THE SUPREME COURT OF THE STATE OF ALASKA

SCOTT A. KOHLHAAS, THE ALASKAN INDEPENDENCE PARTY, ROBERT M. BIRD, and KENNETH P. JACOBUS, Appellants, vs. STATE OF ALASKA; STATE OF ALASKA; DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR KEVIN MEYER, in his official capacity as Supervisor of Elections; and GAIL FENUMIAI, in her official capacity of Director of the Division of Elections; and ALASKANS FOR BETTER ELECTIONS, INC Appellees.	)	Case No. S-18210 Case No. 3AN-20-09532 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE
JUDGE GREGORY MILLER

OPENING BRIEF OF APPELLANTS, SCOTT A KOHLHAAS, THE ALASKAN INDEPENDENCE PARTY, ROBERT M. BIRD AND KENNETH P. JACOBUS

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STATEMENT OF JURISDICTION

Scott A. Kohlhaas, the Alaskan Independence Party, Robert M. Bird, and Kenneth P. Jacobus filed a timely notice of appeal on October 11, 2021, from the two judgments entered in favor of the State of Alaska and Alaskans for Better Elections, Inc., dated September 14, 2021 and distributed September 15, 2021 [Exc. 412-413, 414-416]. This Court has jurisdiction over this appeal in accord with AS 22.05.010 and Appellate Rule 202(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court will need to consider the following issues on this appeal:

(1) Did the trial court err in holding that Proposition 2 did not Constitutionally impermissibly impair the rights of the political parties and voters of the State of Alaska.

(2) Did the trial court err in holding that Proposition 2 did not conflict with Sections 3 and 8 of Article III of the Constitution of the State of Alaska and that Proposition 2 was valid as it applied to the elections of Governor and Lieutenant Governor.

(3) While this issue was not addressed by the trial court, this Court is going to have to consider the effect that its decision in Meyer v. Alaskans for Better Elections, 465 P.3d 477 (Alaska 2020), has on this case.

STATEMENT OF THE CASE

I. Statement of Facts

On November 3, 2020, the voters of Alaska voted on whether to adopt Proposition 2, an initiative which would substantially change the election system of the State of Alaska. [See Exc. 10-34] The proposition, in pertinent part, mandated additional financial disclosure of candidate campaign financing, a 4-winner non-partisan primary election [See Exc. 275-287 for general discussion of the Nonpartisan Blanket Primary system], and a general

election utilizing ranked-choice voting. [See Exc. 290-306 for a general discussion of the Ranked-Choice Voting system]

The language submitted to the voters was mandated by this Court in Meyer v. Alaskans for Better Elections, 465 P.3d 477 (Alaska 2020), which required the voters to vote for or against Proposition 2 in its entirety, instead of voting separately on the entirely separate concepts embodied in Proposition 2. At that election, a very slight majority of the voters of Alaska enacted Proposition 2. [Exc. 10-34]. The enactment was by a vote of 173,725 "yes" votes (50.55%) to 169,918 "no" votes (49.45%). The results of the election of November 3, 2020, were certified by the State of Alaska on November 30, 2020.

Future State of Alaska elections, commencing with the primary election of 2022, will be conducted in accord with the requirements of Proposition 2.

II. Statement of Proceedings

Scott A. Kohlhaas, The Alaskan Independence Party, Robert M. Bird and Kenneth P. Jacobus filed a complaint on December 1, 2020, for Declaratory and Injunctive Relief seeking to set aside Proposition 2 on Constitutional grounds. [Exc. 1-37] The plaintiffs amended their complaint twice. [Exc. 38-47, 60-69] Answers to the First Amended Complaint were filed by the State [Exc. 54-59] and Alaskans for Better Elections, Inc. [Exc. 48-53]

All issues in this case were resolved on motions and cross-motions for summary judgment, which can be found in the excerpt of record at pages 70-391, and need not be repeated here.

By order granting all pending motion filed on July 28, 2021, the trial court granted the motions for summary judgment of the State and Alaskans for Better Elections, Inc. [Exc. 392-411] Final judgments were entered in favor of the State and Alaskans for

Better Elections, Inc., on July 14, 2021. [Exc. 412-413, 414-416] [1] A timely notice of appeal was filed on October 11, 2021.

