IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska,	)	
	)	
Appellant,	)	
	)	
v.	)	Supreme Court No. **S-16875**
	)	
Alaska Democratic Party,	)	
	)	
Appellee.	)	
	)	

Case No.: **1JU-17-00563CI**

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

REPLY BRIEF OF APPELLANT STATE OF ALASKA

JAHNA LINDEMUTH
ATTORNEY GENERAL

Laura Fox (0905015)
Assistant Attorney General
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100
laura.fox@alaska.gov

Filed in the Supreme Court
of the State of Alaska
on February __, 2018

MARILYN MAY, CLERK
Appellate Courts

By: _____
Deputy Clerk

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ALASKA CONSTITUTION:

AK Const. Art. 1, § 5. Freedom of Speech

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

ALASKA STATUTES:

AS 15.25.010. Provision for primary election

Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter. The director shall prepare and provide a primary election ballot for each political party. A voter registered as affiliated with a political party may vote that party's ballot. A voter registered as nonpartisan or undeclared rather than as affiliated with a particular political party may vote the political party ballot of the voter's choice unless prohibited from doing so under AS 15.25.014. A voter registered as affiliated with a political party may not vote the ballot of a different political party unless permitted to do so under AS 15.25.014.

AS 15.25.030. Declaration of candidacy

(a) A member of a political party who seeks to become a candidate of the party in the primary election shall execute and file a declaration of candidacy. The declaration shall be executed under oath before an officer authorized to take acknowledgments and must state in substance

(1) the full name of the candidate;

(2) the full mailing address of the candidate;

(3) if the candidacy is for the office of state senator or state representative, the house or senate district of which the candidate is a resident;

(4) the office for which the candidate seeks nomination;

(5) the name of the political party of which the person is a candidate for nomination;

(6) the full residence address of the candidate, and the date on which residency at that address began;

(7) the date of the primary election at which the candidate seeks nomination;

(8) the length of residency in the state and in the district of the candidate;

(9) that the candidate will meet the specific citizenship requirements of the office for which the person is a candidate;

(10) that the candidate is a qualified voter as required by law;

(11) that the candidate will meet the specific age requirements of the office for which the person is a candidate; if the candidacy is for the office of state representative, that the candidate will be at least 21 years of age on the first scheduled day of the first regular session of the legislature convened after the election; if the candidacy is for the office of state senator, that the candidate will be at least 25 years of age on the first scheduled day of the first regular session of the legislature convened after the election; if the candidacy is for the office of governor or lieutenant governor, that the candidate will be at least 30 years of age on the first Monday in December following election or, if the office is to be filled by special election under AS 15.40.230--15.40.310, that the candidate will be at least 30 years of age on the date of certification of the results of the special election; or, for any other office, by the time that the candidate, if elected, is sworn into office;

(12) that the candidate requests that the candidate's name be placed on the primary election ballot;

(13) that the required fee accompanies the declaration;

(14) that the person is not a candidate for any other office to be voted on at the primary or general election and that the person is not a candidate for this office under any other declaration of candidacy or nominating petition;

(15) the manner in which the candidate wishes the candidate's name to appear on the ballot; and

(16) that the candidate is registered to vote as a member of the political party whose nomination is being sought.

(b) A person filing a declaration of candidacy under this section, other than a person subject to AS 24.60 who is filing a declaration for a state legislative office, shall simultaneously file with the director a statement of income sources and business interests that complies with the requirements of AS 39.50. A person who is subject to AS 24.60 and is filing a declaration of candidacy for state legislative office shall simultaneously file with the director a disclosure statement that complies with the requirements of AS 24.60.200.

(c) An incumbent public official, other than a legislator, who has a current statement of income sources and business interests under AS 39.50 on file with the Alaska Public Offices Commission, or an incumbent legislator who has a current disclosure statement under AS 24.60.200 on file with the Alaska Public Offices Commission, is not required to file a statement of income sources and business interests or a disclosure statement with the declaration of candidacy under (b) of this section.

AS 15.25.100. Placement of nominees on general election ballot

The director shall place the name of the candidate receiving the highest number of votes for an office by a political party on the general election ballot.

AS 15.25.140. Provision for no-party candidate nominations

Candidates not representing a political party are nominated by petition.

AS 15.25.180. Requirements for petition

(a) The petition must state in substance

(1) the full name of the candidate;

(2) the full residence address of the candidate and the date on which residency at that address began;

(3) the full mailing address of the candidate;

(4) the name of the political group, if any, supporting the candidate;

(5) if the candidacy is for the office of state senator or state representative, the house or senate district of which the candidate is a resident;

(6) the office for which the candidate is nominated;

(7) the date of the election at which the candidate seeks election;

(8) the length of residency in the state and in the district of the candidate;

(9) that the subscribers are qualified voters of the state or house or senate district in which the candidate resides;

(10) that the subscribers request that the candidate's name be placed on the general election ballot;

(11) that the proposed candidate accepts the nomination and will serve if elected, with the statement signed by the proposed candidate;

(12) the name of the candidate as the candidate wishes it to appear on the ballot;

