No. S-18210

IN THE SUPREME COURT OF THE STATE OF ALASKA

SCOTT S. KOHLHASS, ET AL.,

Appellants,

v.

STATE OF ALASKA, ET AL.,

Appellees.

On Appeal from the Superior Court for the State of Alaska
Third Judicial District at Anchorage
No. 3AN-20-09532CI
Honorable Gregory Miller

AMICUS BRIEF OF Hon. MEAD TREADWELL & Hon. DICK RANDOLPH

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INTERESTS OF AMICI

Mead Treadwell served as lieutenant governor of Alaska from 2010 to 2014. As lieutenant governor, he was responsible for managing the Division of Elections. He ran in the Republican primary for Governor of Alaska in 2018.

Dick Randolph served as a state representative in the Alaska House of Representatives from 1971-75 and 1979-83. He received nearly fifteen percent of the vote as the Libertarian Party candidate for Governor of Alaska in 1982.

Though Treadwell and Randolph ran for governor under the banners of different political parties, they share a common commitment to the structural protections for liberty and democracy embodied in the Alaska Constitution, and are deeply concerned that Initiative 2 violates those structural guarantees for democratic self-government.

INTRODUCTION

Alaska courts' "duty to uphold the Alaska Constitution is paramount; it takes precedence over the politics of the day and our own personal preferences." *Planned Parenthood of the Great Nw. v. State*, 375

P.3d 1122, 1133 (Alaska 2016). When interpreting the Alaska Constitution, this state's courts "look to the Delegates' debates and statements in interpreting the constitution," *Forrer v. State*, 471 P.3d 569, 587 (Alaska 2020), to guide their understanding of each provision.

Amici submit this brief to detail how the deliberations over the Constitution show that Initiative 2 is inconsistent with the Constitution those delegates adopted. Because Alaska is a younger state and its constitutional convention was more recent than those of many of its sister states, courts and counsel have a myriad of resources to know exactly what the delegates thought as they crafted the state's founding charter. The journal, the staff reports, the committee drafts and notes, the models from other states, all are available in PDF at the click of a mouse. Here, those reams of historical materials all point to a single definitive conclusion for this case: major portions of the recently adopted Initiative 2 transforming Alaska elections are entirely unconstitutional. The voters were closely split on whether the reforms adopted in Initiative 2 are good policy, but both the courts and the statutory initiative process "have no power to rewrite constitutional provisions no matter how clearly advantageous and publicly supported a policy may appear to be." *Id.* at

590. Courts must enforce the Constitution as written, and the people may only change it by going through all the safeguards of the amendment process.

Initiative 2's election procedures are incompatible with the Constitution. Instant runoff voting for the office of governor is incompatible with the plurality principle embedded in the state constitution, and Initiative 2's failure as to the governor's office cannot be severed from other offices. Similarly, the non-party ("jungle") primary is incompatible with the design of the governor-lieutenant governor ticket in the state constitution, and this failure cannot be severed from other offices. The jungle primary also violates the freedom of association for political parties built into the structure of the Constitution's design for elections. For these reasons, much of Initiative 2 must be enjoined as violative of the Constitution.[1]

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[1] Though Mr. Kohlhaas concentrated his arguments on his freedom-of-association claim, he also raised the issue of Article III, placing these concerns properly before this Court on appeal. *See, e.g.*, R. 164, State Defs.' Mt. for S.J. ("Finally, he claims that the 'election system implemented by [Initiative] 2 violates' Article III, §§ 3 and 8 of the Alaska Constitution and 'is void as it applies to the election of the governor and lieutenant governor.'"); R. 185-86, State Defs.' Mt. for S.J. (referencing plurality argument); 187-89, State Defs.' Mt. for S.J. (attempting to refute claims specific to Article III, §§ 3 and 8, as specifically applied to governor and lieutenant governor); R. 223-225 Intervenor Defendant's Mt. for S.J. (same); R. 259-264, Plaintiffs' Mt. for Partial S.J. specific to Article III, §§ 3 and 8; R. 330-331 (Sup. Ct. Order Granting Motion to File Second Amended Complaint adding claims on Article III, §§ 3 and 8

ARGUMENT

I. Article III, Section 3 of the Alaska Constitution requires that the governor be elected by a plurality of voters, not a majority as required by Initiative 2.

A. Initiative 2's use of instant-runoff voting for governor is unconstitutional.

"The governor shall be chosen by the qualified voters of the State at a general election. The candidate receiving the greatest number of votes shall be governor." Alaska Const. Art. III, Sec. 3. The plain meaning of this provision is that the winning candidate for governor is the one who receives a plurality of the votes in the general election. This meaning is supported by both the constitutional history of the provision and cases looking at similar provisions in other state constitutions. Therefore, the application of the Initiative's instant-runoff voting provisions are unconstitutional as applied to the office of governor.

Plain Language

When Alaska's Supreme Court interprets the state constitution, its "analysis of a constitutional provision begins with, and remains grounded

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specific to the offices of governor and lieutenant governor). Admittedly, the Superior Court's decision did not specifically discuss these claims, but a lower court cannot insulate issues from review by failing to address them in its opinion. The Court granted summary judgment on the second amended complaint, which included these claims.

in, the words of the provision itself." *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017). Secondarily, the Court considers the "purpose of the provision and the intent of the framers." *Id.* In undertaking this analysis, "[l]egislative history and the historical context assist in our task of defining constitutional terms as understood by the framers." *Forrer*, 471 P.3d at 583. This "legislative history" means courts "look to the Delegates' debates and statements in interpreting the constitution." *Id.* at 587 and n.185 (collecting cases).

