

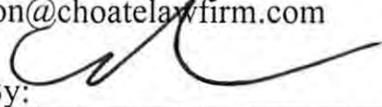
IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA	)	
Appellant,	)	
	)	
vs.	)	
	)	
ALASKA DEMOCRATIC PARTY	)	Supreme Court No. S-16875
Appellee.	)	Superior Court No. 1JU-17-00563CI
_____	)	

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

**BRIEF OF APPELLEE  
ALASKA DEMOCRATIC PARTY**

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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 the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### **U.S. Const. amend. XIV sect. 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **ALASKA CONSTITUTION**

#### **AK Const. Art. 1 sect. 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 15.25.030. 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.

## INTRODUCTION

At issue is whether a political party in Alaska has the associational right to determine for itself whether a primary election candidate must be formally registered as a member of the party to compete for the party's nomination. The Alaska Democratic Party's ("Party") internal rules permit voters who are registered members of the Party, as well as voters who are registered as "Undeclared" or "Nonpartisan" ("independent") to run as candidates for the party's nomination. AS 15.25.030(a)(16) mandates that only voters who are formally registered members of a political party may participate as candidates in the party's primary election. This party-membership requirement excludes the 54% of Alaska's registered voters who are not registered members of a recognized political party from associating with the Party as candidates in its primary election solely on the State's determination that *only* formally registered members of the party have a sufficient associational connection with the party to seek its nomination.

The question of whether a voter who is not a member of another political party must formally register as a member of a political party in order to seek that party's nomination as a candidate falls squarely within the party's associational domain: "The rights of voters to band together as parties to pursue political ends . . . necessarily presupposes the freedom to identify the people who constitute the association."<sup>1</sup> The United States Supreme Court has consistently found that election laws which intrude into

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<sup>1</sup> *State v. Green Party of Alaska*, 118 P.3d 1054, 1064 (Alaska 2005) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 (1986)).

a political party's internal affairs or core associational activities substantially burden the party's associational rights. Alaska's party-membership requirement—which overrides the party's decision regarding the kind of associational connection to the party necessary to participate as a candidate in the core associational activity of selecting its nominees—is such an intrusion. Unlike other candidate eligibility requirements, the party-membership requirement bars one category of association with a political party—candidacy—on the basis of another—formal membership—and does so at the critical juncture of the primary election.

The restriction has significant consequences. The majority of Alaska's voters are prohibited from candidacy in the Party's primary election unless they change their decision not to formally register as a member of a political party. This purely associational restriction narrows the pool of candidates that may seek the Party's nomination, reduces the choices available to the Party's primary voters, alters the resulting ideological cast of the Party's nominees, and limits the party's ability to nominate candidates that may have broader appeal to the majority-independent electorate. Under both the United States Constitution, and the more-protective Alaska Constitution, the requirement substantially burdens the Party's associational rights.

The party-membership requirement also fails to protect the interests asserted by the State: demonstration of public support, voter confusion, and the stability of Alaska's political system. The State has never been able to determine whether a vote for a candidate is motivated by support for a candidate, support for the candidate's party, or some other reason. All that Alaska's election statutes deem relevant for determining party

support at the ballot box is the percentage of votes the candidate nominated by the party receives. Under Alaska's political system, the party-membership requirement provides no additional assurance as opposed to the candidate's nomination that support for the candidate can be equated to support for the party. Relative to the party's nomination, a candidate's personal voter registration is without value as a measure of anticipated public support. Any imputation of support a candidate receives by association with a party is carried through the party's nomination, not the candidate's personal registration.

Nor is it impossible to design a ballot that accommodates such candidates without unreasonably confusing voters. The State's assertion of impossibility is belied by its own motion to the superior court for approval of a new ballot design that it must have deemed fair in submitting for approval. In light of Alaska's experience with a blanket primary and, more recently, joint primaries, as well as the fact that 54% of voters are themselves registered as Undeclared or Nonpartisan, there is no reasonable basis to conclude that a candidate nominated by the Party whose voter registration is Nonpartisan presents an impossible obstacle to designing a reasonable ballot.

Finally, the party-membership requirement does little to advance the State's interests in the stability of Alaska's political system. There remain two viable routes to the general election ballot, and candidates that do not wish to associate with a political party, or compete in a primary election, will still choose nomination by petition. Party labels, in the form of the identity of the nominating party, retain the same or a substantially similar role without the party-membership rule. Their reliability is maintained, as it already is, by the party's core members and the judgment of voters who

choose to associate with the party in its primary election. Those same core members and associated nonmembers are what identify, in general terms, the Party's views for purposes of acting politically towards a shared purpose, not only through the candidates selected, but through all the other associative and expressive activity related to the party. It is thus Alaska's political processes and the combined efforts of all those that associate with its parties, not the party-membership requirement, that protect the stability of Alaska's political system.

#### ISSUES PRESENTED

1. A political party has an associational right to determine the boundaries of its own association. Intrusions into a political party's internal affairs or core associational activities have consistently been found to place a severe burden on the party's associational rights. The Party wants to allow registered voters who are not members of any political party to participate as candidates in its primary election. Does a law that bars the 54% of Alaskan voters that are not members of a recognized political party from associating with the Party as candidates solely because they have not formally registered as members of the Party severely burden the Party's associational rights?

2. Compared to the Party's nomination of a candidate, does whether the candidate is a registered member of a political party provide additional information regarding the level of popular support for that candidate important enough to justify the burden on associational rights created by AS 15.25.030's party-membership requirement?

3. The State moved the superior court to approve a ballot redesigned to recognize nonmember candidates' as party nominees in the general election by

identifying the candidates only by the identity of the nominating party. Is it impossible to design a general election ballot that allows for such nominees and is not unreasonably confusing for voters?

4. Political parties in Alaska are required to select their nominees via primary election. Alaska also allows for open primary elections in which any registered voter may participate. A prospective candidate may register as a member of a political party at any point prior to declaring their candidacy. There is no requirement that the candidate possess or demonstrate any particular set of beliefs or views prior to doing so, submit to any oversight or control by the party, or that the party approve the registration or vet the candidate. Does AS 15.25.030's party-membership requirement provide sufficient additional support to the stability of Alaska's political system to justify its burden on the Party's associational rights?

#### STATEMENT OF THE CASE

The Alaska Democratic Party ("Party") is a political party "recognized" under AS 15.80.008 and AS 15.80.010 with more than 75,000 members. [Exc. 37] At its party convention in May 2016, the Party's delegates voted to change its internal rules to allow "Undeclared" and "Non Partisan" registered voters—voters who are not members of any political party—to participate as candidates in the Party's primary election. [Exc. 38.] On December 12, 2016, the Party petitioned the State of Alaska, Division of Elections, to allow such candidates to participate in Party primary elections. [Exc. 38] On January 18, 2016, the Division of Elections responded that the Party's request was denied because it

conflicted with AS 15.25.030(a)(16) and the Division would enforce the party-membership rule in that statute. [Exc. 38]

On February 22, 2017, the Party filed a complaint in Superior Court in the First Judicial District at Juneau requesting 1) a declaratory judgment that AS 15.25.030(a)(16) unconstitutionally interfered with the Alaska Democratic Party's associational rights under the Alaska and United States constitutions "to the extent that it restricts participation as a candidate in a political party's primary election to registered members of that political party when such political party allows participation as a candidate by non-members," [Exc. 41] and 2) a permanent injunction enjoining the Division of Elections from enforcing AS 15.25.030(a)(16)'s party-membership requirement "to the extent that it restricts participation as a candidate in a political party's primary election to registered members of that political when such political party allows participation as a candidate by non-members." [Exc. 42]

On June 19, 2017, the parties filed cross-motions for summary judgment. [Exc. 43-57, 58-106] The Party argued that AS 15.25.030(a)(16) substantially burdened the party's associational right to allow independent candidates to run in its primary election. [Exc. 44] The State argued that the Party's challenge was not ripe without an identified candidate affected by the law, and that only a candidate, not the Party, would have standing to challenge the statute. [Exc. 65, 68] On the merits of its constitutional claim, the State argued that the Party's associational rights were only minimally burdened, and that any such burden was justified by the party-membership requirement's service of the State's interests in ensuring a modicum of public support for parties and candidates,

ensuring a connection between the candidate and the party's ideology, preventing ballot overcrowding, and party coherence. [Exc. 90]. Oppositions were filed on July 17, 2017. [Exc. 99-138, 139-183] Oral argument was held on September 21, 2017.

