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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA DEMOCRATIC PARTY, Plaintiff, vs. STATE OF ALASKA, Defendant.	Case No. 1JU-17-563 CI Judge: Philip M. Pallenberg

ALASKA DEMOCRATIC PARTY'S
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(Dated: July 17, 2017)

I. Introduction

Plaintiff the ALASKA DEMOCRATIC PARTY ("ADP") opposes Defendant STATE OF ALASKA's Motion for Summary Judgment. The ADP's has standing to challenge AS 15.25.030(a)(16) party-membership requirement and its challenge is ripe because that statute was the basis for the Division of Elections' denial of ADP's request to implement its rule change as required under AS 15.25.014. Furthermore, under Alaska's broad interpretation of standing and the relaxed standards of justiciability applicable the free speech claims, the conflict between the ADP's rule allowing Undeclared and Non-

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Partisan candidates to participate in its primary election and AS 15.25.030(a)(16)'s party-membership requirement presents a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

With respect to its challenge to the constitutionality of AS 15.25.030(a)(16)'s party-membership requirement, the ADP has a constitutionally protected associational right to allow candidates who are not a member of another political party, independent candidates, to participate in its primary election without first registering as a member of the ADP. That right is substantially burdened by AS 15.25.030(a)(16)'s party-membership requirement which prohibits such candidates from participating in the ADP's primary election. Finally, the party-membership requirement is ill-suited to advancing the interests identified by the State in support of the requirement, and in any event, the relationship between those interests and the requirement do not justify the burden on the ADP's associational right. Accordingly, the State's Motion for Summary Judgment must be denied.

II. Argument

A. The ADP has standing to challenge the constitutionality of AS 15.25.030(a)(16) as that statute was the basis for the Division of Elections' denial of the ADP's petition to accept its rule change and because the statute prevents the ADP from allowing independent candidates to run in its primary election.

"A standing inquiry asks whether the plaintiff is a proper party to request an adjudication of a particular issue."[1] Alaska courts interpret the concept broadly in favor of

[1] *Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088, 1092 (Alaska 2014).

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increased accessibility to judicial forums.[2] There are two categories of standing: interest-injury and citizen-taxpayer.[3] To claim interest-injury standing, a plaintiff must show "a sufficient personal stake in the outcome of the controversy to ensure the requisite adversity."[4] "The degree of interest need not be great: an identifiable trifle is enough for standing to fight out a question of principle."[5] Further, "a party need not wait for anticipated harm to materialize before bringing an action to protect [its] rights."[6]

The ADP has an irrefutable interest in the outcome of this challenge under at least two theories of injury. First, the ADP was statutorily required to submit its rule change to allow independent candidates to participate in its primary election to the State of Alaska, Division of Elections, for approval. The State of Alaska, Division of Elections denied the ADP's petition to accept its rule change under the basis that the proposed rule would conflict with AS 15.25.030(a)(16). As the "Alaska Constitution protects a political party's right to determine for itself who will participate in crystallizing the party's political positions into acceptable candidates,"[7] and AS 15.25.030(a)(16) was used as a basis to restrict that right by the State, the ADP has standing to challenge the constitutionality of the statute. The State cannot simultaneously contend that the statute restricts the ADP and

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[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *Id.*

[6] *See Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1040 (Alaska 2004).

[7] *See State v. Green Party of Alaska,* 118 P.3d 1054, 1064-65 (Alaska 2005).

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that the ADP does not have standing to challenge it. Second, even assuming Division of Elections approval were not required, the ADP would still have a sufficient interest as AS 15.25.030(a)(16) blocks the ADP from allowing independent candidates to run in its primary election, despite its associational decision, as shown by its rule change, to allow such candidates. As the effect of the statute is to burden the ADP's associational right, the ADP has suffered an injury sufficient to confer standing.

1. **The ADP has standing to challenge the constitutionality of AS 15.25.030(a)(16) because it was the basis for the Division of Election's denial of ADP's petition for permission to implement its rule change required by AS 15.25.014.**

As noted in the ADP's Motion for Summary Judgment, the Division of Elections denied the ADP's December 12, 2016 petition to implement its rule regarding independent candidates on the basis that the rule conflicted with AS 15.25.030(a)(16). The ADP is required to submit changes to its rules regarding participation in its primary elections for approval by the Division of Elections pursuant to AS 15.25.014.[8] Indeed, last year, the

[8] AS 15.25.014. Participation in a primary election selection of a political party's candidates.

(a) Not later than 5:00 p.m., Alaska time, on September 1 of the calendar year before the calendar year in which a primary election is to be held, a political party shall submit a notice in writing to the director stating whether the party bylaws expand or limit who may participate in the primary election for selection of the party's candidates for elective state executive and state and national legislative offices. A copy of the party's bylaws expanding or limiting who may participate in the primary election for selection of the party's candidates, documentation required under (b) of this section, and other information required by the director, must be submitted along with the notice. The notice, bylaws, documentation, and other information required by the director shall be provided by the party's chairperson or another party official designated by the party's bylaws.

(b) Once a political party timely submits a notice and bylaws under (a) of this section and the director finds that the party has met the requirements of this chapter and other applicable laws, the director shall permit a voter registered as affiliated with another party to vote the party's ballot if the voter is permitted by the party's bylaws to participate in the

State successfully argued in 1JU-16-00533 CI, before the Honorable Louis J. Menendez, S.C.J., that compliance with AS 15.25.014 was required for primary election rule changes involving candidates, not just voters.[9] The State further argued that because the ADP had not complied with AS 15.25.014 by not providing notice to the Division of Elections by the statutory deadline for the 2016 primary election (and then, presumably, being denied permission for the rule change because it conflicted with AS 15.25.030(a)(16)), the ADP's challenge could not proceed.[10] The superior court accepted the State's argument on this issue and the challenge was dismissed. Accordingly, in preparation for the present challenge, the ADP submitted its independent candidate rule change to the Division of Elections for approval, as the State had asserted it must, well ahead of the September 1, 2017 cut-off for the 2018 primary election.[11]

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selection of the party's candidates and may not permit a voter registered as nonpartisan or undeclared to vote a party's ballot if the party's bylaws restrict participation by nonpartisan or undeclared voters in the party's primary. However, for a subsequent primary election, the party shall timely submit another notice, bylaws, documentation, and other information under (a) of this section if the party's bylaws regarding who may participate in the primary election for selection of the party's candidates change.

[9] Exhibit 1, selections from the State's motion practice in 1JU-16-00533 CI.

[10] *Id.*

[11] The ADP unsuccessfully argued in that matter that AS 15.25.014's plain language limited its application only to changes in rules regarding who may participate as a *voter* in a party's primary election. As the ADP dismissed its appeal of the Superior Court's decision finding otherwise prior to consideration by the Supreme Court, it accepts the superior court's decision that the statute also requires approval of changes to who may participate as a candidate as controlling for the purposes of litigation between these two parties. The State also argued that the ADP lacked standing unless it identified an independent candidate, however that argument was withdrawn after the ADP identified United States senate candidate Margaret Stock. Ms. Stock's affidavit from that matter is attached as Exhibit 2 to this motion.

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Now, the State argues that the ADP lacks standing to challenge the constitutionality of AS 15.25.030(a)(16) despite the Division of Elections use of that statute as the basis for denial of the approval that the State successfully argued the ADP needed to seek prior to bringing such a challenge. The State cannot have it both ways. If the ADP is required to submit its proposed rule change to the Division of Elections for approval, and if that approval is withheld because the rule conflicts with AS 15.25.030, then the ADP must have standing to challenge the constitutionality of the statute with which the rule conflicts. AS 15.25.030's application by the Division of Elections has caused the ADP a present injury: denial of the permission it is statutorily required to seek to implement its new primary election rule. Further, the State's argument here is careful to avoid mention of the fact that in the ADP's prior challenge, in response to the State making a similar standing argument, the ADP identified an independent United States senate candidate, Margaret Stock, who was interested in running in the ADP's 2016 primary election.[12]

2. The ADP has standing to challenge the statute as it burdens the ADP's associational right to allow independent candidates to participate in its primary election.

Even if Division of Elections approval were not required for implementation of the new rule, or had not been denied, the ADP would still have standing to challenge the constitutionality of AS 15.25.030(a)(16) as its effect is to burden the ADP's associational right to allow independent candidates to participate in its primary election. Whether the statute prohibits candidates from participating, or political parties from allowing them to do so, in either case the effect is to prevent participation by those candidates. As both the

[12] Exhibit 2, Affidavit of Margaret Stock from 1JU-16-00533 CI.

rights of the candidate and the party are impacted, either should have standing to challenge the statute. Either is "a proper party."