STANDARD OF REVIEW

The standard of review of the granting of summary judgment is de novo. Legal errors are reviewed de novo. Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974)

In reviewing grants of summary judgment, this Court will independently determine whether there were any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law, taking the facts as stated and drawing all reasonable inferences in favor of the non-moving party and against the moving party. E.g. Korman v. Mallin, 858 P.2d 1145 (Alaska 1993).

SUMMARY OF ARGUMENT

Alaska Proposition 2, in various aspects, violates the Alaska Constitutional rights of free political association guaranteed by Article I, Sections 5 and 6, of the Constitution of Alaska to the voters of Alaska, and the political parties and their registered members.

In addition, the provisions of Proposition 2 relating to the elections of the Governor and Lieutenant Governor violate Artilce III, Sections 3 and 8, of the Constitution of Alaska.

ARGUMENT

The State of Alaska, and this Court, have a long and proud history of protecting the

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[1] There was substantial motion practice relating to attorney fees. Alaskans for Better Elections, Inc., sought costs and enhanced attorney fees against the plaintiffs. [R. 634-691] The State took no position on costs and attorney fees. The Court entered an order correctly denying Intervenor's Motion for Attorney Fees and Costs on October 4, 2021. [R. 542-548] These matters are not involved in this appeal and will not be referenced or discussed.

rights of individuals, even to a greater extent than these rights are protected by the Constitution of the United States. For example, individual civil rights are protected by Article 1, Section 3 of the Constitution of Alaska. Religious freedom is separately protected by Section 4. Free speech is separately protected by Section 5. The rights to petition and assembly are protected by Section 6. Even an individual's right to privacy is protected by Section 22. This list is not intended to be exhaustive, but just to identify some of the areas in which the State, and this Court, are extremely protective of the rights of the individual.

This case involves the right to free political association.

I. ALASKA LAW PROTECTS PERSONAL FREEDOMS TO A GREATER EXTENT THAN AVAILABLE UNDER THE CONSTITUTION OF THE UNITED STATES.

In State v. Browder, 486 P.2d 925 (Alaska 1971), the Supreme Court of Alaska held that, while the Court is required to enforce the required minimal Constitutional standards required by the Supreme Court of the United States in a 14th Amendment case, it would be an abdication of the Alaska Court's responsibility to look only to the Supreme Court of the United States for guidance. The Browder Court recognized that Alaska is free, and under a duty to develop additional Constitutional rights and privileges under the Alaska Constitution if it finds such fundamental rights and privileges to be within the intention and spirit of Alaska's constitutional heritage. In Breese v. Smith, 501 P.2d 159 (Alaska 1972), the Court held, among other things, that Alaska is not obliged to interpret the Alaska Constitution in the same manner as the United States Supreme Court has interpreted parallel provisions of United States Constitution. These principles have been applied in numerous subsequent Alaska cases.

This principle applies to elections. In State v. Green Party of Alaska, 118 P.3d 1054 (Alaska 2005), the Alaska Court specifically stated:

By using the Supreme Court's approach to determining the constitutionality

> of election laws, however, we do not mean to suggest that an election law that falls within the bounds of the United States Constitution is necessarily constitutional under the Alaska Constitution. To be sure, the United States Constitution as interpreted by the Supreme Court sets "national minimal constitutional standards" with which Alaska elections laws must comply. But we have often held that the Alaska Constitution is more protective of rights and liberties than the United States Constitution. In Vogler v. Miller, for instance, we found that the free speech guarantee of article 1, section 5, of the Alaska Constitution - under which we decide challenges to elections laws - is more protective of the right to participate in the political process than its federal counterpart, the First Amendment to the United State Constitution. We therefore stress that the results we derive under the Alaska Constitution need not correspond with those the Supreme Court might reach under the federal constitution. (Citations omitted)

II. THE SUPREME COURT OF ALASKA IS EXTREMELY PROTECTIVE OF THE RIGHT OF POLITICAL PARTIES TO DETERMINE WHO MAY PARTICIPATE IN CHOOSING THEIR CANDIDATES FOR PUBLIC OFFICE, AND PROPOSITION 2 VIOLATES THESE RIGHTS OF FREE POLITCAL ASSOCIATION