(13) that the candidate is not a candidate for any other office to be voted on at the primary or general election and that the candidate is not a candidate for this office under any other nominating petition or declaration of candidacy;

(14) that the candidate meets the specific citizenship requirements of the office for which the person is a candidate;

(15) that the candidate will meet the specific age requirements of the office for which the person is a candidate; if the candidacy is for the office of state representative, that the candidate will be at least 21 years of age on the first scheduled day of the first regular session of the legislature convened after the election; if the candidacy is for the office of state senator, that the candidate will be at least 25 years of age on the first scheduled day of the first regular session of the legislature convened after the election; and if the candidacy is for the office of governor or lieutenant governor, that the candidate will be at least 30 years of age on the first Monday in December following election or, if the office is to be filled by special election under AS 15.40.230--15.40.310, that the candidate will be at least 30 years of age on the date of certification of the results of the special election; or, for any other office, by the time that the candidate, if elected, is sworn into office;

(16) that the candidate is a qualified voter; and

(17) if the candidacy is for the office of the governor, the name of the candidate for lieutenant governor running jointly with the candidate for governor.

(b) A person filing a nominating petition under this section, other than a person subject to AS 24.60 who is filing a petition for a state legislative office, shall simultaneously file with the director a statement of income sources and business interests that complies with the requirements of AS 39.50. A person who is subject to AS 24.60 and is filing a nominating petition for state legislative office shall simultaneously file with the director a disclosure statement that complies with the requirements of AS 24.60.200.

(c) An incumbent public official, other than a legislator, who has a current statement of income sources and business interests under AS 39.50 on file with the Alaska Public Offices Commission, or an incumbent legislator who has a current disclosure statement under AS 24.60.200 on file with the Alaska Public Offices Commission, is not required to file a statement of income sources and business interests or a disclosure statement with the nominating petition under (b) of this section.

AS 15.25.190. Placement of names on general election ballot

The director shall place the names and the political group affiliation of persons who have been properly nominated by petition on the general election ballot.

AS 15.15.030. Preparation of official ballot

The director shall prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections. The following directives shall be followed when applicable:

(1) The director shall determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law.

(2) The director shall number ballots in series to ensure simplicity and secrecy and to prevent fraud.

(3) The director shall contract for the preparation of ballots under AS 36.30 (State Procurement Code).

(4) The director may not include on the ballot, as a part of a candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate.

(5) The names of the candidates and their party designations shall be placed in separate sections on the state general election ballot under the office designation to which they were nominated. The party affiliation, if any, shall be designated after the name of the candidate. The lieutenant governor and the governor shall be included under the same section. Provision shall be made for voting for write-in and no-party candidates within each section. Paper ballots for the state general election shall be printed on white paper.

(6) The names of the candidates for each office shall be set out in the same order on ballots printed for use in each house district. The director shall randomly determine the order of the names of the candidates for state representative for each house district. The director shall rotate the order of placement of the names of candidates for governor, lieutenant governor, United States senator, United States representative, and state senator on the ballot for each house district.

(7) The general election ballot shall be designed with the names of candidates of each political party, and of any independent candidates qualified under AS 15.30.026, for the office of President and Vice-President of the United States placed in the same section on the ballot rather than the names of electors of President and Vice-President.

(8) The general or special election ballot shall be designed with the title and proposition for any initiative, referendum, or constitutional amendment formulated as prescribed by law and placed on the ballot in the manner prescribed by the director. When placed on the ballot, a state ballot proposition or ballot question shall carry the number that was assigned to the petition for the proposition or question. Provision shall be made for marking the proposition "Yes" or "No."

(9) The general or special election ballot shall be designed with the question of whether a constitutional convention shall be called placed on the ballot in the following manner: "Shall there be a constitutional convention?" Provision shall be made for marking the question "Yes" or "No."

(10) A nonpartisan ballot shall be designed for each judicial district in which a justice or judge is seeking retention in office. The ballot shall be divided into four parts. Each part must bear a heading indicating the court to which the candidate is seeking approval, and provision shall be made for marking each question "Yes" or "No." Within each part, the question of whether the justice or judge shall be approved or rejected shall be set out in substantially the following manner:

(A) "Shall ..... be retained as justice of the supreme court for 10 years?";

(B) "Shall ..... be retained as judge of the court of appeals for eight years?";

(C) "Shall ..... be retained as judge of the superior court for six years?"; or

(D) "Shall ..... be retained as judge of the district court for four years?"

(11) When the legislature by law authorizes a state debt for capital improvements, the director shall place the question of whether the specific authorization shall be ratified by placing the ballot title and question on the next general election ballot, or on the special election ballot if a special election is held for the purpose of ratifying the state debt for capital improvements before the time of the next general election. Unless specifically provided otherwise in the Act authorizing the debt, the ballot title shall, by the use of a few words in a succinct manner, indicate the general subject of the Act. The question shall, by the use of a few sentences in a succinct manner, give a true and impartial summary of the Act authorizing the state debt. The question of whether state debt shall be contracted shall be assigned a letter of the alphabet on the ballot. Provision shall be made for marking the question substantially as follows:

"Bonds..... Yes" or "Bonds ..... No," followed by an appropriate oval.