Here, the plain meaning of the words is clear. "The greatest number of votes" means a plurality of votes. Black's Law Dictionary 955 (6th ed. 1990) ("when there are more than two competitors for the same office, the person who receives the greatest number of votes has a plurality, but he has not a majority unless he receives a greater number of votes than those cast for all his competitors combined."). *Accord State ex rel. Womack v. Jones*, 201 La. 637, 682, 10 So. 2d 213, 228 (1942) ("the greatest is the largest number, or, in this case, the largest number of votes received by any of the candidates"); *In re Op. of the Justices of the Supreme Judicial Ct.*, 2017 ME 100, ¶ 61 n.36 & n.37; *State v. Wilmington*, 3 Del. 294, 305 (1840).

History & Purpose

Alaska's Constitution: A Citizen's Guide, published by the Alaska Legislative Affairs Agency, describes this meaning of this section: "This provision . . . specifies that a plurality rather than a majority of the votes cast in the election is decisive; that is, the candidate for governor who receives the highest number of votes wins, whether that number of votes is more or less than 50 percent of the total number of votes cast." LAA, *Alaska's Constitution: A Citizen's Guide*, 77 (5th Ed. 2021).[2] The *Guide* goes on to explain the reasoning or purpose for this rule: "Plurality elections are prevalent in this country because they are considered a bulwark of the two-party system. A majority rule (which requires the winning candidate to receive at least one more than half of the votes cast, and usually involves a run-off election) is used in only a few states for executive offices." *Id*. Alaska's plurality-principle reflects a conscious choice by the delegates, which the courts are bound to respect until the people amend the Constitution.

The fact that the drafters of the initiative found a creative way to have a majority voting requirement without a second, separate run-off

[2] Available online at http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.

election does not change the fact that Initiative 2 puts in place a system that requires a majority of votes in contravention of the Constitution. The State, in its briefing below, brushed over this glaring constitutional problem by referencing Article V, Section 3 of the Constitution, which provides, "Methods of voting . . . shall be prescribed by law." (Exc. 105) First, it is dubious that ranked-choice voting is a "method of voting" at all. The constitutional provision in whole reads, "Methods of voting, including absentee voting, shall be prescribed by law." Absentee voting is an example of the mechanics of voting, like hours polling places are open. As a previous Attorney General of Alaska has opined, "[o]ther language in Section 3, Article V, namely, 'secrecy of voting' and 'absentee voting', points up the limited scope of 'methods of voting' as used in the section." 1961 Op. Atty Gen. Alas. No. 20, 1961 Alas. AG LEXIS 34, *20-21. This was contrasted with a term used in another state's constitution, "method of election," which "has to do with the manner of choosing officials. 'Method of voting', on the other hand, concerns the mechanical way in which the voter exercises his choice; in other words, paper ballots, voting machines, polling places, and the like." *Id*. at *21. In that case, Attorney General Ralph Moody concluded that moving from a system of at-large

seats to designated seats dealt with the substance and not the mechanics of elections. *Id*. at *21-22. In the same way, determining the threshold of votes necessary to win the governorship deals with the substance and not the mechanics: it is not a minor modification to the rules of the game, but rather a change to the fundamental rule of how one wins.

Second, even if ranked-choice voting is considered a "method of voting," it still must abide by other constitutional provisions. If the Alaska Legislature passed a law excluding a group of people from voting based on race, to pick an extreme example, that would clearly violate Article I, Section 1 of the Alaska Constitution ("all persons are equal and entitled to equal rights, opportunities, and protection under the law") even if it were a "method of voting . . . prescribed by law." The point is that any new "method" or "system" of voting, like instant-runoff voting, must be consistent with the other provisions of the Constitution, including the plurality requirement of Article III, Section 3.

This language requiring only a plurality to elect the governor reflected a conscious choice on the part of the delegates. In the pre-convention materials provided by the Public Administration Service, the delegates were advised: "In all states the governor is elected by popular

vote. In most states the candidate receiving the highest number of votes is elected, even if that is less than the majority of the total vote. Under the two-party system, plurality elections usually give the same results as a majority requirement. But with three or more candidates, the election might go to one receiving less than an absolute majority, and a few states have special provisions for such a contingency." *A staff paper prepared by Public Administration Service for the Delegates to the Alaska Constitutional Convention* (Nov. 1955), at pg. 4 (Appendix 005).

We know from Delegate Victor Fischer's study of the convention that this staff paper was helpful to the Committee on the Executive Branch's deliberations. Victor Fischer, *Alaska's Constitutional Convention* (U. of Alaska Press 1975) at 106. Fischer notes that the Committee also looked particularly to the constitutions of Hawaii, New Jersey, and New York. *Id*. All three of these models contain a plurality-election provision for governor. Hawaii Const. Art. V, Sec. 1 ("The person receiving the highest number of votes shall be the governor."); New Jersey Const. Art. V, Sec. I, Cl. 4 ("The joint candidates [for governor and lieutenant governor] receiving the greatest number of votes shall be elected."); New York Const. Art. IV, Sec. 1 ("The respective persons

having the highest number of votes cast jointly for them for governor and lieutenant-governor respectively shall be elected."). *See Fortson v. Morris*, 385 U.S. 231, 235 n.3 (1966) (listing these three as among states that "provide for election of their governors by a plurality" in their state constitution). *See also Phillips v. Rockefeller,* 435 F.2d 976, 980 (2d Cir. 1970) (reading the New York constitution's provision as a plurality-principle provision). The fact that the responsible committee looked to these three state constitutions as models for the executive article of Alaska's constitution set the trajectory for its work.