In its two cases dealing with who may participate in Alaska primary elections to determine who the party candidates will be, the Supreme Court of Alaska has affirmed the right of the respective parties to determine the manner of selection of the parties' candidates for the general election. In State v. Alaska Democratic Party, 426 P.3d 901 (Alaska 2018), the Court held that Alaska Constitution's free association guarantee protects the right of the Democratic party to open its primary elections to independent voter candidates. [2] In State v. Green Party of Alaska, 118 P.3d 1054 (Alaska 2005), the Court held that the Green Party of Alaska and the Republican Moderate Party, Inc., had the right to present their candidates together on a combined ballot, as a matter of Alaskan Constitutional law. [3]

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[2] This case protected a bylaw of the Democratic Party which specifically stated that it desired this type of election. The case at bench involves the Alaskan Independence Party, which does not desire the election mandated by Proposition 2. A Proposition 2 election is also contrary to the Rules of the Alaska Republican Party, which provide for a separate primary election. (See Exc. 289, RPA Rules, Article I, Section 10) The Rules of the Alaskan Independence Party provide that their candidates are to be selected by Party convention.

[3] This case also upheld the rights of the involved political parties to determine their own candidates and voters, in a manner contrary to Alaska statutory law.

State v. Green Party of Alaska, 118 P.3d 1054 (Alaska 2005) sets forth a four step approach of the Court in analyzing election law challenges. The four steps were also applied in State v. Alaska Democratic Party, 426 P.3d 901 (Alaska 2018). These steps and how they apply to this case are as follows:

A. Has the claimant in fact asserted a Constitutionally protected right?

This subject is discussed at length in State v. Green Party of Alaska, which concludes that the parties have a right under the United States and Alaska Constitutions to determine who may participate in choosing their candidates. State v. Alaska Democratic Party reaches the same conclusion with respect to choosing nominees. The right of the Alaskan Independence Party to choose its nominees and voters is involved in this case in the same manner that it is involved in the Green Party and Democratic Party cases, has already been decided to be a Constitutionally-protected right, and needs no further discussion. This is a Constitutionally-protected right.

B. What is the character and magnitude of the asserted injury to the protected right?

This issue is best analyzed by reference to State v. Alaska Democratic Party. This analysis specifically rejects contrary federal authority, and holds that the party affiliation rule rejects the very interest that the Democratic Party sought to recognize - it wanted primary election candidates who were independents. The case at bench is the opposite side of this coin. The Alaskan Independence Party, and presumably the Alaska Republican Party, want identifiable candidates that have beliefs consistent with the respective parties, and are affiliated with the parties. Refusal to allow them, and their party members, to do have these candidates is a substantial burden on their associational rights under the Alaska Constitution.

The Court, in State v. Green Party of Alaska, held that the prohibition on combined ballots placed a substantial burden on the associational rights of the Green and Republican Moderate Parties. Again, this is the opposite side of the coin. The Green and Republican

Moderate Parties wanted a combined ballot. The Alaskan Independence Party and, again presumably the Alaska Republican Party, do not want the whole process crammed into 4-winner primary, in which the Party's involvement has been marginalized, even if possibly eliminated.

The State has argued that the open, non-partisan primary does not select party nominees. What the Proposition 2 primary election does, in fact, is force the political parties to accept those candidates that they may or may not want; allows voters to participate who the party does not want; and allows the candidates to identify themselves (truthfully or falsely) or hide their beliefs. If the party selects a candidate [4], there is no way for that party preference to be stated on the ballot - and there should be so that the voter will be able to identify the party candidate. Anything else will lead to massive voter confusion, particularly in a 4-winner primary where candidates are self-designated, truthfully or not, or not designated at all.

The State is correct that the State does not have to operate a state-run nominating process. Proposition 2 is a nominating and election process, which the State is going to run and for which the State is going to pay. If the State does run such a process, it has to treat political parties and their candidates in a Constitutional manner, which the Proposition 2 primary election does not do.

The relevant issue before this Court is how the operation of the primary affects the political parties and their right to political association of their members. For a minor party,

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[4] The parties have traditionally selected their candidates with partisan primaries. What do they do now? No Alaskan political party, particularly the Alaskan Independence Party, has sufficient funds to conduct its own primary election with broad participation. So, the parties would have to go back to selecting candidates by party conventions, or by a few party bosses making decisions in "smoke-filled" rooms, which is a problem that the primary election system was designed to correct in the first place. Going back to the private selection of candidates harms the parties by preventing public participation, which leads to distrust and disfavor, and prevents the parties from getting their messages out in a favorable light.

such as the Alaskan Independence Party, its candidate will get lost in the shuffle. Presuming that there are a lot of candidates because the ballot is more accessible, and the confusion which is engendered because of the "truth, lie or say nothing" candidate self-designation, no minor party candidate is likely to make it to the general election.