(12) The director may provide for the optical scanning of ballots where the requisite equipment is available.

(13) The director may provide for voting by use of electronically generated ballots by a voter who requests to use a machine that produces electronically generated ballots.

AS 15.80.010. Definitions

In this title, unless the context otherwise requires,

...

(26) "political group" means a group of organized voters which represents a political program and which does not qualify as a political party;

(27) "political party" means an organized group of voters that represents a political program and

(A) that nominated a candidate for governor who received at least three percent of the total votes cast for governor at the preceding general election or has registered voters in the state equal in number to at least three percent of the total votes cast for governor at the preceding general election;

(B) if the office of governor was not on the ballot at the preceding general election but the office of United States senator was on that ballot, that nominated a candidate for United States senator who received at least three percent of the total votes cast for United States senator at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States senator at that general election; or

(C) if neither the office of governor nor the office of United States senator was on the ballot at the preceding general election, that nominated a candidate for United States representative who received at least three percent of the total votes cast for United States representative at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States representative at that general election;

...

INTRODUCTION

Alaska's party affiliation rule represents a reasonable policy choice by the Legislature, enshrined in statute and "entitled to a presumption of constitutionality."[1]

The party affiliation rule does not prevent 54 percent of voters from running in a party primary—in fact, it does not prevent even one person from running in even one party primary. Party affiliation is not an immutable human trait; rather, it is very easy to change. Once a candidate decides to seek a party's nomination—which the Party calls a "more involved form of association" than registering as a member—requiring the small step of registering is not asking much. [Ae. Br. 23] The Party asserts an associational interest in allowing candidates who refuse to take this small step to nonetheless compete for its nomination. [Ae. Br. 26] But the Party has no coherent associational interest in allowing its nominee—its purported representative—to be picked from a class of hypothetical candidates defined only by their refusal to identify with the Party.

Important state interests justify the law's minimal burden on the Party's associational rights. If a political party's nominee need not identify with her nominating party, the system the State uses to regulate political party status and ballot access will cease to make sense, party labels will become uninformative, and parties will lose coherence. The Party insists that a non-member party nominee would be sufficiently connected to her nominating party simply by virtue of the party's nomination, but the bare fact of nomination does not signify any link between candidate and party if the candidate is neither a party member nor chosen by party members. Striking the party

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[1] *See State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 980 (Alaska 2005).

affiliation rule would also lead to a confusing and misleading ballot that would either omit critical information or include inherently contradictory labels for candidates, like both "Non-Partisan" and "Democratic Party Nominee."

Finally, the Party does not contest that at least half of Alaska's sister states employ laws similar to Alaska's party affiliation rule, as explained in the State's opening brief. [At. Br. 47-50] The State can "satisfy its burden" of showing that an election regulation is appropriately tailored if it is "in the mainstream" of other states, as Alaska's rule is.[2]

For these reasons, this Court should reverse the superior court's grant of summary judgment to the Party and uphold Alaska's party affiliation rule.

ARGUMENT

I. The party affiliation rule does not severely burden the Party's rights.

A. The party affiliation rule restricts association with only a handful of hypothetical would-be candidates, not half of Alaska voters.

The party affiliation rule impacts only a tiny subset of the 54 percent of Alaska voters who are not registered with a party. Few unaffiliated voters want to run for office in the first place, let alone compete for the nomination of a party that they will not register with. Indeed, the Party has thus far identified only one such person—Paul Thomas—and even he has not actually said that he refuses to change his registration to run in the Party's primary if the party affiliation rule remains in effect. [Exc. 204]

And the rule's burden is slight. If—as the Party itself asserts—"[s]eeking the party's nomination as a candidate is in many ways a more involved form of association

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[2] *Green Party of Alaska v. State, Div. of Elections*, 147 P.3d 728, 735-36 (Alaska 2006) (*Green Party II*) (quoting *Metcalfe*, 110 P.3d at 981).

with the party than registering to vote as a member," [Ae. Br. 23, 32] then requiring a candidate to take the small step of changing her registration status is not asking much.

State v. Green Party of Alaska[3] did not hold that requiring a person to take the small step of changing her voter registration is a severe burden. [Ae. Br. 25-26] In that case, the challenged law required each voter to choose only one primary ballot containing only one party's candidates.[4] That made it impossible for any voter to vote in multiple primaries, regardless of her registration. Voters could not have accomplished this goal by simply changing registration. Thus, the law imposed a severe burden not because it required voters who wanted to vote in multiple primaries to change registration, but because even if voters changed registration they still could not have accomplished that associational goal. Here, by contrast, a candidate can easily accomplish the associational goal of running in a party's primary by simply changing registration. And because a candidate cannot run in multiple party primaries regardless of the party affiliation rule,[5] requiring her to register as a party member once she has decided which primary to run in does not foreclose any other associational opportunities.

The rule's burden on the Party is also slight because the Party's interest in associating with a class of hypothetical non-affiliated candidates who do not wish to publicly identify with the Party is weak. Although the Party has a strong interest generally in associating with people to achieve common goals, its specific interest in

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3 118 P.3d 1054 (Alaska 2005) (*Green Party I*).

4 *See id.* at 1058.

