IN THE SUPREME COURT OF THE STATE OF ALASKA

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

Appellants,

v.

STATE OF ALASKA, STATE OF ALASKA, DIVISION OF ELECTIONS, LIEUTENANT GOVERNOR KEVIN MEYER, in his official capacity as Supervisor of Elections, GAIL FENUMIAI, in her official capacity of Director of the Division of Elections, and ALASKANS FOR BETTER ELECTIONS, INC.

Appellees.

Supreme Court No. S-18210
Trial Court Case No. 3AN-20-09532CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JUDGE GREGORY MILLER

BRIEF OF APPELLEE ALASKANS FOR BETTER ELECTIONS, INC.

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Article I, section 5 of the Alaska Constitution. Freedom of Speech.

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

Article III, section 3 of the Alaska Constitution. Election.

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

Article III, section 8 of the Alaska Constitution. 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.

STATUTES

AS 01.10.030. Severability.

Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

AS 15.15.350. General Procedure for Ballot Count.

(a) The director may adopt regulations prescribing the manner in which the precinct ballot count is accomplished so as to ensure accuracy in the count and to expedite the process. The election board shall account for all ballots by completing a ballot statement containing (1) the number of official ballots received; (2) the number of official ballots voted; (3) the number of official ballots spoiled; (4) the number of official ballots unused and either destroyed or returned for destruction to the elections supervisor or the election supervisor's designee. The board shall count the number of questioned ballots and compare that number to the number of questioned voters in the register. Discrepancies shall be noted and the numbers included in the certificate prescribed by AS 15.15.370. The election board, in hand-count precincts, shall count the ballots in a manner that allows watchers to see the ballots when opened and read. A person handling the ballot after it has been taken from the ballot box and before it is placed in the envelope for mailing may not have

a marking device in hand or remove a ballot from the immediate vicinity of the polls.

(b) Ballots may not be counted before 8:00 p.m., local time, on the day of the election.

(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.

OTHER AUTHORITY

Ballot Measure 2. Section 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.

PARTIES

Appellants are Scott A. Kohlhaas, the Alaskan Independence Party, Robert M. Bird, and Kenneth P. Jacobus (collectively "Appellants"). Appellees are the State of Alaska, the State of Alaska, Division of Elections, Lieutenant Governor Kevin Meyer, Gail Fenumiai (collectively "the State"), and Alaskans for Better Elections, Inc. ("ABE"). Mead Treadwell and Dick Randolph (collectively "Amici") filed an Amicus brief in support of Appellants.

INTRODUCTION

In the 2020 general election, Alaskans voted to adopt election reforms which appeared on the ballot as Ballot Measure 2. These reforms — previously analyzed by this Court in *Meyer v. Alaskans for Better Elections* — primarily: (1) replaced Alaska's prior "party-based primary system with an open, nonpartisan [top-four] primary"; (2) established a ranked-choice voting ("RCV") system for general elections; and (3) added "new disclosure and disclaimer requirements" to existing campaign finance laws.[1]

The day after the election was certified, Appellants filed this facial challenge seeking to invalidate the entirety of Ballot Measure 2 on constitutional grounds. Appellants fail to meet their burden of demonstrating that Ballot Measure 2 infringes on *any* constitutional right. Because Ballot Measure 2 is not facially unconstitutional, this Court should AFFIRM the superior court's decision upholding it.

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[1] 465 P.3d 477, 490 (Alaska 2020).

ISSUES PRESENTED

1. *Facial Challenge*. Did the superior court correctly conclude that Appellants failed to meet the high burden required to invalidate Ballot Measure 2 under the Alaska Constitution in this facial challenge?
2. *Associational Rights of Political Parties*. Did the superior court correctly conclude that Ballot Measure 2 does not violate political parties' associational rights under the Alaska Constitution?
3. *Constitutionality of Ranked-Choice Voting*. Did the superior court correctly conclude that RCV is not too confusing to be constitutional?
4. *Governor and Lieutenant Governor*. Did the superior court correctly conclude that Ballot Measure 2 does not violate article III, sections 3 and 8 of the Alaska Constitution?
5. *Severability*. Would Ballot Measure 2's severability clause operate to sever any unconstitutional provisions of the initiative?

