only procedural fault in last year's litigation was its failure to comply with the timing requirements of AS 15.25.014, then the Party should be granted standing to attempt to implement that same rule once it has complied with AS 15.25.014. The court finds that the Party has standing for the reasons mentioned above.

C. Green Party:

Both the State and the Party consider the validity of AS 15.25.030(a)(16) under the framework provided by the Alaska Supreme Court in *State v. Green Party of Alaska.*[36] In that case, the Court considered the validity of a statute which prohibited two minor political parties from electing to share a combined ballot. The court determined that the law was invalid by asking the following four questions: (1) Has the claimant asserted a constitutionally protected right? (2) If so, what is the character and magnitude of the asserted injury to that right? (3) Do

the State's precise interests in enforcement justify the burden on that right? (4) Is there a strong fit between the State's interests and the law?[37] Subject to the strictures of controlling United States Supreme Court precedent, *Green Party of Alaska* sets out the framework applicable to the present dispute.

D. The Party has a constitutionally protected right of association to open its primary to unaffiliated and independent candidates.

The first step in the analysis under *Green Party of Alaska* is to determine whether the Party has a constitutionally protected right which is at issue in this case. For the reasons set forth below, I conclude that the Party does have a constitutionally protected right to open its primary to unaffiliated and independent candidates. A political party possesses the same right to associate with candidates of its choosing as it does to participate with voters of its choosing. A political party's right to associate necessarily includes the ability to identify the individuals with whom to associate.[38]

Although neither the United States Supreme Court nor the Alaska Supreme Court has ever ruled directly on the issue of whether a political party's ability to select primary candidates of its choosing constitutes an aspect of its associational rights, precedent in both courts suggest that it is. The question was first posed in *Tashjian,* in which the Court determined that a political

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[36] 118 P.3d 1054 (Alaska 2005).
[37] *Id.* at 1061.The parties alternate in their briefs between discussing the third and fourth inquiries separately and in conjunction with one another. The court addresses the two inquiries together.
[38] *See id.* at 1064; *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986); *Timmons v. Twin Cities Area New Party*, 530 U.S. 351, 360 (1997).

party's ability to open its primary ballot to voters of all parties falls within a party's right of association, since the primary election is the time "at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[39] In so doing, the Court made a very clear statement about the present issue, albeit in dicta:

> Were the State... to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals.[40]

Dictum or not, it is difficult to disregard such a clear and unequivocal statement by the United States Supreme Court. Clearly, the Court viewed the ability of a political party to run a nominee of its choosing in the general election, regardless of his or her party affiliation, as an essential associational right.

Tashjian was followed a decade later by *Timmons v. Twin Cities Area New Party.* Although the Court determined that associational rights were not at play in *Timmons,* the Court provided helpful clarification as to when an election law intrudes too far. In that case, the Court determined that an anti-fusion law, which prevented a single individual from participating in multiple parties' primaries during a single election, did not implicate a political party's associational rights.[41] A neutral law which does nothing more than require an individual to select one primary or another to run in does not concern any associational rights because it does

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[39] 479 U.S. at 216.
[40] *Id.* at 215.
[41] 530 U.S. at 360.

not touch on any "internal affairs" of a political party.[42] The law was nothing more than a limitation on the number of primaries an individual could participate in during a single election. The Court went on to speculate that nothing prevented the New Party from attempting to convince the desired primary candidate, who was a registered member of the Democratic-Farmer-Labor Party, from running in its primary instead of his own party's primary.[43] Apparently the Court saw no reason why a registered member of the Democratic-Farmer-Labor Party could not be the candidate of the New Party.

Together, these two cases lead the court to conclude that a party's associational interests in a primary election include its ability to invite candidates who have not yet decided to seek the nomination of another party to vie for the support of its constituents.[44] This was found to be an aspect of a political party's associational rights by the Court in *Tashjian* and was treated by the Court as a basic assumption in *Timmons.* This is the right which the Democratic Party wishes to assert here.