The original proposal #14 before the Committee, which was first circulated on Nov. 21, 1955, contained in section 1 on the executive article: "The governor is elected by the qualified voters of this State at a general election. The person receiving the highest number of votes shall be the governor." (Appendix 006)

A few weeks later, the committee on the executive branch circulated its first committee proposal, denominated #10, with almost identical language moved to section 3: "The governor shall be elected by the qualified voters of this state. The person receiving the greatest number of votes shall be the governor…" ("highest number" was changed to

"greatest number," apparently as a matter of style) (Appendix 011). The committee on the executive branch repeated that language in its 10/a draft on Jan. 12, 1956. (Appendix 012)

It was debated on the floor of the convention the next day, January 13. The chairman of the Committee on Style & Drafting, George Sundborg, suggested that the second sentence was duplicative of the first and should be deleted:

> Mr. President, I submit that the language as we now have it, if it means anything, it means that the person running at that election who gets the greatest number of votes, no matter what he is running for, shall be the governor. If it does not mean that, it is unnecessary to have it in there because the sentence ahead of it says, 'The governor shall be elected by the qualified voters of the state.' If he is going to be elected by the qualified voters, obviously it follows that the man getting the most votes for that office is elected and I don't think we want to say that the person receiving the greatest number of votes shall be the governor. It might be the candidate for the United States Senate or it might be one of the legislators or something. I think it is meaningless. I stand corrected if there is a meaning to it.

(Appendix 031). The president then recognized Katherine Nordale, a member of the committee on the executive branch, who responded that the purpose of the provision was precisely to prevent a future legislature from requiring a majority of votes to select the governor:

> Mr. President, I would just like to say that if you want to say 'the candidate for governor' I would have no objection, but is it not possible if you leave this to the legislature they could say that the candidate receiving a majority of the votes cast, and it is conceivable that there may be three tickets in the field for governor at some future time, and why allow the possibility of requiring a majority of the votes cast to elect the governor?

(Appendix 031-32). This rationale was then reiterated by delegate Frank Barr, another member of the committee on the executive branch:

> [I]n some of the different states there are different methods of selecting the governor: some say that a majority of the votes cast will select the governor; others state that the highest number of votes shall select the governor, and in case there are more than two candidates that complicates the question, and this solves it right here . . .

(Appendix 032). On that basis, the discussion ended and the convention rejected the proposed amendment. Then the Committee on Style & Drafting, reporting out a draft on Jan. 26, 1956, repeated the same wording: "The governor is chosen by the qualified voters of the State at a general election. The candidate receiving the greatest number of votes shall be governor." (Appendix 066). This language became Article 3, Section 3, when adopted by the people of Alaska.

Initiative 2 is incompatible with this text and tradition

Initiative 2 requires a majority to win election, not a plurality. Alaska Stat. § 15.15.350(d). This is the purpose of instant-runoff or ranked-choice voting, to ensure the winning candidate has a majority mandate. *See* FairVote, *Benefits of Ranked Choice Voting*[3]; *see also* Alaskans for Better Elections, *How Ranked Choice Voting Works*.[4] Lauded as "easy-to-understand solution [that] requires candidates to build up a large coalition of supporters and appeal to a wider variety of voters[,]" the majority requirement of the Initiative through an instant-runoff ignores the constitutional history which demands a plurality. Mike Lyons, *Letter: Please Support Ranked Choice Voting*, Press & News (June 11, 2021).[5] Scholarship and judicial decisions on ranked-choice voting mirror the popular discussion in Alaska in advance of the Initiative 2 vote, recognizing that the purposes of ranked-choice voting or instant-runoff voting is to shift election outcomes from a plurality rule to a

[3] Available at https://bit.ly/3pJyXul.
[4] Available at https://bit.ly/3pL0fQT.
[5] Available at https://bit.ly/3iyTIaD.

majority rule.[6] Regardless of the policy merits of these concepts, the Constitution does not permit such an electoral system.

In a similar provision, Maine's state constitution entitles the winner of a "plurality" of votes for any state office to claim electoral victory. Instant-runoff voting requires a majority and prevents a plurality winner from claiming victory. Thus, Maine's Supreme Court advised that instant-runoff voting was impossible for state offices. *In re Op. of the Justices of the Supreme Judicial Ct.*, 2017 ME 100, ¶ 68 (Maine's act was subsequently amended to only apply to certain, primarily federal offices not covered by the state constitution's plurality provision). *Accord* Op. Me. Atty. Gen. (March 4, 2016), 2016 Me. AG LEXIS 1, *13. Maine's Supreme Court concluded, "the Act prevents the recognition of the winning candidate when the first plurality is identified. According to the terms of the Constitution, a candidate who receives a plurality of the votes would be declared the winner in that election. The

[6] *See, e.g.,* Gordon Merrick & Anders Newbury, *Proactively Protecting Vermont's Participatory Democracy*, 45 Vt. L. Rev. 481, 490 (2021); 6 Antieau on Local Government Law, Second Edition § 87.10 ("Ranked Choice Voting (RCV) seeks to produce elected officials who reflect the preferences of a majority of voters, rather than a mere plurality."); *In re Op. of the Justices of the Supreme Judicial Court given under the Provisions of Article VI, Section 3 of the Me. Constitution*, 2017 ME 100, ¶ 65; *Me. Republican Party v. Dunlap*, No. 1:18-cv-00179-JDL, 2018 U.S. Dist. LEXIS 89044, at *2-3 (D. Me. May 29, 2018).