STATEMENT OF THE CASE

I. Factual History

A group of nonpartisan Alaskans formed ABE in 2019 to file Ballot Measure 2, an election reform ballot initiative. [Exc. 111] This initiative proposed three substantive changes to Alaska's election laws. [Exc. 111; *see also* Exc. 111-116]

First, Ballot Measure 2 proposed establishing an open, nonpartisan "top-four" primary, allowing all Alaskans to vote on the same primary ballot regardless of their political party affiliation. [Exc. 112] Under the measure, all candidates regardless of party

affiliation (or lack thereof) run on the same primary ballot,[2] and all voters are eligible to cast a single vote for each office and any joint ticket for governor and lieutenant governor.[3] [Exc. 112-113] The four candidates (or candidate pairings) receiving the greatest number of votes in each race, regardless of party affiliation, then proceed to the general election ballot.[4] [Exc. 112-113]

Second, Ballot Measure 2 proposed adopting RCV for Alaska's general elections.[5] [Exc. 113-115] RCV gives voters the opportunity to rank candidates in order of choice from one to four, which: (1) provides greater choice to general election voters; (2) minimizes the need for strategic voting; and (3) increases the odds that winning candidates will have a broader base of support.[6] [Exc. 113-115]

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[2] AS 15.15.025 ("A voter . . . 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.").

[3] *See* AS 15.15.030(5) ("The lieutenant governor and the governor shall be included under the same section."); AS 15.25.030(a)(16)-(17) (requiring candidates for governor and lieutenant governor to file a joint declaration of candidacy).

[4] *See* AS 15.25.100(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."); *see also* AS 15.25.010 ("[O]nly the four candidates who receive the greatest number of votes for any office shall advance to the general election.").

[5] *See* AS 15.15.360(a)(1) ("In a general election, a voter may mark a ballot that requires the voter to vote for candidates in order of ranked preference[.]"); *see also* AS 15.15.030(16) ("The director shall design the general election ballots so that the candidates are selected by ranked-choice voting."); AS 15.15.350(c) ("All general elections shall be conducted by ranked-choice voting.").

[6] *See* Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CAL. L. REV. 1773, 1785 (2021) ("By allowing voters to convey a richer, more nuanced, and more complete articulation of who they would prefer, ranked-choice votes

Under Ballot Measure 2, if a candidate receives a majority of first-choice votes (fifty percent plus one), then that candidate wins immediately, just as in the prior "first past the post" or "single-choice vote" system.[7] [Exc. 114] But if no candidate receives over half of the first-choice votes, the candidate with the fewest first-choice votes is eliminated from further vote counts, and voters who had ranked that eliminated candidate first will have their vote assigned to their second-choice candidate.[8] [Exc. 114] This process continues until a candidate is elected with a majority of continuing ballots, or "with the greatest number of votes" of the final two candidates.[9] [Exc. 114]

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offer several benefits over single-choice votes. RCV reduces the dangers of vote-splitting and the impact of spoilers; increases the ability of voters to honestly convey their preferences; increases the likelihood that a candidate is elected with the support of a majority; and allows the candidate with the most widespread support to be identified in a single election." (citations omitted)). In fact, one of the benefits of RCV is that it helps prevent a candidate from being elected despite widespread opposition to that candidate. *See id.* at 1781 ("[I]n any election with more than two candidates, a[single-choice voting] system can end up electing a candidate that a majority of voters *oppose*—an arguably perverse outcome for a democratic election system." (emphasis in original) (citing *Dudum v. Arntz*, 640 F.3d 1098, 1100, 1103 (9th Cir. 2011))).

7 *See* AS 15.15.350(d) ("If a candidate is highest-ranked on more than one-half of the active ballots, that candidate is elected and the tabulation is complete.").

8 AS 15.15.350(d)(2) ("[I]f 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 . . ., and a new round [of tabulation] begins[.]").

9 *See* AS 15.15.350(d)(1) (electing "the candidate with the greatest number of votes"); *see also* Pildes & Parsons, *supra* note 6, at 1786 ("The notion of inactive ballots appearing to fall out of the tabulation process over successive rounds may strike some as concerning at first glance, but inactive ballots are perhaps most usefully analogized to casting a vote for a losing candidate in a[single-choice voting] election." (citing *Dudum*, 640 F.3d at 1110; *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 14 (Mass. 1996))).

