**IN THE SUPREME COURT OF THE STATE OF ALASKA**

| | | |
|---|---|---|
| Scott A. Kohlhaas, the Alaskan Independence Party, Robert M. Bird, and Kenneth P. Jacobus,<br><br>Appellants,<br><br>v.<br><br>State of Alaska, Division of Elections, Lieutenant Governor Kevin Meyer, in his Official Capacity as Supervisor of Elections, and Gail Fenumiai, in her Official Capacity of Director of the Division of Elections,<br><br>Appellees,<br>_______________________________<br><br>Alaskans For Better Elections, Inc.,<br><br>Intervenor. | ) | Supreme Court No. **S-18210** |

Trial Court Case No. **3AN-20-09532 CI**

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

**BRIEF OF THE STATE APPELLEES**

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**ALASKA STATUTES:**

**AS 15.15.025. Top four nonpartisan open primary**

A voter qualified under AS 15.05 may cast a vote for any candidate for each elective state executive and state and national legislative office, without limitations based on the political party or political group affiliation of either the voter or the candidate.

**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:

> …
>
> (5) The names of the candidates shall be placed in separate sections on the state general election ballot under the office designation to which they were nominated. If a candidate is registered as affiliated with a political party or political group, the party affiliation, if any, may be designated after the name of the candidate, upon request of the candidate. If a candidate has requested designation as nonpartisan or undeclared, that designation shall be placed after the name of the candidate. If a candidate is not registered as affiliated with a political party or political group and has not requested to be designated as nonpartisan or undeclared, the candidate shall be designated as undeclared. The lieutenant governor and the governor shall be included under the same section. Provision shall be made for voting for write-in candidates within each section. Paper ballots for the state general election shall be printed on white paper.
>
> …
>
> (14) The director shall include the following statement on the ballot:
>
> > A candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party or group or that the party or group approves of or associates with that candidate, but only that the candidate is registered as affiliated with the political party or political group.
>
> (15) Instead of the statement provided by (14) of this section, when candidates for President and Vice-President of the United States appear on a general election ballot, the director shall include the following statement on the ballot:
>
> > A candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party or political group or that the

political party or political group approves of or associates with that candidate, but only that the candidate is registered as affiliated with the party or group. The election for President and Vice-President of the United States is different. Some candidates for President and Vice-President are the official nominees of their political party.

(16) The director shall design the general election ballots so that the candidates are selected by ranked-choice voting.

(17) The director shall design the general election ballot to direct the voter to mark candidates in order of preference and to mark as many choices as the voter wishes, but not to assign the same ranking to more than one candidate for the same office.

**AS 15.15.350. General procedure for ballot count**

…

(c) All general elections shall be conducted by ranked-choice voting.

(d) When counting ballots in a general election, the election board shall initially tabulate each validly cast ballot as one vote for the highest-ranked continuing candidate on that ballot or as an inactive ballot. If a candidate is highest-ranked on more than one-half of the active ballots, that candidate is elected and the tabulation is complete. Otherwise, tabulation proceeds in sequential rounds as follows:

(1) if two or fewer continuing candidates remain, the candidate with the greatest number of votes is elected and the tabulation is complete; otherwise, the tabulation continues under (2) of this subsection;

(2) if the candidate with the fewest votes is defeated, votes cast for the defeated candidate shall cease counting for the defeated candidate and shall be added to the totals of each ballot's next-highest-ranked continuing candidate or considered an inactive ballot under (g)(2) of this section, and a new round begins under (1) of this subsection.

(e) When counting general election ballots,

(1) a ballot containing an overvote shall be considered an inactive ballot once the overvote is encountered at the highest ranking for a continuing candidate;

(2) if a ballot skips a ranking, then the election board shall count the next ranking. If the next ranking is another skipped ranking, the ballot shall be considered an inactive ballot once the second skipped ranking is encountered; and

(3) in the event of a tie between the final two continuing candidates, the procedures in AS 15.15.460 and AS 15.20.430--15.20.530 shall apply to determine the winner of the general election; in the event of a tie between two candidates with the fewest votes, the tie shall be resolved by lot to determine which candidate is defeated.

(f) The election board may not count an inactive ballot for any candidate.

(g) In this section,

(1) "continuing candidate" means a candidate who has not been defeated;

(2) "inactive ballot" means a ballot that is no longer tabulated, either in whole or in part, by the division because it does not rank any continuing candidate, contains an overvote at the highest continuing ranking, or contains two or more sequential skipped rankings before its highest continuing ranking;

(3) "overvote" means an instance where a voter has assigned the same ranking to more than one candidate;

(4) "ranking" or "ranked" means the number assigned by a voter to a candidate to express the voter's choice for that candidate; a ranking of "1" is the highest ranking, followed by "2," and then "3," and so on;

(5) "round" means an instance of the sequence of voting tabulation in a general election;

(6) "skipped ranking" means a blank ranking on a ballot on which a voter has ranked another candidate at a subsequent ranking.

**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 primary election does not serve to determine the nominee of a political party or political group but serves only to narrow the number of candidates whose names will appear on the ballot at the general election. Except as provided in AS 15.25.100(d), only the four candidates who receive the greatest number of votes for any office shall advance to the general election.

**AS 15.25.100. Placement of candidates on general election ballot**

(a) Except as provided in (b)--(g) of this section, of the names of candidates that appear on the primary election ballot under AS 15.25.010, the director shall place on the general election ballot only the names of the four candidates receiving the greatest number of votes for an office. For purposes of this subsection and (b) of this section, candidates for lieutenant governor and governor are treated as a single paired unit.

(b) If two candidates tie in having the fourth greatest number of votes for an office in the primary election, the director shall determine under (g) of this section which candidate's name shall appear on the general election ballot.

(c) Except as otherwise provided in (d) of this section, if a candidate nominated at the primary election dies, withdraws, resigns, becomes disqualified from holding office for

which the candidate is nominated, or is certified as being incapacitated in the manner prescribed by this section after the primary election and 64 or more days before the general election, the vacancy shall be filled by the director by replacing the withdrawn candidate with the candidate who received the fifth most votes in the primary election.

(d) If the withdrawn, resigned, deceased, disqualified, or incapacitated candidate was a candidate for governor or lieutenant governor, the replacement candidate is selected by the following process:

> (1) if the withdrawn, resigned, deceased, disqualified, or incapacitated candidate was the candidate for governor, that candidate's lieutenant governor running mate becomes the candidate for governor, thereby creating a vacancy for the lieutenant governor candidate;
>
> (2) when any vacancy for the lieutenant governor candidate occurs, the candidate for governor shall select a qualified running mate to be the lieutenant governor candidate and notify the director of that decision.

(e) The director shall place the name of the persons selected through this process as candidates for governor and lieutenant governor on the general election ballot.

(f) For a candidate to be certified as incapacitated under (c) of this section, a panel of three licensed physicians, not more than two of whom may be of the same party, shall provide the director with a sworn statement that the candidate is physically or mentally incapacitated to an extent that would, in the panel's judgment, prevent the candidate from active service during the term of office if elected.

(g) If the director is unable to make a determination under this section because the candidates received an equal number of votes, the determination may be made by lot under AS 15.20.530.

**AS 15.58.020. Contents of pamphlet**

(a) Each general election pamphlet must contain

…

(13) the following statement written in bold in a conspicuous location:

> Each candidate may designate the political party or political group that the candidate is registered as affiliated with. A candidate's political party or political group designation on a ballot does not imply that the candidate is nominated or endorsed by the party or political group or that the party or group approves of or associates with that candidate.
>
> In each race, you may vote for any candidate listed. If a primary election was held for a state office, United States senator, or United States representative, the four candidates who received the most votes for the office in the primary election advanced to the general election. However, if one of the four candidates who

received the most votes for an office at the primary election died, withdrew, resigned, was disqualified, or was certified as incapacitated 64 days or more before the general election, the candidate who received the fifth most votes for the office advanced to the general election.

At the general election, each candidate will be selected through a ranked-choice voting process and the candidate with the greatest number of votes will be elected. For a general election, you must rank the candidates in the numerical order of your preference, ranking as many candidates as you wish. Your second, third, and subsequent ranked choices will be counted only if the candidate you ranked first does not receive enough votes to continue on to the next round of counting, so ranking a second, third, or subsequent choice will not hurt your first-choice candidate. Your ballot will be counted regardless of whether you choose to rank one, two, or more candidates for each office, but it will not be counted if you assign the same ranking to more than one candidate for the same office.

…

(c) Notwithstanding (a) of this section, if a pamphlet is prepared and published under AS 15.58.010 for a

(1) primary election, the pamphlet must contain the following statement written in bold in a conspicuous location, instead of the statement provided by (a)(13) of this section:

In each race, you may vote for any candidate listed. The four candidates who receive the most votes for a state office, United States senator, or United States representative will advance to the general election. However, if, after the primary election and 64 days or more before the general election, one of the four candidates who received the most votes for an office at the primary election dies, withdraws, resigns, is disqualified, or is certified as incapacitated, the candidate who received the fifth most votes for the office will advance to the general election.

Each candidate may designate the political party or political group that the candidate is registered as affiliated with. A candidate's political party or political group designation on a ballot does not imply that the candidate is nominated or endorsed by the party or group or that the party or group approves of or associates with that candidate;

(2) special primary election, the pamphlet must contain the following statement written in bold in a conspicuous location, instead of the statement provided by (a)(13) of this section:

In each race, you may vote for any candidate listed. The four candidates who receive the most votes for a state office or United States senator will advance to the special election. However, if, after the special primary election and 64 days or more before the special election, one of the four candidates who received the most votes for a state office or United States senator at the primary election dies,

withdraws, resigns, is disqualified, or is certified as incapacitated, the candidate who received the fifth most votes for the office will advance to the general election. Each candidate may designate the political party or political group that the candidate is registered as affiliated with. A candidate's political party or political group designation on a ballot does not imply that the candidate is nominated or endorsed by the party or group or that the party or group approves of or associates with that candidate.

## ALASKA CONSTITUTIONAL PROVISIONS:

### Article I, § 5. Freedom of Speech

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

### Article I, § 6. Assembly; Petition

The right of the people peaceably to assemble, and to petition the government shall never be abridged.

### Article III, § 3. Election

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

### Article III, § 8. Election

The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes 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.

## U.S. CONSTITUTIONAL PROVISIONS:

### Amendment I

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.

**Amendment XIV, Section 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## PARTIES

The appellants are Scott Kohlhaas, Robert Bird, Kenneth Jacobus, and the Alaska Independence Party (collectively, "Kohlhaas"). The appellees are the State of Alaska, Division of Elections, Lieutenant Governor Kevin Meyer, and Director of Elections Gail Fenumiai ("the State"); and Alaskans For Better Elections, Inc. ("the sponsors").