Standing asks whether the plaintiff is "a" proper party to request adjudication of an issue, not whether the plaintiff is "the" proper party.[13] The State's citation to *Law Project for Psychiatric Rights, Inc. v. State,* 239 P.3d 1252, 1255 (Alaska 2010) on page 12 of its motion for the latter proposition is inaccurate. The State writes, "A standing inquiry asks the court to consider whether the litigant is *the* proper party to adjudicate the issue before it."[14] However, the language from *Law Project for Psychiatric Rights*, the same language as in the Alaska Supreme Court's recent decision in *Kanuk*, and numerous other decisions is "*a* proper party": "The fundamental question raised by an objection to standing is whether the litigant is *a* proper party to seek adjudication of a particular issue."[15] This is a critical distinction. There is no rule limiting standing only to the party that is the subject of the statute to be challenged and there is no Alaska case that stands for that proposition.

To the contrary, Alaska cases look to whether the party is injured by the statute or policy at issue, not whether the party is the subject or target of it. For example, in *Kanuk v.*

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[13] *See Kanuk, supra*, 335 P.3d at 1092.

[14] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 12 (emphasis added). In the context of the State's standing argument, which argues that only candidates have standing to challenge AS 15.25.030's party-membership restriction, this error is significant.

[15] *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010) (emphasis added); *Kanuk, supra*, 335 P.3d at 1092. *See also, e.g., Gilbert M. v. State*, 139 P.3d 581, 587 (Alaska 2006) *Earth Movers v. Fairbanks N. Star Borough,* 865 P.2d 741, 743, (Alaska 1993), *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987), *Moore v. State*, 553 P.2d 8, 23, fn. 25 (Alaska 1976).

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State, Department of Natural Resources, the Supreme Court held that minors "from communities across Alaska" had standing to sue the State for failure "to take steps to protect the atmosphere in the face of significant and potentially disastrous climate change."[16] In finding that the minors had standing, the Court looked not to whether the State had failed to act specifically with respect to the minors, but whether, as alleged in their complaint, the minors would be negatively impacted by the State's failure to act.[17] The Court reaffirmed its "broad interpretation of standing" and its "policy of promoting citizen access to the courts" while expressly rejecting the State's argument that "a standing requirement that does not distinguish Plaintiff's from any other person in Alaska is no requirement at all."[18] The ADP, in challenging a statute that frustrates its associational choice to allow independent candidates to participate in its primary election, certainly has suffered a more direct injury than the plaintiffs in *Kanuk*.

In addition to there being no requirement in Alaska law that the challenged statute directly target the plaintiff for the plaintiff to have standing, in some instances it is not even necessary that the constitutional rights asserted belong to the plaintiff so long as the plaintiff has a sufficient personal stake in the outcome. In *State v. Planned Parenthood*, the State challenged the standing of Planned Parenthood and two physicians who provided abortions to bring a pre-enforcement challenge an abortion parental consent law for minors on the basis that it violated the constitutional rights of minors to privacy, equal protection,

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[16] *See id.* at 1090.

[17] *See id.* at 1092-93.

[18] *See id.*

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freedom of discrimination based on sex, and due process.[19] Even though the rights asserted belonged to the class of minor women to which the statute applied or could potentially apply to in the future, and the challenge was brought pre-enforcement, the Supreme Court upheld the Superior Court's decision that Planned Parenthood and the two physicians had standing to challenge the constitutionality of the statute:

> Here, Planned Parenthood of Alaska has a strong and direct interest in the challenged statutes the injuries it alleges are more than trifling; and no one disputes that its claims raise important questions of principle . . . . Drs. Whitefield and Klem also have a direct interest in the disputed statute: both physicians allege that they regularly provide abortion services to women in Alaska, including minors. The state nonetheless contends that both doctors lack standing because neither faces a specific threat of prosecution or alleges past prosecutions. But the doctors need not allege such drastic harm to meet Alaska's lenient test of standing. The parent consent or judicial authorization act would require both doctors to change their current practices and would expose them to civil and criminal liability if they failed to comply; this suffices to establish more than a trifling or speculative injury.[20]

The ADP has a strong and direct interest in the challenged statute because the statute negates the ADP's decision to allow and encourage independent candidates to participate in its primary election. Furthermore, unlike Planned Parenthood or the doctors, the constitutional rights that ADP asserts are its own.

The State's argument here is also belied by *Tashjian v. Republican Party of Connecticut*.[21] Standing in federal court is an aspect of subject matter jurisdiction,[22] and

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[19] *See* 35 P.3d 30, 32-33 (Alaska 2001).

[20] *See id.* at 34.

[21] *Tashjian v. Republican Party*, 479 U.S. 208 (1986).

[22] *See, e.g., Alaska Right to Life v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007).

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therefore cannot be waived by the parties.[23] In the same manner that AS 15.25.030(a)(16) is targeted at candidates, the statute at issue in *Tashjian* was targeted at voters, not the political party,[24] yet neither the District Court who granted summary judgment on behalf of the party,[25] nor the Second Circuit,[26] nor the United States Supreme Court,[27] raised any concerns about standing (or ripeness, for that matter,) in their respective decisions.

In fact, reviewing the District Court's grant of summary judgment in *Tashjian*, the Republican Party of Connecticut challenged the constitutionality of the statute pre-enforcement, after changing their party rules which resulted in a conflict with the statute.[28] There is no mention that the Republican Party identified independent voters interested in voting in their future primary, or that the State had threatened or made any attempt to enforce the conflicting statute.[29] It can be inferred that standing and ripeness were not questioned in the *Tashjian* line of cases because the existence of the conflict between the party's rule regarding primary election participation and the state statute, given the

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[23] *See, e.g., Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003).

[24] *Republican Party of Conn. v. Tashjian*, 599 F. Supp. 1228, 1230 fn. 4 (Dist. Conn. 1984) ("No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district, as the case may be . . . .").

[25] *See id.*

[26] *See Republican Party of Conn. v. Tashjian*, 770 F.2d 265 (2d. Cir. 1985).

[27] *See Tashjian, supra*, 479 U.S. 208.

[28] *See Republican Party of Conn. v. Tashjian, supra*, 599 F. Supp. 1228.

[29] *See id.*

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importance of freedom of speech and freedom of association, established more than sufficient injury for standing and ripeness purposes.[30] As Alaska law regarding justiciability is more lenient than its federal counterpart, there can be no question that the ADP has standing to bring this challenge.

The State's standing argument reflects neither the character nor the substance of Alaska's standing jurisprudence, nor is it supported by the relevant federal cases. It appears to be based, at least in part, on an incorrect understanding of the fundamental principles of Alaska standing law. AS 15.25.030(a)(16) stands as a barrier between the ADP and its goal of encouraging independent candidates to participate in its primary election. So long as it does, the ADP may in turn stand before this court and seek a judicial determination of whether the statute violates its constitutional rights. The State's motion for summary judgment on the issue of standing must be denied.

B. The ADP's challenge to AS 15.25.030 is ripe.

For the same reasons that its standing argument fails, so too must the State's argument that the ADP's challenge is not ripe fail. The Division of Elections has denied the required approval for the change in the ADP's primary election participation rules on the basis of the challenged statute. Furthermore, in addition to the example set by *Tashjian*, Alaska's own cases on standing and ripeness readily demonstrate that the conflict between the party's participation rules and AS 15.25.030 establish both standing and ripeness.

"Ripeness is an aspect of standing, and we have often noted that Alaska's standing requirements are more lenient than their federal counterpart, since they favor ready access

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[30] *See Tashjian*, *supra*, 479 U.S. 208.

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to a judicial forum."[31] Ripeness "depends on whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[32] In Alaska, there are differing standards for ripeness between *pre-enforcement* challenges to the challenges to the constitutionality of a statute and other cases, where the plaintiff can demonstrate an injury or threat of injury.[33] In cases other than pre-enforcement challenges to the constitutionality of a statute, the ripeness inquiry collapses into that of standing: It looks to "injury" or "threat of injury," is interpreted "leniently to facilitate access to the courts," and "an identifiable trifle is enough for standing to fight out a question of principle."[34]

In pre-enforcement challenges, there is "no set formula" for determining whether a case is ripe for adjudication.[35] Instead, Alaska courts examine "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration in an effort to balance the need for decision against the risks of decision."[36] When undertaking this balancing analysis, the Alaska Supreme Court has held that varying degrees of

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[31] *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 942-42 (Alaska 2004).

[32] *See Alaska Commer. Fishermen's Mem'l in Juneau v. City & Borough of Juneau*, 357 P.3d 1172, 1176 (Alaska 2015) (internal quotation marks omitted).

[33] *See State v. Native Village of Tanana*, 249 P.3d 734, 747-750 (Alaska 2011) (distinguishing pre-enforcement challenges from other cases by whether there has been an injury or threat of injury).

[34] *See id.* at 749, 749 fn. 119.

[35] *See Jacko v. State*, 353 P.3d 337, 340 (Alaska 2015).

[36] *See id.* at 340 (internal quotation marks omitted).