In *Green Party of Alaska,* the Alaska Supreme Court indicated that the United States Supreme Court precedent establishes only a bare minimum for what a political party's associational rights entail. The court stated that the United States Supreme Court's interpretation of election laws sets out "national minimal constitutional standards," and Alaska's constitution

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[42] *Id.*
[43] *Id.*
[44] *See also Libertarian Party of Michigan v. Johnson*, 905 F.Supp.2d 751, 759 (E.D. Mich. 2012) (holding that a substantial burden was not placed on voters' or candidates' rights by way of a "sore loser law," which prevented Johnson from running in the Libertarian primary after losing the Republican primary).

is often more protective of fundamental rights and liberties.[45] The court emphasized that *Tashjian* stands for the proposition that the right of association "necessarily presupposes the freedom to identify the people who constitute that association."[46] The Court went on to note that this right "is perhaps nowhere more important than during a primary election," because that is the point at which "political parties select the candidates who will speak for them to the broader public and, if successful, will lead their political party in advancing its interests."[47]

It is fair to read *Green Party of Alaska* as augmenting the baseline set forth in *Tashjian* and *Timmons.* Whereas the United States Supreme Court suggested in those cases that a political party's associational right to select the candidate of its choosing inherently allows it to open up its primary to non-affiliated candidates, *Green Party of Alaska* throws the Alaska Supreme Court's full weight behind formally enlarging such associational rights. Given the importance under the Alaska Constitution of these associational rights, together with Alaska's significant population of unaffiliated and independent voters in the general election, I conclude that the ability of a Party to permit candidates of varying political affiliations to run in its primary is an associational right of the Party.

Finally, nowhere in any of these cases is it suggested that a non-affiliated candidate must first register as a member of a political party in order to come within the scope of a party's associational rights. As the United States Supreme Court put it in *Tashjian,* "the act of formal

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[45] 118 P.3d at 1060.
[46] *Id.* at 1064.
[47] *Id.*

enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important."[48] Although, as the State suggests, obligating an individual to first register as a member of a party before running in its election does not prevent any candidate from appearing on the ballot, that is not the issue at hand: the Party has a constitutionally protected right to associate with individuals by way of their appearing in its primary election regardless of their present political affiliations.[49] Neither the Supreme Court nor Alaska cases discussed earlier suggest anything otherwise. The court thus finds that the Party has a constitutionally protected right to allow individuals of varying political affiliations to participate in its primary election.

E. The character and magnitude of the injury caused by AS 15.25.030(a)(16) to the Party's associational rights is severe:

Finding that the Party has a constitutionally protected right which is infringed upon by the statute does not end the analysis under *Green Party of Alaska*. The next step in the analysis is to consider the character and magnitude of the injury to that right which results from the statute at issue.

I find that AS 15.25.030(a)(16) 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

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[48] 479 U.S. at 215.

[49] *But see Van Susteren v. Jones*, 331 F.3d 1024, 1026 (9th Cir. 2003) (holding that a one-year disaffiliation requirement required prior to an individual running in another party's primary did not infringe upon an *individual's* right to associate with a political party, where raiding was a concern).

political goals and limits the Party's right to associate with candidates of its choosing.[50] Just as the restriction on a Party's ability to decide who will vote in its primary was found to impose a substantial burden in *Green Party of Alaska,* I conclude that restricting the Party's ability to decide who may run in its primary imposes an equally substantial burden.[51]

Tashjian and *Timmons* both suggest that a statute that has an effect like that imposed by AS 15.25.030(a)(16) constitutes an unconstitutional burden on an associational right. It is true that there is no "'litmus-paper test' that will separate valid from invalid restrictions."[52] To be sure, neither a state's regulation of the time, place, and manner of elections nor a particular candidate's inability to appear on the ballot as a party's candidate alone severely burdens a party's associational rights.[53] However, *Tashjian* held that a state may not constitutionally legislate the means by which a political party goes about achieving its goals and that it is up to a political party to determine "the boundaries of its own association."[54] Because a political party's associational rights include its ability to make decisions about internal affairs, laws that impact a political party's internal structure, governance, and policy-making are generally unconstitutional.[55]

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[50] *See Tashjian*, 479 U.S. at 225; *Timmons v. Twin Cities Area New Party*, 530 U.S. 351, 363 (1997).
[51] *See* 118 P.3d at 1065.
[52] *Tashjian*, 479 U.S. at 213, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), *quoting Storer v. Brown*, 415 U.S. 724, 730 (1974).
[53] *Id.* at 217; *Timmons*, 530 U.S. at 363.
[54] *Tashjian*, 479 U.S. at 225.
[55] *Timmons*, 530 U.S. at 363; *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 230 (1989).