## ISSUES PRESENTED

1. *Nonpartisan primary*. Ballot Measure 2 replaced the State's partisan primary election with an open, nonpartisan primary election.

   A. The nonpartisan primary does not choose political party nominees, thus removing state involvement in party nominations. Does this violate political parties' associational right to choose their nominees?

   B. Is having candidates for lieutenant governor run jointly in the nonpartisan primary with gubernatorial running-mates inconsistent with either Ballot Measure 2 itself or the Alaska Constitution's command that the lieutenant governor be nominated "in the manner provided by law for nominating candidates for other elective offices"?

2. *Ranked-choice voting*. Ballot Measure 2 replaced single-choice voting with ranked-choice voting as the voting method for the general election.

   A. Does ranked-choice voting infringe on the right to vote either by allegedly giving different weight to different votes or in some other way?

   B. Is ranked-choice voting inconsistent with the Alaska Constitution's command that "candidate receiving the greatest number of votes" at a

general election "shall be governor"?

3. *Severability*. If the Court concludes that any portion of Ballot Measure 2 is unconstitutional, can the offending portion be severed from the rest of the law?

## INTRODUCTION

Contrary to Kohlhaas's framing, the Court's task is not to weigh a collection of policy arguments and decide whether Ballot Measure 2 "is or is not appropriate." [At. Br. 11-15] Alaskan voters have already resolved that debate in favor of enacting these election reforms. The Court's only task is to decide whether they are consistent with the constitution. Neither Kohlhaas's legal claims nor the Treadwell amici's supplemental arguments provide a basis for the Court to override the voters' choice.

Kohlhaas first claims that Ballot Measure 2's open, nonpartisan primary system violates political parties' freedom of association. But this new system leaves political parties *more* free from state regulation, not less free. Parties can now nominate and support candidates by whatever process they choose outside the state-run primary. The State does not infringe on their associational rights by *lessening* its involvement in their associative activities. Nor does the State force parties to associate with candidates they do not support by allowing candidates to list their registered party affiliations on the primary and general election ballots. A facial constitutional challenge cannot prevail based on mere speculation that voters will be confused into thinking that candidates are supported by their parties, when no election has been held and the ballots will include an explanatory disclaimer. The Court has more faith in voters than this.

Kohlhaas further challenges the nonpartisan primary under Article III, Section 8 of

the Alaska Constitution, which provides that the lieutenant governor must be nominated in the manner provided by law for nominating candidates and elected as a team with the governor. But Kohlhaas's position rests on a strange misreading of Ballot Measure 2. And the Treadwell amici's different argument interprets Article III, Section 8 more restrictively than is supported by the text or constitutional history. The constitution does not mention primary elections or political parties, much less require that joint gubernatorial tickets be formed through partisan primaries. Its flexible language permits Ballot Measure 2's system, which creates the necessary joint tickets by having candidates for governor and lieutenant governor pair up by choice and run together in the primary.

Kohlhaas also challenges Ballot Measure 2's ranked-choice voting system, raising miscellaneous policy objections to support an apparent theory that it violates voters' right to vote. But ranked-choice voting treats all voters—and their votes—equally. And although Kohlhaas is correct that ranked-choice voting is not perfect, this is not a constitutional defect. No voting system is perfect, including single-choice voting.

Finally, Kohlhaas and the Treadwell amici attack ranked-choice voting on the additional theory that it violates Article III, Section 3's requirement that the governor be "the candidate receiving the greatest number of votes" at a general election. But ranked-choice voting neither creates an impermissible runoff election nor requires that a candidate receive a majority rather than a plurality of votes to win the governorship.

The Court should reject all of these attacks on Ballot Measure 2 and uphold the law in its entirety. In the alternative, if the Court finds any aspect of Ballot Measure 2 unconstitutional, it should sever the offending provisions to the extent possible.

## STATEMENT OF THE CASE

### I. Ballot Measure 2 appeared on the 2020 general election ballot and passed, making major changes to Alaska's election system.

In July 2019, Alaskans for Better Elections filed initiative application 19AKBE with the Division of Elections.[1] [Exc. 111] 19AKBE, which became Ballot Measure 2, had three principal components: it added new disclosure and disclaimer requirements to campaign finance law; it replaced the party primary system with an open, nonpartisan primary; and it established ranked-choice voting in the general election. [Exc. 10-34] The lieutenant governor concluded that combining these three components in one initiative violated the single-subject rule, and he declined to certify the initiative.[2]

The sponsors sued, and the Court ultimately disagreed with the lieutenant governor, holding that Ballot Measure 2 concerned the single subject of election reform.[3] The lieutenant governor then certified the measure and the sponsors collected enough signatures to place it on the 2020 general election ballot.[4] Alaskan voters approved Ballot Measure 2 and the new law took effect in February 2021.[5]

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[1] *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 490 (Alaska 2020).

[2] *Id.* at 479; *see* Alaska Const. art. XI, § 2; AS 15.45.080.

[3] *Alaskans for Better Elections*, 465 P.3d at 499.

[4] *See* AS 15.45.140(a); Alaska Division of Elections, *Initiative Petition List*, https://www.elections.alaska.gov/Core/initiativepetitionlist.php.

[5] *See* Alaska Division of Elections, *2020 Election Summary Report*, https://www.elections.alaska.gov/results/20GENR/data/sovc/ElectionSummaryReportRPT24.pdf (Nov. 30, 2020); Alaska Const. art. XI, § 6.

### A. Ballot Measure 2 replaced state-run political party primaries with a single, open, non-partisan, top-four primary.

One major component of Ballot Measure 2 abolished the state's partisan primary election and replaced it with an open, nonpartisan primary system.[6]

Under the old, partisan primary system, the Division of Elections ran primary elections through which recognized political parties[7] chose nominees for the general election. The Division provided primary ballots for each political party, and each voter could choose one ballot.[8] Generally, voters registered as affiliated with a particular party chose their party's ballot, and other voters chose among the available ballots, subject to any restrictions the parties enacted in their bylaws to govern who could vote in their primaries.[9] Candidates who won these political party primaries advanced to the general election as party nominees.[10] This system allowed each recognized party to advance one candidate per office to the general election ballot via the primary.[11] Candidates not nominated through this party primary process could get their names on the general election ballot by collecting sufficient voter signatures on a nominating petition.[12]

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6 *See* 2020 Alaska Laws Initiative Meas. 2, §§ 20, 72.

7 *See* AS 15.80.010(27) (defining recognized political party).

8 AS 15.25.010 (amended Feb. 28, 2021). Some parties chose to combine their ballots with each other. *See State, Div. of Elections v. Green Party of Alaska (Green Party I)*, 118 P.3d 1054, 1070 (Alaska 2005) (holding that the State was required to allow political parties to combine their primary ballots).

9 *Id.*; AS 15.25.014 (repealed Feb. 28, 2021).

10 AS 15.25.100 (repealed and reenacted Feb. 28, 2021).

11 *Id.*

12 *See* AS 15.25.140 *et seq.* (repealed Feb. 28, 2021).

The new, nonpartisan primary system established by Ballot Measure 2 no longer "serve[s] to determine the nominee of a political party or political group but serves only to narrow the number of candidates whose names will appear on the ballot at the general election."[13] Now, there are no party primary elections with separate party ballots—instead, there is one, open primary in which any candidate may run regardless of political affiliation or lack thereof. A person who wishes to be a candidate in this open primary must simply file a declaration of candidacy.[14] All voters will receive a single primary ballot and they will vote for any candidate on the ballot, "without limitations based on the political party or political group affiliation of either the voter or the candidate."[15] In other words, the political parties no longer nominate candidates via the primary and candidates advance to the general election regardless of their political affiliation.

Although candidates in Ballot Measure 2's nonpartisan primary are not running for any political party's nomination, the primary ballot will still contain some party affiliation information: next to each candidate's name, it will list the candidate's chosen affiliation designation,[16] which will be either their registered political party or political group, or the word "nonpartisan" or "undeclared."[17] For example, a candidate who is

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[13] AS 15.25.010.

[14] AS 15.25.030. Candidates may not appear as write-in candidates during the primary. AS 15.25.070.

[15] AS 15.15.025.

[16] A candidate will choose their affiliation designation in the declaration of candidacy. AS 15.25.030(a)(5).

[17] AS 15.15.030(5) (describing the requirements for general election ballots); AS 15.25.060 (extending those requirements to primary ballots).

registered with the Alaska Libertarian Party could choose to appear on the primary ballot as either a registered Libertarian, as "nonpartisan," or as "undeclared." [Exc. 172] The ballot will not designate a candidate as affiliated with a political party or political group unless that candidate is registered as affiliated with that political party or political group.[18] The ballot will also include a disclaimer telling voters that the candidates' affiliation designations do not mean they are supported by the political parties:

> A candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party or group or that the party or group approves of or associates with that candidate, but only that the candidate is registered as affiliated with the political party or political group.[19]

The four candidates receiving the greatest number of votes in the nonpartisan primary will advance to the general election ballot, regardless of their party affiliations or lack thereof.[20] Thus, the candidates who advance to the general election from the primary will not do so as the nominees of political parties, though they may have party affiliations and parties may separately choose to nominate candidates through their own processes.

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[18] AS 15.15.030(5) ("If a candidate is registered as affiliated with a political party or political group, the party affiliation, if any, may be designated after the name of the candidate, upon request of the candidate . . . ."); AS 15.25.030(a)(5) (requiring candidates to state "the political party or political group with which the candidate is registered as affiliated, or whether the candidate would prefer a nonpartisan or undeclared designation placed after the candidate's name on the ballot").

[19] AS 15.15.030(14). If a general election ballot includes candidates for President and Vice-President, the disclaimer will also state, "The election for President and Vice-President of the United States is different. Some candidates for President and Vice-President are the official nominees of their political party." AS 15.15.030(15).

[20] AS 15.25.100(a).

People may also file as write-in candidates for the general election.[21]

In the general election, the candidates will again appear on the ballot with their chosen affiliation designations.[22] Like the primary ballot, the general election ballot will contain a disclaimer explaining that these designations mean a candidate is registered as affiliated with the political party or group, but do not mean the political party or group has nominated, endorsed, or approved the candidate.[23] The candidate who receives the greatest number of votes for an office in the general election will be elected.[24]

### B. Ballot Measure 2 replaced single-choice voting with ranked-choice voting in the general election.

Ballot Measure 2's other major reform makes ranked-choice voting the means by which voters express their preferences in the general election.[25] Under the old, single-choice voting system—which will still be used in the primary election[26]—a voter votes by choosing a single most-favored candidate, and the Division tallies the candidates' totals in a single round. In the new ranked-choice voting system, a voter instead votes by ranking the candidates in order of preference, and the Division counts the voter's preferences in a series of rounds.[27] Each voter still only casts one "vote" per race—now

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[21] AS 15.25.105.