On October 17, 2017, the superior court issued a decision and order granting the Party's motion for summary judgment and denying the State's cross-motion. [Exc. 205-237] The superior court found that the challenge was ripe and that the Party had standing to bring it. [Exc. 208-17]. The court found that the Party had an associational right to open its primary to unaffiliated and independent candidates, that the character and magnitude of the injury caused by AS 15.25.030(a)(16) to the Party's associational rights is severe, especially given that 54% of Alaska's voters are unaffiliated or independent, and that the State's asserted interests do not justify imposing on the Party's associational rights and are not sufficiently advanced by the requirement. [Exc. 218-222, 222-225, 226-236]

The court stated that the Party must be permitted to allow unaffiliated and independent candidates to run in the Party's primary election, but it was up to the director of division of elections to design an appropriate ballot in light of that change. [Exc. 237] The court concluded by noting that it had "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. [Exc. 237]

In light of the decision, the Party submitted a proposed final declaratory judgment and permanent injunction on October 20, 2017. [Exc. 247] The State responded to the Party's proposed final judgment with a "Contingent Non-Opposition to Plaintiff's

Proposed Final Declaratory Judgment and Permanent Injunction” and “Motion to Adopt Ballot Design.” [Exc. 238-246] The State made no objection to the Party’s proposed judgment, but requested that the superior court “adopt the proposed ballot design” attached to its motion and include its approval of the design in the final judgment. [Exc. 239] The State asserted that the “superior court’s approval of a ballot design will help assure that voters are able to make fully informed decisions while voting; provide for a more efficient resolution of the issues; and foreclose future expedited litigation over whether the State’s 2018 ballot design comports with the Court’s ruling.” [Exc. 239]

On October 27, 2017, the superior court denied the State’s motion and adopted the Party’s proposed final judgment. [Exc. 248-251, 252-253] The superior court identified three reasons for its denial of the State’s motion. First, the standard for ballot design had not been briefed or argued by the parties and to order such briefing would delay the Supreme Court’s review and final resolution of the constitutionality of AS 15.25.030(a)(16). [Exc. 249-250] Second, the issue was not ripe for decision as there did not appear to be an actual dispute as to ballot design. [Exc. 250] Third, issuing an “advisory opinion” adopting the State’s proposed design would not foreclose challenges by the numerous other stakeholders in the political process: other political parties, prospective candidates, organizations, and, potentially, any registered voter in Alaska. [Exc 250-251]

## STANDARD OF REVIEW

Constitutional questions are reviewed de novo, and the Alaska Supreme Court adopts the rule of law that is “most persuasive in light of precedent, reason, and policy.”<sup>2</sup>

## ARGUMENT

In *State v. Green Party of Alaska*, 118 P.3d 1054 (Alaska 2005) (“*Green Party*”), this Court adopted the “flexible standard” used by the Supreme Court in evaluating challenges to election laws under the United States 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 state’s interests in order to determine the extent to which those interests make it necessary to burden the plaintiff’s rights.<sup>3</sup>

This brief will first address the constitutional right at issue: the right to determine the associational boundaries of the party with respect to participation in the basic function of selecting the party’s candidates. Next it will discuss how AS 15.25.030’s party-membership requirement substantially burdens that right by restricting the relationship an individual may have with the party solely on the basis of the individual’s existing relationship with the party and how that has significant consequences for the ideological cast of the Party’s candidates and its prospects in the general election given Alaska’s

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<sup>2</sup> See, e.g., *Jerry B. v. Sally B.*, 377 P.3d 916, 924-25 (Alaska 2016).

<sup>3</sup> *Green Party, supra*, 118 P.3d at 1061 (internal quotation marks omitted).

majority of independent voters. Finally, it will address how AS 15.25.030(a)(16)'s party-membership requirement fails to advance the State's identified interests to a sufficient degree to justify its substantial burden on the Party's associational rights.

**I. In a state where the majority of voters are not registered members of any political party, an election law that denies the Party the choice to open its nomination to such voters substantially burdens the Party's associational rights.**

The superior court correctly applied *Green Party* to find that AS 15.25.030(a)(16) restriction of the Party's ability to allow voters who are not registered members of any political to seek its nomination substantially burdens the Party's associational rights. In *Green Party*, this Court held that the First Amendment "protects the rights of voters to band together as parties to pursue political ends," which "necessarily presupposes the freedom to identify the people who constitute the association."<sup>4</sup> This Court further held that the Alaska's Constitution "protects a political party's right to determine for itself who will participate in crystallizing the political party's political positions into acceptable candidates."<sup>5</sup> This right necessarily encompasses not only voters but candidates, as they are indispensable participants in the process of selecting a nominee. Accordingly, the Party has a constitutionally protected right to open its nomination to voters who are not registered members of any political party.

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<sup>4</sup> *Green Party*, 118 P.3d at 1064 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 (1986)).

<sup>5</sup> *See id.* at 1065.

In determining the degree that AS 15.25.030's party-membership requirement burdens this right, both the character and magnitude of the burden are considered.<sup>6</sup> The character of the burden is a purely associational intrusion into the Party's core associational activity: it substitutes the State's judgment for the Party's own as to the kind of associational relationship *with the party* necessary to participate in the basic function of selecting the party's nominee. The magnitude is also significant: the requirement restricts the Party's ability to associate with the 54% of registered voters in Alaska who are not members of any political party. This has corresponding effects on the Party's pool of potential candidates, the resulting ideological cast of the Party's nominees, and the Party's ability to achieve success in the general election with candidates that better represent its political positions and goals than the candidates of other parties. The superior court thus correctly concluded that AS 15.25.030 substantially burdens the Party's associational rights.

**A. The Alaska Democratic Party has a constitutionally protected right to open its nomination to registered voters who are not members of any other political party.**

As a political organization, the Party has a right to freedom of association under the First and Fourteenth Amendments of the United States Constitution and article I, section 5 of the Alaska Constitution.<sup>7</sup> The party's associational rights include determination of the boundaries of the party's association, and of the structure which best

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<sup>6</sup> See *id.* at 1061.