The court in *Green Party of Alaska* emphasized that the right of voters to band together as parties to pursue political ends "is perhaps nowhere more important than during a primary election: it is at the primary election that political parties select the candidates who will speak for them to the broader public and, if successful, will lead their political party in advancing its interests."[56] Thus the associational rights of a political party are of paramount importance during the primary election process. Insofar as AS 15.25.030(a)(16) seeks to interfere with this process, it goes to the heart of a party's internal structure, governance, and policy-making. AS 15.25.030(a)(16) imposes a substantial burden on the Party's right of association because it limits the Party's ability to select the candidate whom its primary voters believe will fare best among Alaska's unique population of registered voters.[57]

Green Party of Alaska further emphasizes the significant interests that an Alaskan political party has in associating with non-affiliated individuals. In allowing for the Green Party and Republican Moderate Party to share a combined primary ballot, the court explained the importance of an Alaskan political party's ability to reach out to "a broader spectrum of voters—one which includes voters who might otherwise be unwilling to sign on to the entirety of the political party's agenda or slate of candidates but who would have wanted to support some

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[56] 118 P.3d at 1064.

[57] *See also South Dakota Libertarian Party v. Gant*, 60 F.Supp.3d 1043, 1050 (D.S.D. 2014). In *Gant*, the district court held that a state requirement that an individual be a registered party member on the day that they announce their candidacy in the party's primary or receive their party's nomination was not a substantial burden because an individual could easily meet the requirement by registering right before receiving the nomination. The court had no reason to consider whether and how this law imposed on the rights of political parties to associate with individuals of other political affiliations.

of the political party's candidates."[58] The Green Party's ability to associate with a spectrum of candidates and voters who possessed principles different from its own was determined essential to its success come election day. This was because a shared primary election ballot would result in the nomination of a candidate with a set of principles that would appeal to the greatest number of individuals during the general election.[59]

Although there is a difference between a combined primary ballot and a single party opening up its primary ballot to non-affiliated candidates, the purpose is the same: both practices help a political party to choose a candidate for the general election who has the greatest level of support from the broadest range of Alaskan voters. The dual ballot allowed the Green Party to nominate a candidate who also had the support of certain Republican Moderate Party voters in the general election, and vice versa.

In the present case, the Party's proposed rule would allow for the nomination of a candidate who would be more likely to appeal to Alaska's substantial population of unaffiliated and independent voters. AS 15.25.030(a)(16) is thus deeply entwined in the Party's internal structure, governance, and policy-making and limits the Party's ability to make decisions about how best to achieve its goals. I find that this places a substantial burden on the Party's right of association.

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[58] *Green Party of Alaska*, 118 P.3d at 1065.
[59] *Id.*

F. The State's asserted interests do not justify imposing on the Party's associational rights and are not sufficiently advanced by AS 15.25.030(a)(16):

The third and fourth prongs of the *Green Party of Alaska* test are whether the State's interests justify the burden on the plaintiff's associational rights, and whether there is a strong fit between the State's interests and the challenged statute. Under these prongs, the court must consider the importance of the State's asserted interest, and the degree to which the challenged statute advances those interests. Because these prongs interrelate, they will be discussed together.

The State points to three State interests which it contends justify the statute's limitation upon the Party's ability to select independent or nonaffiliated candidates. According to the State, AS 15.25.030(a)(16) ensures that a group enjoys a significant modicum of support before being granted the benefits of political party status, preserves the stability of the political system, and guards against voter confusion and deception. Each of these interests will be considered in turn.

1. Modicum of support

Under Alaska law, a political party is officially recognized for various purposes if its registered voters equal three percent of the votes cast in a statewide race in the preceding general election, or if its candidate received three percent of votes cast in a statewide race in the preceding general election.[60] A political party receives a number of benefits if it is officially recognized. Among these are the right to participate in the primary election process, and to have the candidate who wins the primary election appear on the general election ballot. Candidates

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[60] AS 15.80.010(27).

who are not the nominee of a recognized political party must go through the more demanding process of submitting a petition for nomination, which requires signatures from at least one percent of the voters who cast ballots for the office sought in the last general election.[61]

The United States Supreme Court has held that it is established 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."[62] The State's asserted interest in ensuring that candidates (and parties) have a "modicum of support" stems from this right on the part of States.[63]

The State's reliance upon this "right," however, fails here because it is simply irrelevant to the present context. The 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. Thus the statute at issue does not promote the State's interest in assuring a modicum of support.