[22] AS 15.15.030(5).

[23] AS 15.15.030(14).

[24] AS 15.15.350(d).

[25] AS 15.15.350(c).

[26] *See* 2020 Alaska Laws Initiative Meas. 2, § 40.

[27] *See* AS 15.15.350.

expressed as a ranked preference rather than a single choice—and the candidate with the greatest number of votes in the final round of counting wins.[28]

Under this new system, voters will rank the candidates on the general election ballot by filling in ranking ovals that correspond to the number of choices available.[29] [Exc. 423] That is, in a race with four candidates on the ballot—the maximum possible that can advance from the new open primary described above—voters will be able to rank the candidates first, second, third, fourth, or fifth (because there is an option for voters to rank a write-in candidate). Voters may choose to rank only one candidate, or they may rank two or more candidates, but they may not assign the same ranking to multiple candidates.[30] For example, a voter could rank a first and second choice but—having no preference between the other two candidates or a potential write-in—list no third, fourth, or fifth choice ranking. Or a voter who has no preference between any candidates other than a first choice can rank that candidate first and not rank any others. A voter's "vote" in each race consists of the voter's full set of rankings.

When tabulating the results of a race, the Division will start by counting how many first-choice rankings each candidate received.[31] If any candidate received more than half of all the first-choice rankings, the counting process is complete and that

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[28] AS 15.15.350(d) (the Division counts "each validly cast ballot as one vote").

[29] AS 15.15.360(a)(1).

[30] AS 15.15.350(g)(2); AS 15.15.360(a)(3).

[31] AS 15.15.350(d). If a voter did not fill in the first-choice oval, the Division will count that voter's highest-ranked candidate as the voter's first choice. *Id.* ("highest-ranked continuing candidate").

candidate is the winner.[32] If not, the Division will continue the counting process by eliminating the candidate with the fewest first-choice rankings[33] and redistributing the ballots of voters who ranked that candidate first, such that those ballots now count for the voters' second-choice candidates.[34] If a voter has not expressed a preference among the remaining candidates, that voter's vote will count for the eliminated candidate in the final results, and the voter's ballot becomes "inactive" and is not included in further rounds of tabulation.[35] If only two candidates remain after a candidate is eliminated, the candidate with the greatest number of votes is the winner.[36] If more than two candidates remain, the process repeats until only two candidates are left and one of those candidates wins.[37] Although this system will often result in a winner who has received the support of a majority of the voters, it does not require this. Instead, the winner is the candidate with the most *active* ballots in the final round of tabulation, which may not be a majority of the *total* ballots but should reflect at least strong plurality support.

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[32] AS 15.15.350(d).

[33] AS 15.15.350(d)(2). If two candidates tie for the fewest first-choice rankings, the loser is determined by drawing lots. AS 15.15.350(e)(3).

[34] AS 15.15.350(d).

[35] AS 15.15.350(d)(2), .350(g)(2).

[36] AS 15.15.350(d)(1); AS 15.80.010(34) (defining ranked choice voting as "the method of casting and tabulating votes in which voters rank candidates in order of preference and in which tabulation proceeds in sequential rounds in which (A) a candidate with a majority in the first round wins outright, or (B) last-place candidates are defeated until there are two candidates remaining, at which point the candidate with the greatest number of votes is declared the winner of the election").

[37] AS 15.15.350(d).

Ranked-choice voting is sometimes referred to as "instant runoff voting," because it allows voters to express their preferences among all of the candidates on a single ballot, and those preferences are used to identify the winning candidate in successive rounds of counting after the election—i.e. "instantly"—rather than in a later, separate runoff election between the most popular candidates. [*See* Exc. 174]

In addition to these two major reforms—the open, nonpartisan primary and ranked-choice voting—Ballot Measure 2 also added new campaign finance disclosure and disclaimer requirements,[38] but this case does not concern those provisions.

## II. Kohlhaas brought a facial constitutional challenge to Ballot Measure 2, and the superior court granted summary judgment, rejecting his claims.

Kohlhaas sued the State in December 2020, and amended his complaint twice. [Exc. 38–47, 60–69] His second amended complaint alleged that Ballot Measure 2's open, nonpartisan primary and ranked-choice voting systems violate multiple provisions of the federal and state constitutions. [Exc. 60–61] He claimed that the open, nonpartisan primary violates associational rights by "creat[ing] a system in which political parties are rendered irrelevant and are prevented from selecting their candidates and having their candidates meaningfully identified on the ballots." [Exc. 65] He alleged that ranked-choice voting violates the "principle of 'one person, one vote,'" because it "require[s] the

[38] Ballot Measure 2 requires additional disclosures for contributions of more than $2000 to independent expenditure groups, which is intended to reveal the "true source" of such contributions, and defines the term "true source." *See* 2020 Alaska Laws Initiative Meas. 2, §§ 1(2)-(3), 6-7, 9, 14-18. The bill also requires disclaimers on any paid communications by an independent expenditure group when a majority of the contributors to the group reside outside Alaska. *See id*. at §§ 11-12, 19.

counting of votes of those who vote for the more popular candidates more than once," and forces voters to rank multiple candidates or "lose their right to vote." [*Id.*] He claimed that Ballot Measure 2 will harm minor political parties and have a "disparate impact on Alaska Native and rural communities." [Exc. 65–66] Finally, he claimed that the "election system implemented by [Ballot Measure] 2 violates" Article III, Sections 3 and 8 of the Alaska Constitution—which concern the election of the governor and lieutenant governor—and "is void as it applies to the election of the governor and lieutenant governor." [Exc. 67–68] He asked for declaratory and injunctive relief, and asserted that the provisions of Ballot Measure 2 "are not separable," such that if any part is invalid "the entire Proposition is invalid." [Exc. 66, 68] The sponsors of Ballot Measure 2—Alaskans for Better Elections, Inc.—intervened in defense. [Exc. 393]

The parties filed summary judgment motions, and after oral argument, the superior court issued an order rejecting all of Kohlhaas's claims. [Exc. 394, 411] The court first rejected Kohlhaas's associational challenge to the open, nonpartisan primary, recognizing that "political parties do not have the constitutional right to force states to run the parties' nominating process" or to have their nominees identified on the ballot, and observing that Kohlhaas had conceded these points at oral argument. [Exc. 406–08] The court next rejected Kohlhaas's argument that ranked-choice voting violates Article III, Section 3 of the Alaska Constitution—which provides that the candidate "receiving the greatest number of votes shall be governor." [Exc. 408] The court further concluded that that the option to rank multiple candidates does not impermissibly provide voters multiple "votes," and that Kohlhaas's concerns that voters would find the new voting system

confusing could not sustain a facial challenge. [Exc. 408–09] Finally, the court rejected Kohlhaas's argument that the nonpartisan primary creates problems under Article III, Section 8 of the Alaska Constitution, which provides that the lieutenant governor shall be nominated in the same manner as other candidates and shall run jointly with a candidate for governor in the general election. [Exc. 410] The court observed that under the new system, candidates for governor and lieutenant governor team up before the primary, and nothing in the constitution prohibits this. [Exc. 410–11] The court granted summary judgment to the State and the sponsors and denied it to Kohlhaas. [Exc. 411]

Kohlhaas appeals.

## STANDARDS OF REVIEW

This Court reviews a grant of summary judgment de novo, affirming when there are no genuine issues of material fact and the prevailing party is entitled to judgment as a matter of law.[39] Statutes are presumed to be constitutional, and the burden of showing otherwise is on the party challenging the statute.[40] Kohlhaas brought a facial challenge because no election has yet been held under Ballot Measure 2,[41] and the Court will "uphold a statute against a facial constitutional challenge if 'despite occasional problems

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39 *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 34 (Alaska 2007).

40 *Id*.

41 *Cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455-56 (2008) (noting that a challenge to a Washington initiative creating a nonpartisan primary was a facial challenge with no evidentiary record to support speculation about implementation because no election had been held).

it might create in its application to specific cases, [it] has a plainly legitimate sweep.'"[42]

## ARGUMENT

### I. Ballot Measure 2's nonpartisan primary system is constitutional.

#### A. The nonpartisan primary does not violate political parties' or candidates' rights to freedom of association.

Alaska and federal courts apply essentially the same balancing test to constitutional challenges to election laws.[43] Under that balancing test, a court first determines whether the plaintiff has asserted a constitutional right.[44] The court then weighs "the character and magnitude of the asserted injury to the rights . . . against the precise interests put forward by the State . . . ."[45] Finally, the court judges the "fit between the challenged legislation and the state's interests."[46] "The extent of the burden determines how closely [the Court] will scrutinize the State's justifications for the law."[47] If the burden on constitutional rights is "substantial," the Court will "require compelling interests narrowly tailored to minimally infringe on the right," but if the burden is "modest or minimal," the Court will "require only that the law is reasonable, non-

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42 *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (quoting *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 n.14 (Alaska 2004)).

43 *State, Div. of Elections v. Green Party of Alaska (Green Party I)*, 118 P.3d 1054, 1060 (Alaska 2005) (adopting the federal test for "evaluating whether [a] challenged election law violates the Alaska Constitution."); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

44 *Green Party I*, 118 P.3d at 1061.

45 *Id.* at 1059 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

46 *Id.* at 1061.

47 *State v. Alaska Democratic Party*, 426 P.3d 901, 909 (Alaska 2018).

discriminatory, and advances 'important regulatory interests.'"[48]

Kohlhaas appears to object to three features of Ballot Measure 2's nonpartisan primary system: (1) ending the political parties' role in the primary election, (2) eliminating the automatic placement of political party nominees on the general election ballot, and (3) allowing candidates to identify their registered political party on the ballot even if they are not party nominees. But none of these features of the new nonpartisan primary severely burdens any constitutional rights that Kohlhaas identifies, and all of them advance important regulatory interests.

#### 1. Replacing partisan primary elections with a nonpartisan primary election does not violate associational rights.

Kohlhaas dislikes that Ballot Measure 2's nonpartisan primary is just that—nonpartisan—that is, it does not determine the nominees of political parties. [At. Br. 7] But although the State may not unduly interfere with political parties' freedom to associate with candidates and voters, the State is not required to involve political parties in state processes or involve itself in parties' associative activities. Ballot Measure 2 simply removes such involvement, along with the constitutional concerns that come with it. What remains are policy arguments that are beyond the Court's purview.