Finally, Ballot Measure 2 proposed changing Alaska's campaign finance disclosure requirements. [Exc. 115-116] These modifications primarily sought to increase transparency of donations made for independent expenditures in candidate races. [Exc. 115-116]

After this Court upheld Ballot Measure 2 in *Meyer v. Alaskans for Better Elections*,[10] the Division of Elections placed it on the November 2020 general election ballot. [Exc. 116] And in an election with record turnout, Alaskans voted to enact Ballot Measure 2, which the State certified on November 30, 2020.[11] [Exc. 118]

II. Procedural History

Appellants filed suit on December 1, 2020, bringing a facial challenge to invalidate the entirety of Ballot Measure 2. [Exc. 1-37] ABE intervened without objection. [R. 387-388; *see also* R. 389-393]

After the parties moved for summary judgment, [Exc. 70-153] and after full briefing, [Exc. 193-214, 311-365] the superior court heard oral argument on the motions. [Exc. 394] The superior court then granted the State's and ABE's summary judgment motions and denied Appellants' requested relief. [Exc. 394; *see also* Exc. 392-411] Appellants appealed the final judgment declaring "that Ballot Measure 2 is facially

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[10] 465 P.3d at 479; *see also id.* at 499 ("[I]t now is up to the people to decide whether [Ballot Measure 2's] provisions should become law.").

[11] Ballot Measure 2's victory was also confirmed by an optional hand recount of the ballots, which concluded on December 10, 2020. [Exc. 118]

constitutional, and that [Appellants'] claims do not have merit." [Exc. 415; *see also* Exc. 412-416]

STANDARD OF REVIEW

This Court "review[s] summary judgment rulings de novo,"[12] and applies its "independent judgment" to interpret "constitutional and statutory" provisions.[13] When doing so, this Court "adopt[s] the 'rule of law that is most persuasive in light of precedent, reason, and policy.' "[14]

Although Appellants bring this facial challenge to invalidate Ballot Measure 2 in its entirety, [Exc. 60-69] Appellants and Amici both fail to cite the high bar that must be met to have a law declared facially unconstitutional. [At. Br. 3; Am. Br. 1-39] This Court has long recognized that the "party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[15] Additionally, in a facial

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12 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Seybert v. Alsworth*, 367 P.3d 32, 36 (Alaska 2016)).

13 *Id.* (quoting *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016)).

14 *Id.* (quoting *Ketchikan Gateway Borough*, 366 P.3d at 90); *see Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020) ("[P]olicy judgments do not inform [this Court's] decision-making when the text of the Alaska Constitution and the framers' intent as evidenced through the proceedings of the Constitutional Convention are sufficiently clear." (citing *Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1176-77 (Alaska 2009))); *see also Wielechowski*, 403 P.3d at 1143 n.2 (reiterating that this Court is "concerned only with upholding the Alaska Constitution, which 'takes precedence over the politics of the day and our own personal preferences.' " (quoting *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1133 (Alaska 2016))).

15 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019) (quoting *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001)); *see Ketchikan Gateway Borough*, 366 P.3d at 90-91 (reiterating that this Court "presume[s] statutes to be

challenge this Court can only rule in Appellants' favor if "there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution."[16]

Facial challenges are "disfavored" because they "risk . . . 'premature interpretation of statutes on the basis of factually barebones records,' "[17] and they "run contrary to the fundamental principle of judicial restraint."[18] Such challenges also "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."[19] In such cases, this Court has emphasized its "duty to construe a statute, where reasonable, to avoid dangers of unconstitutionality,"[20] "particularly" in the context of "a facial challenge."[21]

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constitutional; the party challenging the statute bears the burden of showing otherwise." (citing *Se. Alaska Conservation Council*, 202 P.3d at 1167)); *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 214 (Alaska 2007) ("When [this Court] consider[s] the facial invalidity of a statute, we require the party seeking to invalidate the statute to bear the burden of demonstrating the necessity of invalidation." (citing *Andrade*, 23 P.3d at 71)).

