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

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

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The State of Alaska, and this Court, have a long and proud history of protecting the rights of individuals and their right to organize into political parties to protect their political beliefs and goals, even to a greater extent than these rights are protected by the Constitution of the United States. The State is correct that this is a facial challenge, and that Alaska has no experience as to how this new scheme will work out. There are a few things which can easily be predicted, which have previously been discussed, and which should be taken into account by this Court.[1]

The appellants are not arguing that Proposition 2 should be set aside because it is "confusing." What is wrong with Proposition 2 is perfectly clear. It deprives the political parties of free political association and harms all political parties. It actually prevents minor parties from having candidates on the general election ballot. It forces the voters to make a "ranked-choice" in the blind without knowing who are actually the candidates in the particular round of voting, and violates the Alaska Constitution regarding the election of governor and lieutenant governor.

I. MEYER V. ALASKANS FOR BETTER ELECTIONS, 465 P.3d 477 (ALASKA 2020) WAS TOO BROAD A DECISION, RESULTING IN THE VOTERS BEING DEPRIVED OF BEING FAIRLY ABLE TO VOTE ON THE ISSUES INVOLVED.

In Section IV of the opening brief, the appellants discussed this issue extensively. After reading the briefs of the State and the Amici, it is clear that this subject needs

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[1] Among these obvious results are that all political parties will be harmed because they are unable to identify their candidates on the ballot, and that minor political parties will never get a candidate on the general election ballot. The only way to get on the general election ballot is through winning the four-winner primary or through a write-in candidate petition. Write-in candidates are at a substanteial disadvantage and have almost no chance of winning a general election.

additional discussion and a solution. The Meyer decision was too broad.[2] It is certainly not incorrect as a matter of precedent, but is too broad an application of precedent.. This Court could not have fully considered the practical effects that this decision would have. In fact, it deprived the voters from being able to fairly vote on the three major and different issues involved in the Proposition. In footnote 8 of the opening brief, I stated:

> 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 opinion of the majority of Alaskans. 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. (Quote slightly revised in a non-material way)

In summary, what we have in this case is "dark money" coming to Alaska and telling Alaskans to vote against "dark money", so that we Alaskans can have 4-winner primary and ranked-choice voting foisted upon us. And it still has not stopped. A printout from the website of RepresentUs, an amicus on this appeal, is attached as Appendix A. RepresentUs claims that "independent voters are locked out of primary elections." This is not true. Independent voters could vote in any primary election prior to the adoption of Proposition 2, and were not locked out. Even the Alaskan Republicans excluded only those voters who were registered members of another political party from voting in their primary election. (See Exc. 289, RPA Rules, Article I, Section 10(a)) This type of misrepresentation had to have gotten into the campaign to adopt Proposition 2.

If this Court does not invalidate Proposition 2, in order to allow a fair vote on these three major changes in Alaska election law, appellants request that this Court stay the

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[2] This was also the observation of Professor Erwin Chemerinski when he reviewed this case as part his presentation at the 2021 Alaska Bar Convention. He also suggested that this Court will have to deal with the breadth of this decision in the future.

application of Proposition 2 for the 2022 primary and general elections, and direct that three questions be placed on the 2022 general election ballot to allow the voters to vote separately on each of the three issues - campaign finance disclosure, 4-winner primary election, and ranked choice voting for the general election. This is the only way that it can be fairly determined what Alaskans really want.[3]

II. PROPOSITION 2 VIOLATES THE PARTIES' RIGHTS OF FREE POLITICAL ASSOCIATION

In State v. Green Party of Alaska, 118 P.3d 1054 (Alaska 2005), the Supreme Court of Alaska 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)

In its two Alaska 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

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[3] This system is more than fair to the sponsors, who will not have to circulate the petitions for signature again.

Democratic party to open its primary elections to independent voter candidates. [4] 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.[5]

Justice Thurgood Marshall's opinion in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) is hugely in support of the rights of political parties. He even added that it would violate the freedom of association to tell a party that it is not permitted to nominate a non-member. Section XI, at pages 23-26, of Woodruff v. Harrera, U.S.D.C. New Mexico, Civ. No. 09-449 (March 31, 2011) (Appendix B) [6] quoted Justice Marshall's language in holding that the Libertarian and Green Parties of New Mexico had the right to determine who their candidates were to be. Colorado Democratic Party v. Meyer, D.C. City and County of Denver, Colorado, Civil Action No. 88CV7646 (1988) (Appendix C) quoting Tashjian, reached the same result, holding that the Parties had the right to select who would be their candidates.

The case at bench poses a different problem, but is also one in which the State, through Proposition 2, is attempting to control who and how the political parties can select candidates. The State says, at page 2 of its brief, and in Argument I beginning at page 15, that the parties cannot complain because the "parties are more free from State regulation,"

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[4] 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.

[5] 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.