<sup>7</sup> See *Green Party, supra*, 118 P.3d at 1064.

allows it to pursue its political goals.<sup>8</sup> Past cases have upheld the right to share a primary election ballot with other political parties and their voters,<sup>9</sup> to open a party's primary election to voters who are not registered members of a political party,<sup>10</sup> to exclude non-party members from voting in a party's primary,<sup>11</sup> and to selectively endorse specific candidates in the party's primary election.<sup>12</sup>

These decisions reflect “the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences.”<sup>13</sup> “[I]t 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.”<sup>14</sup> Accordingly, in *Green Party* this Court recognized that “[t]he right to determine who may participate in selecting its candidates – and, if the political party so

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<sup>8</sup> See, e.g., *Tashjian*, 479 U.S. at 224 (“The Party's determination of the boundaries of its association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.”).

<sup>9</sup> See *Green Party*, 118 P.3d 1054.

<sup>10</sup> See *Tashjian*, 479 U.S. 208.

<sup>11</sup> See *Jones*, 530 U.S. 567.

<sup>12</sup> See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989).

<sup>13</sup> See, e.g., *Green Party*, 118 P.3d at 1064 (quoting *Jones*, *supra*, 530 U.S. at 575) (internal quotation marks omitted).

<sup>14</sup> See *id.* at 1064.

desires, to seek the input and participation of a broad spectrum of voters – is of central importance to the right of political association.”<sup>15</sup> The Court concluded that “the Alaska Constitution protects a political party’s right to determine for itself who will participate in crystallizing the political party’s political positions into acceptable candidates.”<sup>16</sup>

While neither this Court nor the United States Supreme Court have explicitly held that a political party has the right to open its primary election to candidates who are not formally registered as members of any political party, the Supreme Court suggested in *Tashjian* that the right to associate with nonmember voters is the same as the right to associate with nonmember candidates:

Were the State to restrict by statute financial support of the Party’s candidates to Party members, *or 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.* . . . The statute here places limits upon the group of registered voters whom the Party may invite to participate in the “basic function” of selecting the Party’s candidates. The State thus limit the Party’s associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.<sup>17</sup>

Although dicta, the language above is entirely consistent with the fundamental principle uniting *Tashjian*, *Jones*, and *Green Party*: political parties have a robust right to determine the boundaries of their association with respect to member/nonmember status,

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<sup>15</sup> *See id.*

<sup>16</sup> *See id.* at 1064-65.

<sup>17</sup> *Tashjian, supra*, 479 U.S. at 215-16 (emphasis added).

*especially* in the context of the primary election. It strongly suggests that the party's determination of its boundaries is not limited to who may participate as a voter, but who may participate as a candidate as well. And, importantly, it recognizes that the right to associate includes the right to associate with nonmembers.

The State suggests that this language from *Tashjian* was implicitly overruled by *Burdick v. Takushi*, 504 U.S. 428 (1992), because the Supreme Court did mention in that opinion that Hawaii's party-membership requirement for primary candidates could be unconstitutional if challenged.<sup>18</sup> At issue in *Burdick* was a challenge to Hawaii law, which made no provision for write-in candidates, by a voter who wished to cast a write-in vote for a person not on the ballot.<sup>19</sup> While the opinion in *Burdick* described the Hawaii primary process and the routes by which a candidate may make it to the ballot, *Burdick* did not involve any challenge to Hawaii's party-membership requirement, and a discussion of the requirement was not pertinent to the analysis. No reasonable inference can be drawn from the Court's omission of an irrelevant issue other than that it was irrelevant.

The State also erroneously contends that *Tashjian*'s dicta was "disregarded" in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).<sup>20</sup> *Timmons*, however, dealt with a fusion ban that prevented a political party from having a candidate appear on

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<sup>18</sup> Brief of Appellant State of Alaska, 21.

<sup>19</sup> See *Burdick*, 504 U.S. at 430-31.

<sup>20</sup> Brief of Appellant State of Alaska, 21.

the general election ballot as its nominee when that candidate had already been nominated by a different political party.<sup>21</sup> At issue was not whether a political party could nominate a nonmember, it was whether the party could nominate another party's nominee, and, further, have that candidate appear as the party's nominee on the general election ballot. The candidate at issue may or may not have been a nonmember, but it was the candidate's multiple nominations that led to the restriction, not his member or nonmember status.

The State use of *Timmons*' reference to a quote from *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991) (“[A] party may nominate any candidate that the party can convince to be *its* candidate”) creates the incorrect impression that *Timmons* and *Swamp* support that to be a “party’s candidate” an individual must be a party member.<sup>22</sup> *Swamp* addressed a challenge to a ban on “multiple party nominations.”<sup>23</sup> The natural reading of these two cases, both of which dealt with multiple nominations, is that for a party to convince a candidate to be “its candidate” the party must convince the candidate to be the nominee of only that party. Nothing about that proposition is at odds with *Tashjian*.

*Tashjian*'s dicta has thus never been overruled or superseded, implicitly or otherwise. It is also fully consistent with this Court's decision in *Green Party: Voters cannot alone “participate in crystallizing the political party's political positions into*

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<sup>21</sup> See *Timmons*, 520 U.S. at 360.

<sup>22</sup> Brief of Appellant State of Alaska, 21.

<sup>23</sup> See *Swamp*, 950 F.2d at 384.

acceptable candidates.”<sup>24</sup> Candidates are indispensable participants in that process. In the same way that a party may seek the input and participation of a broader spectrum of voters, so too may it seek a broader spectrum of candidates for those voters to choose between. Once chosen, that input may guide the party in how its own political platform should evolve to better reflect the concerns of the electorate, and increase the party’s chances of putting forth successful candidates in the general election who better represent the preferences of the party than candidates from other parties. The superior court correctly concluded that the PARTY has a constitutionally protected right to open its primary election to independent candidates.

**B. The party-membership requirement intrudes into the Alaska Democratic Party’s core associational activities by restricting the Party’s determination of its associational boundaries in the basic function of selecting its candidates.**

In past cases, analysis of the “character” of the burden has looked to whether the restriction intrudes into the party’s internal affairs or core associational activities.<sup>25</sup> Restrictions that intrude into a party’s internal affairs or core associational activities have consistently been found to substantially burden the party’s associational rights.<sup>26</sup> In

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<sup>24</sup> See *Green Party*, 118 P.3d at 1064.

<sup>25</sup> Cf. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (distinguishing *Eu* and *Tashjian* on the basis that those decisions “involved regulation of political parties’ internal affairs and core associational activities.”).

<sup>26</sup> See *id.* See also *Jones, supra*, 530 U.S. at 575-577 (discussing central importance of process of selecting nominee), *Tashjian, supra*, 479 U.S. at 215-216, 224 (discussing selection of party candidates as a “basic function” of the party and that State may not substitute its own judgment as to associative boundaries for that of the party), *Eu, supra*, 489 U.S. at 224-25 (noting that selection of candidates is “crucial juncture at which the

*Tashjian*, a law that restricted participation in a party’s primary election to registered party members intruded was found to interfere with the party’s core associational activities by limiting “whom the Party may invite to participate in the basic function of selecting the Party’s candidates.”<sup>27</sup> And as this Court explained in *Green Party*, the “freedom to identify the people who constitute the association” is “perhaps nowhere more important than during a primary election.”<sup>28</sup>

The Party has decided to invite to voters who are not registered members of any political party to participate in the basic function of selecting the Party’s candidates. AS 15.25.030(a)(16) party-membership requirement unquestionably interferes with that core associational activity. The requirement is a purely associational restriction. It regulates one category of associational relationship with the party—candidacy—on the basis of another—formal membership. It extinguishes the sole discretion the party may exercise in determining the boundaries of the association as to candidates: the choice to allow nonmembers to participate. In Alaska, primary elections are mandatory for recognized political parties,<sup>29</sup> and a political party has no power to exclude candidates from entering

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appeal to common principles may be translated into concerted action, and hence to political power in the community”), and *Green Party, supra*, 118 P.3d at 1065.