Act, in contrast, would not declare the plurality candidate the winner of the election, but would require continued tabulation until a majority is achieved or all votes are exhausted. Accordingly, the Act is not simply another method of carrying out the Constitution's requirement of a plurality. In essence, the Act is inapplicable if there are only two candidates, and it is in direct conflict with the Constitution if there are more than two candidates." 2017 ME 100, ¶ 65.

Maine actually went forward with ranked-choice voting for federal offices, and it makes a real difference. In the 2018 race for a Maine congressional seat, Republican Bruce Poliquin won 46 percent of the vote in the first round and Democrat Jared Golden won 45 percent, a difference of about 2,100 votes, with the rest going to two minor candidates. On the second round of calculation, however, with the two minor party candidates removed, Golden eeked ahead with 50.62 percent to 49.38 percent for Poliquin. Thus, the congressional seat was awarded to Golden, even though Poliquin had won a plurality of votes in the first round. *Baber v. Dunlap*, 376 F. Supp. 3d 125, 130-31 (D. Me. 2018).

The plain meaning, purpose, and history of Article 3, Section 3 make the Initiative 2 provisions creating instant-runoff voting for

governor unconstitutional under Alaska's constitution. Like the Maine Supreme Court, this Court must protect the state's constitutional tradition by applying its plain text to strike ranked-choice voting as applied to the office of governor.

B. The instant-runoff provision is not severable.

Because the instant-runoff sections of Initiative 2 are an integrated whole, the instant-runoff for governor is not severable from any other office. While the Initiative does not contain a savings clause, Title 1 of Alaska Statutes provides a general savings clause for any law enacted which lacks a severability clause. Alaska Stat. § 01.10.030. This provision provides that such a law should be construed to include the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be effected thereby." *Id.* However, this provision creates only "a weak presumption in favor of severability." *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1172 (Alaska 2009) (internal citations omitted). In interpreting the application of the general savings clause, the Alaska Supreme Court has adopted the U.S. Supreme Court's twofold test to

determine severability. *See Lynden Transp. v. State*, 532 P.2d 700 (Alaska 1975). A provision will not be deemed severable "unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fail." *Lynden Transp.*, 532 P.2d at 713 (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924)).

Initiative 2's instant-runoff provision applies to "all general elections." Alaska Stat. § 15.15.350(c). That, of course, includes the general election for governor. In order to give legal effect to the instant-runoff provision without the unconstitutional application to the governor, it would need to say "except for the office of governor." However, Alaskan courts "are not vested with the authority to add missing terms or hypothesize differently worded provisions in order to reach a particular result." *Hickel v. Cowper*, 874 P.2d 922, 927–28 (Alaska 1994). The second-prong of *Lynden Transport* asks whether the voters "intended the provision to stand" in the even that portions of it were struck down. 532 P.2d at 713. Unlike the severable statute in *Alaskans for a Common Language, Inc. v. Kritz*, Initiative 2 does not contain a savings clause. 170 P.3d 183 (Alaska 2007). The court there understood the inclusion of a

savings clause to mean that the voters *did* intend the remaining provision to stand. *Id.* at 212–13. This point is further illustrated by the fact that there are not backup rules for electing governor if the office of governor were to be severed from the rest of the Initiative—the previous electoral process was repealed upon adoption of the Initiative. Therefore, the Legislature must come back and fix the entire electoral process. Quite simply, this Court cannot write into the new statute, "except for governor," and even if it did, there would be no rules on the books then for electing the governor. The instant-runoff provisions are an integrated whole and cannot be severed as to one office, though they can be severed from the jungle primary and campaign-finance provisions of Initiative 2.

The Supreme Court of Maine reached the right result in its consideration of this exact question. *See In re Opinion of the Justices of the Supreme Judicial Ct.*, 2017 ME 100. There, the Supreme Court of Maine determined that an act to create instant runoff for both state and federal offices was unconstitutional under Maine's plurality principle for state offices. *See* Me. Const. art. IV, pt. 1, § 5 (requiring only a plurality for state representatives); Me. Const. art. IV, pt. 2, § 4 (requiring only a plurality for state senators); and Me. Const. art. V, pt. 1, § 3 (requiring

only a plurality for governor). Maine then enacted instant runoff just for federal offices, which the Maine Supreme Court upheld. *Senate v. Sec'y of State*, 183 A.3d 749, 759 (Me. 2018). That's fine—but it requires the Legislature to come back and fix this; courts cannot. Therefore, the office of governor is not severable from the overall instant-runoff provisions of Alaska's Initiative 2.[7]

II. Article III, Section 8 requires a separate partisan primary to nominate candidates for lieutenant governor. This is incompatible with the jungle primary of Initiative 2.