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concreteness might be deemed acceptable depending on the need for a judicial decision.[37] In the context of free speech, courts may adopt a "somewhat relaxed approach to justifiability because of the special consideration traditionally afforded speech rights."[38] This case takes place within the context of free speech as the right to freedom of association is part of the right to free speech guaranteed by both the Alaska and United States constitutions.[39]

1. **The ADP's challenge is ripe because the ADP has already suffered injury from the Division of Elections' denial of the ADP's petition to implement the change in its rules allowing independent candidates to participate in its primary election and from the conflict between the ADP's participation rules and the statute.**

The State's argument that any harm to the ADP by application of the statute is "theoretical" without an identified candidate fails immediately for the same reason its general standing argument fails: the ADP has already suffered an injury because the Division of Elections denied the ADP's request for permission to implement its rule change because the rule conflicts with AS 15.25.030(a)(16). Importantly, the State has failed to distinguish between the ripeness determination for a pre-enforcement constitutional and other cases. This is not a pre-enforcement challenge. The ADP, as a political association, decided to change its rules to allow independent candidates to

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[37] *See State v. ACLU of Alaska*, 204 P.3d 364, 368 (Alaska 2009).

[38] *See id.*

[39] *See State v. Green Party of Alaska*, 118 P.3d 1054, 1064 (Alaska 2005) ("The overarching principle uniting *Tashjian* and *Jones* is that the First Amendment protects the rights of voters to band together as parties to pursue political ends. This freedom, the Court has affirmed, "necessarily presupposes the freedom to identify the people who constitute the association.")

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participate in its primary election. Under the State's own interpretation of Alaska law, the ADP was required to submit that rule change to the Division of Elections for approval. The Division of Elections denied that request because it conflicted with AS 15.25.030(a)(16). The Division of Elections also reaffirmed that it would enforce the statute as written.

Further, as discussed previously in the context of standing, it can be inferred from *Tashjian* that the conflict between the primary participation rule and a state statute is in of itself a sufficient immediate injury to establish ripeness. In *Tashjian,* as here, the challenged law restricted voters, not the party itself. Indeed, the State cites to no case, whether in Alaska or the federal courts, where a conflict between a political party's rules regarding who may participate in its primary election and a state election law was not ripe for decision. The denial of the ADP's request, the promise of enforcement, and the conflict between the party rule and the statute, either individually or taken together establish the "injury" and "threat of injury" "necessary to support this suit."[40]

2. The ADP does not need to identify a specific independent candidate to challenge a law that restricts its right to open its primary election to such candidates.

Even if considered under the balancing analysis of a pre-enforcement constitutional challenge, the ADP's claim is ripe. It is fit for decision as it presents pure legal questions in the context of a concrete factual situation. There is a significant need for decision well in advance of the 2018 primary election to be able to attract the potential candidates and for such candidates to plan for their participation. And, the risks posed by decision are low due to the substantial Alaska and federal case law on the relevant legal principles. The risk is

[40] *See State v. Native Village of Tanana, supra*, 249 P.3d at 749.

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further diminished by the fact that an independent candidate for the United States Senate was interested in participating in the 2016 primary. Especially given the "somewhat relaxed approach to justiciability because of the special consideration afforded speech rights," the ADP's claim is ripe for determination.[41]

a. The ADP's challenge is fit for decision because it presents both a pure legal question and a concrete factual situation.

In determining the fitness of an issue for judicial decision, "[p]ure legal questions are more likely to be ripe" but a plaintiff bringing a pre-enforcement challenge to the constitutionality of a statue must nonetheless present a "concrete factual situation."[42] The ADP's claim presents a pure legal question: if a political party in Alaska chooses to allow independent candidates to run in its primary election, does AS 15.25.030's requirement that primary election candidates be a registered member of the political party whose nomination is sought impair that political party's right to freedom of association? Further, the question is presented in the context of a concrete factual situation: the ADP has changed its rule, it has requested permission to implement it from the State (as the State has previously demanded of the ADP), and that permission has been denied. Additional context is provided by the established fact of the high proportion of "undeclared" and "nonpartisan" voters in Alaska which provides perspective on the importance to an Alaska political party in appealing to those voters.

The identity or details of an independent candidate that seeks to run in the ADP's primary, especially almost a year before the candidate filing deadline, does not add to the

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[41] *See State v. ACLU of Alaska*, *supra*, 204 P.3d at 368.

[42] *See id.* at 368-369.

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analysis. Indeed, none of the arguments raised by the State as to the merits of the ADP's challenge and the State's interests at stake have turned on the identity of the candidate, or the office sought. The State has merely argued that the ADP must identify an interested independent candidate, without explaining how that would inform the court's analysis. Nor has the State identified other facts that it contends are necessary to develop prior to the court being able to render a considered decision on this legal question. To the contrary, that the State has brought a motion for summary judgment, rather than conducting discovery, cuts in the other direction.

b. The hardship of withholding consideration of this challenge is significant as it reduces the time the ADP will have to attract independent candidates to participate in its next primary.

While there is little to be gained from further factual development, the hardship to the ADP from withholding consideration of its challenge is significant. First, the ADP's claim had to be brought sufficiently far in advance to both 1) satisfy the statutory requirement of submitting a request for approval of the rule change to the Division of Elections, and 2) give any resulting challenge to that denial enough time to be resolved ahead of the June 2018 candidacy deadline for the 2018 primary election. To satisfy these timing considerations, the ADP necessarily had to bring its challenge before potential independent candidates may have even decided whether to run, or, if they have, made that information public. Because they are independent candidates, the probability that the ADP will have notice of who they are, or that they might be interested in running in the ADP's primary, is lower than a candidate who is a member of the party. Requiring that the ADP locate such independent candidates before bringing suit forces the ADP to delay the challenge until closer to the election, reducing the probability that the litigation will be

resolved before the election, increasing the hardship on the State in terms of making the necessary changes to the ballots should the challenge succeed, and actually increasing the risks of decision by rushing the process through the courts.

Second, potential candidates may wish to wait and see the outcome of this challenge before making a private, or public, decision about whether to run, and whether they will seek to make the general election ballot by petition, or by trying to win a nomination in the ADP primary. The State's argument thus puts the cart before the horse: under the State's construction of ripeness, the ADP would have to convince a candidate to publicly indicate interest in running in the ADP primary both 1) before many candidates have even announced they are seeking office and 2) before there is even a judicial determination that they could run in the ADP election. In other words, the ADP must attract an independent candidate to its primary before it has even established that it has a right to attract such candidates to its primary.

In *Jacko v. State, Pebble Limited Partnership*, the Alaska Supreme Court affirmed the superior court's finding of ripeness in a pre-enforcement challenge to an initiative prohibiting certain large-scale mining activities in part because the initiative "exerted a dissuasive effect on Pebble's potential investors."[43] Here, the candidates are like potential investors. They choose whether to invest time, money, and political capital in the ADP's primary election versus a campaign by petition, the ADP receives a broader set of candidates who may better help the ADP achieve its political goals, and in return, they have the potential to win the nomination and support of the ADP in the general election.

[43] 353 P.3d 337, 341 (Alaska 2015).

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Those candidates are less likely to choose to invest in the ADP primary the longer the ADP's challenge to the statute barring their participation is postponed.

c. The risks of decision are limited by the substantial guidance provided by past decisions of the Alaska Supreme Court and United States Supreme Court.

The "risks of decision are measured by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision."[44] The availability of guidance from "substantial case law" is an important determinant of the difficulty of the issues presented.[45] As discussed, further factual development is not necessary to aid decision on the issues presented, and the State has not advanced any argument to the contrary. With respect to difficulty, substantial Alaska and federal case law is available to guide the court's decision, "rendering the risk of decision low." Both *State v. Green Party of Alaska* and *Tashjian* address at length the associational right of a political party over its primary elections, as well as the interplay of the State's potential interests with that right.

Neither *Brause v. State* nor *ACLU of Alaska* demand the opposite conclusion.[46] In *Brause*, the Supreme Court found the plaintiffs' claim was not ripe because their challenge alleged a deprivation of at least 115 separate rights but "lacking in [the plaintiffs'] brief is any assertion that they *have been* or in their current circumstances that they *will be* denied

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[44] *Metcalfe v. State*, 382 P.3d 1168, 1176 (Alaska 2016) (quoting *Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 360 (Alaska 2001)).

[45] *See id.* ("[A]s explained above, substantial case law guides a court decision an article XII, section 7 claim, rendering the risk of decision low.").

[46] 21 P.3d 357 (Alaska 2001); 204 P.3d 364 (Alaska 2009).

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rights that are available to married partners."[47] The Court further found that "[w]ithout more immediate facts it will be difficult to deal intelligently with the legal issues presented" and "the issues themselves are difficult, presenting a case of first impression in Alaska."[48] Here, unlike *Brause*, the ADP's request for implementation of its rule change has already been denied, the State has informed the ADP that it will enforce AS 15.25.030 as written, ADP's challenge is narrower than the 115 rights at issue in *Brause*, AS 15.25.030 and the ADP's rule directly conflict, and no time-dependent or event-dependent factual development is necessary for a fair determination of the legal issue. Finally, as noted, unlike the difficult "issue of first impression" in *Brause*, *State v. Green Party of Alaska* and *Tashjian* provide substantial guidance here.