<sup>27</sup> See *Timmons*, 520 U.S. at 360 (distinguishing *Tashjian*, 479 U.S. at 215-216 on the basis that the restriction in *Tashjian* involved regulation of core associational activities whereas the fusion ban at issue in *Timmons* did not).

<sup>28</sup> See *Green Party*, 118 P.3d at 1064.

<sup>29</sup> AS 15.25.010.

the primary.<sup>30</sup> The right to “determine the boundaries of association” is hollow if those boundaries are fixed by law. The party-membership requirement is a direct invasion of the party’s core associational activities and substantially burdens the Party’s associational rights.

**C. The burden created by the party-membership requirement is magnified by Alaska’s majority of independent voters.**

The magnitude of the burden from the restriction reinforces the conclusion that it is substantial: 54% of Alaska’s registered voters are not registered as members of any political party and AS 15.25.030’s party-membership requirement prohibits them from participating as candidates in primary elections. In *Tashjian*, the Supreme Court noted the “substantial benefit” that allowing independent voters to participate in a party’s primary might provide the party given the “numerical strength of independent voters” in Connecticut as a relevant consideration in weighing the State’s interest in preventing voter confusion versus the burden to the party.<sup>31</sup> In *Green Party*, this Court recognized that restrictions “on the spectrum of voters allowed to select a political party’s candidates will have a significant effect, not just upon which candidates the political party ultimately nominates, but also on the ideological cast of the nominated candidates.”<sup>32</sup> The benefits identified in *Tashjian* and *Green Party* are especially important here given Alaska’s

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<sup>30</sup> See AS 15.25.010-135.

<sup>31</sup> See *Tashjian, supra*, 479 U.S. at 221.

<sup>32</sup> *Green Party, supra*, 118 P.3d at 1065.

majority of independent voters. Restricting the Party from opening its nomination to independent candidates is more likely to have a substantial effect on who the Party nominates, the ideological cast of its nominees and the party, and its success at advancing its political goals in the general election.

While the potential effects on who is nominated is self-explanatory, the other effects benefit from explanation. Introducing independent candidates does not only change the ideological cast of the party's nominees in the event those candidates are nominated. The presence of those independent candidates as competition in the primary campaign will also lead to shifts in the positions of candidates that are party members to better appeal to primary voters. The candidates who are successful may also signal to the party that an evolution of its platform will better reconcile the beliefs of its members with those of the general electorate. Thus, even if independent candidates are unsuccessful, their participation in the primary election process may nonetheless lead to important changes in the ideological cast of both the party's nominees and the party itself.

These shifts, in of themselves, may lead to better success in the general election for nominees of the party both member and nonmember. Nonmember nominees who, like the majority of Alaskan voters, sometimes associate with, but are not formally members of any political party, may also have a better understanding of what appeals to those voters. And even in the event that the political positions of a nominee diverge in some respects from the party's stated political platform, there is no requirement that a political party be uniform in its beliefs. Furthermore, a successful candidate that adopts some or

most of the party's political positions may be preferable to an unsuccessful candidate that loses the election to an opposition candidate that opposes all of them.

**D. *Timmons* and other candidate eligibility cases do not support the State's argument that AS 15.25.030's party-membership requirement only minimally burdens the Party's associational rights.**

This Court and the Supreme Court have never held that a restriction on a political party's ability to associate or disassociate with an individual on the basis of whether the individual is a formal member of the party is anything other than a substantial burden on the party's associational rights. The cases that have addressed restrictions on that basis—*Jones* and *Tashjian*—both found such restrictions to substantially burden associational rights.<sup>33</sup> Fusion laws, sore-loser laws, and disaffiliation laws do not prohibit association solely on the basis of nonmember status, are triggered by the relationship between the candidate and a *different* party, are limited in duration, and do not restrict candidacy by a majority of registered voters.<sup>34</sup> Neither ease of registration as a member, nor the option to endorse a candidate, lessen the burden on the party's associational rights.

1. *Timmons*' fusion ban created an associational burden of a fundamentally different character than Alaska's party-membership requirement.

The State relies primarily on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) to support its position that the party-membership requirement is a candidate-eligibility requirement that, as in *Timmons*, does not substantially burden associational

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<sup>33</sup> See *Jones, supra*, 530 U.S. 567, *Tashjian, supra*, 479 U.S. 208.

<sup>34</sup> See, e.g., *Timmons, supra*, 520 U.S. 351, *Libertarian Party of Mich. v. Johnson*, 714 F.3d 929 (6th Cir. 2013), *Van Susteren v. Jones*, 331 F.3d 1024 (9th Cir. 2003).

rights. The State contends that “a law preventing [the Party] 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 burdens the Party’s associational rights to exactly the same extent.”<sup>35</sup> This is a false equivalence. The character of the fusion ban in *Timmons* is fundamentally different than that of the party-membership requirement:

But while *Tashjian* and *Eu* involved regulation of political parties’ internal affairs and core associational activities, Minnesota’s fusion ban does not. The ban, which applies to major and minor parties alike, *simply precludes one party’s candidate from appearing on the ballot, as that party’s candidate, if already nominated by another party.* Respondent is free to try to convince Representative Dawkins to be the New Party’s, not the DFL’s, candidate.<sup>36</sup>

The fusion ban in *Timmons* did not intrude into the New Party’s core associational activity because its scope was limited. It did not substitute the State’s judgment for that of the party with respect to member/nonmember status, but instead was triggered by a relationship to another party. The ban also limited in duration to a single election as, practically speaking, there was no guarantee that a candidate would receive multiple nominations in subsequent elections. Finally, as the Supreme Court recognized, the candidate’s substantial conflicting commitment to another political party as its nominee reduced the strength of the associational relationship between the candidate and the party.

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<sup>35</sup> Brief of Appellant State of Alaska, 22.

<sup>36</sup> *Timmons*, 520 U.S. at 360 (emphasis added).

The party-membership requirement presents a far more severe intrusion into the Party's core associational activities. The sole criteria for its application is the associational relationship, in the form of member/nonmember status, between the candidate and the Party, as opposed to the candidate's relationship to any other party, or neutral, non-associational criteria such as residency in a district. It is indefinite in duration—a nonmembers will always be prohibited so long as the requirement exists. And, importantly, the requirement prevents the Party from nominating candidates who would commit to be the Party's, and only the Party's, nominee.

2. A party's nominee is "its candidate."

The State asserts that a candidate who is not a registered member of a party cannot be "its candidate."<sup>37</sup> However, it is clear from *Timmons* and *Swamp*, the cases where that language appears, that "its candidate" refers to the party's nominee—not to the candidate's formal membership in the party.<sup>38</sup> The State cites no case that ties formal party membership to whether an individual is or can be a party's candidate. The State's presumption is also contradicted by *Tashjian*, which recognized that party association may take different and valid forms:

A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives to furthering its political and organization goals, other provide substantial financial support, while still others limit their participation to casting their votes for some or all of

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<sup>37</sup> State Opening Brief, 21.