In fact, Proposition 2 harms the right of a minor political party to exist at all. This result is explained in Ballot Access News, Vol. 36, No. 7 (December 1, 2020.) [Exc. 35]. Proposition 2 eliminated the only reasonable method of qualifying a party in Alaska - 3% of the vote cast for governor in gubernatorial election years and 3% of the vote for U.S. Senator or U.S. Representative in other years. The other way to qualify, which remains, is a registration membership of at least 3% of the last vote cast, which is approximately 2% of the registration total. This method is so difficult that no party in any state in the United States ever has met it, except for Democratic and Republican parties, and parties that have "Independent" or "Independence" in their names. This means that the Alaska Libertarian Party and the Green Party of Alaska are effectively wiped out by Proposition 2.

Qualified party status is crucial, because (1) it allows a party to be on the ballot for President with no petition, and (2) it allows the party to be listed on the voter registration as a choice.

Also, Ballot Access News establishes that the minor parties will be very unlikely to have any candidate for Congress or partisan state office on the Alaska general election ballot. All the four available spaces will be filled by Republicans or Democrats.

In summary, the damage done to the associational rights of the political parties and their voters by Proposition 2 is massive and cannot be allowed to stand.

C. Has the State demonstrated sufficiently important interests to justify the limitations on placed by Proposition 2 on the associational rights of the political parties and their members.

At Exc. 102, the State has identified the Findings and Intent Section of Proposition 2 which it argues are sufficiently important interests that justify depriving the political parties

and voters of their constitutional rights of political association. However, these are just words and the speculation of the persons who wrote the initiative. There is no evidence that these results will be reached. This Court is being required to balance speculation against the hard evidence of the injuries to the Constitutionally protected rights of the political parties and Alaskan voters to the right of free political association.

State v. Alaska Democratic Party, 426 P.3d 901 (Alaska 2018) places the burden on the State of Alaska to demonstrate that there is a compelling interest which justifies the incursion on the rights granted by the Alaska Constitution. Specifically,

> It is not sufficient for the State to assert theoretical possibilities....to justify incursions upon free speech rights protected by the Alaska Constitution. Instead the State must explain why the interests it claims are concretely at issue and how the challenged legislation advances these interests. (Citations omitted)

The State has not done this, and this Court cannot hold that the speculative interests advanced by the State are sufficient to justify depriving the Alaskan political parties and the voters of their rights to free speech and free political association.

There is authority showing that the lofty speculative goals set forth in the Findings and Intent section do not take place. For example, research on California's primaries has showed no increase in moderate candidates and no increase in voter turnout among non-partisan voters. Also, the partisan structure of Washington's Legislature appears unaltered by its new primary system. (Donovan, Todd, "The Top Two Primary: What can California Learn from Washington, California Journal of Politics & Policy, Vol. 4, Issue 1, pg. 1-22 (2012), Also, political polarization is not reduced. [Exc. 275-287 at Exc. 282]

An example of how this worked in the 2003 California Gubernatorial Recall Election appears at Exc. 229-247. There were 135 ballot-qualified candidates, plus a slew of write-ins. Only four of the candidates received at least 1% of the total votes. Arnold Schwartzenegger won the election handily - 4,206,284 (48.6% of the votes) to 724,874

(31.6%) over his closest opponent. This was likely because of his incredible name recognition as a Hollywood actor, and being a Republican was benefit in California in the good old days. The winner in the Proposition 2 general election in Alaska will be whoever has the most money to spend, whether from Alaska or from outside, since political party participation will have been marginalized.

In summary the State has not shown that its alleged interests are sufficient to justify depriving the Alaskan political parties and the voters of their rights to free speech and political association.

D. Finally, the Court judges the fit between the challenged legislation and the State's interests in order to determine "the extent to which these interests make it necessary to burden the plaintiffs rights."

This is a flexible test. As the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the State's interest must be closer.