Kohlhaas's claim about the primary arguably clears the first step of the Court's balancing test described above because he has "asserted a constitutional right":

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[48] *Id.*

specifically, a political party's associational right to choose its nominees for office.[49] The right to free political association is protected by the First and Fourteenth Amendments to the U.S. Constitution and by Article I, Section 5 of the Alaska Constitution.[50] This right "guarantees the rights of people, and political parties, to associate together to achieve their political goals."[51] The Court has recognized that this means a political party has a constitutionally protected associational right to choose its nominees.[52]

Kohlhaas's claim stumbles at the second step of the Court's balancing test because Ballot Measure 2 does not burden this associational right. When the State requires parties to nominate candidates through a state-run partisan primary—as Alaska did before Ballot Measure 2—the laws governing the primary may burden the party's right to choose its nominees because they constrain the party's nomination process. Courts have thus concluded that to avoid unduly interfering with a political party's nominations in a state-run partisan primary system, the State may not override a party's rules about whether or not non-members can vote on that party's nominees.[53] Nor, under the Alaska Constitution, may the State prevent parties from combining their partisan primaries with

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[49] *See id.* at 907 (observing that a political party "has an associational right to choose its general election nominees").

[50] *See id.* at 906-07.

[51] *Id*. at 906 (emphasis omitted).

[52] *Id.* at 907.

[53] *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986).

each other[54] or allowing non-members to seek their nomination.[55]

But unlike laws governing state-run partisan primaries, Ballot Measure 2 does not restrict political parties' right to nominate candidates—on the contrary, it *eliminates* state involvement in that party business altogether. Political parties will no longer nominate candidates through a state-run primary. The new, nonpartisan primary does not select political party nominees—instead, it simply winnows the overall field of candidates to four, regardless of their party affiliations or lack thereof.[56] This case is not "the opposite side of the coin" to the cases Kohlhaas cites, because Ballot Measure 2 has tossed out the partisan primary "coin" altogether. [At. Br. 6] The parties are now completely free to nominate and endorse candidates however they like, and to campaign on behalf of those candidates—the State is no longer involved in that process. Because the State is no longer involved in the parties' nomination of candidates, the State's election laws do not burden the parties' associational right to choose their nominees.

The U.S. Supreme Court reached this conclusion in *Washington State Grange v. Washington State Republican Party*, holding that open, nonpartisan primaries are permissible under the federal constitution because they do not select party nominees.[57]

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[54] *Green Party I*, 118 P.3d at 1070.

[55] *Alaska Democratic Party*, 426 P.3d at 915.

[56] AS 15.25.010.

[57] *Wash. State Grange*, 552 U.S. at 459. *See also Cal. Democratic Party*, 530 U.S. at 585-86 (noting, in dicta, that a nonpartisan primary "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure

The Court rejected a facial challenge to a Washington voter initiative creating an open primary in which the top two candidates advanced to the general election regardless of party affiliation.[58] Regulations explained that this primary "does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election."[59] The political party plaintiff argued that this open, nonpartisan primary violated its right to political association by "usurping its right to nominate its own candidates and by forcing it to associate with candidates it does not endorse."[60] The Court rejected this argument because Washington's system did not select the party's nominees.[61] The Court explained that "[t]he essence of nomination—the choice of a party representative—does not occur" in an open, nonpartisan primary.[62] Thus, the state did not "usurp" the party's right to select its own nominees; parties could still do so "by whatever mechanism they choose," and whether they did so "outside the state-run primary is simply irrelevant."[63]

Kohlhaas' constitutional claim here fails for the same reason: Just like Washington's primary, Alaska's new primary will not select political party nominees.

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more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association.").

58 *Wash. State Grange*, 552 U.S. at 447-48.

59 *Id.* at 453 (quoting Wash. Admin. Code § 434-262-012 (repealed)) (internal quotation marks omitted).

60 *Id.* at 448.

61 *Id.* at 453-54, 458.

62 *Id.* at 453.

63 *Id.*

The primary "does not serve to determine the nominee of a political party or political group but serves only to narrow the number of candidates whose names will appear on the ballot at the general election."[64] If a political party wants to nominate or endorse candidates, it is free to do so outside of the state-run primary process.[65] As Kohlhaas observes, "[t]he Rules of the Alaskan Independence Party provide that their candidates are to be selected by party convention," and parties remain free to use a convention process or any other process they like to select nominees. [At. Br. 5 n.2] Even under the prior system, all political parties selected nominees for president and vice president without state involvement, so they can do the same for other offices.[66]

Kohlhaas dislikes that Ballot Measure 2's new primary does not involve the political parties, asserting that the parties cannot afford to run their own primary elections to choose their nominees and may resort to doing so via "party bosses" in "smoke-filled rooms." [At. Br. 7 n.4] But these are policy concerns—not constitutional ones—because the parties' right to choose their nominees does not include an obligation that the State run their primaries. Indeed, Kohlhaas has conceded that "there is no legal requirement that the State pay for primary elections to select party candidates." [Exc. 194]

The State's prior partisan primary system was a creature of statute—nothing in the state or federal constitution requires the State to hold a primary at all, much less one structured around political parties. During Alaska's constitutional convention debates,

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64 AS 15.25.010.

65 *Cf. Wash. State Grange*, 552 U.S. at 453.

66 *See* AS 15.30.020.

Delegate Victor Rivers explained that the constitution does not mention a primary election because the delegates intended to leave flexibility for future changes:

> [I]t would probably be very unwise to pinpoint in the constitutional section here a method of conducting elections such as set up that the primary shall do this or that. There might not always be a primary. There might be some time when nominating conventions will be reverted to as they are in some states. So if we pinpointed the matter of a primary in this thing, we might then pin down the type of the nominating elections we would have in the state for all time to come. It did not seem to me that we should do that in the constitution . . . .[67]

Here, Alaskan voters, exercising their constitutional right to "enact laws by initiative" and relying on the State's "broad power" to regulate elections for federal and state offices, have eliminated partisan primaries.[68] It is not the Court's role to second-guess the voters' choice based on the policy concerns Kohlhaas raises.

Kohlhaas asserts that if the State chooses to run primary elections, "it has to treat political parties and their candidates in a Constitutional manner," but he does not explain how this requires giving the parties a central role in primaries. [At. Br. 7] He worries that without a central role, political parties will be "marginalized" and minor party candidates "will get lost in the shuffle." [At. Br. 7-8] He suggests that the voters who passed Ballot Measure 2 wanted to harm political parties by reducing their role in primaries. [At. Br. 12] But these are just more policy concerns, not constitutional ones. The State is

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67 Proceedings of the Constitutional Convention (PACC) at 2044-45; *see also* PACC at 2087 (Delegate Cooper) ("There is nothing in here that states, or in any article that I know of on this constitution floor that deals with primary elections.").

68 Alaska Const. art. XI, § 1; *see also Tashjian*, 479 U.S. 217 (citing U.S. Const. art. I, § 4, cl. 1)).

not obligated to promote political parties or protect their political power—indeed, the State has no valid interest in protecting political parties from competition,[69] and the open primary may in fact benefit minor political parties and their candidates.

Nor is it constitutionally relevant whether Alaska's new election system is an "experiment"; whether Alaskan voters or voters in other states previously rejected similar systems; whether Alaskan voters passed Ballot Measure 2 because they favored the "dark money disclosure" provisions and not the new election system; or whether pending legislation "would make severability provisions in initiative provisions illegal." [At. Br. 11, 13-15] None of these miscellaneous policy arguments identify constitutional burdens.

Because an open, nonpartisan primary "does not impose any severe burden" on parties' associational rights, the State needs only an "important regulatory interest" to justify it.[70] Section 1 of Ballot Measure 2 lays out the intent behind the new system, declaring that the law will "generate more qualified and competitive candidates for elected office, boost voter turnout, better reflect the will of the electorate, reward cooperation, and reduce partisanship among elected officials."[71] These are not "just words," as Kohlhaas calls them, but valid regulatory interests. [At. Br. 9] Indeed, the

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69 *Green Party I*, 118 P.3d at 1068 ("States do not have a valid interest in manipulating the outcome of elections, in protecting the major parties from competition, or in stunting the growth of new parties.") (quoting *Clingman v. Beaver,* 544 U.S. 581, 609 (2005) (Stevens, J., dissenting)).

70 *Cf. Wash. State Grange*, 552 U.S. 458.

71 2020 Alaska Laws Initiative Meas. 2, § 1.

Court has recognized similar interests as "legitimate and important."[72] Kohlhaas contends that the new system may not actually advance these goals, but that remains to be seen, because no elections have been held. [At. Br. 9] And because strict scrutiny does not apply—given the minimal (or absent) burden on associational rights—the State need not show that a nonpartisan primary is the best or least restrictive way to advance these goals.

The Alaska Constitution, although "more protective of political parties' associational interests than is the federal constitution,"[73] does not demand a different result than the U.S. Supreme Court reached in *Washington State Grange*. Although this Court sometimes sees laws as more burdensome on rights than the federal courts do,[74] here the law does not burden the parties' right to choose their nominees at all. Indeed, Alaska law now interferes much *less* with this right than it used to. Before, the State required parties to use a state-controlled process governed by state rules. Now, they may nominate candidates however they choose. The Court should not view this complete freedom as any more of a "burden" than the federal courts do. The State does not interfere with political party nominations by washing its hands of them altogether.

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[72] *See O'Callaghan v. State*, 914 P.2d 1250, 1261–63 (Alaska 1996) (recognizing as "legitimate and important" the state interests in "encourag[ing] voter turnout, maximize[ing] voters' freedom of choice among candidates, and . . . ensur[ing] that the 'officers elected are representative of the people to be governed'").

[73] *Alaska Democratic Party*, 426 P.3d at 909.

[74] *See id*. (finding that requiring a candidate to register with a party to run in its primary was a substantial burden, where federal courts considered it a modest burden).

### 2. Limiting the general election to candidates who succeed in the nonpartisan primary does not violate associational rights.

Ballot Measure 2's nonpartisan primary system means that the political parties' nominees for office are no longer guaranteed spots in the general election, but this is likewise not a constitutional problem. Overall, the new system makes running for office much easier—not harder—so it does not burden associational rights in this way either.

To start with, *State v. Alaska Democratic Party* did not hold that political parties have a constitutional right to get their nominees' names onto the general election ballot.[75] Although the Court referred to a party's "right to choose its general election nominees,"[76] the Court was talking about the party's right to *choose* its nominees, not its right to get them into the general election. The issue before the Court was whether the State could restrict a party's choice by requiring that a party's nominee be registered with that party.[77] The Court did not decide—because the question was not before it—that political parties have a right to automatic slots for their nominees in the general election.