ACLU of Alaska is distinguishable first and foremost because it was a pre-enforcement challenge. This is not a pre-enforcement challenge given the State's denial of approval for implementation of the rule change. Even if treated as pre-enforcement challenge, *ACLU of Alaska* remains distinguishable because it did not involve a challenge involving freedom of speech, with its "relaxed approach to justiciability." Further, the Supreme Court's decision in *ACLU of Alaska* turned in large part on the fact that regardless of how the court decided regarding Alaska law, the marijuana possession at issue would remain illegal under federal law.[49] There is no such concern here.

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[47] *See Brause, supra*, 21 P.3d at 360 (emphasis added).

[48] *See id.*

[49] *See ACLU of Alaska*, 204 P.3d at 369.

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"As compared to mootness, which asks whether there is anything left for the court to do, ripeness asks whether there yet is any need for the court to act."[50] The ADP has changed its party rules to allow independent candidates to participate in its primary election. The Division of Elections has denied the ADP's petition to implement the rule on the basis that it conflicts with AS 15.25.030(a)(16). There is a need for this court to determine whether the rule unconstitutionally burdens ADP's right to freedom of association. The State's motion for summary judgment on the issue of ripeness must be denied.

C. AS 15.25.030(a)(16)'s party-membership requirement is an unconstitutional burden on the Alaska Democratic Party's associational right to allow individuals who are not a member of any political party to participate as candidates in its primary election

1. The ADP has a right under the Alaska and United States constitutions to determine who may participate as a candidate in its primary election.

The State's motion does not directly address the question of whether the ADP has a constitutionally protected interest in determining who may participate as a candidate in its primary election. Following the four-part test set out in *Green Party*, the section of the State's motion challenges whether the ADP has an interest focuses on characterizing the burden of AS 15.25.030(a)(16)'s party-membership requirement rather than the interest asserted by the ADP.[51] This analysis is flawed, as it allows the State to select which specific aspect of the right to freedom association it wants to weigh the burden of the

[50] *See Brause, supra*, 21 P.3d at 358-359 n.6 (quoting 13A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3532.1, at 101 (Supp. 2000)).

[51] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 18-22 ("a. The party-membership requirement does not restrict ballot access or violate a constitutionally protected right.")

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restriction against and, perhaps unsurprisingly, the State identifies those aspects that, in the State's view, are not burdened. But that is not the test laid out by the Alaska Supreme Court.

The first step in a challenge to an election law is to "determine whether the claimant has in fact asserted a constitutionally protected right."[52] In *Green Party*, the Alaska Supreme Court concluded that this was the constitutionally protected associational interest of political parties in "opening their ballots to voters who would otherwise vote in the primaries of their own political parties."[53] The Court explained:

> The overarching principle uniting *Tashjian* and *Jones* is that the First Amendment protects the rights of voters to band together as parties to pursue political ends. This freedom . . . necessarily presupposes the freedom to identify the people who constitute the association. This right is perhaps nowhere more important than during a primary election: it is at the primary election that political parties select the candidates who will speak for them to the broader public and, if successful, will lead their political party in advancing its interests. . .
>
> The right to determine who may participate in selecting its candidates – and, if the political party so desires, to seek the input and participation of a broad spectrum of voters – is of central importance to the right of political association. We think that the Green and Republican Moderate parties' First Amendment rights under the United States Constitution include a right to share a ballot and thereby to seek the participation of members of the other political party who, if forced to choose, would vote in their own political party's primary. But even if this conclusion might overestimate the reach of the Federal Constitution, we hold 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.[54]

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[52] *See State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005).

[53] *See id.*

[54] *Id.* at 1064-65 (internal quotation marks and citations omitted).

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Although *Green Party* was framed in respect to the participation of voters, as discussed in the ADP's Motion for Summary Judgment, for a political party to "determine for itself who will participate in crystallizing the political party's political positions into acceptable candidates," the party must also be able to determine for itself who may participate as a candidate. In this challenge, therefore, the right asserted is the constitutionally protected associational interest of a political party to allow independent candidates to participate in the party's primary election without the candidate registering as a member of the party. This right is based in the guarantees of freedom of speech in article I, section 5 of the Alaska Constitution, and the First Amendment to the United States Constitution and is entitled to the same or similar deference as the right at issue in *Green Party*.

With respect to this right, the State argues that the ADP cannot have a constitutionally protected interest in allowing an independent candidate to run in its primary election:

> It can hardly be controversial to suggest that before a candidate can become a party's 'standard bearer,' the candidate in fact bear the party's standards. After all, under the new bylaw, the Democratic Party may have no idea of the political beliefs of the candidates appearing on its ballot and no choice but to include all interested candidates, even if their political beliefs are offensive to Party values."[55]

This argument does not stand up to examination. Neither the ADP, nor any other political party in Alaska, imposes ideological testing on their members or primary election candidates prior to allowing them to register as a member of the party or appear as a

[55] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 21.

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candidate on the primary ballot. An independent candidate may better reflect the values of the party than one who is a registered member. Nothing stops an individual with beliefs "offensive to Party values" from registering as a member of the ADP and running in its primary election. It will be up to the voters in the ADP's primary to determine, on behalf of the party, which candidates, independent or Democrat, will best represent the party in its general election.

Furthermore, the State's argument assumes that the beliefs or goals of a political party are static and uniform. They are neither. There is a room for a range of political beliefs, policies, values, and goals in the ADP and other political parties, and those advanced by the party and its members can change over time. The crystallization of a party's political positions is not just embodied in the candidates chosen, but in the debate and campaigning that leads up to the primary election. Even a casual political observer could not miss the shifts that occurred in the 2016 platform of the national Democratic Party in reaction to that party's primary campaign, which involved an independent, Senator Bernie Sanders, who registered as a Democrat solely for that election. Thus, in allowing independent candidates to participate in its primary the ADP is choosing not only to broaden its pool of potential general candidates, but also broaden the ideas that will shape the party's political positions going into the general election. This may result in a platform that better serves and represents both the ADP's members and the Alaska's many independent voters as well as provide a greater chance at the ADP's nominees winning in the general election. This mirrors the benefit to the party served by the inclusion of independent voters, the collective counsel of which both the Alaska and United States

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Supreme Court have affirmed a political party has the right to seek at the primary ballot box:

> In arguing that the Party rule interferes with educated decisions by voters, appellant also disregards the substantial benefit the Party rule provides the Party and its members in seeking to choose successful candidates. Given the numerical strength of independent voters in the State, one of the questions most likely to occur in Connecticut Republicans in selection candidates for public office is how can the Party most effectively appeal to the independent voter? By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors.[56]
>
> Neither the Green Party nor the Republican Moderate Party here wished to have its candidates selected only by voters who are willing to choose that particular political party to the exclusion of others. Rather, the political parties sought to have their candidates elected by a broader spectrum of voters – one which includes voters who might otherwise be unwilling to sign on to the entirety of the political party's agenda or slate of candidates but who would have wanted to support some of the political party's candidates. *The state's restriction 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.*[57]

Finally, the ADP has an interest in these candidates as a form of outreach. The First Amendment protects "a political party's right to reach out to independent voters" through participation in the party's primary election.[58] An independent voter, invited to participate

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[56] *See Tashjian*, *supra*, 479 U.S. at 221; *see also State v. Green Party of Alaska*, *supra*, 118 P.3d at 1064.

[57] *See State v. Green Party of Alaska*, *supra*, at 1065.

[58] *See id.* at 1064.

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in a political party's primary, may develop an interest in the party, its candidates, and in becoming a member. The same could occur with an independent candidate, who, after participating in the primary election, may be more inclined to support the efforts of the political party and those of its candidates, or may develop an interest in becoming a member. Association through the primary election, even without formal membership, thus has a practical and associational value to the political party. As the United States Supreme Court stated in *Tashjian,* "[c]onsidered 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*."[59] For all these reasons, the ADP has a constitutionally protected associational right to allow independent candidates to participate in its primary election.

2. The requirement that only registered members of the ADP may participate as a candidate in its primary election places a substantial burden on the ADP's associational rights.

Having established the right at issue, the analysis turns to the "character and magnitude" of the burden on this right by the party-membership restriction. With respect to the burden on the ADP and its members, the State argues that the requirement does not burden the ADP's associational right because a) it simply imposes a "qualification requirement" on a candidate such as those preventing fusion candidates and so-called "sore loser" candidates, and b) the restriction does not prohibit the ADP from "endorsing or supporting" independent candidates or its members from voting for an independent candidate in the general election. However, the fact that other burdens on a political party's

[59] *See Tashjian*, *supra*, 479 U.S. at 215.

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associational rights have been upheld neither diminishes the associational right nor minimizes the burden created by the party-membership restriction in this matter.