In making this balance, this Court must taken into account all of the circumstances surrounding this case, and cannot simply focus on one or two factors. For example, even if one factor is legal, when combined with other legal or improper factors, the total of all factors may demonstrate an unconstitutional limitation on the constitutional rights of the Alaskan Independence Party and Alaskan voters.

Also, this Court must make this balance, taking into account that Alaska grants more protection to personal rights, especially in election cases, under the Alaska Constitution than are available under the United States Constitution and cases interpreting it.

Some of the facts that this Court must consider are:

1. The ballot language and intent of the sponsors, which was specifically to get rid of the party primary system, and insure that the political parties could no longer select their

candidates to appear on the general election ballot. [5]

2. The advertising campaign, which involved spending large amounts of money and effort focusing on "dark money disclosure", with a lack of misunderstanding by the voters of the remainder of the initiative. Even with this massive effort on the part of the sponsors, the result of the election was extremely close - 50.55% for and 49.45% against. This is definitely not a mandate in favor of the new system.

3. The effects of the new system on the political parties, who can no longer have their candidates selected according to their rules or desires, can no longer select their candidates through a public process, and can no longer have their candidates identified as their candidates on the ballots.

4. The effects of the new system on the voters, who are not provided meaningful information (truth, lie or no identification of the candidate on the ballot), the lack of a prominent disclaimer on the ballot, and the confusion that this is likely to engender.

5. The fact that the 4-winner primary election, coupled with a ranked-choice general election, does not exist anywhere else, and Alaska should not be used as an experiment to advance the interests of outside millionaires.

6. Four-winner primary initiatives were rejected for the ballot in two other states, North Dakota and Arkansas. Haugen v. Jaeger, 948 N.W.2d 1, 2020 N.D. 77 (August 25, 2020) and Arkansas Voters First v. Thurston, 2020 Ark 265 (August 27, 2021).

Taking all factors into account, under Alaska law which favors political parties and personal rights, this Court should rule that the election system imposed by Proposition 2 on the voters and political parties of Alaska is unconstitutional. [6]

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[5] This Point and Point #2 are the subject of detailed briefing following.

[6] The case at bench does not involve the "dark money" provisions of Proposition 2, except as to whether they are separable from the rest of the Proposition.

III. THE SPECIFIC PURPOSE OF PROPOSITION 2 WAS TO HARM THE PEOPLE'S RIGHT TO FREE POLITICAL ASSOCIATION.

A Constitutional analysis of Proposition 2 must begin with the purpose of political parties in the United States and Alaska.

Political parties presently constitute the major method of the exercise of free political association. [See Exc. 248-274 for a general discussion of political parties] Political parties, such as the Republicans and Democrats, are organizations that exist for the purpose of electing candidates to public office. The members of a political party generally have similar political views and goals, and associate politically for the purpose of electing candidates with similar political views and goals to public office.[7]

In order to accomplish the goal of electing candidates, in the United States and Alaska, two major political parties have arisen and presently exist - the Democrat and Republican Parties. The political party system in the United States strengthened by the second half of the 19th century, and parties have continued strong since that time. [Exc. 248-274] The Alaska Democrat and Republican Parties have existed since Statehood. The parties are obviously the manner that American citizens and Alaskans have determined to most effectively exercise their rights of free political association for many years.

The people exercise their right of free political association by forming political parties for the purpose of electing candidates and advancing issue and principles. Proposition 2 was specifically designed, and presented to the voters, in a manner the specific purpose of which was to harm the political parties.

The first sentence of the Ballot Language for Proposition 2, which is what is presented to the voters as the first line to be read as part of casting their ballots, is:

"This act would get rid of the party primary system, and political parties would

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[7] There are various other types of political parties that exist to advance specific ideologies or sets of policy goals, such as the Green Party (environmental issues).

not longer select their candidates to appear on the general election ballot." [Exc. 288]

By their own rules, the political parties had determined different methods of selecting their candidates. This language makes it clear that the purpose of Proposition 2 is to prevent the political parties from selecting their candidates in the manners that the political parties desired to select them. That the parties are being excluded from the candidate selection process is clear from the language of the Proposition as presented to the voters by the ballot language.

IV. THE "DARK MONEY DISCLOSURE" PROVISIONS OF PROPOSITION 2 RESULTED IN THE APPROVAL OF THE PROPOSITION.

The "dark money disclosure" provisions of Proposition 2 took effect for 2021 campaigns. This is discussed by Susan Downey in her Anchorage Daily News Article dated Aril 17, 2021, and the 34 comments. People are very concerned about the influence of dark money on Alaskan elections, and do not want our elections owned or controlled by outside interests.