[6] The authorities which might be difficult to locate are being provided to this Court and parties as an appendix to this brief.

not less free. This is just not true. In the past, the parties could select their candidates in any manner they wished to select them. The parties at that time freely chose to participate in the primary election. The parties themselves determined the type of primary election and who their voters could be. Under the present scheme, the parties are more controlled by the State, and not more free. They are prohibited from selecting their candidates through the primary election, as was done in the past, because they cannot (1) even participate and (2) run accurate party-identified candidates in the primary election. In other words, the State is determining how the "party" candidates who might advance to the general election may be selected - by using a method to select 'party" candidates from which the parties are excluded. Perhaps the problem could be slightly ameliorated by placing a statement next to candidate's name on the ballot which states "This is the official candidate selected by the Alaska Republican Party," but this is forbidden under the Proposition 2 scheme. There is no way to distinguish the real Republican candidate from the candidates who usurp the party's name, with or without any contact with the party, or even if the candidate represents principles directly contrary to the party's principles. Anyone can freely register to vote as a member of any political party, and then will have the right to use that party's name on the ballot. The State's proposed "explanatory disclaimer" does not solve the problem, because the voter will still not know who the real Republican candidate is. If this is not a substantial interference with the party's right to political association, it is hard to image what is.

If this Court is as protective of political parties and the voters of Alaska as appears in its prior cases, it should adopt the reasoning of the dissenting opinion of Justices Scalia and Kennedy in Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008). Washington State Grange is cited by the opposing parties and amici more broadly than for what it actually held. It did not approve the Washington election. The majority opinion simply said that, in that particular facial challenge case, the Court

needs to wait until the election process is implemented to determine if there are problems. The dissenting opinion of Justices Scalia, joined by Justice Kennedy, correctly pointed out why waiting was not appropriate, because the harms to the political parties were obvious, and that there is no reason to allow the parties to be harmed before acting. This is the same situation that faces this Court at the present time. A copy of this dissenting opinion is attached to this brief as Appendix D because its reasoning is so clear and convincing, and should be adopted by this Court. The writer of this brief could not make the argument any better.

The concurring opinion of Justice Roberts, joined by Justice Alito is attached as Appendix E. These Justices agreed with the position of Justice Scalia, as follows:[7]

> I share Justice Scalia's concern that permitting a candidate to identify his political party preference on an official election ballot - regardless of whether the candidate is endorsed by the party or even is a member - may effectively force parties to accept candidates they do not want, amounting to forced association is violation of the First Amendment.

This is exactly the situation that exists in the case at bench. Proposition 2, permits a candidate to identify himself or herself with a political party label whether or not the candidate is endorsed by the party, is even a member, or has usurped the party label as an election tactic. This is a forced association in violation of the First Amendment and the Alaska Constitution.

III. INSTANT RUN OFF (RANKED CHOICE) VOTING INVOLVES MORE THAN ONE VOTE AND MORE THAN ONE ELECTION.

At page 8 of its brief, the State claims that the voter casts only one "vote" per race,

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[7] These justices also determined that the record before the Court was not sufficient for the Court to hold that the system was unconstitutional, and agreed with the majority opinion as to the disposition of the appeal.

expressed as a ranked choice vote, rather than as a single choice. [8]

This is reminiscent of Allice's conversation with Humpty Dumpty in Through the Looking Glass, which goes in part as follows:

> When I use a word, Humpty Dumpty said in a rather scornful tone, it means what I choose it to mean - neither more nor less.
>
> The question is, said Alice, whether you can make words mean so many different things.
>
> The question is, said Humpty Dumpty, which is to be the master - that's all.

Suppose I cast my ballot for Candidate A (First choice), Candidate B (Second choice), Candidate C (Third choice) and Candidate D (Forth choice). This does not mean I cast a single vote. It means that I voted for, i.e. cast a vote, for Candidate A in the first round, a vote for Candidate B in the second round, a vote for Candidate C in the third round, and a vote for Candidate D in the fourth round. Each round would be a separate election with a different slate of candidates because one would have been dropped, under the Proposition 2 scheme. I would have cast four votes in four separate run-off elections, done at the same time.

The State's definition of "vote" is incorrect, just like Humpty Dumpty's definition of "glory" for Alice, only so that it can be the master, and justify its arguments to uphold the governor/lieutenant governor election, which actually violates the Alaska Constitution.

At page 11 of its brief, the State even recognizes that this scheme is also known

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[8] 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.")

as "instant run-off voting." What this system involves is a series of run-off elections which take place at the same time. At each level run-off election, the voter has to cast a vote in advance without knowing who the candidates are still remaining in the race, and may even be voting for a different candidate because the voters higher choice would have been eliminated. To say this is a single "vote" totally ignores what is actually taking place. Another problem is recognized by the State at page 10 of its brief. The winner is selected only from "active" ballots. This means that a voter unlucky or unwise enough to cast an inactive ballot, is deprived of his or her right to vote in the election where the winner is finally selected.

At page 20 of its brief, the State cites Delegate Rivers remarks to the Alaska Constitutional Convention. These remarks do not support ranked-choice voting. They only stands for the observation that the parties might in the future select candidates for the general election ballot by convention. They certainly do not stand for the proposition that the parties must be excluded from the process entirely. The remarks also do not even mention ranked-choice selection, which does not appear to have been considered at all at the Constitutional Convention, much less by stating that ranked-choice would be an acceptable method of selecting office-holders.