Kohlhaas previously denied any such ballot-access claim, stating that this aspect of *Alaska Democratic Party* is "not relevant" and that his objection is that a party cannot have its candidate *identified* in the primary, "not that its candidate cannot get on the general election ballot because they do not prevail in the primary." [Exc. 204]

Nevertheless, to the extent Kohlhaas asserts a claim about ballot access for

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75 *Id.* at 909.

76 *Id.*

77 *Id*. at 904.

political party nominees, it fails because Ballot Measure 2 does not restrict ballot access at all: any person may file to run in the open primary by simply filling out a declaration of candidacy.[78] Likewise, any political party or group may field candidates in the primary without the need to meet the requirements for recognized party status.[79] And independent or political group candidates no longer need to go through a signature-gathering process—they can simply file to run in the primary with everyone else.

Although only the top four candidates in the primary proceed to the general election, that limit is both reasonable and not actually a "ballot access restriction." It is reasonable because a candidate who is not among the top four most popular candidates in the primary is unlikely to have much chance of winning the general election. And it is not a "ballot access restriction" because "ballot access"—properly conceived—is simply the chance to run for office. The new system, unlike the old system, lets anyone have that chance, without any need for candidates or parties to demonstrate any threshold "modicum of support" as a prerequisite to going before the voters.[80] A candidate who runs and loses in the open, nonpartisan primary has not been deprived of "ballot access," unlike an independent candidate who could not gather enough signatures to get on the

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[78] *See* AS 15.25.030.

[79] *See* AS 15.80.010(27) (requirements for political party status).

[80] The State may require "some preliminary showing of a significant modicum of support" before printing a candidate's name on the ballot to avoid "laundry list" ballots. *See State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 980 (Alaska 2005); *Vogler v. Miller*, 651 P.2d 1, 4 (Alaska 1982). Ballot Measure 2 does away with the requirement of any preliminary showing of support to appear on the primary ballot, and advances the top four candidates to the general election ballot.

ballot under the old system, or a political group that could not meet the State's standards for recognized party status.[81] Instead, a candidate who loses in the open, nonpartisan primary—like a candidate who lost in the old, partisan primary—has had their name presented to the voters, and has simply failed to win them over at the ballot box.

Ballot Measure 2's nonpartisan primary thus does not unconstitutionally restrict political parties' ballot access. In fact, the "ballot is more accessible" because of Ballot Measure 2, as Kohlhaas recognizes. [At. Br. 8] Party-supported candidates have the same unrestricted ballot access as everyone else: they can run in the open primary, and if they get enough votes to be among the top four, they will proceed to the general election.

Kohlhaas argues for the first time on appeal that Ballot Measure 2 "eliminated the only reasonable method of qualifying a party in Alaska," such that it will now be too difficult for minor political parties to achieve official recognition and the benefits that come with it. [At. Br. 8] Kohlhaas attached to his complaint an article that discussed this idea. [Exc. 35–36, 65] But Kohlhaas did not include any claim about party recognition in his complaint, instead summarizing the article as arguing that Democrats and Republicans would advance to the general election instead of minor party candidates. [Ex. 65] And Kohlhaas did not discuss the qualifications for political parties in any of his trial court briefing or at oral argument below. [*See* Exc. 149, 199–200]

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[81] *Cf. Green Party of Alaska v. State, Div. of Elections (Green Party II),* 147 P.3d 728, 730 (Alaska 2006) (explaining that Green Party candidates could not run in the partisan primary because the Green Party did not meet the requirements for party recognition); *Vogler*, 651 P.2d 1 (explaining that a petition candidate was denied ballot access because he did not gather enough signatures to meet the statutory threshold).

The Court should not consider this new claim because Kohlhaas did not raise it below,[82] and even if he had, it is inadequately briefed and suffers from standing and ripeness defects.[83] [At. Br. 8] The proper context for such a claim would be a challenge to the State's requirements for political party recognition, filed by a party that cannot meet them, rather than this facial challenge to Ballot Measure 2.

### 3. Listing candidates' registered political party affiliation on the ballot does not violate associational rights.

Kohlhaas further objects that Ballot Measure 2 allows candidates to list their registered political party affiliation on the primary and general election ballots even if their parties do not support them.[84] [At. Br. 7] But the State's interest in providing relevant information to voters justifies including these designations on the ballot, and the ballot will explain what they mean. Speculation that voters will be confused into thinking that these designations are party endorsements cannot sustain a facial challenge.[85]

Kohlhaas's complaint about the candidate affiliation designations clears the first step of the Court's balancing test by "assert[ing] a constitutional right."[86] He believes the

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82 *O'Callaghan v. State*, 826 P.2d 1132, 1134 n.1 (Alaska 1992) ("Basic due process considerations mandate that we not entertain [new] arguments for the first time on appeal.").

83 *See State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980) ("Failure to argue a point constitutes an abandonment of it.").

84 AS 15.15.030(5) (describing the requirements for general election ballots); AS 15.25.060 (extending those requirements to primary ballots).

85 *Cf. Washington State Grange*, 552 U.S. at 454.

86 *See Alaska Democratic Party*, 426 P.3d at 907 (observing that a political party "has an associational right to choose its general election nominees").

designations force parties to associate with candidates they may not support. [At. Br. 7] "[A] corollary of the right to associate is the right not to associate,"[87] so political parties do have a constitutional right not to associate with candidates.

But Kohlhaas again falters at the second step of the Court's balancing test because Ballot Measure 2 does not significantly burden this right. Here, *Washington State Grange* is again instructive.[88] Like Ballot Measure 2, the initiative in that case—in addition to establishing a nonpartisan primary—allowed candidates to indicate their political party "preference" on the ballot.[89] The U.S. Supreme Court rejected the claim that this forced parties to associate with candidates they did not endorse.[90] The Court observed that Washington law made clear that the general election candidates were not the nominees of any party.[91] And the Court doubted that voters would mistakenly believe that the candidates were party nominees, holding that a facial challenge could not survive "on the mere possibility of voter confusion."[92] Having found no severe burden on associational rights, the Court held that the state interest in providing relevant information to voters

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[87] *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

[88] *Wash. State Grange*, 552 U.S. at 454 (addressing the contention that the law "burdens [political parties'] associational rights because voters will assume that candidates on the general election ballot are the nominees of their preferred parties").

[89] *Id*. at 444.

[90] *Id*. at 448-49.

[91] *Id.* at 453.

[92] *Id.* at 454 ("There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate.").

"easily" justified including candidates' party preference on the ballot.[93]

Kohlhaas similarly cannot prevail in his facial challenge based on his speculation that voters will mistake a candidate's registered party affiliation for the party's endorsement or nomination, leading to "massive voter confusion." [At. Br. 7] He has produced no evidence of such confusion—nor could he, since no election has yet been held and the State has not even finalized the new ballot design. The ballots discussed in motion practice below were clearly marked "Demonstration Ballot," and were found on the Division's website under the heading "Concept Ballots." [Exc. 417, 172] The website told the public: "You can view sample demonstration ballots. If you have suggestions or questions, please let us know. *We want voters to be part of the ballot design process*." [Exc. 417 (emphasis added)] Kohlhaas's concerns that the ballot is confusing should be directed to the Division, so that it can consider his design suggestions. [At. Br. 11]

Ballot Measure 2 requires a disclaimer on the ballot stating that "[a] candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party or group . . . ."[94] Both the U.S. Supreme Court and this Court have endorsed such disclaimers as a way to avoid voter confusion.[95] Along with disclaimers,

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93 *Id.* at 458.

94 AS 15.15.030(14).

95 *Wash. State Grange*, 552 U.S. at 456 (noting voter confusion is unlikely because the "ballot could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party"); *Alaska Democratic Party*, 426 P.3d at 913 (noting voters could be educated by "prominent disclaimers explaining that a candidate's party affiliation denotes only the candidate's voter registration and nothing more").

the ballots will also likely include text like "Reg." or "Registered" before the candidates' party affiliations (e.g., "Registered Republican"), to flag for voters that these are merely the candidates' voter registrations, not party endorsements. [E.g., Exc. 172] These ballot design measures will be reinforced by the public education campaign that Ballot Measure 2 requires, further limiting the chance that voters will mistake the candidates for party nominees rather than simply registered party members.[96]

Kohlhaas and the Treadwell amici are incorrect in asserting that "nonmember" candidates can "lie" about their party affiliation by designating themselves as affiliated with a party "with no obligation to be a member of or support that party." [At. Br. 8; Treadwell Br. 38-39, 28-29] On the contrary, Ballot Measure 2—unlike the law upheld in *Washington State Grange*[97]—allows only candidates "registered as affiliated with a political party" to choose to have that party designation listed on the ballot, reducing the risk that candidates will use the labels to deceive voters.[98] While a candidate who is

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[96] 2020 Alaska Laws Initiative Meas. 2, § 74 ("For a period of not less than two calendar years immediately following the effective date of this Act, the director of elections shall, in a manner reasonably calculated to educate the public, inform voters of the changes made to the state's election systems in this Act.").

[97] *See Wash. State Grange*, 552 U.S. at 447 ("A political party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference.").

[98] *See* AS 15.15.030(5) ("If a candidate is registered as affiliated with a political party or political group, the party affiliation, if any, may be designated after the name of the candidate, upon request of the candidate. If a candidate has requested designation as nonpartisan or undeclared, that designation shall be placed after the name of the candidate. If a candidate is not registered as affiliated with a political party or political group and has not requested to be designated as nonpartisan or undeclared, the candidate shall be designated as undeclared.").

registered with a political party may choose to be designated as "nonpartisan" or "undeclared," that has no bearing on the party's associational rights.[99] Whether candidates registered with political parties truly "support" or "have beliefs consistent with" their parties can be debated during the campaign. [Treadwell Br. 29, At. Br. 6]

The Treadwell amici ask this Court to reject *Washington State Grange* and view the possibility of voter confusion as a severe burden on parties' associational rights that triggers strict scrutiny. [Treadwell Br. 34-35] But although the Alaska Constitution is more protective than the federal constitution, the Court should not view the speculative possibility of voter confusion as any more of a burden than the U.S. Supreme Court did. The cases in which this Court disagreed with the U.S. Supreme Court involved state laws that actually restricted what political parties could do—restrictions that this Court saw as more burdensome for purposes of the Alaska Constitution.[100] Here, by contrast, the candidates' designations on the ballot do not prevent political parties from doing anything—they remain fully free to campaign against any candidates they dislike.