This principle affects the case at bench in at least two ways. First, as Ms. Downey recognizes, only a handful of Alaskans understand the ballot measure which stretches 25 ges long. The focus in the campaign to enact Proposition 2 was mainly on the disclosure of dark money, which almost every voter supports. The campaign, funded by large amounts of outside money, was absolutely brilliant. It used the bait of disclosure of dark money to induce voters to swallow the hooks of 4-winner primary and ranked choice voting.

Meyer v. Alaskans for Better Elections, 465 P.3d 477 (Alaska 2020) ruled that Proposition 2 was a single subject, "elections", and that it had to be presented to the voters in its entirety for acceptance or rejection. We all have to live with this result. However, the Proposition really contains a minimum of two distinct subjects, with different policy factors and arguments applicable to each. The first subject is providing more transparency for dark

money. This relates to the financing of election campaigns. The second general subject relates to the actual manner in which the candidates reach the ballot, and are elected or defeated. This is the part that deals with 4-winner primary and ranked choice general elections. These are two separate general subjects and all three specific items - campaign finance disclosure, 4-winner primary elections, and ranked choice general elections - actually should have been voted on separately in order for the election to have been appropriate, meaningful and fair. The voters should have been allowed to vote on the various concepts adopted by Proposition 2 separately. Many voters would have accepted some provisions and rejected others. [8]

"Dark Money disclosure", which provides for more information being made available to the voter as to where the candidate's money is coming from, is supported by most voters and probably would have passed. The 4-winner primary most probably would have failed if people had understood that the political parties, in which they were registered voters, would have very little effect in the election and would not be allowed to choose their own candidates.

Ranked-choice voting would have failed massively had it been a single subject for the voters to consider. In fact, ranked-choice voting was the subject of a stand-alone proposition on the August, 2002, ballot, as 99PVRT. Alaskans soundly defeated the proposition by a vote of 69,683 (63.73%) to 39,666 (36.27%). [Exc. 307} There is no reason that such a massive defeat in Alaska would not have been repeated in a 2020 stand-alone election dealing with ranked-choice voting. Nothing relevant has changed in the interim.

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[8] My own position is a good example, and I am not alone. I, along with I believe most people, support more disclosure of campaign financing. I also support ranked choice/instant run-off voting, which is my personal position and not the majority opinion. In fact, I coordinated the ranked-choice voting initiative which resulted in the subject being placed on the Alaska General Election Ballot in 2002. However, I was forced to vote against two of my strong beliefs because, in my opinion, a 4-winner primary election with the conditions proposed in Proposition 2 which destroy political parties is an anathema.

Another indication that ranked-choice voting would have been rejected was the action of the Fairbanks North Star Borough Assembly on April 29, 2021. It rejected ranked-choice voting for Borough elections by a 1-7 decision. The sponsors even abandoned the idea after protests and dozens of email and comments in opposition. [Exc. 309]

There is at least one other factor which should be considered by this Court in determining whether Proposition 2 was appropriate. HB 174, introduced on April 14, 2021, in the Alaska Legislature, would make severability provisions in initiative petitions illegal, and require such initiatives be rejected and not placed on the ballot. [Exc. 310] These Legislative proceedings are another factor which this Court should consider in determining whether Proposition 2 is or is not appropriate.

V. RANKED CHOICE VOTING IMPOSES AN UNCONSTITUTIONAL BURDEN ON THE VOTER'S RIGHT TO MAKE A KNOWLEDGEABLE CHOICE BETWEEN CANDIDATES. [9]

In an ordinary run-off general election, the voter casts two ballots, in two separate elections. Under Proposition 2, the voter casts only one general election ballot, ranking up to four candidates in order of preference.