16 *State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009) (citing *State, Dep't of Revenue, Child Support Enf't Div. v. Beans*, 965 P.2d 725, 728 (Alaska 1998)).

17 *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

18 *Id.*

19 *Id.* at 451; *see also Johnson v. City of New York*, 9 N.E.2d 30, 38 (N.Y. 1937) ("If the people . . . want to try [a new] system, make the experiment, and have voted to do so, [courts] should be very slow in determining that the act is unconstitutional, until we can put our finger upon the very provisions of the Constitution which prohibit it.").

20 *ACLU of Alaska*, 204 P.3d at 373 (citing *Alaskans for a Common Language*, 170 P.3d at 192).

21 *Treacy v. Mun. of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

ARGUMENT

Broadly, Appellants and Amici make four overarching arguments for why Ballot Measure 2 is facially unconstitutional. First, Appellants and Amici argue that the top-four primary violates political parties' associational rights under the Alaska Constitution. [At. Br. 3-13; Am. Br. 33-38] Second, Appellants suggest that Ballot Measure 2's RCV system is too confusing to be constitutional. [At. Br. 15-16] Third, Appellants and Amici argue that the Alaska Constitution requires that the governor be elected by a plurality in the general election, and that allowing RCV is unconstitutional. [At. Br. 17-18; Am. Br. 4-16] Finally, Amici argue that Ballot Measure 2 unconstitutionally mandates that the lieutenant governor be paired with a gubernatorial candidate in the primary.[22] [Am. Br. 19-31] Appellants and Amici then ask this Court to invalidate the entirety of Ballot Measure 2. [At. Br. 20; Am. Br. 16-19, 31-33]

Appellants and Amici err on all four points. Ballot Measure 2's top-four primary system satisfies Alaska's Constitution because political parties do not have the right to a state-run primary to select their candidates, the right to specifically designate their official nominees on the general election ballot, or the right to prevent candidates from self-designating their own party affiliation. Ballot Measure 2's RCV system neither confuses voters nor violates Alaska's Constitution when it empowers them to knowingly rank their top-four preferences. And Ballot Measure 2's pairing and tabulation methods for electing

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[22] As discussed *infra* Part IV, Appellants argue — in seeming opposition to Amici — that Ballot Measure 2 unconstitutionally fails to mandate the governor and lieutenant governor to run as a pair in the primary, somehow missing that Ballot Measure 2 already requires this. [At. Br. 18-20]

the governor and lieutenant governor do not violate Alaska's Constitution because those methods are entirely consistent with the relevant provisions. Furthermore, even if this Court were to conclude that some minor part of Ballot Measure 2 is facially unconstitutional, the law's severability clause would require this Court to uphold the vast majority of its popularly-enacted provisions.

Because Ballot Measure 2 is facially constitutional, this Court should respect the will of the voters and affirm the superior court's judgment upholding it.

I. Ballot Measure 2's Top-Four Primary Does Not Unconstitutionally Infringe On Political Parties' Associational Rights.

Both Appellants and Amici argue that Ballot Measure 2's top-four non-partisan primary violates article I, section 5 of the Alaska Constitution because it purportedly harms the associational rights of political parties.[23] [At. Br. 3-13; Am. Br. 33-38] Both concede, as they must, that the United States Supreme Court has ruled directly against their position with respect to the United States Constitution: The First Amendment does not give political parties the right to a state-run primary to select their candidates or the right to designate their official nominees on a ballot.[24] [Am. Br. 34; *see* At. Br. 7]

They mention, however, that Ballot Measure 2 violates the Alaska Constitution because it affords political parties more rights than the United States Constitution.

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[23] Alaska Const. art. I, §5 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.").

[24] *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 & n.7 (2008) ("The First Amendment does not give political parties a right to have their nominees designated as such on the ballot." (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63 (1997))).