5 *See* AS 15.25.030(a)(14).

associating with any random candidate who refuses to become a member but still wants to use the Party as a nominating platform is slight because the Party knows nothing whatsoever about the political views or goals of this class of candidates. The only thing that defines this class of candidates is that they are not registered with any political party. They do not purport to have any political ideology or goals that the Party could want to associate itself with. There is no "independent" platform they endorse. The Party's asserted desire to associate with this heterogeneous class of candidates cannot be characterized as a desire to "organize with like-minded citizens in support of common political goals"[6] or "band together as parties to pursue political ends"[7] because the Party knows nothing about the "political goals" of these candidates and has no reason to think they are "like-minded" in any way.

Associating with the class of hypothetical non-affiliated *candidates* by allowing them to *run* in a party primary is different from associating with the class of non-affiliated *voters* by allowing them to *vote* in a party primary. There is a substantive, associational reason for a party to want non-affiliated voters to vote in its primary—to ascertain "the level of support for [its] candidates among a critical group of electors."[8] It does not matter that non-affiliated primary voters lack allegiance to the party, because they nonetheless represent a slice of the general electorate, so their votes may help the party determine which of its candidates is most electable.

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6 *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986).

7 *Green Party I*, 118 P.3d at 1064.

8 *Tashjian*, 479 U.S. at 221.

But this reasoning does not apply to non-affiliated *candidates*. A party's nominee advances to the general election as the purported representative of the party's views and advocate of its platform.[9] Because the party's nominee is supposed to represent the party in the general election, it matters a great deal whether a candidate seeking a nomination has some sort of allegiance to the party. A party has no coherent associational interest in allowing its nominee to be picked from a class of candidates defined only by their *lack* of even the simplest form of allegiance to it.

The Party's position about burden would be stronger if the Party's nominating process ensured that its members would choose a favored unaffiliated candidate—a candidate who shared some goals in common with them. The Party would then be seeking a substantively meaningful association (though courts in cases like *Timmons v. Twin Cities Area New Party* still would not consider the rule a severe burden, [At. Br. 18-27]). But because of the Party's open primary, there is no guarantee that its nominee will share any common goals with party members. Thus, the associational right the Party asserts is not substantive: rather than seek to associate with a favored candidate, the Party wants the opposite—to blow the doors off its nomination process entirely by removing the last guarantee that its nominee has any connection to the Party at all. Although this indiscriminate desire may be a type of associational interest, it is not a strong one.

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[9] The Party's rules undercut its assertion that having non-affiliated candidates in its primary will "evolve" its platform. [Ae. Br. 16] The Party's platform is adopted at its biennial convention in May, before the primary campaign starts. [Exc. 1, 15-18]

B. Caselaw demonstrates that candidate eligibility requirements like the party affiliation rule do not severely burden a party's rights.

The Party fails to undermine the State's point that candidate eligibility cases like *Timmons v. Twin Cities Area New Party*[10] are more analogous than voter participation cases like *Tashjian v. Republican Party of Connecticut.*[11] [Ae. Br. 13-27; At. Br. 19-27]

The Party does not attempt to defend the superior court's flawed analysis of *Timmons*, nor does the Party itself adequately distinguish *Timmons*. [Exc. 219-20; Ae. Br. 14-15] In *Timmons*, the U.S. Supreme Court held that an anti-fusion law—which prohibited a party from nominating a candidate who was already running in another party's primary—did not severely burden the party's associational rights even though it prevented the party from nominating its favored candidate.[12] [At. Br. 19-24] The Party points out that in *Timmons*, "it was the candidate's multiple nominations that led to the restriction, not his member or nonmember status," and the ban "was triggered by a relationship to another party." [Ae. Br. 15, 21] But this observation just means that the cases are not identical—it does not undermine their underlying similarity. In *Timmons*, just as here, the law prevented the party from nominating a candidate because of his choice to prioritize other interests. In *Timmons*, the candidate prioritized another party's nomination. Here, the hypothetical candidate prioritizes her desire not to change her voter registration. In both cases, an associational choice of the candidate—which the party is free to try to influence—prevents the nomination. The Party insists that in *Timmons*, "the

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10 520 U.S. 351 (1997).

11 479 U.S. 208 (1986).

12 520 U.S. 351, 359-64 (1997).

candidate's substantial conflicting commitment to another political party as its nominee reduced the strength of the associational relationship between the candidate and the party." [Ae. Br. 21] But the same can be said here—the hypothetical candidate's substantial conflicting commitment to remaining non-affiliated reduces the strength of the associational relationship between the candidate and the party.

The Party contends that "[t]he fusion ban in *Timmons* affected far fewer candidates" and was "limited in duration," but both of these attempts at framing can be flipped. [Ae. Br. 23, 21] One could say that the fusion ban in *Timmons* affected every candidate, because it prevented every candidate from seeking multiple nominations—just like the rule here prevents every candidate from running in a party's primary without registering. Conversely, one could say that the *Timmons* ban affected only the small group of candidates who wanted to pursue multiple nominations[13]—just like the rule here affects only the small group of candidates who want to pursue a party's nomination without registering. The laws in both cases therefore impact relatively small groups.