In summary, the issues in this case must be analyzed based on a series of separate elections being involved, and not as a situation involving only a single vote.

IV. THE RESULT OF PROPOSITION 2 WAS TO HARM THE PEOPLE'S RIGHT TO FREE POLITICAL ASSOCIATION.

In the opening brief, the appellants pointed out that the specific purpose of the sponsors was the harm the political parties by removing them from the primary election process. Technically, the purpose of the sponsors is not relevant. It is the result which is determinative. The sponsors succeeded in harming the political parties by removing

them from the primary election process.

As previously pointed out in the opening brief, 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 not longer select their candidates to appear on the general election ballot." [Exc. 288]

This goal was achieved by the sponsors, and the political parties were harmed, in violation of the Alaska Constitution..

V. 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.

Article III, Section 2, very clearly states that the candidate receiving the greatest number of votes is elected governor. Section 8, clearly requires that the candidate for lieutenant governor must move through the nomination process individually. This is confirmed by McBeath, The Alaska State Constitution. Copies of the relevant pages are attached as Appendix F.

In addition, it is clear from the website of Alaskans for Better Elections that the

goal of the sponsors was to require a majority election, which they succeeded in doing. See https://alaskansforbettterelections.com/about/ranked-choice-voting/ A majority election mandate for governor and lieutenant governor violates the Alaska Constitution.

This subject is more extensively discussed in the brief of the amici Mead Treadwell and Dick Randolph. The proposal of the State to force the candidates through the process of a team also violates the Alaska Constitution, and the application of Proposition 2 to the offices of governor and lieutenant governor must be voided by this Court.

In summary, it requires a Constitutional Amendment to apply Proposition 2 to the election of the governor and lieutenant governor. Proposition 2 should be voided in its entirety. If not, it must be voided as it applies to the offices of governor and lieutenant governor.

VI. BRIEF RESPONSES TO POINTS MADE BY AMICI.

The Amicus Brief of RepresentUs and Fairvote provides as excellent descriptions of the history of the process, but a few responses are necessary.

In Footnote 25 at page 11, Fairvote and Represents correctly represent that the 2002 Ballot Measure 1 provided for ranked-choice voting for state and federal elections, except governor. Even as early as 2002, it was recognized that the application of ranked-choice voting for the office of governor violated the Alaska Constitution.

The ice cream analogy, which is always used by supporters of ranked choice voting, is too simplistic for the election of public officials. For example assume my favorite candidate is Candidate W, my second favorite is Candidate X, I believe that Candidate Y is ok, but not great, and that Candidate Z will destroy the country. I will vote for Candidate W in the first round, but Candidate W is eliminated. I believe that

Candidate Y has a better chance of beating Candidate Z, so I vote for Candidate Y in the second round. Not that I really want Candidate Y, but Candidate Z is so awful that Candidate Z must be defeated. If Candidate Z is defeated, then I want to vote for Candidate X in the third round because that Candidate is the one that I really want. If Candidate Z makes it through the second round and one of the other candidates is defeated, then I want to stick with Candidate Y because it is imperative that Candidate Z be defeated. Where a present choice is affected by choices or results in the past, it is a violation of the knowledgeable right to make that present choice without being able to know what the past result was. This does not apply to ice cream, because ranking your favorite ice cream has nothing to do with what took place in the past during the ranking process.

Regardless of policy and whether or not ranked-choice voting is a good idea or has been adopted elsewhere, the only definite information that we have is that it was rejected in Alaska in 2002 by a vote of 63,73 against and 36.27% in favor.

The Amicus Brief of Victor Fischer, Richard Pildes, and Gary Parsons, Jr., is another very interesting and complete history of the development of RCV, and includes policy arguments in favor of RCV. For Alaska, however, the best answer to their Constitutional arguments appear in the amicus brief of Mead Treadwell and Dick Randolph, which need not be repeated.

In particular, Argument 3 at page 17 is incorrect, Instant run-off voting is really a serious of separate elections with different slates of candidates, as previously demonstrated. The process is handled by a voter's single trip to the polling place, but the determination of the slates up for election at each step, and the counting of the votes is done as a series of separate acts.

In addition, Argument B at Page 20 is wrong because the method of pairing the governor and lieutenant governor under Proposition 2 as proposed by the State is a violation of the Alaska Constitution, as demonstrated the amicus brief of Mead Treadwell and Dick Randolph, and Section VI of the argument in the opening brief of appellants.

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. There are other options available to this Court. If Proposition 2 is not voided in its entirely, than those portions that remain should be stayed, and the voters of Alaska allowed to vote again on those remaining provisions. This result is fair to both the sponsors and the voters.

Dated this 15th day of December, 2021.

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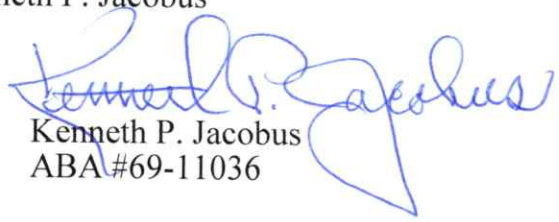
By 
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