A. The jungle primary is unconstitutional as to lieutenant governor.

The Alaska Constitution provides, "The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him. The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor." Alaska Const. Art. III,

[7] Amici do not argue that the instant runoff provisions cannot be severed from the jungle primary or donor disclosure provisions, unlike Mr. Kohlhaas, only that they cannot sever the governor from other offices as to instant runoff.

Sec. 8. The plain meaning of this provision is that the lieutenant governor runs solo in a partisan primary on the same basis as candidates for other offices, and runs together with the governor candidate of his party in the general election. The plain meaning of this provision is confirmed by the constitutional history of the provision. As explained in *Alaska's Constitution: A Citizen's Guide*:

> According to the method of electing the lieutenant governor specified [in Section 8], candidates for the office must appear on the primary ballot. The party candidate with the highest number of votes becomes that party's nominee, who is paired with the party's nominee for governor and the two of them stand in the general election together. This scheme was chosen by the delegates over the proposal submitted by the committee on the executive branch, by which candidates for governor would handpick a running mate much the way candidates for U.S. president handpick their running mates for vice-president. The delegates also rejected a proposal for the lieutenant governor to be elected independently of the governor, because this method might produce a governor and lieutenant governor of different parties.

LAA, *Alaska's Constitution: A Citizen's Guide* 80.

Therefore, the Initiative's pairing of governor and lieutenant governor candidates together as a ticket for the jungle primary is unconstitutional.[8]

[8] The Alaska Division of Alaska sample primary ballot makes this pairing obvious. Appendix 059. Available at https://www.elections.alaska.gov/doc/PrimBallotSamp2.pdf.

Delegates to the 1955–1956 Alaska Constitutional Convention wanted a strong executive branch. Subjecting the lieutenant governor to an independent primary would ensure that voters properly vet the candidate. At the same time, a joint ticket would prevent a situation where the lieutenant governor and governor hailed from different political parties. This compromise received overwhelming support at the convention.

On January 13, 1956, the Committee on the Executive Branch introduced Proposal No. 10a to the delegates attending Alaska's constitutional convention. Alaska Legislative Council, Minutes to the Constitutional Convention Proceedings 1981 (1965). This document contained proposed sections of the new constitution's article on the executive. When introducing the proposal, Victor Rivers (the committee's chairman) made clear the group's central philosophy: "We are all strongly agreed on the principle of the strong executive." *Id.* at 1985 (Appendix 022). Rivers felt that a competent and efficient executive branch would prove most beneficial to the state in modern times. *See id.*

Section 6 reflected a primary manifestation of this goal. This section introduced the office of lieutenant governor, which the committee

members referred to as the "secretary of state" ("SOS") at the time. *See* LAA, *Alaska's Constitution: A Citizen's Guide* 79. They settled on this title because "lieutenant governor" carried too much baggage. As one committee member put it, the office of lieutenant governor in other states "is very frequently given to some political hack, to someone to whom the party owes a debt but [is] not particularly qualified." Minutes to the Constitutional Convention Proceedings at 2004–2005 (Appendix 027-28).

The committee aimed to buck this trend. It envisioned an individual who would serve as the "general manager of the state under the governor," would "have a knowledge of all the work that is going on and all the problems," and would prove "highly qualified" in the event of succession. *Id.* To accomplish this end, Section 6 proffered a joint ticket system. By subjecting the SOS to the electoral process alongside the governor, the SOS would "make a better second-in-command in the absence or the death of the governor, [because] he would have then been elected by the popular will." *Id.* at 2007 (Appendix 030). In other words, voters could scrutinize the candidate at election time as opposed to the governor appointing some obscure figure. Section 6 initially read as follows:

> There shall be a secretary of state, who shall have the same qualifications as the governor. He shall be elected at the same time and for the same term as the governor, and the election procedure prescribed by law shall provide that the electors, in casting their vote for governor shall also be deemed to be casting their vote for the candidate for secretary of state shown on the ballot as running jointly with the respective candidate for governor. The candidate for secretary of state who runs jointly with the successful candidate for governor shall be elected secretary of state. The secretary of state shall perform such duties as may be prescribed by law and as may be delegated to him by the governor.

The Committee on the Executive Branch, *Alaska Constitutional Convention: Revised Report of the Committee on Executive Branch* 2–3 (1956) (Appendix 013).

However, not everyone accepted Section 6's earliest incarnation. Delegates primarily questioned whether a joint ticket scheme would adequately vet the SOS. John Hellenthal disputed the notion that the secretary would be "elected," since people would merely support the secretary indirectly as the governor's hand-picked "buddy." Minutes to the Constitutional Convention Proceedings at 2070 (Appendix 037). Seaborn Buckalew agreed with this sentiment, arguing that Section 6 "leav[es] it up to the people to rubber-stamp a 'flunky' selected by the man that's running for governor." *Id.* at 2089 (Appendix 046). George McLaughlin summarized these opposing views quite clearly:

> [I]f we are going to have a strong executive, I believe that the executive should not be burdened with a crown prince who substantially would be dictated by the body that runs or supports the governor. Normally, that second-in-command is someone who is picked, not because of ability, but because of political considerations. He inevitably will come from a different part of the state, or appeal to that class of voters which the candidate for governor does not appeal to. It's a history of the Vice Presidency, and I suspect it would be the history here. We would not have as a successor a strong secretary of state; he would make a poor governor largely because the consideration of his selection would be political.