<sup>38</sup> See *Timmons*, 520 U.S. at 360 (quoting *Swamp*, 950 F.2d at 385). As discussed, *supra*, both cases addressed bans on nominations of one individual by multiple parties.

the Party's candidates. *Considered from the standpoint of the Party itself, the act of formal 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.*<sup>39</sup>

Seeking the party's nomination as a candidate is in many ways a more involved form of association with the party than registering to vote as a member. Both the party and the candidate are necessarily committed to the relationship. To be successful in the primary, the candidate will have to convince the Party's primary voters that she is the best choice over all other candidates. If she is unsuccessful, she cannot appear on the general election ballot: by appearing in the primary she cannot qualify by petition. If she is successful, the Party is committed to supporting her as its candidate—it cannot nominate any other candidate for that office to the general election. As the Party's nominee, she is “its candidate.”<sup>40</sup>

### 3. The fusion ban in *Timmons* affected far fewer candidates.

Further distinguishing *Timmons* is that a fusion ban affects far fewer candidates. The ban only restricted a political party's ability to associate on the general ballot with candidates who had succeeded at being nominated by more than one political party. By virtue of the winnowing of the field accomplished by the primaries, that necessarily limited the scope of the restriction to just a few individuals. Here, Alaska's party-membership requirement prohibits the majority of Alaskan voters from associating with the Party as candidates. And, as discussed, it not only prevents them from being the

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<sup>39</sup> *Tashjian*, 479 U.S. at 215 (emphasis added).

<sup>40</sup> *See Timmons*, 520 U.S. at 360 (quoting *Swamp*, *supra*, 950 F.2d at 385).

Party's nominee, it also prevents their participation in the primary process as candidates, which may benefit the party even if they are not ultimately chosen as the party's nominee.

4. *Libertarian Party of Michigan v. Johnson, Van Susteren v. Jones, Vulliet v. Oregon, and Libertarian Party v. Gant* addressed laws that only burdened association for a single election and were not categorical restrictions based on member/nonmember status.

The State's reliance on *Libertarian Party of Michigan v. Johnson*, a Sixth Circuit case that upheld a "sore loser" law, and *Van Susteren v. Jones*, a Ninth Circuit case that upheld a disaffiliation law, is also misplaced as both dealt with time requirements triggered by an associational relationship outside of the one being restricted.<sup>41</sup> In *Johnson*, the challenged rule prevented a candidate who had run in and lost a party primary from running as a candidate of another party in the resulting general election.<sup>42</sup> In *Van Susteren*, the challenged rule required primary election candidates to have been disaffiliated from membership in other political parties for one year.<sup>43</sup> Similarly, the United States district court cases of *Vulliet v. Oregon*, No 6:12-cv-00492-AA, LEXIS 55979 (Dist. Or. 2013) and *Libertarian Party v. Gant*, F. Supp. 3d 1043 (S.D.S.D. 2014) also addressed *timing* restrictions. *Vulliet*, brought by an individual and not the party, addressed a 180-day affiliation requirement. In *Gant*, the Libertarian Party's bylaws prohibited nomination of any candidate not registered as a member of the party at the

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<sup>41</sup> See *Johnson, supra*, 714 F.3d 929, *Van Susteren*, 331 F.3d 1024.

<sup>42</sup> See *Johnson* at 930.

<sup>43</sup> See *Van Susteren* at 1025.

time of nomination, and the candidate at issue's change in registration to Libertarian from Republican was not effective until after his nomination. Neither asserted that the party wanted to associate with nonmember candidates.

Unlike the cases cited by the State, the restriction in this matter is categorical rather than temporal. The candidates in *Johnson*, *Van Susteren*, *Vulliet*, and *Gant* were only prevented from participating in one election. Alaska's party-membership requirement operates to block participation as a candidate indefinitely on the basis of the association alone, and the resulting burden is correspondingly more severe.

5. Ease of registration as a member of the party does not lessen the burden on associational rights because it is the right to associate with voters who choose to not to register as members that is protected.

While the State argues that the burden is minimal because any candidate may register as a member of the party, this argument is irreconcilable with *Green Party*. In *Green Party*, this Court considered the requirement that a voter change their registration to participate to increase the burden, not lessen it:

By limiting voters to a single primary ballot on which the candidates of only one political party may appear, the prohibition on combined ballots creates a de facto election-day registration requirement. Voters must choose to fully affiliate themselves with a single political party or to forgo completely the opportunity to participate in that political party's primary. This places a substantial restriction on the political party's associational rights.<sup>44</sup>

This requirement resulted in a substantial burden *because* though the voter, "if forced to choose" would choose only to associate with their own party, and not the other party

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<sup>44</sup> See *Green Party*, *supra*, 118 P.3d at 1065.

seeking the joint primary.<sup>45</sup> Here, the Party has purposefully chosen to open its nomination to candidates who are unwilling to formally register as members of any political party *because* those candidates are unwilling to do so. AS 15.25.040's party-membership substantially burdens the Party's right to associate with those candidates because those candidates, if forced to choose, would retain their status as nonmembers of any political party.

Similarly, *Tashjian's* discussion of the "continuum of participation in Party affairs" and its dicta regarding the unconstitutionality of restrictions on association with nonmember donors and candidates reinforce the conclusion that the associational right includes the right to associate with individuals *as nonmembers*. An individual may wish to associate with the Party, and the Party with the individual, as a candidate, but not as a registered member. This could be for any number of reasons, including, for example, that the candidate may support the party's political platform, but not the internal leadership, or to signal dissent from the actions of an elected official who is a registered member of the party. The First Amendment and article I, section 5, of the Alaska Constitution protect the candidate and the party's right to associate without formal membership.

6. The option to endorse, rather than nominate, a nonmember candidate is neither an equal nor viable alternative to nomination.

Nor does the party's ability to associate with an independent candidate by endorsing that candidate lessen the burden of the restriction. "We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity

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<sup>45</sup> *See id.* at 1064.

simply because it leaves other First Amendment activity unimpaired. There is simply no substitute for a party's selecting its own candidates."<sup>46</sup> By not having the benefit of that candidate's participation in the primary process, the party is deprived of the input of its primary voters and the candidate's contributions to the ideological crucible of the primary election. Further, whichever party member wins the primary by virtue of the independent not being able to run will by default be the party's nominee. Unless the party can convince that candidate to drop out of the race, the party will be left in an unenviable position. Endorsing one candidate while nominating another is not a viable alternative to being able to nominate the independent candidate in the first instance.

The State's arguments rely on both an unsupportable expansion of *Timmons* and the purely semantic argument that to be "its candidate" an individual must be a party member rather than the party's nominee. Were the State's reasoning to be adopted by this Court, no restriction on candidates on the basis of associational relationship would substantially burden associational rights. That conclusion is both unreasonable and incompatible with prior cases. The party-membership requirement is a purely associational restriction that takes from Alaska's political parties the right to decide for themselves whether to open their nomination to voters who are not registered members of a political party. It intrudes into core associational activity and has an outsized effect given Alaska's majority of such voters. Like the restrictions at issue in *Green Party* and

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<sup>46</sup> *Jones, supra*, 530 U.S. at 581 (internal citations omitted).

*Tashjian*, the party-membership requirement substantially burdens the Party’s associational rights.

**II. AS 15.25.030(a)(16)’s party-membership requirement does not advance the State’s identified interests and fails to justify its substantial restriction on the Party’s associational rights.**

When examined in the context of its practical consequences, rather than edge-case hypotheticals, AS 15.25.030(a)(16)’s party-membership requirement does little, if anything, to advance the interests in ensuring sufficient candidate and party support, avoiding voter confusion on the ballot, and protecting the stability of Alaska’s political system. While threats to those interests may be compelling in the abstract, the scenarios envisioned by the State do not demonstrate that the party-membership requirement plays any critical role. As to each interest

**A. The party-membership requirement does not sufficiently advance the State’s interests in determining the adequacy of public support for a political party or candidate.**

1. The party-membership requirement does not help the State determine whether the small political parties that qualify for recognized status via the ballot box do so because of support for their candidate or the party.