Moreover, this Court, like the U.S. Supreme Court, has opined that voters are not as readily confused as Kohlhaas and the Treadwell amici assume. The U.S. Supreme Court has said that voters are not easily "misled by party labels," and can "inform

[99] *See id.*

[100] *See, e.g.*, *Alaska Democratic Party*, 426 P.3d at 909 (finding that requiring a candidate to register with a party to run in its primary was a substantial burden); *State, Div. of Elections v. Green Party of Alaska (Green Party I)*, 118 P.3d 1054, 1065 (Alaska 2005) (finding that prohibiting combined party primary ballots was a substantial burden).

themselves about campaign issues."[101] This Court was "equally confident that Alaska voters would have little trouble understanding and choosing between combined ballots" that included candidates with multiple party designations in a partisan primary.[102] This Court likewise expressed confidence that the State can "design a ballot that voters can understand."[103] In *Alaska Democratic Party*, the Court saw "no basis for predicting that Alaska voters will be unable to understand a Democratic Party nominee who nonetheless is, for voter registration purposes, an independent voter."[104] The Court similarly has no basis for predicting that they will be unable to understand a candidate who is, for voter registration purposes, a Democrat, but who is not the Democratic Party's nominee.

Although the ballots will not indicate which candidates are nominated or endorsed by political parties, a party's right to associate (or not associate) with candidates does not entail a right to have its nominees "meaningfully identified on the ballots which are provided to the voter," as Kohlhaas originally claimed. [Exc. 65] Kohlhaas conceded this point at oral argument, and even though he attempts to resurrect it here, it remains meritless. [Exc. 408; Tr. 34 ("[I]f the state decided to hold a non-party primary like they do in various municipalities where nothing was put on the ballot as to identifying the candidates, that wouldn't be improper."); At. Br. 7] The parties are free to campaign for

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101 *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983)).

102 *Green Party I*, 118 P.3d at 1068.

103 *Alaska Democratic Party*, 426 P.3d at 913.

104 *Id*.

the candidates they support, but the ballot is not their campaign forum. As the U.S. Supreme Court held in *Washington State Grange*, "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot."[105] And "[p]arties do not gain such a right simply because the State affords candidates the opportunity to indicate their party preference on the ballot."[106] As the Ninth Circuit has succinctly observed: "A ballot is a ballot, not a bumper sticker. Cities and states have a legitimate interest in assuring that the purpose of a ballot is not 'transform[ed] . . . from a means of choosing candidates to a billboard for political advertising.'"[107]

Because Ballot Measure 2's candidate designations do not severely burden associational rights, the State need only show an important regulatory interest in including them on the ballot.[108] Alaska—like Washington, as the U.S. Supreme Court recognized—has an interest in providing voters with relevant information about candidates, including their party affiliation.[109] "There can be no question about the legitimacy of [this interest]" and it "easily" justified Washington's law in *Washington State Grange*, so it justifies the very similar provision in Ballot Measure 2.[110]

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105 *Wash. State Grange*, 552 U.S. at 453 n.7.

106 *Id*.

107 *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997)).

108 *See Alaska Democratic Party*, 426 P.3d at 909.

109 *Wash. State Grange*, 552 U.S. at 458.

110 *Id.* (quoting *Anderson*, 460 U.S. at 796).

### B. The nonpartisan primary does not violate Article III, Section 8's commands about the election of the lieutenant governor.

Article III, Section 8 of the Alaska Constitution provides that the lieutenant governor is nominated like other candidates and elected as a team with the governor:

> 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.

Kohlhaas correctly observes that this means candidates for governor and lieutenant governor must run together on joint tickets in the general election, but he incorrectly asserts that that Ballot Measure 2 provides no feasible way of pairing candidates for these joint tickets. [At. Br. 18-20] In fact, Ballot Measure 2 creates the necessary joint tickets by having candidates pair up by choice and run together in the primary, and this system falls within the bounds of Article III, Section 8's flexible language.

Kohlhaas's position seems to be not so much that Ballot Measure 2 violates the constitution in how it pairs candidates, but that the State is violating Ballot Measure 2 in its election planning. [At. Br. 18-20] His curious misreading of the initiative springs from Section 20, which provides that in the primary, a voter "may cast a vote for any candidate for each elective . . . office, without limitations based on the political party or political group affiliation of either the voter or the candidate."[111] [At. Br. 18] Kohlhaas believes the words "*each* elective . . . *office*" implicitly foreclose joint gubernatorial tickets in the

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[111] AS 15.15.025. Ballot Measure 2 designated this section AS 15.15.005, but it was renumbered by the revisor of statutes in 2021.

primary. [Exc. 151] But Section 20 is intended to establish only that primary will be an open, nonpartisan election in which all voters may participate without regard to political affiliation. The key phrase is not "each elective . . . office," but "without limitations based on the political party or group affiliation of either the voter or the candidate."[112]

Looking at Ballot Measure 2 as a whole, it is clear that it contemplates joint tickets in the primary. Alaska Statute 15.25.030 requires candidates for governor and lieutenant governor to identify their running-mates when declaring candidacy, meaning that they must team up *before* the primary.[113] And AS 15.25.060 requires that "the order of the placement of the names for each office" on the primary ballot be the same as it is on the general election ballot, where the governor and the lieutenant governor appear "under the same section."[114] Further, AS 15.25.100—which provides that the top four primary candidates proceed to the general election—clarifies that "candidates for lieutenant governor and governor are treated as a single paired unit" for this purpose.[115] This language only makes sense if those candidates run on joint tickets in the primary.

Pairing gubernatorial candidates with their running-mates before the primary is a reasonable way to resolve a practical issue that Kohlhaas recognizes. [At. Br. 18-19] The constitution does not specify how joint gubernatorial tickets should be formed for the general election, but of course—as Kohlhaas observes—candidates cannot simply be

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112 AS 15.15.025.

113 AS 15.25.030(a)(16)-(17).

114 AS 15.15.030(5).

115 AS 15.25.100(a).

randomly paired with running-mates who may have completely incompatible views. [At. Br. 19] Kohlhaas prefers the old system of creating joint tickets through partisan primaries, which approximated rough ideological compatibility by pairing candidates based on their political party allegiances. [*Id.*] But with Ballot Measure 2, the voters have chosen a different way to create joint tickets, which ensures even closer compatibility by simply allowing the candidates to choose their own running-mates.

The constitution leaves room for the voters' choice. Under Ballot Measure 2, candidates for lieutenant governor are "nominated in the manner provided by law for nominating candidates for other elective offices" as Article III, Section 8 requires. They qualify for the general election in the same general way as everyone else, by winning a top-four slot in an open, nonpartisan primary. Although candidates for lieutenant governor run alongside a running-mate in the primary, the Court need not adopt a restrictive reading that considers this a different "manner" of nomination. The constitutional text is silent on nomination processes, and read in context, its phrasing—"in the manner *provided by law*"—connotes legislative *flexibility*, not restriction.[116]

The Treadwell amici assert that the "plain meaning" of Article III, Section 8 is that the lieutenant governor must "run[] solo in a partisan primary," but the text says nothing about requiring a primary election of any kind, let alone a partisan one in which the

[116] *See* PACC at 2045 (Delegate V. Rivers) ("The election procedure prescribed by law is the terminology used in this line, and I think it would then be left up to the legislature to make a fair and just manner of nominating these individuals so they could run on a joint ballot.").

lieutenant governor must run alone. [Treadwell Br. 20] Nor does the spirited convention debate over the section justify penciling in a serious restriction that did not make it into the text. The final language was a compromise between many opposing views and different visions.[117] The debates reveal no uniform intent by the delegates that Article III, Section 8 would implicitly enshrine partisan primary elections in the constitution without even mentioning them. [Treadwell Br. 23-28]

The Treadwell amici seize on some delegates' derogatory use of the terms "buddy" and "flunky" to describe the lieutenant governor,[118] implying that this reflected widespread opposition to the idea of hand-picked running-mates. [Treadwell Br. 23, 30] But in fact, Delegates Hellenthal and Buckalew—who first employed these terms[119]—objected to having *any* elected second-in-command, advocating instead for the governor to *appoint* all officials to make the executive branch more efficient.[120] This was the crux

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117 *See, e.g.*, PAAC at 2070 (Delegate Hellenthal) ("[W]hy don't we just let our governor hire someone to help him and fire him when he does not want him[?]"); 2072 (Delegate Hurley) (advocating for "a primary election at which the voters will determine what men are to go on the general election ballot as secretary of state"), (Delegate Nordale) (proposing that the governor and lieutenant governor "would run together").

118 The term used in the original constitution was "secretary of state," but this discussion uses the current term "lieutenant governor" for simplicity. Although the delegates debated which term to use given the different connotations of each, that debate is not particularly relevant here. *See, e.g.*, PACC at 2145-47.

119 *See* PACC at 2070 (Delegate Hellenthal introducing the term "buddy"), 2089 (Delegate Buckalew introducing the term "flunky").

120 *See* PACC at 2128-29 (Delegate Hellenthal) (proposing language creating a secretary of state appointed by the governor); 2081 (Delegate Buckalew) ("I want to make my position clear in this matter. I'm going to vote against the amendment. I don't believe in an elective secretary of state. I can see no reason for it."). A partisan primary requirement would not have appeased Delegate Buckalew at all. *See* PACC at 2142 ("[We] all know that in Alaska my party, which is the Democratic party, has splinter

of the debate: whether the governor's second-in-command would be appointed or elected.[121] The "buddy" system that Delegates Hellenthal and Buckalew criticized was in fact the system that was ultimately adopted in the constitution over their objection: having two candidates run on a joint ticket in the general election.[122]

Other delegates who supported this joint ticket "buddy" system—and whose views therefore prevailed over Hellenthal's and Buckalew's in the end—opined that the joint tickets could pair up in various possible ways, including by choice.[123] Although the final

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groups in it. The Republican party has splinter groups in it, and I can envision that you will have a secretary of state, although he is running under the same flag, who will be miles apart, . . . I am for a strong executive, and I go along with Mr. Rivers' thinking on this matter to its logical conclusion. I think they should all be appointed.").

121 *See* PACC at 2137 (Delegate Nordale) ("[I]t seems to me it does boil down to just one thing, do we want the people to elect this man or do we want him appointed?"); 2138 (Delegate White) ("I think the thing to get settled here is whether we want an elected or an appointive secretary of state.").

122 Delegate Buckalew proposed deleting the section that became Article III, Section 8 altogether. *See* PACC at 2089. Delegate Hellenthal supported the proposed deletion and objected to the final version. *See* PACC at 2092, 2145.