Id. at 2090–91 (Appendix 048-49).

In response to these attacks, George Cooper introduced an amendment to Section 6. His change would have had the candidates for secretary and governor run in separate elections, rather than on a joint ticket. *Id.* at 2080 (Appendix 037). Cooper believed this system would ameliorate the delegates' concerns, since it would enable the secretary to "run on the merits of his own qualifications and seek office individually, not collectively, tied to another elective official." *Id.*

Cooper's amendment received some positive reception. James Hurley remarked how the change would prevent concerns over the "buddy system" raised by Hellenthal and others. *Id.* at 2082 (Appendix 039). Jack Hinckel expressed a similar sentiment, noting how it also preserved the ideal for a strong executive:

> I feel that we would get a better secretary of state if we had one that was not merely picked by the governor-elect as a running partner. I think if we had a chance to select him ourselves in a primary election or some other way, I believe we would get a better man. I don't think that a strong man ordinarily is interested in merely running as a partner or second horse from the same stable, or something.

Id. at 2086 (Appendix 043).

But despite this support, others challenged Cooper's recommendation. Most notably, John Boswell questioned how the amendment would ensure that the governor and secretary hailed from the same political party. *Id.* at 2081 (Appendix 038). If the two elected officials harbored opposite political views, that would directly undermine the ideal of a strong executive. In such an instance, the officials "could not only not work together, but there would be terrific confusion if that secretary of state ever succeeded to the governor." *Id.* at 2128 (Appendix 053). Cooper admitted that he merely assumed they would share the same party affiliation, but his system did not necessarily guarantee this result. *Id.* at 2081. Ultimately, this uncertainty alongside other factors prompted the delegates to reject Cooper's amendment in a 33–19 vote. *See id.* at 2088 (Appendix 045).

With Cooper's amendment gone, the delegates remained split over Section 6's effectiveness. Buckalew, citing earlier issues, moved to strike the section altogether. *Id.* at 2089 (Appendix 046). In a narrow 26-25 vote, the delegates supported Buckalew's motion, eliminating the office of SOS. *Id.* at 2093 (Appendix 050). However, the following day Dora Sweeney expressed regret over her vote to strike Section 6. She believed the idea of a secretary of state could be salvaged. *Id.* at 2127–28 (Appendix 052-53). Hence, she moved to reconsider the section, bringing it onto the table once more. *Id.* at 2128 (Appendix 053).

Although the delegates remained dissatisfied with the secretary's method of election, they believed a compromise was possible. The convention's president, William Egan, decried the joint ticket scheme because under it, "[t]he people won't have one thing to say about who shall be secretary of state." *Id.* at 2135 (Appendix 054). Yet he did not consider Section 6 a lost cause. Rather, Egan said he would support it if someone amended it to allow the people to nominate a secretary, who then would run with the governor on a joint ticket. *Id*.

Others quickly coalesced around this solution. James Hurley believed it would preserve the ideal for a strong executive in two ways.

First, nominating the secretary at the primary level would vet the candidate through the body politic. Second, pairing the nominated secretary with the gubernatorial candidate would "guarantee [the candidates] being at least from the same political party," avoiding concerns over executive infighting. *Id.* at 2139 (Appendix 058). Dora Sweeney agreed wholeheartedly: "I just wanted to say that I want to have a secretary of state elected. I want him compatible with the governor. I want him nominated in the primary and I want him teamed with the governor in the general election. That is all I want." *Id.* at 2142 (Appendix 061).

The system was perhaps inspired by looking to models from other states. We know the Committee on the Executive Branch looked particularly to three states: New York, New Jersey, and Hawaii. Fischer, *Alaska's Constitutional Convention* at 106. New York and Hawaii are two of the seven other states beside Alaska to have so-called "shotgun marriage" selection of the lieutenant governor, where the candidates run in separate partisan primaries but on a paired partisan ticket in the

general. Kristin Sullivan, "Methods of Electing Lieutenant Governors," Connecticut Office of Legislative Research (2015).[9]

In light of this support, the Committee on the Executive Branch introduced an amendment incorporating this system into Section 6. *Id.* at 2144–45 (Appendix 063-64). Warren Taylor praised the amendment, indicating how it "removes the objection of every person in this Convention." *Id.* at 2141 (Appendix 060). And evidently, Taylor proved correct—nearly all the delegates approved the amendment, providing Alaska with its method of electing its lieutenant governor. *See id.* at 2145 (Appendix 064); *see also* Fischer at 109. And although Alaska later amended the Constitution to retitle the secretary of state the lieutenant governor, 6th Legislature's SJR 2 (1970), it nonetheless maintained the system where the candidate for lieutenant governor is independently elected—in the manner of other officer holders such as senators and representatives—and then runs on a joint ticket with the gubernatorial candidate on the general ballot.