Neither *Timmons v. Twin Cities Area New Party,* nor *Libertarian Party of Michigan v. Johnson*, which dealt with fusion candidates and so-called "sore loser" laws stand for the proposition that the burden on the ADP's associational right from the party-membership requirement is insubstantial.[60] At issue in *Timmons* was a law preventing fusion candidates.[61] Fusion candidates, who appear on the ballot of more than one party, are significantly different than the candidates at issue here, who would only appear on the ADP's primary ballot. The restriction at issue here is also quite different: preventing candidates from appearing on multiple ballots has a far more direct connection to the State's interest in the stability of a two-party system than a requirement that a candidate become a formal member of a party. *Timmons* is further distinguishable because the number of candidates affected was quite small: it only restricted "those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party."[62] In that context, the Court held that the burdens imposed on the associational right were "not severe" but also "not trivial."[63]

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[60] *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), *Libertarian Party of Mich. v. Johnson*, 714 F.3d 929 (6th Cir. 2013).

[61] *See Timmons*, *supra*.

[62] *See id.* at 363.

[63] *See id.*

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In contrast, AS 15.25.030 rules out *all* Undeclared and Non-Partisan candidates from participating in the ADP's primary, candidates who, unlike the fusion candidates at issue in *Timmons*, have not "chosen to associate with another party."[64] Indeed, by choosing to run in the ADP's primary election, such candidates would be choosing to associate with the ADP, though on a different point on the "continuum of participation" than a candidate who is a registered member.[65] While the Court upheld the fusion ban in *Timmons*, it did so because it was "justified by . . . weighty state interests" in the stability of the "two-party system."[66] As will be discussed, that interest is not affected in the same manner by this challenge. Nothing in *Timmons* suggests that the burden of candidate qualification requirements is presumptively minimal, that such requirements cannot significantly burden a political party's associational rights, or that the State does not need to advance "weighty" interests to support the requirements.

Libertarian Party of Michigan v. Johnson also fails to support the State's contention that the burden here is minimal. *Libertarian Party* dealt with a so-called "sore loser" law that prevented a candidate whose name had appeared on the primary ballot of one political party from running as a candidate for any other political party in the general election.[67] Critically, the district court's decision was not premised on the idea that candidate qualification requirements always only impose a minimal burden on a party's

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[64] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 23.

[65] *See Tashjian, supra*, 479 U.S. at 215.

[66] *See Timmons, supra*, 520 U.S. at 366-370.

[67] *See Liberty Party of Mich. v. Johnson*, 905 F. Supp.2d 751, 754 (E.D. Mich. 2012).

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associational rights, but rather, that under certain circumstances the burden is not severe: "The Supreme Court has held that laws having the same effect as the Michigan sore-loser law, i.e. precluding a particular candidate from placing his or her name on the ballot under certain circumstances, do not place severe burdens on voters' or candidates' associational rights."[68] *Libertarian Party of Michigan* and *Timmons* addressed specific types of restrictions put in place in service of important state interests, not the categorical ideological test that the party-membership restriction applies here. Further, the right asserted by the ADP, to allow candidates without a political party to run in its primary, is narrower in scope and thus more directly burdened by the party-membership requirement.

South Dakota Libertarian Party v. Gant also falls well short of carrying the State's argument that the burden here is only minimal. *South Dakota Libertarian Party* is not precedent and its reasoning is unpersuasive with respect to the issues at hand here. Notably, in *South Dakota Libertarian Party,* the Libertarian Party's bylaws required its candidates to be registered Libertarians at the time of their nomination.[69] Further, the district court's construction of the political party's interest and the burden is inapposite to the consideration here. The district court reasoned that because it was straightforward for a candidate to register as a member of a political party, the burden caused by the party-membership restriction was minimal.[70] However, it appears that the Libertarian party in *South Dakota Libertarian Party* did not argue, and the district court did not consider,

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[68] *See id.* at 759.

[69] *See S.D. Libertarian Party v. Gant*, 60 F. Supp.3d 1043, 1050, n.4 (Dist. S.D. 2014).

[70] *See id.* at 1050.

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whether the party has an associational interest in independent candidates, just as it does in independent voters, who choose not to register as members of the party.[71] That is a fundamental component of the decision in *Tashjian*, which affirmed a political party's right to open its primary specifically to independent voters, regardless of the ease with which such a voter might be able to register as a member of the party.[72] This may be because the candidate in *South Dakota Libertarian Party* was a registered Republican up until the day of the Libertarian primary, and so the challenge was not limited, as this one is, to the party's right to allow participation by independents.[73]

South Dakota Libertarian Party is also distinguishable by the state's interest at play. Even though the district court found that the restriction created a minimal burden on the Libertarian party's rights, it still noted that the state needed to show that "affiliation with the nominating party advances an important state interest."[74] In *South Dakota Libertarian Party,* those interests including "preserving political parties as viable and identifiable groups, enhancing party building efforts, and guarding against party raiding and 'sore loser' candidacies by spurned primary contenders." [75]As will be discussed in

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[71] *See id.* ("While it is true that the South Dakota law burdened Plaintiffs by denying the Libertarian Party the right to nominate Gaddy for the upcoming election . . . ."

[72] *See Tashjian*, *supra*, 479 U.S. at 219 (noting that, under Connecticut law at the time, voters could register as members of a political party as late as noon on the business day preceding the primary to vote in that party's election.)

[73] *See S.D. Libertarian Party*, *supra*, 60 F. Supp.3d at 1044 (findings of fact).

[74] *See id.* at 1050.

[75] *See id.* at 1051.

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examination of the State's asserted interests, those interests are not implicated by the challenge here in the context of Alaska's election laws. Thus, *Timmons*, *Libertarian Party of Michigan,* and *South Dakota Libertarian Party* do not compel a finding that the burden on the ADP's associational right, under federal law, is minimal or insubstantial.

Finally, even if the court decides that AS 15.25.030's party-membership restriction does not severely burden the ADP's associational right under the United States Constitution, it is important to note that the Alaska Constitution as interpreted by the Alaska Supreme Court is more protective than the United States Constitution in this area:

> 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 election laws must comply. But we have often held that Alaska's constitution is more protective of rights and liberties than is the United States Constitution. In *Vogler v. Miller*, for instance, we found that the free speech guarantee of article I, section 5 of the Alaska Constitution under which we decide challenges to election laws – is more protective of the right to participate in the political process than its federal counterpart . . . . 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.[76]

Thus, as argued in the ADP's Motion for Summary Judgment, AS 15.25.030(a)(16)'s party-membership requirement should be found to be a substantial burden on the ADP's associational rights under the stronger protection provided by the Alaska Constitution and Alaska law. The Alaska Supreme Court has recognized the importance of the benefits flowing from inviting participation in a political party's primary election by voters who choose not to be members of that party. Those benefits also accrue from inviting

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[76] *See State v. Green Party of Alaska, supra*, 118 P.3d at 1060-61.

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participation by independent candidates. AS 15.25.030(a)(16), which prohibits those candidates from participating in the ADP's primary election despite the ADP's rule allowing them to do so thus places a substantial burden on the ADP's associational rights.

3. AS 15.25.030(a)(16) has little connection to the interests identified by the State and does not justify the burden on the ADP's associational rights.

The State identifies the following interests that it argues support the constitutionality of the party-membership restriction: a) "ensuring that a political group be able to demonstrate a significant modicum of support before enjoying the benefits of political party status,"[77] b) "making sure a party's continued status as a recognized political party reflects sincere support for the *party's* values, to avoid compromising the integrity and value of recognized party benefits,"[78] c) "fairly and effectively administering elections" by "ensuring the integrity of the ballot and in regulating the number of candidates on the ballot, both to avoid overcrowding and help ensure that voters can discern the views of those for whom they vote,"[79] and d) protecting the "stability of its political system and preserving political parties as viable groups."[80]

While some of these interests may be compelling in the abstract, the connection between them and the party-membership requirement is conclusory and unpersuasive. "[W]hile the state may anticipate likely problems in the electoral process, it cannot justify

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[77] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 27-28.

[78] *Id.* at 29.

[79] *Id.* at 31.

[80] *Id.* at 31-32.

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imposing significant constitutional burdens merely by asserting interests that are compelling only in the abstract. . . . Instead, the state must explain why the interests it claims are concretely at issue and how the challenged legislation advances those interests."[81] The State's argument fails to explain how its asserted interests are concretely at issue, and its explanations for how the party-membership requirement advances those interests do not stand up to scrutiny.

a. The State's interest in ensuring that a general election candidacy reflect a "modicum of support" is not served by the party-membership restriction because an independent candidate would still need to win the ADP's primary election to get on the general election ballot, and whether a party has a "modicum of support" under state law is based on the prior election.

The court should find the State's argument that AS 15.25.030(a)(16)'s party-membership requirement supports the State's interest in "ensuring that a political group be able to demonstrate a significant modicum of support before enjoying the benefits of political party status" unpersuasive. There is no requirement that a candidate who is a registered member of a political party have a modicum of support to become a candidate in a political party's primary election. As the State has argued, it is simple for a potential candidate to register as a member of the ADP and then file to run in the ADP primary. Thus, the party-membership requirement does nothing to ensure that a primary election candidate has "bona fide public support"[82] prior to getting on the primary ballot.