123 *See, e.g.*, PACC at 2130 (Delegate Longborg) ("I think the fair way to the people would be to have that man along with the governor on the general election ticket. Then if we don't feel that the governor chose wisely or the party chose wisely, they can both be rejected."); 2131 (Delegate V. Rivers) ("We heard this referred to as a 'pal', 'buddy', 'flunky' and a number of other package deal systems, but I just want to point out to you in all sincerity, regardless of the sarcasm or ridicule attaching to the presentation of this section by the Committee, it is the 'granddaddy' system of the American system of government, inasmuch as it is a part of the national administration's original organization, which to my way of thinking has worked quite successfully. It is also the method adopted and used by the most populous and the wealthiest state of the union, the State of New York"); 2083 ("[W]e wanted to see this procedure of joint election carried on in the general election; certainly had no objection to seeing the nominations for the office be made whatever manner of primary the law should prescribe or provide."); 2134 ("[T]hey will be elected jointly at a general election. Nominations then would be made in any manner prescribed by the legislature."); 2071 (Delegate Harris) (noting that the

version of the section included language stating that the lieutenant governor would be nominated, it did not specify any required nomination process.[124] Some delegates may have *wanted* the joint tickets to be paired through partisan primaries, but the text that actually passed did not mention either political parties or primaries.[125] Given the range of the delegates' different priorities and the tensions between them, the comments of a few individuals cannot overcome the text.

In the end, the Treadwell amici contradict their own assertion that the "plain meaning" of Article III, Section 8 requires a partisan primary by acknowledging that it leaves flexibility for "a party convention if the primary is abolished." [Treadwell Br. 20, 30] This undermines their position, because a convention system would likewise not guarantee a lieutenant governor candidate who is voted on "solo" and not hand-picked.

What's more, if Article III, Section 8 truly meant that governor and lieutenant governor candidates could not team up by choice, then Alaska's old system for petition

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committee did "not set any definite rules of how they are to be tied up on the ticket. That is to be done later on by the legislature.").

[124] *See* PACC at 2145 (adding language requiring nomination of lieutenant governor).

[125] *See, e.g.*, PACC at 2141 (Delegate Taylor) ("If I felt that the secretary of state was going to be handpicked, the people were not going to be allowed to select that secretary of state by our system of nomination which at present is by the primary, I would be against Section 6, but where he is going to go on the ballot of the general election, how would he get on that ballot unless he was selected by the people in the primary? It is the only way he could do it. . . . we can put in there that after nomination the man receiving the highest number of votes in the primary for secretary of state would be paired with the man receiving the highest number of votes for nomination for governor, and they would run by unit or along that particular line.").

candidates—which was never questioned on this basis[126]—would be unconstitutional too. Under that system, candidates not seeking political party nominations—such as independent candidates—were nominated by petition rather than through the partisan primary. Candidates for governor and lieutenant governor who pursued this path did so in pairs: they teamed up *before* gathering voter signatures. A nominating petition for a candidate for governor had to list "the name of the candidate for lieutenant governor running jointly with the candidate for governor."[127] A gubernatorial candidate could also replace a running-mate who withdrew after nomination.[128] Thus, if forming joint tickets by choice was a constitutional problem under Article III, Section 8, that problem predated Ballot Measure 2 and would continue to exist if it were struck down. And indeed, requiring candidates to be paired by political parties rather than pairing up by choice would completely bar ballot access for independent candidates who are not affiliated with political parties, likely violating both the state and federal constitutions.[129]

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[126] *See, e.g.*, 1982 Alaska Op. Att'y Gen (Aug. 27), 1982 WL 43796 at *2 (discussing questions related to the nominating petition process and noting "no conflict with the joint candidacy language of Alaska Constitution, article III, sections 8 and 13").

[127] AS 15.25.180(a)(17) (repealed Feb. 28, 2021).

[128] *See* former 6 AAC 25.225 (allowing a petition candidate for governor to replace a lieutenant governor running mate who withdraws); 2006 Alaska Op. Att'y Gen. (Oct. 30), 2006 WL 3148680 at *1 ("[W]e think that no-party gubernatorial candidates are free to choose any running mate they wish, regardless of political affiliation or lack thereof.").

[129] *See e.g.*, *Vogler v. Miller*, 651 P.2d 1 (Alaska 1982) (invalidating statute requiring independent and small party candidates to submit signatures of three percent of votes cast at last election to secure place on ballot); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidating March filing deadline for independent presidential candidates as imposing unconstitutional burden on ballot access); 1982 Alaska Op. Att'y Gen (Aug. 27), 1982

Under Ballot Measure 2, the lieutenant governor is still nominated in the same manner as other candidates—i.e. in a non-partisan top four primary—and then elected in the general election alongside the governor as the constitutional text requires. Ballot Measure 2 therefore does not violate Article III, Section 8.

## II. Ballot Measure 2's ranked-choice voting system is constitutional.

### A. Ranked-choice voting does not burden the right to vote.

Kohlhaas also challenges Ballot Measure 2's ranked-choice voting system, but his objections are based on misunderstandings coupled with policy concerns—he identifies no constitutional problem with this new method of voting. [At. Br. 14-16]

Ranked-choice voting treats all voters—and their votes—equally. All voters have only one opportunity to rank the candidates; each voter has the same opportunity; all voters' ballots are tabulated according to the same rules; and no voters cast additional "votes" during the tabulation process. As the Ninth Circuit explained in *Dudum v. Arntz*, which upheld the constitutionality of San Francisco's similar ranked-choice voting system, "the option to rank multiple *preferences* is not the same as providing additional *votes,* or more heavily-weighted votes, relative to other votes cast."[130]

Kohlhaas suggests that a voter who does not rank all of the candidates and whose first choice is eliminated is denied "input into the final decision" as if that person had not voted at all. [At. Br. 15 n.9] But such a person will have had the exact same voting

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WL 43796 at *3 (discussing constitutional concerns with preventing a no-party gubernatorial candidate from replacing a withdrawn running-mate).

[130] 640 F.3d 1098, 1112 (9th Cir. 2011).

opportunity as all other voters, and her vote will be counted for the candidates she chooses to rank. As the Ninth Circuit explained in *Dudum*, " 'exhausted' ballots *are* counted in the election, they are simply counted as votes for losing candidates, just as if a voter had selected a losing candidate in a plurality or runoff election."[131] Voting for a losing candidate does not deny a voter input into the result. Nor does a voter who supports an unpopular candidate have any less input under the new system than under the old system. On the contrary, ranked-choice voting gives supporters of unpopular candidates *more* opportunity for input into the final decision by letting them express the full scope of their preferences rather than simply picking one favorite candidate.

Kohlhaas objects that ranked-choice voting does not precisely replicate an "ordinary run-off general election" and may not perfectly capture voters' preferences because some voters may wish they could rank candidates in a more strategic way that takes into account the order in which they are eliminated. [At. Br. 15-16] But imperfection is not a constitutional problem—no voting system is perfect, and the State nonetheless must choose one.[132] Ranked-choice voting may not offer voters all possible complex strategic voting options, but neither does single-choice voting. [At. Br. 15-16]

And ranked-choice voting comes much closer to allowing voters to express their true preferences. Under ranked-choice voting, a supporter of an unpopular candidate is more empowered to "join with the supporters of a more popular candidate with the same

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[131] *Id.* at 1110 (emphasis in original).

[132] *Id.* at 1103 (citing David M. Farrell, *Electoral Systems: A Comparative Introduction* 47 (2001)).

political views in order to avoid a totally unacceptable candidate from being elected." [At. Br. 16] A single-choice system forces such a voter to choose between a heartfelt vote for her favorite candidate and a strategic vote for a less preferred, but more popular candidate. A ranked-choice system gives the voter another option: to rank both candidates.[133] Providing this additional option does not burden the right to vote. There is no "requirement that the voter make additional choices," as Kohlhaas asserts. [At. Br. 16] Voters may make only a first-choice ranking, if they like. The distinctions between these voting systems are policy concerns, not constitutional ones.

Even if the Court were to conclude that ranked-choice voting imposes some sort of burden on the right to vote, that burden is not severe and thus the State need only show an important regulatory interest to support it.[134] The "Findings and Intent" section of Ballot Measure 2 identifies the relevant regulatory interests as follows:

> It is in the public interest of Alaska to adopt a general election system that reflects the core democratic principle of majority rule. A ranked-choice voting system will help ensure that the values of elected officials more broadly reflect the values of the electorate, mitigate the likelihood that a candidate who is disapproved by a majority of voters will get elected, encourage candidates to appeal to a broader section of the electorate, allow Alaskans to vote for the candidates that most accurately reflect their values without risking the election of those candidates that least accurately reflect their values, encourage greater third-party and independent participation in

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133 Of course, she could always decide to rank her second-choice candidate ahead of her favorite candidate if she were sufficiently worried that her second-choice candidate would be eliminated early and a totally unacceptable candidate would prevail. This would be similar to the strategic choice she might make in a single-choice system.

134 *Dudum*, 640 F.3d at 1106 ("We have repeatedly upheld as '"not severe" restrictions that are generally applicable, even-handed, politically neutral, and . . . protect the reliability and integrity of the election process.'")

elections, and provide a stronger mandate for winning candidates.[135]

These interests are more than sufficient to justify any minimal burden that ranked-choice voting imposes on voters. Single-choice voting may be easier to understand, but it can also result in the victory of a candidate whom most voters strongly disfavor or who wins only a small minority of votes in a big field, or both.[136] Ranked-choice voting may be somewhat more complicated, but it allows voters to "express nuanced voting preferences" and to elect candidates with the support of more voters.[137] Weighing the advantages and disadvantages of these different voting systems is a quintessentially legislative function and courts should not second-guess this policy choice.[138]

### B. Ranked-choice voting does not violate Article III, Section 3's command that the candidate with the greatest number of votes shall be governor.

Article III, Section 3 of the Alaska Constitution provides that "[t]he 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." Kohlhaas sees Ballot Measure 2 as inconsistent with this directive, but he again misunderstands the system.

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135 2020 Alaska Laws Initiative Meas. 2, § 1(5).

136 *Dudum*, 640 F.3d at 1103.

137 *Id.* at 1116 (citing *Storer v. Brown*, 415 U.S. 724, 732 (1974) (noting a state interest in "assur[ing] that the winner is the choice of a majority, or at least a strong plurality, of those voting.")). *See also McSweeney v. City of Cambridge*, 665 N.E.2d 11, 15 (Mass. 1996) (observing that "a preferential scheme . . . seeks more accurately to reflect voter sentiment").

138 *Cf. Dudum*, 640 F.3d at 1114 ("[T]he City must use *some* overall system for casting ballots, tabulating votes, and determining the outcome of elections. It cannot select a system that best serves all the multiplicity of interests implicated in an election, as no such system exists.").