In an ordinary run-off general election, the voter is able to knowledgeably choose between the two leading candidates. In the ranked-choice general election between the four winners in the primary election, the voter votes for his or her favorite choice, but for the second and later rounds the voter is voting blind. The voter must vote in advance for the

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[9] Each voter casts a single ballot. A vote is not really "the rankings as a whole." For each round, a "vote" is cast by each voter for that voter's preference in that round as determined by the rules of the election. Each voter may cast more than one vote on each ballot - the voter casts a vote for each round. This is what is recognized in the State's cited case of Dudum v. Arntz, 640 F.3d 98, 1112 (9 Cir. 2011) ("Each ballot is counted as no more than one vote at each tabulation.") This is only be a matter of semantics, however. Other then the fact that voting is done in the blind, as discussed in this section, this process does not create a problem until farther along in the count. When a voter's ballot is exhausted (becomes inactive), because there are no choices remaining on the ballot that are still in the running, that voter has no input into the final decision. It is just as if the voter did not participate in the election at all.

second and later rounds without knowing who has been eliminated and who are the remaining candidates. The voter must be able to cast a knowledgeable ballot, knowing who the candidates are that he or she is being asked to choose between.

For example, if a voter must choose between the remaining two or three candidates, the voter may choose to vote for someone that the voter might have given a lower ranking to in order to avoid a more unfavorable outcome. The voter cannot make such a choice without knowing who the remaining candidates are.

Ranked-choice voting requires that voter to face the decision of who the second choice will be, without knowing anything about who is going to be eliminated in the first round. The voter wants to retain expression of preference of his or her favorite candidate over any second choice, but also wants to retain the right to make a knowledgeable choice in later rounds. But Proposition 2 does not allow the same voter to express preference of their second choice over any specific other choices, or allow the voter to change their second choice if circumstances turn out to require a different vote.

For example, if a voter's first choice is eliminated, the voter may want to make a different choice in a second round to join with the supporters of a more popular candidate with the same political views in order to avoid a totally unacceptable candidate from being elected. The voter must be knowledgeably allowed to do so.

The foregoing issue becomes more complicated in the new ranked-choice general election, especially if the voter does not rank four choices, for whatever reason.

In summary, the requirement that the voter make additional choices after the first choice, in the blind, without knowing who the remaining candidates are, is an unconstitutional burden on the voter's right to cast a meaningful ballot.[10]

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[10] This appeal is about the Constitutionality of Proposition 2, not whether it is a good idea or not. R. 728-733 describes the situation in New York City. The most pertinent comment about ranked-choice voting is that it lets the losers pick the winners. [R.732]

VI. THE PROPOSED GOVERNOR/LIEUTENANT GOVERNOR ELECTIONS CONFLICT WITH ARTICLE III OF THE CONSTITUTION OF ALASKA.

Article III, Section 3, of the Constitution of the State of Alaska, provides:

> **Section 3. Election.** The governor shall be chosen by the qualified voters of the State at a general election. The candidate receiving the greatest number of votes shall be governor.

Article III, Section 8, of the Constitution of the State of Alaska, provides:

> **Section 8. Election**. The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes for governor shall be considered as cast also for the lieutenant governor running with him. The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor.

A. THE ELECTION OF THE GOVERNOR

Article III, Section 2, states that the candidate receiving the greatest number of votes is elected governor. There is no provision made for a run-off election. In fact, the State of Alaska never had a run-off election for governor. The candidate receiving the greatest number of votes, whether that number is a majority or a plurality, is elected governor.

The Alaska gubernatorial elections referenced in Exc. 219-222 reflect that the governors were elected by a plurality of the vote in 1966 (Walter Hickel, 49.99%), 1974 (Jay Hammond, 47.67%), 1978 (Jay Hammond 39.1%),1982 (Bill Sheffield 46.1%), 1986 (Steve Cowper 47.3%), 1990 (Walter Hickel, 38.9%), 1994 (Tony Knowles 41.1%), 2006 (Sarah Palin 48.3%), and 2014 (Bill Walker 48.1%). There were no run-off elections.

Proposition 2 imposes ranked-choice/instant run-off voting on the Alaska gubernatorial elections. [11] This is, in essence, a series of run-off elections which take place

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See also Gruening, Win, "Ranked-Choice Voting is not that Simple," July 10, 2021. [R 737-748].

[11] Exc. 173-190 discusses Instant Run-off voting, which is just another name for Ranked-choice voting.

concurrently, with different candidates at each successive election, until a majority is reached. It is certainly an efficient way of conducting run-off elections, because a voter casts votes for different candidates on a single trip to the polls, but it is still a series of run-off elections with a different slate of candidates for each election and the voter making different choices for each level of election. This procedure violates Article III, Section 2, which mandates that the governor be elected at a single election with the plurality winner being elected. Any attempt to change this Constitutional language and many years of actual practice creates a result which conflicts with the Alaska Constitution, and is void.