This method is incompatible with the jungle primary of Section 2. Section 21 of Initiative 2 allows the candidate to pick the party label he

[9] Available at https://www.cga.ct.gov/2015/rpt/2015-R-0021.htm.

wishes to appear after his name, but with no obligation to be a member of or support that party. Sections 22 and 23 specify that the parties' name is not an endorsement or other formal affiliation of the party with the candidate. Section 37 is very specific adding new statutory language that "The primary election does not serve to determine the nominee of a political party or political group but only serves to narrow the number of candidates whose names will appear on the ballot at the general election." Alaska Stat. § 15.25.10. But then Section 38 amends Alaska Stat. § 15.25.030 to say when a candidate files for governor or lieutenant governor, he must identify the companion with whom he is "running jointly." Alaska Stat. § 15.25.030 (16) & (17). In other words, from the moment of filing for office, a governor and lieutenant governor candidate run as a ticket, *which is precisely the scenario the delegates to the convention wanted to avoid*, which is why they structured the constitutional provision as they did. This unconstitutional arrangement persists throughout Initiative 2: for instance, Section 42 requires write-in candidates for governor and lieutenant governor to file a letter identifying their ticket together. Alaska Stat. § 15.25.105(b).

The adoption in Initiative 2 of a "flunky" or "buddy" system for selection of lieutenant governor is not just contrary to the express intent of the delegates to have the lieutenant governor elected as other representatives in the primary (or a party convention if the primary is abolished[10]) and then on a ticket with the governor in the general election, it swings the power in favor of the single executive model in a manner apparently unpalatable to those same delegates. Unlike other states, Alaska has only two elected executive branch officials—we do not for instance, elect an attorney general or state treasurer as is common in other states. Other high level executive branch officials serve at the pleasure of the governor. Alaska Const. Art. III, Sec. 25. It is perhaps why Alaskans have delegated the administration of state elections to the lieutenant governor—a separately elected official is more capable of exercising the independence required to oversee elections than an

[10] Delegate Rivers pointed out that the adopted language in Article III, Section 8 that the SOS "shall be nominated in the manner provided by law for nominating candidates for other elective office" allowed enough flexibility to still have an independently elected SOS if the primary system was abolished. (Appendix 059) ("That would mean that on any primary election system every candidate runs on his own candidacy. The secretary of state would run as provided by law for all other candidates, and if they ever abolished the system of primary election and went back to the convention system, your language would still be broad enough to make it flexible").

appointed commissioner. Further, the constitutional decision to have the SOS, and later the lieutenant governor, be nominated independently of the governor provides not just an independent voice and action to the administration, but a way to foster elective talent at the statewide level—an opportunity that strong candidates will lose out on in favor of handpicked candidates.

B. The jungle primary as to lieutenant governor is not severable.

Like the unavailability of severability for the ranked-choice voting sections, the jungle primary provisions as applied to the office of lieutenant governor cannot be severed from their application to other elected offices. Therefore, all sections of Initiative 2 relating to the jungle primary system must be struck down. As mentioned above, to be severable the remainder of the statute standing alone must still have legal effect and reflect the intention of the legislature or, in a ballot measure case, the voters. *Lynden Transp.*, 532 P.2d at 713. The courts do not have authority to rewrite laws in order to cure their defects, so adding "except for lieutenant governor" is not an option to give the provision legal effect. *Hickel*, 874 P.2d at 927–28. As for the intention of the voters, Initiative 2 does not contain a savings clause. If the presence of a savings

clause in *Alaskans for a Common Language* meant the voters intended any remaining provisions to stand, then the lack of such clause in Initiative 2 suggests the voters did not intended the provisions to be severable. 170 P.3d 183. Because the jungle primary sections of the Initiative cannot satisfy both prongs of the *Lynden Transport* test for severability, they are not severable and must be struck down in their entirety.

Additionally, even if the office of lieutenant governor *could* be severed, the state would be left without a constitutional method to elect the lieutenant governor. Initiative 2 repealed the previous electoral system, so without a replacement procedure the state would not have the means to vote for the office.

Thus, as with the governor and instant runoff voting, the court cannot write "except for the lieutenant governor" into the sections creating a jungle primary. And even if the court could do that, it wouldn't work because there are no back-up rules for the lieutenant governor. Though the jungle primary provisions can be severed from the instant-runoff and campaign-finance provisions, all of the jungle primary

provisions must be enjoined together because of their unconstitutionality as to the lieutenant governor.[11]

III. The jungle primary violates the Alaska Constitution's freedom of association.

Under Alaska's previous blanket primary system, any voter could cast a ballot in any party's primary, but any candidate could not run in any party primary. In order to be a candidate in a particular party's primary, that candidate "must be 'a member of the political party.' This, by definition, 'means a person who supports the political program of a party.' AS 15.60.010(15)." *O'Callaghan v. State*, 914 P.2d 1250, 1255 (Alaska 1996). Several years later, the Alaska Democratic Party decided to permit non-members to run as candidates in its primaries. *State v. Alaska Democratic Party*, 426 P.3d 901, 906 (Alaska 2018). The state division of elections said this was not possible, citing the party-membership rule then extant in statute. This Court struck down the rule, protecting the right of the Democratic Party to allow non-members to run under its banner. *Id.*

[11] Again, different from Mr. Kohlhaas, Amici are not making the argument that the entire initiative must go down if any one part fails, but only that if the Court finds the jungle primary fails as to the office of lieutenant governor, it must fail as to all offices; the instant-runoff and donor-disclosure provisions are separate and severable.