With respect to the general election, an independent candidate who wins the ADP primary would still have demonstrated a modicum of support by *winning the primary*. This

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[81] *State v. Green Party of Alaska*, *supra*, 118 P.3d at 1066.

[82] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 33.

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may, depending on the office, demonstrate more support for the candidacy than if the candidate had taken the alternate path and made it on the general ballot via petition. While it is true that it is theoretically possible for an independent candidate to win the ADP's nomination for an office with a single vote in the primary, the State does not explain how disallowing that independent candidate, but allowing the candidate who registers as a member of the ADP to proceed to the general election with a single vote, supports the State's interest in ensuring that a political group demonstrate a modicum public support. In either case, the number of votes, and therefore the level of public support is the same. The only difference between the candidates is a label.

This is a consequence of the fact that, as the State acknowledges, recognized political party status reflects support for the party, either in gubernatorial votes or registered voters in the *previous* election. The level of support for the candidate in the instant election is unimportant to that determination. What matters is whether the candidate has received the support of the political party through the mechanism of its primary election. Indeed, the State's argument here echoes its argument in *Green Party,* and is unpersuasive for the same reason: "because a political party's level of support at the primary election is not relevant in determining whether the party has enough community support to qualify for a place on the general election ballot, the state's interest in requiring community support is not threatened" by independent candidates in the ADP primary.[83]

Importantly, Alaska allows for open primaries. It is entirely possible that the winner of an ADP primary election could be decided entirely by voters who are not

[83] *Cf. State v. Green Party of Alaska, supra,* 118 P.3d at 1067.

members of the ADP, even a single independent voter. Thus, the State's reliance on its interest in ensuring that parties show "modicum of support" is unavailing. It is the province of the party, not the State, to determine the mechanism by which it chooses its candidates. In the context of ensuring that a political party has a modicum of support, the party-membership requirement is an arbitrary restriction that does nothing to advance that interest.

Finally, the State argues with respect to community support: "Under the Party's rule, election results are no longer an accurate indicator of which political parties deserve recognized status."[84] This argument is without basis. Allowing independent candidates in the ADP primary has no effect on whether the ADP, or other parties, achieve recognized political party status by their number of registered voters. With respect to achieving recognized status via the gubernatorial, United States senator, or United States representative elections, the State provides no compelling basis for why the fact that an individual is a registered member of a political party as compared to being the party's nominee is important to gauging whether the party has a modicum of community support. Logistically, as that candidate will not be the nominee of any party, the State can tally the votes for that candidate to determine whether the nominating party meets the threshold for recognized status. And, there is no reason to treat a vote for a candidate differently for determining support for the party, under Alaska's current primary and general election system, based on whether that candidate is a registered member of that party, as opposed to

[84] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 33.

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chosen as a candidate via the party's primary election mechanism. Only the latter is significant for determining whether the candidate enjoys the party's support.

b. The State's interest in ensuring a political party's support at the ballot reflects support for the "party's values" is minimal, if it exists at all, is not served by the party-membership requirement, and in any event, whether a candidate reflects the party's values should be determined by the primary election, not an ideological test administered by the State.

The State cites no law in support of the proposition that it has an interest in "making sure a party's continued status as a recognized political party reflects sincere support for the *party's* values, to avoid compromising the integrity and value of recognized party benefits."[85] As discussed, a political party's "values" are not set in stone, may differ within the party, and can change through time, circumstance, and candidates. The State posits no reasonable mechanism for how it can determine what a party's "values" are, and, in any event, the link between candidate support and support for a particular set of values based on ballots is weak as voters may decide to vote for a candidate for any number of differing, and sometimes contradictory, reasons.

Even assuming the State has a recognizable interest of this kind, it is not well served by the party-membership requirement. The State contends that allowing independent candidates would "sever the connection between the candidate and the political party's ideology," but that argument assumes that party membership ensures such a connection in the first place. As discussed previously, party membership is a poor proxy for values or ideology. There is no ideological test that an individual must pass to obtain party membership. Candidates within the same party may have sharply differing views on

[85] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 29.

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certain issues. An independent candidate may better reflect the values of the ADP's members than one who is a registered member. The "connection" the State asserts as at issue is neither promoted nor protected by the requirement of party membership: it does nothing to stop a candidate with views and values repugnant to those of the ADP's members from registering as a member and then running in the primary under current law.

Such candidates are dealt with in the same manner that independent candidate with repugnant views, via the mechanism of the primary election. The ADP has decided internally that it will rely on its voters, which include any registered voter in Alaska, to pick candidates with the values they most support. The party-membership requirement is thus completely ineffectual at promoting the interest the State asserts it has in ensuring that votes at the ballot reflect support for a particular set of values.

c. The State's interest in "fairly and effectively administering elections" is not served by the party-membership requirement because the ADP's rule will result in the same or fewer general election candidates, there is no requirement of public support for a registered member to get on a primary election ballot, and there is little risk of increase in voter confusion.

The State's reasoning in support of a connection between its interest in "fairly and effectively administering elections" and the party-membership requirement does not add up. Quite literally, it does not add up with respect to the general election: greater participation by independent candidates in the primary election will lead to either the same or fewer number of candidates on the general election ballot. This is because the ADP will have the same number of general election candidates, one per office, irrespective of whether independent candidates run in its primary election.

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Turning to the primary election ballot, while there is some possibility that increasing the size of the universe of potential candidates will increase the number of candidates in the ADP primary election, similar to the State's argument regarding ballot overcrowding in *Green Party*, this "provides no realistic grounds for concern":

> Considering Alaska's long experience with the blanket primary ballot – on which the candidates of many political parties were commonly listed – and the absence of any historical problem of overcrowding, it seems unrealistic to fear that a ballot shared by two political parties would create problems of overcrowding. Because the state does not face a credible threat of ballot overcrowding, this interest is not actually at issue and will not support the challenged legislation.[86]

Here, too, the State points to no credible threat of ballot overcrowding. It does not argue that the ADP's primary ballot is currently overcrowded or close to becoming overcrowded. Further, the party-membership requirement does little to prevent overcrowding even if that interest was truly implicated because the State takes no other measures to limit the number of candidates.

With respect to voter confusion, the State's arguments repeat those that it has made earlier: that allowing independent candidates "sever[s] the link between party and ideology" and, therefore such candidates "would tend to confuse or mislead the general voting population to the extent it relies on party labels as representative of certain ideologies."[87] However, as extensively discussed, labels are a poor proxy for ideology, and the fact that an ADP nominee who is an independent candidate will have been selected via the ADP primary election mitigates concerns that the candidates values are not reflective

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[86] *See State v. Green Party of Alaska*, *supra,* 118 P.3d at 1066.

[87] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 34.

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of those of the party. Further, as "Alaska's blanket primary caused little apparent voter confusion"[88] and, as the State acknowledges, Alaska primary voters already navigate a combined ballot in the ADP primary,[89] any risk of voter confusion is minimal, and certainly not worth the burden of the party-membership restriction. Indeed, Alaska's high proportion of independent voters indicates less reliance on party identity as a proxy for beliefs and values than the State's arguments would imply.

d. The State's interest in the "stability of its political system and preserving political parties as viable groups" is not served by the party-membership requirement in the context of Alaska's primary system which allows for open primary elections.

The State's asserted interest in the "stability of its political system and preserving political parties as viable groups" echoes its arguments in *Green Party*, where the State asserted that the prohibition on combined ballots supported its interest in "strengthening political parties."[90] The Alaska Supreme Court found this argument unpersuasive in the context of Alaska's election system:

> Strengthening political parties may, in the abstract, be an important government interest. But in the context of a primary system that already allows political parties to open their ballots not merely to unaffiliated voters, but also to registered members of other political parties, this interest is neither sufficiently concrete nor sufficiently compelling to support prohibiting mutually willing political parties from opening their ballots to each other. Similarly, the state's asserted interest in encouraging unaffiliated voters to become political party members cannot serve as a justification for prohibiting combined ballots in a primary system that already allows unaffiliated voters to vote in any political party's primary.

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[88] *See State v. Green Party of Alaska*, *supra*, 118 P.3d at 1068.

[89] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, Affidavit of Josephine Bahnke, 1.

[90] *See State v. Green Party*, *supra*, 118 P.3d at 1067.