The State argues that the party-membership requirement protects its interest in requiring political parties to demonstrate sufficient public support for recognized party status and in ensuring that “candidates enjoy sufficient public support before getting on the general election ballot.”<sup>47</sup> The State asserts that it “uses support for a candidate as a

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<sup>47</sup> Brief of Appellant State of Alaska, 29.

proxy for support for that candidate’s party, and vice versa.”<sup>48</sup> “Without the party affiliation rule,” it argues, “support for a candidate is no longer a meaningful proxy for support for the nominating party.”<sup>49</sup> According to the State, only a vote for a registered Democrat nominated by the Democratic Party provides a reasonable approximation of public support for the Democratic Party.<sup>50</sup> The State is unable, it maintains, to determine whether a vote for a Democratic nominee reflects the voter’s support for the Party or for the nominee as an individual unless the nominee is also a registered member of the Party.

This argument does not reflect reality. First, the State’s concerns are, with a few exceptions for particular positions, inapplicable to larger political parties, such as the Alaska Democratic Party, that can easily maintain their recognized status through the size of their membership. Its concerns are more relevant with regard to recognized political parties whose membership has dwindled to less than three percent of the total votes cast in the last election for governor, US senator, or US representative, depending on which office was on the ballot.<sup>51</sup> These parties are small in membership and, correspondingly, public support. If such a party cannot maintain more than a handful of members, but nominates a candidate who then goes on to receive at least three percent of the total votes cast for that statewide office, the State has no meaningful way of determining whether

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<sup>48</sup> *Id.* at 30.

<sup>49</sup> *Id.*

<sup>50</sup> Brief of Appellant State of Alaska, 30.

<sup>51</sup> AS 15.80.010(27).

votes for that candidate were motivated by support for the candidate or for the party. The candidate's personal registration as the member of an unknown party was likely not the source of his or her support. Nonetheless, under Alaska's political system, such a party is deemed to have demonstrated sufficient public support to qualify for recognized status.

The above reflects the inconvenient truth for the State's argument that under Alaska's existing electoral system, the State *never* knows the motivation underlying any particular vote for a candidate, or the political affiliation of the voter who cast it. With a majority of Alaska's registered voters not being members of any political party, the State cannot reasonably discern whether a vote for an individual candidate is motivated by support for the Party, support for the Party's policy platform, support for the candidate, in opposition to another candidate that the voter does not want to see elected, or some combination of the above. Does an Unaffiliated voter who votes for a Democrat for governor and Republicans for every other position on the ballot support the Democratic Party, the Republican Party, or the gubernatorial candidate? Does this change if the candidate's political platform is closer to the Republican Party's than that of other Democratic candidates? Under Alaska's electoral system, it does not matter. Votes for a popular Republican candidate by registered Democratic voters are not discounted as not showing public support. Support is measured by the number of votes for the candidate *nominated* by the political party, whatever the reason behind them, precisely because that reason is unknowable. The support for the candidate is imputed to the party because the party has associated with the candidate as its nominee.

The State cannot pretend that the party-membership of the candidate gives them any greater insight into the motivation behind an individual vote than the identity of the nominating party. If there is a link between support for the candidate and support for the party, it is in the party's selection of that candidate as its nominee. Allowing small political parties to nominate candidates that are not members of any other political party does not make this method of determining popular support any more, or less, reliable than it already is. Even if it did, it could not do so to a sufficient degree so as to outweigh the party-membership requirement's burden on the Party's associational rights.

2. The benefit of the party's recognized status can reasonably be imputed to the candidate by virtue of the party's nomination.

Turning now to the candidates, the State contends that only a registered Democrat that wins the Democratic primary has demonstrated sufficient public support to occupy the spot reserved on the primary ballot for the Party as a recognized political party.<sup>52</sup> Because a primary may be uncontested or have low turnout, the State reasons, winning the primary is not an adequate assurance of public support for the candidate.<sup>53</sup> That can only come from the "imputed support" the candidate is assumed to receive by virtue of his or her party registration.<sup>54</sup> "The State assumes that because the Democratic party has public support, so will a candidate who is labeled as a Democrat."<sup>55</sup>

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<sup>52</sup> *Id.* at 31.

<sup>53</sup> *Id.* at 33.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

The winner of a contested primary election with moderate turnout has undeniably demonstrated a modicum of public support for his or her candidacy. It is when, according to the State, the nomination is uncontested, or voter turnout is low, that winning the primary fails to provide an adequate assurance of public support for the candidate. The State's concerns here are not well-founded. Increasing the Party's potential candidate pool by 54% of registered Alaskan voters may lead to corresponding decrease in the number of uncontested nominations.<sup>56</sup> This will increase the number of candidates whose nominations reflect actual support, rather than "imputed" support.

More importantly, relative to a nomination, party-membership is valueless as a measure of public support. The decision to register involves no public or party input. As the State admits, the candidate is merely assumed to have support because the party has received support in the past and the candidate has registered as a member of the party. But *anyone* can register as a member of the party, and there is no compelling reason to conclude that a voter is more likely to support a candidate on the basis of her party membership than on the basis her nomination by that party. The latter constitutes a more substantial and committed relationship between the candidate and the party.

It would be irrational for a voter that wants to support a particular party not to support its nominee solely because that nominee is not a registered member of the party. After all, the party has nominated no other candidate for that office, nor is there another

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<sup>56</sup> The State has not provided a standard for determining whether turnout is "low" and there is no evidence in the record as to voter turnout.

candidate for that particular office who is a registered member of the party. If she chooses not to support the candidate at the election, it is far more likely to be for reasons other than the candidate's nonmember status. To the extent that the past support for the party is imputed to its candidate, that support flows through the nomination, not the candidate's formal membership.

3. The circumvention of party and candidate support requirements feared by the State is neither likely nor prevented by the party-membership requirement.

Finally, the State warns that, without the party-membership requirement, its public support interest could be circumvented: “[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.”<sup>57</sup> This edge case-scenario is not of practical concern. This hypothetical candidate would have to be popular enough to garner 3% of the vote for a statewide office, but nonetheless, in a state where 54% of the voters are independent, choose to saddle her candidacy with a party with so little recognition that it cannot retain more than a handful registered members, all to get around a petition requirement that, as a popular candidate, she could easily meet. This scenario is unlikely. And, there is nothing that prevents such a candidate in the current system, if bent on “circumvent[ing] the State’s “dual compelling interests,” from registering as a member of the party in order to do so. The party-membership requirement provides far

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<sup>57</sup> *Id.* at 32.

too little additional information or guarantee regarding the relevant level of support for a candidate or party to justify its burden on the Party's associational rights.

**B. The State's belief that a fair general election ballot is impossible without the party-membership rule is belied by its own actions in this case, gives insufficient credit to the ability of voters to inform themselves and be informed by others, and unreasonably assumes that personal voter registration and party nomination are irreconcilable on the same ballot.**

1. The State, unprompted, submitted a proposed ballot redesign to the superior court and requested "approval" of the design in the final judgment.