Similarly, both the fusion ban in *Timmons* and the party affiliation rule here can be equally characterized as either "indefinite" or "limited in duration." One could say that the *Timmons* ban was indefinite, because it prevented a party from ever nominating a candidate who was seeking another party's nomination—just like the rule here is indefinite, because it prevents a party from ever nominating a candidate who refuses to

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[13] The Party is incorrect in assuming that the *Timmons* ban affected only those who actually *won* multiple nominations—in fact, it prevented the New Party from nominating any candidate who ran in another party's primary, regardless of result. [Ae. Br. 23] *See Timmons*, 520 U.S. at 354 n.3.

register. Or one could say that the *Timmons* ban was limited in duration, because it ceased to apply when a candidate was not seeking another party's nomination—just like the rule here is limited in duration, because it ceases to apply when a candidate registers. The laws in the two cases are therefore equally "indefinite" or "limited in duration."

The Party's insistence that its nominee is necessarily "*its* candidate" also does not distinguish *Timmons*. [Ae. Br. 15, 22-23] The phrase "*its* candidate" comes from a statement in *Swamp v. Kennedy*—quoted in *Timmons*—opining that a fusion ban is not a severe burden "because a party may nominate any candidate that the party can convince to be *its* candidate."[14] A party's desire to nominate a candidate is insufficient to make him "*its* candidate" within the meaning of this quote, because it was insufficient in *Timmons* and *Swamp.* In each of those cases, a party wanted to nominate a candidate, and the candidate wanted to accept, but because the candidate was already seeking another party's nomination, the fusion ban prevented this. So although the party wanted to nominate the candidate, he was still not "*its* candidate" in the court's eyes. As *Swamp* put it, the party "has no right to associate with a candidate who has chosen to associate with another party."[15] The party, however, remained free to "nominate any candidate that the party can convince to be *its* candidate"—i.e., any candidate that it can convince to prioritize it over other interests. Likewise here, the Party has no right to associate with a candidate who has chosen not to associate with it by remaining non-affiliated. The party,

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14 *Swamp*, 950 F.2d at 385 (emphasis in original); *Timmons*, 520 U.S. at 360 (quoting *Swamp*, 950 F.2d at 385).

15 950 F.2d at 385.

however, remains free to nominate anyone it "can convince to be *its* candidate"—i.e., anyone it can convince to prioritize it over other interests by registering.

The Party also fails to distinguish the other candidate eligibility cases discussed in the State's brief, including *Libertarian Party of Michigan v. Johnson*,[16] *Van Susteren v. Jones*,[17] *Vulliet v. Oregon*,[18] and *Libertarian Party v. Gant*,[19] which held that laws more restrictive than Alaska's did not severely burden associational rights. [At. Br. 24-27; Ae. Br. 24-25] The Party asserts that the candidates in those cases "were only prevented from participating in one election" and that unlike the laws in those cases, "the restriction in this matter is categorical rather than temporal." [Ae. Br. 25] But the law upheld in *Gant* was almost identical to Alaska's,[20] and the restrictions in the other cited cases were *both* categorical *and* temporal—that is, *more* restrictive than Alaska's law. In *Vulliet*, the law required that a candidate be a member of a party for at least 180 days before running in its primary.[21] This restriction was categorical, because it prevented a party from ever

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16 714 F.3d 929, 932 (6th Cir. 2013) (affirming district court for reasons stated in its opinion, *Libertarian Party of Mich. v. Johnson*, 905 F. Supp. 2d 751 (E.D. Mich. 2012)).

17 331 F.3d 1024, 1026 (9th Cir. 2003).

18 No. 6:12-cv-00492-AA, 2013 WL 867439 (D. Or. 2013) (unreported).

19 60 F. Supp. 3d 1043 (D.S.D. 2014).

20 In *Gant*, the challenged law required that a candidate be a party member at the time of nomination. 60 F. Supp. 3d at 1044. Although the would-be party candidate had become a member, the law barred his nomination because his change in affiliation had not yet been effective at the time of nomination. *Id.* The Party points out that the party in *Gant* was trying to associate with a member, not a non-member. [Ae. Br. 24-25] But this distinction does not help them, because surely a party's interest in associating with a member is even stronger than its interest in associating with a non-member.

21 2013 WL 867439 at *1.

nominating a non-member. And it was also temporal, because it also prevented a party from nominating even a member, if he had not yet been one for 180 days. In *Van Susteren*, the law required that a partisan candidate be disaffiliated from membership in other parties for one year before filing to run in a party's primary.[22] This restriction was categorical, because it prevented a party from ever nominating a member of another party. And it was also temporal, because it prevented a party from nominating even a member, if he had not yet been disaffiliated from other parties for long enough. And in *Johnson*, the law provided that a candidate who ran in the primary of one party could not run as the nominee of another party at the general election. This restriction was categorical, because it prevented candidates from ever seeking multiple nominations. And it was also temporal, because it prevented a party from nominating a candidate who had recently sought another party's nomination, regardless of current affiliation. Alaska's party affiliation rule is *less* burdensome than the laws upheld in these cases because it has no temporal aspect—as soon as a candidate registers with a party, she becomes eligible to run in its primary, with no waiting period. Thus, the Party's "temporal" vs. "categorical" theory does not assist it. And the Party fails to address *South Carolina Green Party v. South Carolina State Election Commission*[23] at all. [At. Br. 24]

Finally, *Tashjian*'s dicta questioning party affiliation rules is not as helpful to the Party as it believes. [Ae. Br. 13-15] The *Tashjian* court speculated that a rule providing "that only Party members might be selected as the Party's chosen nominees for public

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22 331 F.3d at 1026.