> By the same token, where the state's primary system allows political parties to open their primary ballots to registered members of other political parties . . . the state's interests in protecting political parties from disorganization cannot support prohibiting willing political parties from sharing a primary ballot.[91]

As in *Green Party*, the State's worst-case arguments with respect to the stability of Alaska's political system are undercut by the system itself. The State argues that allowing independent candidates in party primaries "would allow groups with dwindling or marginal political support" to "recruit a viable independent candidate to run on that party's primary ballot simply in order to bolster that party's votes in the general election."[92] Yet, the ADP, and any other recognized political party, under current law can already recruit an independent candidate to try and bolster support with the minimal additional requirement that the candidate register as a member of the party. As discussed, this carries with it no guarantees of ideological purity or even ideological compatibility. And, in any event, such a candidate would need to win the ADP's primary election, thus ensuring that the candidate has the requisite support contemplated by Alaska's primary system, which allows for open primary elections. Far from being "closely-drawn to serve the State's interest," the party-membership requirement does not advance the State's interest in the context of Alaska's election law.

III. Conclusion

The State's rationales for why form should triumph over substance with respect to whether the ADP has a constitutional right to allow Undeclared and Non-partisan

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[91] *See id.* at 1067.

[92] Memorandum in Support of the State of Alaska's Motion for Summary Judgment, 33.

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candidates to participate in its primary election is without merit. The party-membership requirement does little to advance the State's legitimate interests in the context of Alaska's election system. On the other hand, it substantially burdens the Alaska Democratic Party's associational right to allow independent candidates to participate in its primary election. As the ADP's has standing to bring this challenge, as this challenge is ripe, and AS 15.25.030(a)(16) unconstitutionally burdens the Alaska Democratic Party's associational rights under the Alaska Constitution and the United States Constitution, the State's Motion for Summary Judgment must be denied.

DATED: Monday, July 17, 2017 at Juneau, Alaska.

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

ALASKA DEMOCRATIC PARTY,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

Case No.: 1JU-17-00563CI

STATE OF ALASKA'S OPPOSITION TO THE ALASKA DEMOCRATIC PARTY'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Alaska Democratic Party ("Party") challenges the constitutionality of AS 15.25.030(a)(16), a candidate eligibility statute requiring a candidate seeking the party's nomination in a party's primary election be a registered member of that political party. The Party's motion for summary judgment however, relies on only two cases, neither of which involves candidate eligibility statutes. Instead, they address the separate and distinguishable issue of restrictions on who may *vote* in a party primary—not who may *run* in one. At the same time, the Party ignores a long line of federal cases addressing and upholding candidate eligibility statutes analogous to the law challenged here.

What is more, the Party fails to acknowledge the impact of its requested relief on a broad range of election statutes or even recognize the important state interests at issue in this case. Alaska's party-membership requirement is the foundation of the State's

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party system, and it plays a central role in ensuring that candidates have the requisite modicum of public support to obtain access to the general election ballot. It does not implicate the Party's associational rights, and even if it does, any burden the statute does impose is relatively insignificant. Accordingly, the party-membership statute violates neither the federal nor state constitutions, and should be upheld.

II. ARGUMENT

A. *State v. Green Party of Alaska* does not support the Party's claim.

In urging this Court to invalidate AS 15.25.030(a)(16), the Party relies almost exclusively on the Alaska Supreme Court's declaration in *State v. Green Party of Alaska* that the "Alaska Constitution protects a political party's right to determine for itself who will participate in crystallizing the party's political positions into acceptable candidates."[1] But *Green Party* was concerned with who could select a party's candidates: It considered whether a party could open its primary ballot to a broader class of voters—a fundamentally different inquiry from whether a candidate is eligible to run in a party's primary election. And a law like the one invalidated in *Green Party*, which prohibited parties from opening their ballots to non-party voters, implicates a party's associational interests in a wholly different way than a provision prohibiting unaffiliated candidates from running in a party's primary election. Yet the Party fails to recognize either the significance of that distinction or the unique way in which it shapes the State's interests in the party-membership requirement.

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[1] 118 P.3d 1054, 1065 (Alaska 2005).

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Indeed, in *Green Party*, the Alaska Supreme Court expressly distinguished statutes limiting who may vote in a primary election from statutes "impos[ing] eligibility requirements upon candidates,"[2] like the one at issue here, and emphasized that it was not addressing candidate eligibility requirements.[3] Beyond identifying the applicable constitutional test, *Green Party* does not "establish[] the rights at issue" in this case nor dictate the Court's resolution of it.[4] [Party Motion for Summary Judgment at 5]

B. The Party has no associational right to authorize candidates with any political beliefs to run in its party primary, an election which is structured on the basis of shared support for the party's platform.

The Party argues that because it has an associational right that encompasses the right to open its primary election to independent voters, it necessarily follows that it has an associational right to allow candidates of any political persuasion to run in its party primary. [Party Motion for Summary Judgment at 8-9] But the Party's claimed associational interest in this case is an illusory one, and it rests on a skewed interpretation of *Green Party*.

In *Green Party*, the Alaska Supreme Court evaluated a party's associational interest in opening its primary election to independent voters.[5] When considering the scope of a party's right to determine who will help select the party's candidates, the

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[2] *Id.* at 1062 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)).

[3] *Id.*

[4] *Id.* at 1061.

[5] *Id.* at 1061-65.

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Court relied on *Tashjian v. Republican Party of Connecticut*,[6] a United States Supreme Court case invalidating a state law prohibiting a political party from allowing independent voters to participate in its primary election.[7] In striking down Alaska's ban on combined party primary ballots, the Alaska Supreme Court quoted approvingly *Tashjian*'s holding that a "political party's effort to 'broaden the base of public participation in and support for its activities,' was 'conduct undeniably central to the exercise of the right of association.'"[8]

Extrapolating from this broad principle, the Party quotes *Tashjian* for the proposition that "the freedom to join together in furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association."[9] [Party's Motion for Summary Judgment at 8] And, indeed, courts routinely locate political parties' associational rights in the First Amendment's protections for the advancement of political ideas. But the language that the Party quotes from *Tashjian* highlights the fundamental difference between opening a primary election to voters of any political belief and opening it to candidates of any political belief. The former scenario involves a united effort among two or more parties or voters built on shared political views. The latter involves one party's interest in bestowing a state-conferred party benefit on some unknown person or persons—individuals whose

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6 479 U.S. 208 (1986).

7 *Green Party*, 118 P.3d at 1062-63.

8 *Id.* at 1063 (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986)).

9 *Tashjian*, 479 U.S. at 215.

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political beliefs are so uncoupled from the Party's platform that they do not, and will not, even affiliate with the Party.[10] In other words, the Party's proposal is not that it should be permitted to join with others "in furtherance of common political beliefs," but rather that it should be able to open its primary election to *candidates* who reject the Party's beliefs so much that they affirmatively *decline* to associate themselves with the Party.

In *Green Party*, the court noted that "it is at the primary election that political parties select the candidates who will speak for them to the broader public and, if successful, will lead their political party in advancing its interests."[11] But a candidate who declines to register as a member of a party expressly does *not* speak for that party to the broader public, nor will such a candidate either lead the party or necessarily advance its interests. When a party wants to open its primary to any random candidate of any political stripe who might wish to leapfrog the nominating petition requirement and instead exploit the party's right to a primary election, the right to advance the party's ideology is simply not at stake.

Similarly, while "a political party may desire to open its primary ballot to a wider spectrum of voters in order to allow the political party and its members 'to inform themselves as to the level of support for the Party's candidates among a critical group of

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[10] This lack of an association only further highlights the Party's ripeness and standing problems in this case, as discussed in the State's opening motion.

[11] *Green Party*, 118 P.3d at 1064.

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electors,'"[12] this associational interest does not extend to unaffiliated candidates. What both *Green Party* and *Tashjian* recognize is that a political party seeking to elect *its own candidates* to office has an interest in determining which of those candidates is likely to have the widest appeal, even to voters who are not registered supporters of the party. The Alaska Democratic Party may choose to endorse or encourage its voters to throw their support to a candidate who is a member of the Republican Party, the Green Party, the Alaska Independence Party, the Communist Party, or any other political party. It may choose to endorse or encourage its voters to support a candidate who is unaffiliated or registered as an independent. But such any such candidate is not, and cannot be by definition, an "Alaska Democratic Party candidate."

It is hard to tell—and the Party's motion offers no real explanation—what interest the Party has in allowing candidates who do not support the party or affiliate with its ideology to use the Party's primary as a shortcut to the general election ballot.[13]

The Party merely asserts that it wishes to "open candidacy on [the primary] ballot to a wider spectrum of candidates . . . [who] may draw wider appeal in a subsequent general election, and thus better advance the party's political positions than a candidate who is a registered member of the party." [Party's Motion for Summary

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[12] *Id.* (quoting *Tashjian*, 479 U.S. at 221).

[13] Nor is it apparent that the Party fully comprehends the presumably vast number of individuals of any political persuasion—including individuals who might espouse beliefs that are offensive or antithetical to the values and positions of the Alaska Democratic Party—who would theoretically become eligible to appear on the Party's primary ballot under its new rule.