The State asserts in support of its argument that a Democratic candidate running unopposed in his or her Party's primary could potentially win the nomination if the lone vote cast in the primary is cast in his or her favor; the State suggests that the same circumstances could lead to an otherwise unsupported independent candidate receiving the Party's nomination.[64] This exercise in strained hypotheticals, however, is unconvincing. It assumes that

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[61] *See* AS 15.25.140 *et seq.*
[62] *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), *quoting Anderson v. Celebrezze*, 460 U.S. 780, 788-89 n. 9 (1983).
[63] *See, e.g., Vogler v. Miller*, 660 P.2d 1192, 1195 (Alaska 1983), *citing Jenness v. Fortson*, 403 U.S. 431, 442 (1971).
[64] State's Motion, *supra* note 23, at 29.

the presence of an unpopular independent candidate on the Party's primary ballot would not embolden other candidates who better embrace the Party's principles to also run, and that primary voters would not in turn be incited to vote in support of these better, alternative candidates. Furthermore, the State does not explain how allowing a registered Democrat to proceed to the general election on the basis of a single primary vote ensures that that candidate enjoys any greater support from the Party than an independent candidate who advances in the same way. As the Party puts it, "[t]he only difference between the candidates is a label."[65] The best way to ensure that a candidate has the requisite level of support is to put the candidate before the people in an election. If the candidate wins the primary election, that candidate has demonstrated a level of support, regardless of the candidate's party affiliation.

Furthermore, the State's hypothetical, which is based upon a hypothetical legislative district in which the Democratic Party has little support, has no connection to the question of whether the Democratic Party will attain the three percent threshold necessary to be a recognized political party. That threshold is determined by the statewide vote in the last general election. While parties' fortunes vary from election to election, it seems unlikely that the Democratic Party candidate will receive only a single vote in a statewide election, at least in the near future.

The State suggests that the problem is aggravated by the fact that the Democratic Party has chosen to have an open primary. According to the State, an independent candidate who is elected in a Democratic primary by voters who may or may not be registered Democrats

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[65] Party's Opposition to Defendant's Motion for Summary Judgment at 33.

receives the benefits of the primary election process without any assurance that this candidate is, in fact, supported by Democrats.

This "problem," however, is purely a result of the open primary. Whether the winning candidate is a registered Democrat or not, that candidate is the democratically[66] selected choice of the primary election process chosen by the Democratic Party. That a candidate checks the "Democrat" box on his or her voter registration form provides no guarantee that the candidate supports the ideals of the Democratic Party. That assurance can come only from the voters.

The risk that the Democratic nominee may not be true to the ideals of the Party is a risk that the Party took upon itself when it chose to have an open primary. I am not persuaded that this risk is appreciably increased by opening up the field of candidates to nonaffiliated candidates. If the result of this choice is the nomination of candidates who do not support the ideals of the party, the Party will presumably change its rules, either to close its primary, or to limit the field of candidates to registered Party members.

The "problem" to which the State points is largely a result of the Democratic Party's choice of an open primary. That choice, however, is constitutionally protected under *Tashjian.*

Furthermore, whatever risk is posed by this choice is to the interests of the Party. It is not an appropriate State interest to protect the integrity of the Party against the Party itself.[67] Limiting candidates in the Democratic primary to members of the Party has no discernible

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[66] Small "D."
[67] *Tashjian,* 479 U.S. at 224.

bearing on the legitimate State interest in preserving the integrity of the three percent rule, which is the interest asserted by the State.

While the State has a legitimate interest in ensuring that political parties possess a significant modicum of support before gaining access to the general election ballot, I do not find that AS 15.25.030(a)(16) materially advances that interest.

2. Preserving the stability of the political system

The State next asserts that AS 15.25.030(a)(16) preserves the stability of the political system. The State does not make it clear, however, how permitting a nonaffiliated candidate to run in a party primary would endanger the stability of the political system. The State's arguments about "political stability" are vague and abstract, with no clear basis from which one can conclude that this statute serves the interest of political stability.