23 612 F.3d 752 (4th Cir. 2010).

office" would "clearly infringe upon the rights of the Party's members under the First Amendment."[24] The Party thinks this suggests that "the party's determination of its boundaries is not limited to who may participate as a voter, but who may participate as a candidate as well." [Ae. Br. 14] But *Timmons* and other cases after *Tashjian* establish that although limits on a party's choice of candidates may touch on associational rights, they do not necessarily severely burden them. Although *Timmons* is not on all fours with this case, neither is *Tashjian*—and *Timmons*, because it is a candidate eligibility case, is far closer. It is not surprising that *Tashjian*'s dicta has not been overruled, because dicta is never controlling in the first place. [Ae. Br. 15] And even taking *Tashjian*'s dicta at face value, it covers only one small part of the constitutional test. It says only that a party affiliation rule would burden associational rights—not how severe the burden would be, nor whether the burden could be justified by corresponding state interests.

Although "the results [this Court] derive[s] under the Alaska Constitution need not correspond with those the Supreme Court might reach under the federal constitution," this Court has said that the federal test for election laws "fits well with our own constitutional jurisprudence."[25] The Alaska Constitution contains no specific language on free association that could anchor a more stringent interpretation than federal courts give its federal counterpart.[26] This Court need not be any more concerned about the minimal burden created by the party affiliation rule than a federal court would be.

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24 479 U.S. at 215.

25 *Green Party I*, 118 P.3d at 1060–61.

26 *Compare* U.S. Const. amend. I *with* AK Const. Art. 1, § 5.

II. The minimal burden that the party affiliation rule places on associational rights is justified by important state interests.

A. Striking the party affiliation rule would destroy the standard for party recognition by severing the last link between candidate and party.

As explained in the State's opening brief, the State uses public support for a candidate as a proxy for public support for that candidate's party, and vice versa. [At. Br. 29-34] But this proxy system makes sense only if a candidate is in some way representative of her nominating party. The party affiliation rule ensures that a party's nominee is representative of her nominating party in at least one of two ways: either she is the choice *of* the party's members or she is the choice *among* the party's members. If a party has a closed primary, the party's nominee is the choice *of* the party's members. If a party opens its primary, the party's nominee is no longer the choice *of* the party's members. Eighty-five percent of those eligible to vote in the open Democratic primary are non-Democrats, making it unlikely that nominees are chosen by mostly party members.[27] But even in an open primary, the party affiliation rule ensures that a party's nominee is at least the voters' choice *among* party members. In other words, out of all of the party members who want to run for an office, the nominee is the member whom voters prefer. Striking the party affiliation destroys this last remaining link.

The Party insists that a nomination itself sufficiently links a nominee to the nominating party, but this is circular reasoning. [Ae. Br. 30, 33] The bare fact of

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[27] *See* State of Alaska, Division of Elections, *Number of Registered Voters by Party Within Precinct* (January 3, 2018), http://elections.alaska.gov/statistics/2018/JAN/VOTERS%20BY%20PARTY%20AND%20PRECINCT.htm#STATEWIDE (reporting 76,362 registered Democrats out of 531,749 total registered voters in Alaska).

nomination does not signify a link, though it seems natural to assume a link because most nomination processes involve a link. If a nominee is chosen by party members at a convention, a link is present. If a nominee is chosen by party members in a closed primary, a link is present. Even in an open primary where a nominee must simply be a party member, a link is present. But if none of these things are true—if the nominee is neither a choice *of* the party's members nor a choice *among* the party's members—the bare fact of nomination alone means nothing. Without some sort of link—like that provided by the party affiliation rule—the nominee is not connected to the "party's views" at all, let alone the person "chosen" as their "best representative." [Ae. Br. 37]

If the nominee in no way represents the nominating party, it makes no sense to use public support for a candidate as a proxy for public support for the party, and vice versa. Votes for a candidate who is neither the choice of Democrats nor a Democrat—who, indeed, *refuses* to register as a Democrat—do not represent even a rough measure of support for the Party. Conversely, the support that the Party enjoys is no guide at all to the support a candidate who *rejects* the Party will enjoy.

This is not speculation about individual voters' motives; it is just logic. The Party's response, on the other hand, itself reflects speculation (for example, that "[a] candidate's personal registration as the member of an unknown party was likely not the source of his or her support" [Ae. Br. 30]) and also misses the State's point. The State does not assume that voters support candidates solely on the basis of their party membership, or that party membership is "the source of" candidates' support. The State recognizes that voters often support candidates based on their principles. But a

candidate's party membership says something about her principles—it says she identifies with the party and advocates its views. So when voters vote for a party-member candidate because they support the candidate's principles, that in turn reveals that they support the party's principles. But votes for a non-member candidate nominated in an open primary reveal nothing about voter support for the party's principles.