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Judgment at 9] Thus, the Party appears to concede that the only party interest promoted by opening their primary to independent candidates is increasing their chances of nominating a winning candidate. Invalidating the candidate eligibility statute is not, as the Party suggests, akin to a party legitimately broadening its base of support by expanding its voter base to better advance the party's platform. Instead, this case is about—at most—the Party's desire to field a winning candidate. But there is no First Amendment right to nominate a winning candidate, only the right to associate with others "in furtherance of common political beliefs."[14]

The Party hypothesizes that an independent candidate exists who shares at least some of the Party's political positions, but who is unwilling to register as a member of the Party in order to run in its primary. But again, nothing prevents the Party from encouraging its voters to support the candidate—any candidate— in the general election who it believes most closely aligns with its political positions and can help advance some of the Party's positions. And while the Party may have an understandable interest in electing candidates to office that are more favorable to the Party's platform, that interest does not extend to allowing the Party to bestow a state-conferred benefit, which is premised on a presumption of popular party support, on candidates of any political stripe. What is more, while the Party suggests that Alaska's "large proportion of independent voters may be more drawn to an independent candidate than to one that identifies as a member of a specific political party," [Party's Motion for Summary

[14] *Tashjian*, 479 U.S. at 215.

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Judgment at 9] it fails to explain how running in the Party's primary would not undermine a voter's perception of that candidate's alleged independence just as registering as a member of the Party would.

The Party argues that the candidate eligibility requirement "prevents the ADP from determining for itself whether its interests are best served by candidates who are registered members of the party, or independent candidates who may share political and policy goals with the ADP while also appealing to a broader spectrum of general election voters." [Party's Motion for Summary Judgment at 10] But the Party's new rule does not, as the Party might suggest, limit access to only those "candidates who may share political and policy goals with the ADP." Instead, it opens the Party's nomination to any independent candidate, whatever their political views and however extreme or antithetical to the Party's platform they may be, and does not even require the extremely modest act of affiliation involved in registering as a Democrat.

The First Amendment protects the right of association to safeguard people's ability to join together to promote their shared ideas and political goals.[15] But in the absence of any common ideas or goals—for example, when a candidate seeks to gain access to the general election ballot through a party's primary without being willing to associate himself with the party sufficiently even to register as a member—no First Amendment values are implicated. A candidate who wishes to run in the Democratic primary while at the same time reserving his ability to deny that he is a Democrat or

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[15] *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

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shares any Democratic Party values is not engaging in an act of expressive association—he is simply trying to bypass the requirement that he obtain sufficient petition signatures to get on the general election ballot as an independent candidate. This sort of non-expressive, opportunistic act is not protected by the First Amendment.

C. Federal courts around the country have recognized that candidate eligibility statutes like AS 15.25.030(a)(16) do not impermissibly burden parties' associational rights.

Federal case law is clear: candidate eligibility statutes are constitutional ballot-access laws that do not severely burden a political party's associational rights. The Party misreads *Tashjian* by quoting dicta from that decision noting that a state law "provid[ing] that only Party members might be selected as the Party's chosen nominees for public office . . . 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." [Party's Motion for Summary Judgment at 14] The Party suggests that "the prohibition at issue here was used as an example of a clearly unconstitutional restriction in *Tashjian*." [Party's Motion for Summary Judgment at 14] But *Tashjian* never, in fact, declared that such a prohibition would be "clearly unconstitutional," only that it would clearly infringe the party's associational rights. Whether a right is infringed is merely the first step in a three-part constitutional analysis, and even if this language suggested that the Court believed in 1986 that candidate eligibility requirements might violate the federal constitution, later cases establish that such laws are constitutional and do not impose a severe burden on a party's or candidate's

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associational rights.[16]

Indeed, federal courts have repeatedly upheld state affiliation, disaffiliation and non-affiliation laws—i.e. laws that impose candidate eligibility requirements related to party affiliation—finding "[t]hat a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights."[17] In *Timmons v. Twin Cities Area New Party*, for example, the United States Supreme Court expressly rejected the claim that a ban on fusion candidates—i.e. candidates appearing on the ballot as the candidate of more than one party—involved "core associational activities."[18] On the contrary, the Court found that even though Minnesota's fusion ban "reduce[d] the universe of potential candidates who may appear on the ballot as the party's nominee," it concluded that "the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights—though not

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[16] *See, e.g., id.*

[17] *Id.* at 359; *see also e.g., Storer v. Brown*, 415 U.S. 724 (1974) (upholding California disaffiliation requirement); *Van Susteren v. Jones*, 331 F.3d 1024 (9th Cir. 2003) (same); *Morrison v. Colley*, 467 F.3d 503 (6th Cir. 2006) (upholding Ohio statute requiring independent candidates to claim on day before primary that they were not affiliated with any political party); *Jolivette v. Husted*, 694 F.3d 760 (6th Cir. 2012) (same); *Libertarian Party of Michigan v. Johnson*, 905 F.Supp.2d 751, 759 (E.D.Mich. 2012) (upholding Michigan sore-loser law); *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991) (upholding Wisconsin anti-fusion law).

[18] *Timmons*, 520 U.S. at 360.

trivial—are not severe;" and it upheld the statute.[19]

Alaska Statute 15.25.030(a)(16) is an affiliation statute and, as such, does not impose a severe burden on the Party's associational rights. The Party's claim that the right "to determine who may vote for candidates in a party's primary election is hollow without a corresponding right to determine who those candidates may be," [Party's Motion for Summary Judgment at 8-9] is both unsupported by any legal authority and somewhat perplexing given that the Party's rule does not enhance its ability to determine which candidates may run in its primary election. To the contrary, the Party's rule opens its primary to candidates who are unwilling even to register as Democrats.

D. The State's interests are concretely at issue and the party membership requirement advances them.

The Party's motion for summary judgment expresses ignorance of what State interests might conceivably justify the statute's purported infringement of its associational rights. Nevertheless, the Party recognizes that the State's interests in party primaries were discussed in some depth in *Green Party*.[20] As the State explained in its

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[19] *Id.* at 363; *see also Libertarian Party of Michigan*, 905 F.Supp.2d at 759 ("The Supreme Court has held that laws having the same effect as the Michigan sore-loser law, i.e. precluding a particular candidate from placing his or her name on the ballot under certain circumstances, do not place severe burdens on voters' or candidates' associational rights and therefore need only be reasonable and nondiscriminatory restrictions that serve a State's important regulatory interests.).

[20] Yet despite the fact that ADP was aware of the State's interests in party primaries generally in light of *Green Party*, and although the State previously identified "its interest in ensuring the integrity of elections and the political party framework and avoiding voter confusion," during the ADP's unsuccessful 2016 challenge to the party-membership requirement, the Party's motion addressed no other state interest beyond voter confusion. (*See* State of Alaska's Reply in Support of Motion to Dismiss for Lack

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motion for summary judgment, the party-membership requirement is a key foundation of the party system in Alaska, a system which affects and is reflected throughout the State's election laws. [State's Motion for Summary Judgment at 2-5] But the Party's motion does not even acknowledge this reality. Instead, it assumes that the State's "strongest interest" in the statute is "[p]reventing voter confusion." [Party's Motion for Summary Judgment at 14] The Party's motion thus both ignores multiple important state interests underlying AS 15.25.030(a)(16) and minimizes the significant risk of voter confusion that would arise if the Court were to invalidate it.

When evaluating the dangers of voter confusion, the Party shrugs off the potential for confusion created by candidates who are unwilling to register as Democrats—with all of the political messaging implicit in that refusal—but who nevertheless seek access to the general election ballot as the nominee of the Democratic Party. To the extent that party labels serve any purpose at all for voters, what are voters supposed to make of a person who is unwilling to register as a Democrat, but wishes to be the Party's nominee; or of a Party who does not wish to impose any sort of test of political positions or values—not even the most minimal willingness to associate with the Party by registering as a member—on candidates before opening their primary election to those candidates?

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of Subject Matter Jurisdiction at 16-17, April 4, 2016, Case No. 1JU-16-0533CI). Because the parties' agreement to waive replies was made in anticipation of full briefing of each side's position in the opening cross-motions, the State may seek leave to file a reply in order to address any new arguments made by the Party in its opposition.

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As explained at length in the State's motion, the party-membership requirement also serves other important state interests, particularly preserving the link between the advantages of political party status and a showing of some level of popular support for the party. [State's Motion for Summary Judgment at 27-31] The Party's new rule threatens to sever that link, and thus the State's interests are both "concretely at issue" here and advanced by the requirement.[21] Neither the federal nor the Alaska constitution requires more. AS 15.25.030(a)(16) is constitutional, and this Court should uphold it.

V. CONCLUSION

For the foregoing reasons, and those detailed in the State's opening Motion, the Court should deny the Party's Motion and grant the State's Motion for Summary Judgment.

DATED: July 17, 2017.

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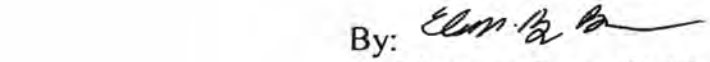
By: 
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[21] *Green Party*, 118 P.3d at 1066.