Kohlhaas argues that Ballot Measure 2 imposes "a series of run-off elections," which he believes is contrary to the requirement that the governor win the most votes in "a general election." [At. Br. 17-18] But even assuming this language prohibits run-off elections—an assumption that Kohlhaas does not support—ranked-choice voting does not violate it. Although ranked-choice voting is sometimes referred to as an "instant runoff" system,[139] it does not create actual runoff elections. Voters vote only once, in a single general election; they never return to the polls. Although the vote tabulation process is more complex than before, there is still only one general election, and the candidate with the most votes in that election wins. As the Ninth Circuit explained, "[t]he series of calculations required by the algorithm to produce the winning candidate are simply steps of a single tabulation, not separate rounds of voting."[140]

Ballot Measure 2 introduces new methods of voting and vote tabulation, but it does not—as the Treadwell amici assert—"put[] in place a system that requires a majority of votes in contravention of the Constitution." [Treadwell Br. 7] Although ranked-choice voting will often produce a winner who has been ranked by (and thus has at least partial support from) a majority of voters, it does not require this. At the last stage of tabulation, "if two or fewer continuing candidates remain, the candidate with the greatest number of votes is elected."[141] This winning candidate will of course have a majority of the remaining *active* ballots, but that is not necessarily a majority of the *total*

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[139] *See, e.g.,* Exc. 174.

[140] *Dudum*, 640 F.3d at 1107.

[141] AS 15.15.350(d)(1).

ballots.[142] Depending on how many voters choose to rank multiple candidates, the winner need not have been ranked favorably—or at all—by a majority of voters. When a voter does not rank all of the candidates and her choices are eliminated in earlier rounds of tabulation, her ballot becomes "inactive" and counts for a losing candidate. Because inactive ballots are not counted in later rounds, if enough ballots become inactive a candidate with a majority of active ballots might not have a majority of total ballots cast in the race. Indeed, although supporters of ranked-choice voting emphasize that it *promotes* majority results,[143] critics of ranked-choice voting protest that it does not actually *require* majority results.[144] Kohlhaas himself pointed this out below. [Exc. 65 (stating that "a majority result cannot necessarily be obtained")]

The Treadwell amici observe that the Maine Supreme Court found ranked-choice voting to be inconsistent with Maine's constitutional requirement that candidates be elected "by a plurality of all votes," but this Court need not adopt that court's flawed analysis.[145] [Treadwell Br. 14-15] The Maine court reasoned that the candidate receiving the most *first-choice rankings*—thus coming out ahead in the first round of tabulation—

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142 *See* AS 15.15.350.

143 *See, e.g.*, FairVote, *Benefits of RCV*, https://www.fairvote.org/rcvbenefits; Alaskans for Better Elections, *Ranked Choice Voting*, https://alaskansforbetterelections.com/about/ranked-choice-voting/.

144 *See, e.g.*, Sarah Montalbano, *Alaskans are right to worry about ranked-choice voting*, https://www.washingtonexaminer.com/opinion/alaskans-are-right-to-worry-about-ranked-choice-voting (Nov. 16, 2021) ("Exhausted ballots lead to a sobering conclusion: Ranked-choice voting does not guarantee winners receive an absolute majority.").

145 *See* Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked Choice Voting*, 109 Cal. L. Rev. 1773, 1812–18 (2021).

should be the rightful "plurality" winner.[146] But a first-choice ranking is not a "vote" under a ranked-choice system—instead, a "vote" consists of the voter's complete set of rankings. Each voter casts only one "vote," expressed as a set of ranked preferences. Because a single first-choice ranking is not itself a complete "vote"—but rather, only *part* of a vote—a candidate who gets the most first-choice rankings does not necessarily get the most "votes." Until the rankings have been fully tabulated, the "votes" have not yet been fully counted, so no candidate can yet have "the greatest number of votes." In other words, you have to finish counting the votes before you know who has "the greatest number." Although the candidate with the most *first-choice rankings* may not win, the candidate with "the greatest number of votes" in the end will be elected. Ranked-choice voting is thus consistent with the text of Article III, Section 3 of the Alaska Constitution.

The scant constitutional history on Article III, Section 3 does not support the Treadwell amici's more restrictive reading. The delegates spent little time discussing its language, and their comments note only a concern that a majority vote requirement could create complications in a field of more than two candidates where no candidate might win a majority.[147] In adopting the "greatest number of votes" provision, the delegates did not intend to rule out systems like ranked-choice voting, but to prevent elections that failed to identify a winner in a single election.[148] Decisions in other states confirm that a primary

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[146] *Opinion of the Justs*., 162 A.3d 188, 211 (Maine 2017).

[147] PACC at 2065-66.

[148] *See* Pildes & Parsons, *supra* note 145, at 1797–98.

purpose of similar provisions is to prevent failed elections that require run-offs.[149] A governor's race with no clear winner is not a danger in a ranked-choice system, which produces a winner just as reliably as the previous system.

The Alaska Constitution does not prescribe the use of a particular voting system, instead expressly delegating that responsibility to the legislature or the people through the initiative process: Article V, Section 3 provides that "[m]ethods of voting, including absentee voting, shall be prescribed by law." This suggests flexibility, and nothing in the constitution defines "voting" or "method" in a restrictive way that would rule out voting by ranking preferences.[150] Citing an attorney general opinion from 1961,[151] the Treadwell amici argue that Article V, Section 3 concerns the mechanics of voting, rather than the "method of election." [Treadwell Br. 7] But under Ballot Measure 2, ranking preferences will be "the mechanical way in which the voter exercises his choice."[152] Moreover, as long as an election law is not prohibited by anything in the constitution, it does not violate the constitution regardless of whether it concerns "methods of voting." Because the candidate who receives the "greatest number of votes" is elected governor under

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149 *Id.* at 1799 n.136 (citing *In re Todd*, 193 N.E. 865, 870–71 (Ind. 1935); *Rockefeller v. Matthews*, 459 S.W.2d 110, 111 (Ark. 1970); *Op. to the Gov.*, 6 A.2d 147, 154 (R.I. 1939) (Moss, J., dissenting)); *see Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 238 (Mass. 1941) (abrogated by *McSweeney v. Cambridge*, 665 N.E.2d 11, 14–15 (Mass. 1996)) ("preferential voting . . . cannot be declared unconstitutional on the ground that it is in conflict with ordinary principles of plurality voting").

150 *See* AS 15.80.010(34) (defining ranked-choice voting as a "method of casting and tabulating votes").

151 1961 Op. Att'y Gen. No. 20, 10–13 (Aug. 18).

152 *Id.* at 12.

Ballot Measure 2, the measure does not violate Article III, Section 3.

## III. Although the Court need not reach severability, most provisions of Ballot Measure 2 that Kohlhaas challenges are severable.

The Court need not reach the issue of whether any unconstitutional provisions of Ballot Measure 2 could be severed, because none of its provisions are unconstitutional. But if the Court sustains any of Kohlhaas's constitutional challenges, it should—to the extent possible—sever the offending portions and leave the remainder in effect.

Below, Kohlhaas argued that the Court's decision in *Meyer v. Alaskans for Better Elections*—holding that the initiative did not violate the single subject rule[153]—means that its provisions are "not separable" and that the entire law must stand or fall as a unit. [Exc. 44] On appeal, he does not explicitly renew this argument, though he again complains that Ballot Measure 2 "really contains a minimum of two distinct subjects" that "actually should have been voted on separately." [At. Br. 13-14] But this case is not an opportunity to re-litigate *Alaskans for Better Elections*. The single-subject rule applies to all legislation, so if Kohlhaas were correct that no provisions of a bill that complies with the single-subject rule can be severed, then no part of any bill could ever be severed. This is clearly not the law,[154] and *Alaskans for Better Elections* is irrelevant here.

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[153] 465 P.3d 477, 499 (Alaska 2020).

[154] *See e.g.*, *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 210 (Alaska 2007); *Lynden Transp., Inc. v. State*, 532 P.2d 700, 715 (Alaska 1975); *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 634-35 (Alaska 1999); *see also Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1176 (Alaska 2009) (holding one part of act severable and another not severable from unconstitutional provision).

Instead, just as the Court applies the same single-subject rule to initiatives as it does to the bills passed by the legislature,[155] the Court also applies the same severability test to post-enactment initiatives as it does to legislatively enacted statutes.[156] This severability test "asks (1) whether 'legal effect can be given'" to the severed statute and (2) if 'the legislature intended the provision to stand' in the event other provisions were struck down."[157] Kohlhaas does not address this severability test.

The Treadwell amici do, arguing that some parts of Ballot Measure 2 are severable and others are not. [Treadwell Br. 16-19, 19 n.7, 31-33] They repeatedly—and incorrectly—assert that "Initiative 2 does not contain a savings clause," which they contend weighs against finding provisions to be severable. [*Id*. at 16-17, 31] In fact, Ballot Measure 2 contains a clear severability clause that states, "The provisions of this Act are independent and severable," and shows that voters intended its provisions to take effect "to the fullest extent possible" even if some provisions fail.[158] In a post-enactment challenge to an initiative that includes a clause like this, "the burden is on the challengers

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[155] *Alaskans for Better Elections*, 465 P.3d at 497.

[156] *Kritz*, 170 P.3d at 210 ("We conclude there is no compelling reason to apply a different severability analysis to statutes enacted by the people from those enacted by the legislature.").

[157] *Id*. (quoting *Lynden Transp.*, 532 P.2d at 713).

[158] *See* 2020 Alaska Laws Initiative Meas. 2, § 73 ("The provisions of this Act are independent and severable. If any provision of this Act, or the applicability of any provision to any person or circumstance, shall be held to be invalid by a court of competent jurisdiction, the remainder of this Act shall not be affected and shall be given effect to the fullest extent possible.").

to show that the voters did not intend the remaining provisions to be given effect."[159]

Thus, if the Court concludes that any provision of Ballot Measure 2 is unconstitutional, it should sever the offending provision to the extent possible. For example, if the Court concludes that identifying candidates' party affiliations on the ballot violates the political parties' associational rights, it should simply sever the language that requires listing this information on the ballot,[160] rather than strike down the entire nonpartisan primary, much less the whole initiative. But Kohlhaas has never identified specific offending provisions, requesting instead that the whole initiative be invalidated. [Exc. 68, 212] And again, the Court need not consider severability because none of the challenged provisions are unconstitutional.

## CONCLUSION

For these reasons, the Court should reject all of Kohlhaas's constitutional challenges to Ballot Measure 2 and affirm the grant of summary judgment.

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159 *Kritz*, 170 P.3d at 211.

160 *See* AS 15.15.030(5).