The State goes at length into deficiencies into the potential ballot design that the Party discussed at oral argument. However, the Party never requested relief in the form of a specific ballot design. [Exc. 37, 252] It did not do so, in part, for the same reason that the superior court did not approve the State's proposed redesign: there are too many other affected stakeholders for the Party's opinion as to a specific proposed design to be worth fighting over in this litigation; there is no guarantee the resulting ballot would not be subsequently challenged by someone else. Litigating a redesign would also have been premature given that there was no reason to think that the Party and the State would be unable to agree on a design should the Party's challenge to AS 15.25.030(a)(16) prove successful. That opportunity did not materialize however, as after the Party submitted its proposed final judgment, the State submitted a redesigned ballot in response. [Exc. 238] the State submission did not contain any caveat that its proposed design was potentially confusing to voters. [Exc. 238-41]

2. The State has reversed course on its proposed ballot design.

Now, the State argues that the ballot design it submitted for approval, the denial of which the State initially raised as a point of appeal, is unreasonably confusing to voters. The State's new position is that it is impossible to fairly design a general election ballot that allows for party nominees that are not registered members of the party. It asserts that if the general election ballot lists only the identity of the nominating party, a situation we will refer to as Scenario I, "[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."<sup>58</sup> On the other hand, if the ballot includes both the candidate's voter registration and the nominating party, Scenario II, "any words the State uses to describe the candidate's affiliation will be linguistically confusing, deceptive, or both." For example, the State opines that a party's nominee cannot be fairly described as "non-affiliated" if she has affiliated with the party as its candidate, and she cannot be "undeclared" because candidates "declare" their candidacies.<sup>59</sup> "[W]hatever word is chosen," the State concludes, "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."<sup>60</sup> These factors that the State identifies as unavoidably confusing or mutually exclusive, present less of an obstacle than the State suggests.

3. Many voters will inform themselves or be informed about this significant change to the ballot.

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<sup>58</sup> Brief of Appellant State of Alaska, 39.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 40.

The State proceeds as if Alaska voters would encounter a redesigned general election ballot in November without any advance warning. In *Green Party*, this Court noted that the Supreme Court has “expressed faith in the ability of individual voters to inform themselves about campaign issues” and expressed its equal confidence in Alaska voters.<sup>61</sup> It is difficult to imagine that the great majority of likely Alaskan voters will not become informed, at some point before November, that Alaska political parties may nominate nonmember candidates. It will likely be discussed in the news, by the parties, and by their candidates for office. For some percentage of voters, at least, the fact that a party’s nominee may not be a registered member of that party will neither be a surprise nor go unnoticed.

In each subsequent election, the percentage of voters not aware of this fact will diminish. Eventually, and probably in relatively short order, that political parties in Alaska sometimes nominate candidates that are not registered members of the party will be commonly accepted and understood, just as blanket primaries were in the past. Before the State’s interest in preventing voter confusion can justify the party-membership requirement burden on the Party’s associational rights, the State should have to demonstrate significant, ongoing confusion. Otherwise, any change in the ballot could be opposed simply on the ground that voters are not used to it, rather than on substantive concerns.

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<sup>61</sup> *Green Party, supra*, 118 P.3d at 1068.

4. The risk of voters being misled if candidates are identified by party nomination alone is overstated.

As to the potential for ongoing confusion, the State assumes that voters support candidates on the basis of their party membership, not on the basis of their nomination by the party. In the State's view, this is because a hypothetical voter would support a candidate that is a member of the party, but would not want to support a candidate who is nominated by the party but chooses not to register as a member. This is irrational. Our hypothetical voter is following party labels because he or she wants to support the Democratic party. The Democratic party's nomination indicates that the party has chosen the candidate best representative of the party's views in the election. No other candidate for that office on the ballot can have a stronger tie to the Democratic party because no other candidate can be Democratic party's nominee, and by winning the primary election, the nominee has knocked out all the registered Democrats.

Accordingly, if our hypothetical voter wants to use a shorthand designation to support the Democratic party or the candidates most closely-aligned with its views, he or she is equally or better served by the candidate's identity as the nominee as by the candidate's member or nonmember status. Indeed, it is the *lack of knowledge* of this voter of a candidate's specific views that, according to the State, make the party label useful to the voter. As party-membership does not actually guarantee any specific set of beliefs, the party nomination is equally useful to such a voter in determining which candidate among his or her choices is most likely to reflect the voter's preferences.

5. That a candidate's voter registration and party nomination semantically conflict or overlap does not justify the party-membership requirement's burden on the Party's associational rights.

As to Scenario II, a general ballot that lists both the candidate's personal affiliation and the nominating party, the State's assertion that any word or phrase that it chooses 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" is not persuasive. The State extends "party labels" to include the candidate's personal voter registration. However, as the candidates in question are not members of any political party, the actual, rather than semantic, conflict is minimal. Independent candidates are not listed as "Nonpartisan" or "Undeclared" on the existing ballot—they are "Non Affiliated." Voters do not choose between independent candidates based on whether they are Nonpartisan as opposed to Undeclared on the existing ballot. No one suggests that there is any confusion, or failure of a party label to operate as shorthand, in the relabeling of a registered Nonpartisan as Non Affiliated. None of these designations acts as shorthand for any particular set of beliefs. There is thus no inherent ideological conflict between these labels and the party label associated with the nomination.

The conflict identified by the state is a purely semantic one, and one likely to be attenuated as voters learn about the change in the ballot. A solution to that conflict may be as simple as adding "Registered" in front of the candidate's personal affiliation to indicate that the designation refers to how the candidate has registered to vote rather than a qualitative description of their affiliation status. Thus a "Registered Nonpartisan" could also be the "AK Democratic Party nominee." In any event, there many options available

to the State, and the State has fallen well short of demonstrating that it is impossible to design a ballot that does not unreasonably confuse voters. The party-membership requirement does not prevent voter confusion on the general election ballot to a sufficient extent to justify its burden.

**C. The party-membership requirement neither prevents nor promotes the stability of Alaska’s political system in the manner identified by the State.**

The State’s final identified interest is “in the stability of its political system.”<sup>62</sup> The State argues that the party-membership requirement 1) protects “the integrity of the State’s two routes to the general election ballot,” 2) “preserves party labels as meaningful sources of information for voters,” and 3) “maintains political parties as viable and coherent entities.”<sup>63</sup> As will be shown, the party-membership requirement does little to protect or promote these interests. The operation of Alaska’s other political processes is the actual protector of stability, and these processes are not threatened by a change in the requirement to allow primary candidates that are not members of any political party.

1. The State has waived its argument regarding the fit between party-membership requirement and “the integrity of the State’s two routes to the general election ballot” by failing to explain why the interest is concretely at issue and how the party-membership requirement advances that interest.

The State asserts that the “party affiliation rule is an integral part of the same two-route ballot access system” that this Court “fine-tuned” in *Vogler* and *Metcalf*.<sup>64</sup> What is

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<sup>62</sup> Brief of Appellant State of Alaska, 41.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 43 (citing *Vogler v. Miller* (“*Vogler II*”), 660 P.2d 1192 (Alaska 1983), *State v. Metcalfe*, 110 P.3d 976 (Alaska 2005)).

missing from the State's discussion here, however, is any explanation of the basis for this assertion, or how and to what degree, the integrity of those two routes will be impacted by allowing political parties to open their primaries to independent candidates. The State "cannot justify imposing significant constitutional burdens merely by asserting interest that are compelling only in the abstract." The State "must explain why the interests it claims are concretely at issue and how the challenged legislation advances those interests."<sup>65</sup> The State has failed to do so here, and should be deemed to have waived this argument.