B. THE ELECTION OF THE LIEUTENANT GOVERNOR

Article III, Section 8, requires that the governor and lieutenant governor run as a team in the general election. The votes for governor then determine the fate of the lieutenant governor who was running with him or her. In its demonstration primary ballot, the candidates are listed as running as a team. [Exc. 172] By doing so, the State recognizes that the governor and lieutenant governor must run as a team in the general election. But a primary election team is not what is mandated or authorized by Proposition 2.

The demonstration ballot is very straight forward, but it does not show what is mandated by Proposition 2. First, Section 20 of Proposition 2 states that voters may vote for any candidate for each elective office. There is no requirement, or even authorization, that candidates for governor and lieutenant governor run as a team in the primary election. If the State mandates that they have to run as a team, as required by the Alaska Constitution, that violates Section 20. The voter's right to vote for a single candidate of his or her choice is mandated by Section 20.

If the State follows the requirements of Section 20, and places the candidates for governor and lieutenant governor on the ballot separately, then a different type of problem is created. The question then becomes how the team required by the Alaska Constitution

formed for the general election is determined. Does the State require the pairings of the equally-ranked candidates in each election to constitute the team for the general election? This violates the associational right of a candidate who does not want to be paired with the candidate of some other party. In summary, the creation of acceptable pairings is not possible under Section 20. An acceptable pairing is created only by random luck.

The creation of a team by the voters has been solved by the political parties. In both the 2014 and 2018 elections, for example, in the primaries for recognized political parties, the candidates for governor and lieutenant governor ran separately. The winners of each respective primary for governor and lieutenant governor then became the joint ticket for the general election. [See Articles on 2014 and 2018 primary elections, Exc. 155-171] This result supported the right of the candidates to political association because, while a candidate might not know who his or her teammate might be, the candidate will know that the teammate is someone of similar political beliefs. Under Proposition 2, teams may be created where the teammates totally disagree with each other, represent different political beliefs, and might even despise each other.

Second, Section 21 of Proposition 2 exacerbates the problem. A candidate, whether or not a member of a political party, may decide to be placed on the ballot as a nonpartisan or undeclared candidate. If the candidate so desires, the candidate may hide his political beliefs from the voters. The voters then have to make a choice based on lack of knowledge, which is opposite to the entire stated purpose of Proposition 2, which is transparency and to make knowledge available to the electorate.

In summary, Proposition 2 is void as it applies to the elections of governor and lieutenant governor, for the following reasons among other:

(1) The governor is Constitutionally required to be elected by a single election, with the winner receiving the most votes in that election. If a run-off election is going to be

required, whether the run-off election is conducted by people voting twice on two separate days or whether the run-off election or elections are conducted by people voting more than once on a single ballot, this type of change must be done by Constitutional amendment and not by a ballot initiative.

(2) The joint candidacy required for the Constitution for the general election cannot be created under Proposition 2. Two candidates running as a team in the primary election is not authorized or mandated under Proposition 2. If candidates run for the offices separately in a non-party primary election, the results are likely to violate the associational rights of the candidates.

Proposition 2 must be voided in its entirety. If not, it must be voided as it applies to the offices of governor and lieutenant governor.

CONCLUSION

For the reasons set forth herein, the judgments [Exc. 412-413, 414-416] entered by the trial court should be reversed, and Proposition 2 voided as being in violation of the Alaska Constitutional rights of Alaskan voters and political parties.

Dated this 14th day of November, 2021.

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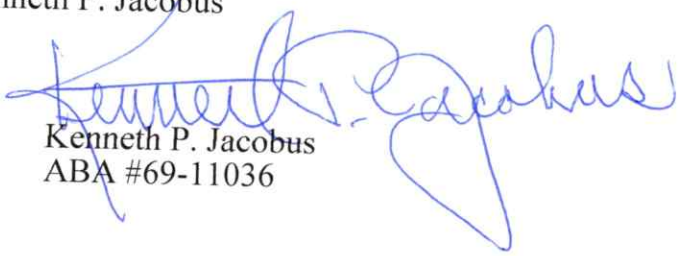
By 
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