If by this argument the State means to echo the argument it made in *Green Party of Alaska* that political stability is served by encouraging the two-party system, the *Green Party* court rejected this argument as a matter of Alaska law.[68] The court further determined that it was not readily apparent how allowing two minor parties to share a primary ballot posed any real risk to whatever semblance of a two-party system did exist in Alaska.[69]

The extent of the State's discussion of this interest in its Motion for Summary Judgment is, "Because Alaska's election procedures presumes a central role for political parties, the erosion of party integrity and identity may have a significant impact on the State's electoral

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[68] 118 P.3d at 1054.
[69] *Id.* at 1068.

process."[70] The State does not provide any further detail as to how permitting independent candidates to run in party primaries would threaten this "central role," nor is it clear how party integrity and identity may erode.

Furthermore, it makes these assertions without accounting for the use of open primaries in Alaska. The *Green Party* court viewed similar arguments with skepticism when viewed in the context of a political system that already allows political parties to open their primary ballots to voters who are not members of the party.[71]The State's assertion that "the party-membership requirement is a key foundation of the party system in Alaska" is unsupportable given the Party's right to open its primary.

While the State unquestionably has an interest in preserving the stability of its political system, it is not at all clear how this statute promotes that interest. I thus reject the State's second asserted interest.

3. Avoiding voter confusion and deception

The State's third proposed justification for the statute is that it avoids voter confusion and deception. It is clear that these are legitimate State interests. The question of whether there is a sufficient fit between this interest and the statute at issue, however, poses a more difficult question.

At oral argument, counsel for the Party suggested that, if it prevailed on its claims, the combined primary ballot would list each candidate by party affiliation (or "non-partisan" or

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[70] State's Motion, *supra* note 23, at 31-32.
[71] *Green Party of Alaska*, 118 P.3d at 1067.

"undeclared") with no indication of the party primary in which that candidate was running. Thus a primary voter would not be able to tell from the ballot which primary a non-affiliated voter was running in.

Counsel for the Party went on to suggest that, at the general election, each candidate would again be listed by their own party affiliation (or "non-partisan" or "undeclared") without any indication of the party nominating that candidate. If a non-affiliated candidate won the Democratic primary, under this ballot design, a general election voter would not be able to tell from the ballot whether that 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.

If the law actually required this ballot design, I would find that such a ballot design created a significant potential to mislead or confuse voters. The State has a legitimate interest in preventing a party from engaging in such a bait and switch. Accordingly, if this were actually the ballot design that would result from striking down the statute, I would uphold the statute.

The issue is more nuanced, however, because AS 15.15.030 requires the general election ballot to list the names of the candidates and their "party designations" or "party affiliation." The statute is ambiguous about whether this means the party with which the candidate is registered, or whether it means the party which nominated the candidate.

Of course, as the statute was enacted there was no such distinction, because AS 15.15.030 must be read in conjunction with AS 15.25.030, which precludes a nonaffiliated candidate from running in a party primary. But if AS 15.25.030 is found to be unconstitutional, AS 15.15.030 is left with this ambiguity.

The resolution of this ambiguity is clear. If the court must choose whether to interpret the statute in a way that misleads voters, or alternatively in a way that discloses to the voter which candidate is nominated by which party, the court must choose transparency. I thus conclude that, if the law permits the Democratic Party to nominate as its candidate a nonaffiliated candidate, AS 15.15.030 requires that the general election ballot must inform voters that such a candidate is the nominee of the Democratic Party.[72]

Given that conclusion, the question is whether the State's interest in guarding against voter confusion and deception justifies excluding nonaffiliated candidates from party primaries. As more fully explained below, I conclude that it does not.

In *Tashjian*, the United States Supreme Court acknowledged the importance of "party labels" as a shorthand means for voters to quickly identify which candidates stand for which matters of public concern. [73] However, the Court was skeptical of the claim that permitting independent voters to participate in a party primary would result in voter confusion. As the Court put it, "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues."[74] Additionally, the Court weighed the State's interest in

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[72] The issue is less clear with respect to the primary election ballot. AS 15.25.060(a) provides that the State shall prepare a primary election ballot for each political party that contains all of the candidates of that party for each office. This statute, plainly, did not contemplate that nonaffiliated candidates could run in a party primary. However, it seems clear that the Legislative intent was that the ballots list candidates by party, which would enable voters to know which primary they are voting in.

[73] 479 U.S. at 220-21.