Conceding that parties have no right to a state-run primary, [At. Br. 7] Appellants ask this Court to invent a new state constitutional right allowing parties to designate their preferred candidates on the ballot, and both argue that allowing candidates to self-identify with a political party infringes on that party's rights to choose its own candidate. [At. Br. 6-13; Am. Br. 33-38] Neither the plain language of the Alaska Constitution nor the case law interpreting it supports these arguments. The superior court correctly held that Ballot Measure 2 did not violate a political party's associational rights. [Exc. 406-408]

ABE agrees with Appellants on the standard this Court should use when analyzing whether an election law unconstitutionally burdens a political party's associational rights. [*See* At. Br. 5-11] As this Court reiterated in *State v. Alaska Democratic Party*:

> When an election law is challenged th[is C]ourt must first determine whether the claimant has in fact asserted a constitutionally protected right. If so we must then assess "the character and magnitude of the asserted injury to the rights." Next we weigh "the precise interests put forward by the State as justifications for the burden imposed by its rule." Finally, we judge the fit between the challenged legislation and the [S]tate's interests in order to determine "the extent to which those interests make it necessary to burden the plaintiff's rights." This is a flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the [S]tate's interest must be closer.[25]

The standard for evaluating election laws is deliberately "flexible" because "[e]lection laws will invariably impose some burden upon individual voters"[26] and their

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25 426 P.3d 901, 907 (Alaska 2018) (second and third alterations in original) (quoting *State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005)).

26 *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

"right to associate with others for political ends."[27] "Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[28]

Appellants and Amici have not identified a constitutionally protected right, and thus they fail the test at the first question.

In *Washington State Grange v. Washington State Republican Party*, the U.S. Supreme Court held that nonpartisan primary systems — like the one Ballot Measure 2 established — do not unconstitutionally burden political parties' associational rights because they do not interfere with the internal affairs of parties.[29] There, the Supreme Court upheld the State of Washington's top two primary system,[30] and squarely rejected the claim that this system interfered with political parties' ability to "choose their own standard bearers" by unconstitutionally burdening their associational rights.[31] Indeed, far from giving political parties special constitutional rights, the Founders deliberately created a constitutional framework designed in part to restrain the power of political parties.[32] This

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27 *Id.* at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

28 *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections[.]").

29 *See* 552 U.S. at 451-59.

30 *Id.* at 458-59.

31 *Id.* at 453.

32 RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 3 (1970) ("If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party."); *see* THE FEDERALIST NO. 10 (James Madison) (explaining that one of the purposes of the

Court should adopt the sound reasoning of the *Washington State Grange* Court in evaluating Ballot Measure 2's nonpartisan primary system under the Alaska Constitution.

Under the system at issue in *Washington State Grange*, all candidates in the primary are listed on the same ballot, and "[t]he top two candidates from the primary election proceed to the general election regardless of their party preferences."[33] Because this primary election system "does not, by its terms, choose parties' [official] nominees" — and political parties retain the ability to "nominate candidates by whatever mechanism they choose" — the Supreme Court found no associational harm.[34]

Both Appellants and Amici concede that there is no associational right under the Alaska Constitution to a state-run primary to select the parties' official candidates and that there are other means available, like a convention, to do so. [At. Br. 7 ("The State is correct that the State does not have to operate a state-run nominating process."); Am. Br. 30 n.10 (conceding the Alaska Constitution allows selection of party candidates through a convention process)] And Ballot Measure 2 clearly provides that state-run primaries are no longer used to select official nominees of political parties.[35]

Constitution was "[t]o secure the public good and private rights against the danger of [political parties], and at the same time to preserve the spirit and the form of popular government"); *see also* HOFSTADTER, *supra*, at 53 ("[T]he [Founding] Fathers hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties.").

33 *Washington State Grange*, 552 U.S. at 453.

34 *Id.*

35 AS 15.25.010 ("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

Rather, Appellants first argue that a party has an affirmative right to identify their nominees on the ballot, relying heavily on two prior decisions of this Court. [*See* At. Br. 6-9] But Ballot Measure 2 does not present "the opposite side of the coin" from *Alaska Democratic Party* or *State v. Green Party of Alaska* at all. [At. Br. 6] In those cases, this Court interpreted the Alaska Constitution to be more protective of political parties *only* with respect to determining their own *internal processes* for nominating or supporting candidates. Specifically, this Court has given political parties some latitude to determine who selects their official nominees,[36] and who may compete for their official party nomination.[37] But this Court has never held that the Alaska Constitution somehow prohibits non-partisan primaries or provides parties an affirmative right to identify their preferred candidates on the ballot.