Now this court faces a new state rule that does the opposite: rather than forcing parties to only accept members as their standard-bearers, it forces parties to accept non-members as their representatives running under their banners. Under the new primary system created by Initiative 2, a candidate may associate himself or herself with a party even if the party does not support him and he does not "approve[] of or associate[] with that candidate." Initiative 2, Sec. 22; see also Sec. 23, 64, 66. This violates the parties' associational rights.

The immediate response to this is "tough luck, the U.S. Supreme Court has already rejected your argument." *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008). And that is true as far as the First Amendment, where the U.S. Supreme Court has indeed upheld the party-self-designation against a facial challenge. However, that hardly ends the inquiry, because "the Alaska Constitution is more protective of political parties' associational interests than is the federal constitution." *State v. Alaska Democratic Party*, 426 P.3d 901, 909 (Alaska 2018). Indeed, in *Democratic Party* the state high court rejected the reasoning of another U.S. Supreme Court opinion, *Clingman v. Beaver*, 544 U.S. 581 (2005), that had said a party membership rule for

voters was only a modest burden. The Alaska Supreme Court, interpreting the Alaska Constitution, concluded otherwise in *Green Party*, 118 P.3d at 1065, and it reaffirmed that rejection in *Democratic Party*, 426 P.3d at 909-10.

Instead, under the Alaska Constitution, "[r]estrictions on the right to associate in pursuit of political beliefs are permissible only where the government is able to show that the restrictions are justified by compelling governmental interests. Further, the restrictions must be no broader than needed to accomplish the governmental interests which justify them." *VECO Int'l v. Alaska Pub. Offices Comm'n,* 753 P.2d 703, 711 (Alaska 1988); *see Green Party of Alaska v. State*, 147 P.3d 728, 734 (Alaska 2006) ("The state bears the burden of proving that it has a compelling interest to justify infringing on the rights of free speech, political association, and equal protection."); *see also* LAA, *Alaska's Constitution: A Citizen's Guide* 18 ("Rights of free speech include rights of political expression, and infringements on those rights must be carefully drawn."); *see generally S.N.E. v. R.L.B.*, 699 P.2d 875, 880 (Alaska 1985) ("where such fundamental rights as freedom of speech and association are involved, only compelling government interests will

justify their encroachment. An essential aspect of this test is an inquiry into whether less restrictive alternatives will adequately protect those interests."). Compelling interest and least restrictive means are together strict scrutiny. *State v. Planned Parenthood*, 171 P.3d 577, 582 (Alaska 2007).

The government here cannot bear the burden of strict scrutiny. The party has a substantial interest in ensuring that only its members may claim its mantle on the ballot, and the State does not have sufficient countervailing interests.

The party name following a candidate's name is hugely important to voters—in many instances, social science tells us it is more important to voters than the candidate's own name. *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) ("party candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth."). That is especially true in lower profile races. *Republican Party of Conn. v. Tashjian*, 770 F.2d 265, 284 n.27 (2d Cir. 1985), *aff'd* 479 U.S. 208 (1986) ("The further one moves down the ballot, the more difficult it

is for voters to make selections without relying on the party label."). Courts recognize and respect "the potential power of the party-preference label as a signal to voters of a candidate's ideological bona fides," *Soltysik v. Padilla*, 910 F.3d 438, 445 (9th Cir. 2018), because "party labels provide a shorthand designation of the views of party candidates on matters of public concern." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986).

It is a substantial burden to force a party to see its brand associated with someone who is not a member. "Parties devote substantial resources to making their names trusted symbols of certain approaches to governance. They then encourage voters to cast their votes for the candidates that carry the party name. Parties' efforts to support candidates by marking them with the party trademark, so to speak, have been successful enough to make the party name, in the words of one commentator, 'the most important resource that the party possesses.'" *Wash. State Grange*, 552 U.S. at 464 (Scalia, J., dissenting) (quoting Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. Pa. L. Rev. 793, 804 (2001)). In *Hurley*, the U.S. Supreme Court said that "mere presence behind the organizer's banner conflicted with the

organizer's 'particular point of view,'" and this was an unconstitutional infringement on the freedom of association. *Truth v. Grohe*, 499 F.3d 999, 1014 (9th Cir. 2007) (discussing *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995)). Here the State is forcing the Alaskan Independence Party to accept the presence of persons who do not share its point of view under its banner on the ballot, and this is equally unconstitutional.

Political parties are built into the background framework of the Alaska Constitution, as evidenced by all the discussion by delegates quoted above about ensuring a governor and secretary of state from the same political party. This reflects the simple reality that political parties were much more institutionalized and accepted in 1956 compared to 1787, which is one reason the Alaska Constitution provides them greater protection. Given that greater protection, the State may not force the parties to give their banners and brand to candidates who are not members. *Democratic Party* commands this result: if the State could not force the Democratic Party to accept only members as bearing its label, it may not force the parties here to accept nonmembers as bearing its label.

CONCLUSION

For the forgoing reasons, the decision below should be reversed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the format length limitations imposed by Alaska Rules of Appellate Procedure 212(c) and 513.5, and produced using the following font: Proportional Century Schoolbook Font 14 pt body text, 14 pt for footnotes. The length of this brief is under 50 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing Amicus Brief with the Clerk of the Alaska Supreme Court, and by served it on the below Counsel of Record:

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