[74] *Id.* at 220, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983).

avoiding voter confusion and deception against other interests, and found that it ranked low against other potential interests:

> By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors.[75]

The *Tashjian* Court ultimately concluded that "[t]he State's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions in no respect 'make it necessary to burden the [Party's] rights.'"[76]

I reach a similar conclusion here. I am not persuaded that any voter, presented with a properly designed ballot, would be confused or deceived if a nonaffiliated candidate is permitted to run in a party primary. Without question, it is in a state's interest to ensure that election procedures are transparent and that the information disseminated to voters is clear and accurate. However, states should maintain faith in the ability of their electorates, and need not encroach upon a party's pursuit of its goals in order to clarify every conceivable ambiguity for voters.

The State's support for this interest does not extend past ensuring the continued viability of traditional party labels. Although the State goes on to speculate that opening the Party's primary to non-affiliated candidates threatens "to turn Alaska's electoral scheme on its head," the State fails explain where this doomsday vision comes from. The State suggests that striking

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[75] *Id.* at 221.
[76] *Id., quoting Anderson*, 460 U.S. at 789.

down AS 15.25.030(a)(16) could result in an otherwise hopeless minor party recruiting a viable independent candidate in order to garner the votes necessary to retain its party status as well as to gain much sought after seats on various boards and commissions.[77] Absent from this hypothetical, however, is any indication as to how voters would actually be misled by the minor party's actions. The State appears to assume that voters would be unable to discern that an independent candidate is running on behalf of a party.[78]

In its Opposition, the State asks, "what are voters supposed to make of a person who is unwilling to register as a Democrat, but wishes to be the Party's nominee…?"[79] Of course, the answer to this question is clear. The voters should make of this person exactly what they want to make of this person. If a majority of voters disapprove of this candidate's actions, the candidate will lose the election. If a majority of voters approve of the candidate's choice – and the Party's – then the candidate might win the election. This judgment is ultimately for the voters – not for the State or for this court.

In the court's view, the State fails to place sufficient faith in the ability of voters to make informed choices. As a result, I conclude that the State's legitimate interest in avoiding voter confusion and deception does not justify the restriction that AS 15.25.030(a)(16) places on the Party's associational rights.

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[77] State's Motion, *supra* note 23, at 33-34.
[78] Long time Alaskans will recall that essentially the scenario the State posits occurred in 1990, when Wally Hickel left the Republican Party and was elected Governor as the nominee of the Alaskan Independence Party. There is no indication that the election of Governor Hickel turned Alaska's political system on its head.
[79] State's Opposition to Plaintiff's Motion for Summary Judgment at 12.

G. Summary:

Because I conclude that none of the interests relied upon by the State have a strong fit with the challenged statute, I find that AS 15.25.030(a)(16) violates the constitutional right to freedom of association under the First Amendment to the United States Constitution and Article I, Section 5 of the Alaska Constitution.

V. REMEDY

The court's conclusion that AS 15.25.030(a)(16) is unconstitutional means that that the Democratic Party must be permitted to implement its 2016 rule permitting undeclared or non-partisan candidates to participate as candidates in the Party's primary election.

However, as alluded to above, the court wishes to make clear that this conclusion does not mean the court is ordering the ballot design proposed by counsel for the Democratic Party at oral argument. On the contrary, the court believes that that ballot design would be highly misleading to voters as to which primary election candidates are participating in, and which political party has nominated candidates.

Alaska law provides that the director of elections is obligated to "prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter."[80] The director is permitted to include additional instructional notes to voters on the general election ballot.[81] This should allow the director to clarify for voters, should a non-affiliated individual receive the Party's nomination for any race, that that

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[80] AS 15.15.030.
[81] AS 15.15.030(1).

candidate is the nominee of the Democratic Party. Similarly, the court believes the law permits – and likely obligates – the director to make clear to primary election voters which nomination is being sought by a nonaffiliated voter who runs in a party primary. Sufficient care on the director's behalf will ensure that voters in both the primary and general elections are fully informed about exactly who it is they are voting for.

The court has not been asked to adopt a specific design for the ballot, and it declines to do so at this time. The court has no reason to believe that the director of elections will be unable to design a ballot which will both implement the Democratic Party rule and also allow voters to make fully informed decisions.

V. CONCLUSION

For the above reasons, the Party's Motion for Summary Judgment is hereby GRANTED. The State's Motion for Summary Judgment is DENIED.

Entered at Juneau, Alaska this 17 day of October, 2017.

Philip M. Pallenberg
Superior Court Judge

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