The Party asserts that it would be "irrational" for a party-supporting voter to not support the party's nominee simply because the nominee is not a member, but it would be no such thing. [Ae. Br. 32, 37] In fact, the converse is true—it would be irrational for a party-supporting voter to support a nominee simply because she is the nominee, if the nomination process does not guarantee even the most minimal connection to the party. To use a real-world example, Pennsylvania law—which does not have a party affiliation rule—apparently allowed a Republican to win the Democratic nomination for an office in 2016, going on to run as the Democratic nominee while remaining an avowed Republican.[28] In the Party's view, it would be "irrational" for Democrats not to support this candidate—after all, they support his nominating party. But in reality, the nomination of this candidate did not symbolize a connection between him and the Democratic Party, nor would support for him have represented support for the Democratic Party.

To be sure, the party affiliation rule is not a perfect tool for ascertaining a party's

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[28] *See* Heather Caygle, *Tea party challenger to take on Shuster as a Democrat*, Politico (Aug. 2, 2016), https://www.politico.com/story/2016/08/art-halvorson-bill-shuster-226551; Melanie Zanona, *Tea Party candidate will run as Democrat in bid to oust GOP chairman*, The Hill (Aug. 2, 2016), http://thehill.com/policy/transportation/290090-tea-party-candidate-will-run-as-democrat-in-bid-to-oust-gop-chairman.

popular support because even a nominee who is a party member will not necessarily be a good representative of the party's views generally. But it is reasonable to assume that people who register with a party generally identify with the party and support its principles. So although the State's proxy system is not perfect, it is sensible. And its imperfection does not justify destroying it by removing a critical provision.

The State need not show that potential problems stemming from destruction of the proxy system—which the Party calls "edge-case scenarios"—are likely to happen with the Alaska Democratic Party. [Ae. Br. 33] This is a facial challenge, so when assessing the State's interests the Court must consider the situations of *all* hypothetical parties and candidates, not just well-established ones. [Ae. Br. 29, 33-34]

The Party doubts that a marginal political party and an independent candidate would ever team up to circumvent the proxy system, using each other to retain party status and avoid the petition requirement. [Ae. Br. 33-34] But Alaska has several small parties that operate right around the threshold for party recognition and do not field candidates in every race.[29] And from an independent candidate's perspective, gathering petition signatures might seem like a waste of valuable time and effort if the same result could be obtained by simply winning a small party's nomination in an uncontested

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[29] *See* State of Alaska, Division of Elections, *Number of Registered Voters by Party Within Precinct* (January 3, 2018), http://elections.alaska.gov/statistics/2018/JAN/VOTERS%20BY%20PARTY%20AND%20PRECINCT.htm#STATEWIDE (reporting that the Alaskan Independence Party and the Alaska Libertarian Party have 17,120 and 7,579 registered voters, and the non-recognized Green Party of Alaska has 1,728 registered voters); *Green Party II*, 147 P.3d at 731 (detailing efforts of Green Party of Alaska to maintain recognized party status); *Metcalfe*, 110 P.3d at 977-78 (detailing efforts of Republican Moderate Party to maintain recognized party status).

primary. This is why striking the party affiliation rule will destabilize the State's two routes to the general election ballot, one designed for party candidates and the other for independent candidates. Alaska's political history includes many examples of improbable alliances.[30] The State does not have to wait for its political system to "sustain some level of damage" before it can take action—the party affiliation rule is a permissible way to "respond to potential deficiencies in the electoral process with foresight."[31]

B. Striking the party affiliation rule would undermine the value of party labels and the coherence of political parties.

For similar reasons, the party affiliation rule is justified by the State's interest in preserving the informational value of party labels and the coherence of political parties. This interest is valid—and is supported by *Clingman v. Beaver*, even though that case does not control. [At. Br. 45; Ae. Br. 41-42] In *Clingman*, the U.S. Supreme Court recognized the importance of the state's interest in "preserv[ing] the political parties as viable and identifiable interest groups"[32]—the same interest advanced here. When this Court discussed *Clingman* in *Green Party*, it did not reject this state interest—rather, it rejected *Clingman*'s comments about burden, which is an entirely different part of the constitutional test.[33] *Green Party* thus does not preclude this important state interest.

Striking the party affiliation rule will strip party labels of their meaning and utility.

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30 As an example, the superior court cited the Alaskan Independence Party's nomination of former Republican Wally Hickel in 1990. [Exc. 235]

31 *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

32 544 U.S. 581, 594 (2005).

33 *Green Party I*, 118 P.3d at 1070 n.72.