In the alternative, allowing parties to nominate nonmember candidates does not present an existential threat to either of Alaska's two routes to the general election ballot. Both retain their distinct character. One requires association with a political party as a candidate, and success over all other candidates for that party's nomination its primary election. The number of candidates who may reach the general election ballot through this route remains limited to the number of recognized political parties. The petition route requires no association with any party. A petition candidate needs only to gather sufficient signatures, and does not have to win a primary election. While the type of association necessary to associate with a political party through the first route has changed, there is no reason to conclude that preventing this particular change is a sufficient to justify the party-membership requirement's burden on associational rights.

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<sup>65</sup> See *Green Party, supra*, 118 P.3d at 1066.

2. The informational value of party labels is protected by the political party’s core members and the voters that choose to associate with the party in its primary election, not any individual candidate’s personal voter registration status.

With respect to party labels, here, as elsewhere, the State assumes that if a “candidate personally identifies as a Democrat” a voter “can infer that the candidate generally supports the ideology of the Democratic Party.”<sup>66</sup> Without the party-membership requirement, the State reasons, the Democratic nominee “could be a non-Democrat chosen without any input from the Democratic Party by a collection of non-Democrat primary voters” and “the Democratic Party’s label on the general election ballot would mean nothing.”<sup>67</sup> In the resulting system, the State warns, “any candidate—regardless of how repugnant to the Party—can obtain its nomination without even the need to personally identify with it.”<sup>68</sup> The State cites to *Clingman v. Beaver*, 544 U.S. 581 (2005), which upheld semiclosed primaries in Oklahoma, in support of this interest.<sup>69</sup>

But *Clingman* is not persuasive with respect to associational rights under the Alaska Constitution because *Green Party* was decided three months after *Clingman* and acknowledged the conflict between the two holdings: “[b]ecause we hold that the election statutes substantially burden rights protected by the Alaska Constitution . . . *Clingman*

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<sup>66</sup> Brief of Appellant State of Alaska, 43.

<sup>67</sup> *Id.* at 46.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 45.

does not control our resolution of this case.<sup>70</sup> As Alaska allows for the open primaries prohibited in *Clingman*, it has already accepted the attendant risks identified with such primaries without ill-effect. The Democratic nominee can already be a non-genuine Democrat, who has registered as a Democrat for strategic or convenience reasons, chosen entirely by a collection of non-Democrat primary voters. A candidate “regardless of how repugnant to the Party” *can* already be chosen as the Party’s nominee, even against the wishes of the Party’s internal leadership or registered members. If a candidate has views so different from that of the average Democrat as to be deemed “repugnant,” there is no reason to believe that the candidate would want to associate with the party, as a candidate or otherwise. And, if she did desire to associate with, or take advantage of, a party with which she vehemently disagrees, the party-membership requirement would be of little obstacle to her designs.

Alaska has already decided that this risk is an acceptable consequence of a system that mandates primary elections while allowing open primaries. If the risk presented a genuine threat to the stability of Alaska’s electoral system, the party-membership requirement would be ill-equipped to prevent it. Nothing stops an individual with views repugnant to the party from circumventing the party-membership requirement by registering as a member of the target party. Nothing prevents the party from nominating candidates with diametrically opposed views to different offices. Our system allows this possibility, and gives the parties themselves no direct power to stop it.

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<sup>70</sup> See *Green Party*, 118 P.3d at 1064 n.72.

Instead, Alaska relies on the efforts of the party's core members, and the judgment of the voters that choose to associate with the party in its primary, to reduce the risk of this scenario and provide weight to the import of a party's nomination of a candidate. The Party's nomination already reflects both the judgment of the party's 75,000 registered members and those nonmembers that choose to participate in its primary, even if the latter may theoretically outweigh the latter. Indeed, the latter may lead to the nomination of a suite of candidates that, on the whole, reflect a platform that differs markedly from the party's core membership. The assumption is that nonmember voters that choose to vote in a party's primary have an associational interest with the party motivating that decision, and, on average, will vote in the way that reflects that interest. It is the aggregated interests of those voters and the party's registered members, informed by the Party's own statements as to what its beliefs are, or should be, that safeguard the informational value of party labels.

Contrary to the State's position, allowing nonmembers to participate as candidates may lead to the party label in the general election being more informative as to both support and beliefs, rather than less. When party-membership is required, the *primary* ballot provides no information distinguishing one member candidate from another. If nonmember candidates are allowed to participate, the party's voters in the *primary* election will have more information regarding potential differences in the views of the candidates. The voters' choice of that independent candidate as the party's nominee is thus more likely to reflect a preference for that candidate and his or her beliefs, and make the fact of that nomination a more useful signal to voters in the general election.

3. The viability and coherence of Alaska’s political parties is the result of the associational and expressive activities and efforts of the party’s leadership, core members, and nonmembers, that associate with the party as voters, donors, volunteers, candidates, and in other capacities.

The State similarly argues that the potential for a party’s nominee to be chosen entirely by non-party members threatens the party’s identity as a “viable and coherent” entity if the nominee is not required to personally register as a member of the party.<sup>71</sup> The State asserts that “viability of this party system depends on a party representing some identifiable set of views or policies.”<sup>72</sup> Otherwise, “a party may nominally command a majority but be unable to govern because the party label will not represent shared views.”<sup>73</sup> But the party-membership requirement is neither the only nor most reliable indicator of whether two candidates represent sufficiently similar views. Party membership is only one, unilateral, form of association between an individual and a political party, and not necessarily the most important or intense form of association.<sup>74</sup> Personal registration does not guarantee any particularly fit between the candidate’s political positions and those of the party.

Nomination by the Party, which includes both its core membership and the voters, includes not only the candidate’s judgment about whether their views represent the

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<sup>71</sup> Brief of Appellant State of Alaska, 46.

<sup>72</sup> *Id.* at 47.

<sup>73</sup> *Id.*

<sup>74</sup> *See Tashjian, supra*, 479 U.S. at 215.

common interest of the Party, but the Party's as well. The preferences of the Party are expressed not only by the *votes* of the party's core members and primary participants, but by all the other associational relationships and expressive activities that praise, criticize, debate, fund, support, and otherwise shape the course of the Party and the success of individual candidates. At the end of the day, all of these participants have chosen to associate with *this* party, each in his or her own way. Relative to role played by all of this other protected associational and expressive activity in maintaining the viability and cohesiveness of a political party, the party-membership requirement cannot carry its own weight. AS 15.25.030(a)(16) does not advance this, or any State interest, to enough of a degree to justify its substantial burden on the Alaska Democratic Party's associational rights.

### CONCLUSION

The Alaska Constitution is more protective of individual rights than is the United States Constitution, and the rights this Court derives under its auspices "need not correspond with those the Supreme Court might reach under the federal constitution."<sup>75</sup> Because the Alaska Constitution "protects a political party's right to determine for itself who will participate in crystallizing the political party's political positions into acceptable candidates,"<sup>76</sup> and for all the reasons above, the Court should affirm the superior court's

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<sup>75</sup> See *Green Party, supra*, 118 P.3d at 1060-61.

<sup>76</sup> See *id.* at 1065.

decision finding AS 15.25.030(a)(16)'s party-membership requirement to be an unconstitutional restriction of the Alaska Democratic Party's associational rights.