A voter is not "equally or better served by the candidate's identity as the nominee as by the candidate's member or nonmember status" in choosing a candidate "most likely to reflect the voter's preferences." [Ae. Br. 37] As explained above, a candidate's identity as a nominee reveals nothing once the links between party and nominee are removed.[34]

The fact that anyone can register with a political party without truly identifying with that party does not make the party affiliation rule useless, just like the fact that people can lie does not make people's words useless. [Ae. Br. 42] The State can reasonably assume—as voters likely do—that most people who register with a party do so because they personally identify with it. And even though registration alone does not guarantee anything, the State can reasonably distinguish between candidates who register as party members and those who *refuse* to do so. Refusal to register before running indicates that a candidate does *not* personally identify with the party. Thus, the State can reasonably assume that requiring a candidate to register before seeking a party's nomination will make it more likely that the nominee will personally identify with the party. And if a candidate registers with a party while nonetheless openly rejecting it, her deception will be apparent to voters. Without a party affiliation rule, however, a candidate could openly reject her nominating party without the need for any deception.

The Party argues that the informational value of a nomination and party label is somehow protected by primary voters, but the vagueness of this argument exposes its emptiness. [Ae. Br. 41-45] A non-Democrat's support for a non-Democrat running in the

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34 *Supra* at 12-14.

Democratic primary reflects no judgment about what the Democratic Party stands for. And increased participation of non-Democrat voters and candidates in the Democratic primary would not reflect a broadening of the Party's base—it would reflect the Party's conversion from a coherent entity into an ideologically empty nomination factory.

Thus, the party affiliation rule is justified by the State's interest in protecting the coherence of political parties and the meaning and utility of party labels.

C. Striking the party affiliation rule would confuse voters, as confirmed by the Party's failure to offer an adequate ballot redesign.

The Party has abandoned the "bait and switch" ballot design it enshrined in its bylaws and advocated below. [Exc. 232, 236] Instead, the Party now adopts the superior court's approach of kicking the can down the road. [Ae. Br. 34-39] But the ballot design issue cannot be ignored: the inherently confusing nature of a ballot featuring purportedly unaffiliated political party nominees further justifies the party affiliation rule.

The Party downplays the problem of conflicting labels on the ballot by calling it "semantic," but "semantic" does not mean "trivial"—a semantic conflict on the face of the ballot will confuse voters. [Ae. Br. 38] The Party is wrong in asserting that there is "no inherent ideological conflict" between a nominating party label and the words "Non-Partisan," "Independent," "Non Affiliated, or "Undeclared." [Ae. Br. 38] The first three words describe an affirmative *lack* of connection to a political party, which inherently conflicts with a party label. And "Undeclared" applies only to the subset of candidates who have chosen that specific voter registration, so that label could not be used for candidates who have chosen to register as "Non-Partisan." "Undeclared" could also be

confusing because candidates "declare" their candidacies. Adding the word "registered" would not change any of these conflicts. [Ae. Br. 38]

If the general election ballot identifies candidates by their party nomination alone, it will be incomplete and misleading because voters will reasonably assume that the Democratic Party's nominee is a Democrat. The Party does not argue otherwise, instead saying it would be "irrational" for a voter to care whether a party's nominee is a party member. [Ae. Br. 37] As explained above, it would be no such thing.[35]

The State need not demonstrate "significant, ongoing confusion" to justify its concerns about these ballot redesign options. [Ae. Br. 36] The Court has recognized that states need not "prove actual voter confusion" before acting.[36] And the State must design its ballots with *all* of its voters in mind—not just the subset of highly informed voters whom the Party focuses on. [Ae. Br. 36, 38]

The State's attempt to propose a ballot design below does not undermine its point. The superior court raised the issue of ballot redesign sua sponte, assuming (without offering actual examples) that ballots could be redesigned to adequately prevent voter confusion and deception. [Exc. 232-35; 248-51] Not only did the court's unsupported assumption make its constitutional ruling incomplete—because it is impossible to verify the assertion that a redesign would protect the State's interests without even one redesign option to assess—but it also put the State in a difficult practical position.

Understood in this proper context, the State's proposal of a ballot design in the

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35 *Supra* at 14.

36 *O'Callaghan*, 914 P.2d at 1254 (quoting *Munro*, 479 U.S. at 195-96).

superior court was not an endorsement of that design—it was simply an attempt to "foreclose future expedited litigation over whether the State's 2018 ballot design comports with [the superior court's] ruling." [Exc. 239] The State did not assert that its proposed design was good—on the contrary, the State made clear that its request "should not be read to waive any right of appeal on the part of the State." [Exc. 239] Consistent with its reservation of its appeal rights, the State's position on appeal—as explained in detail in its opening brief—is that the ballot cannot actually be redesigned in a way that would adequately protect the State's interests.[37] [At. Br. 34-41]

Thus, the State's interest in preventing voter confusion and deception justifies the party affiliation rule. But if the Court disagrees because it believes that a ballot redesign will protect the State's interests, it should identify at least one such redesign.

CONCLUSION

For these reasons, the Court should reverse the superior court's decision and uphold the party affiliation rule set forth in AS 15.25.030(a)(16). The rule represents a reasonable—and constitutional—policy choice by the Legislature. Those who would prefer a different policy can seek a statutory change through the legislative process.

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[37] This is not a "new position" improperly raised on appeal. [Ae. Br. 35] The State never had a chance to argue that the ballot cannot be adequately redesigned because the Party never argued that it could. [At. Br. 37; Exc. 231-35] The State cannot fairly be expected to have anticipated that the superior court would raise this sua sponte.