Indeed, Appellants complain that under Ballot Measure 2, a political party cannot force the government to specifically identify that party's nominees on the ballot. [At. Br. 7] But this is simply not a constitutionally-protected right. As *Washington State Grange* made clear, "[t]he First Amendment does not give political parties a right to have their nominees

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candidates whose names will appear on the ballot at the general election."); *see also* AS 15.15.030(14), (15) (requiring disclaimer statements on the ballot); AS 15.58.020(a)(13) (requiring a similar disclaimer statement in the general election pamphlet); AS 15.58.020(c) (requiring a similar disclaimer statement in any primary or special primary election pamphlet).

[36] *Green Party of Alaska*, 118 P.3d at 1070.

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

designated as such on the ballot,"[38] because "[b]allots serve primarily to elect candidates, not as forums for political expression."[39] And although "the Alaska Constitution is more protective of political parties' associational interests than . . . the federal constitution"[40] — which includes a party's ability to determine membership, endorse candidates, restrict or expand candidate eligibility, and select official party nominees[41] — this Court should adopt the reasoning of *Washington State Grange* in interpreting the Alaska Constitution and hold that parties have no right to campaign on the ballot itself.

Appellants recognize that nothing in Ballot Measure 2 prevents a political party from holding a convention or internal election to determine which candidates to officially support. [*See* At. Br. 7 & n.4] Nor does Ballot Measure 2 prevent a political party from either promoting or disavowing candidates who may choose to list their personal affiliation with that political party.[42] And nothing in Ballot Measure 2 infringes on a political party's right to free speech during a political campaign.

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38 *Washington State Grange*, 552 U.S. at 453 n.7 (citing *Timmons*, 520 U.S. at 362-63).

39 *Id.* (quoting *Timmons*, 520 U.S. at 363).

40 *See Alaska Democratic Party*, 426 P.3d at 909; (citing *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982)).

41 *See Alaska Democratic Party*, 426 P.3d at 909-10; *Green Party of Alaska*, 118 P.3d at 1064.

42 *Washington State Grange*, 552 U.S. at 453 ("[P]arties may now nominate candidates by whatever mechanism they choose[.]"). [*See* Exc. 340-341 (explaining how Alaska's political parties have previously "abandoned" duly-nominated party candidates)]

But no one — including a political party — has a constitutional right to free speech *on the ballot itself*.[43] This conclusion is neither surprising nor new; ballots are not a proper forum for political speech.[44] Nowhere in the text of the Alaska Constitution is there any affirmative right for political parties to use the ballot as a forum for speech; indeed, political parties are not even mentioned in article V on elections, or anywhere else in the Constitution. And other large membership organizations, like the National Rifle Association or Planned Parenthood, do not have a constitutional right to designate their preferred candidates on the ballot. Furthermore, this Court has previously recognized that "[s]tates 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."[45]

Relatedly, Appellants and Amici also argue that Ballot Measure 2 infringes on political parties' rights by permitting candidates to self-identify with a party, purportedly "forcing" candidates on them. [*See* At. Br. 7; Am. Br. 33-38] But a candidate has always

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43 *Id.* at 453 n.7 (citing *Timmons*, 520 U.S. at 362-63).

44 *See id.* (citing *Timmons*, 520 U.S. at 362-63); *see also Marcellus v. Virginia State Bd. of Elections*, 849 F.3d 169, 176 (4th Cir. 2017) ("The jurisprudence of *Timmons* and *Washington State Grange* thus makes clear that even though a statute . . . may prevent political parties from indicating on the ballot which local candidates are their nominees, it does not impose a constitutionally cognizable burden on those parties' associational rights because '[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot.' " (second alteration in original) (quoting *Washington State Grange*, 552 U.S. at 453 n.7)); *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) ("The Supreme Court has twice concluded that political parties do not have a First Amendment right to party designation of their nominees on a ballot." (citing *Washington State Grange*, 552 U.S. at 453 n.7; *Timmons*, 520 U.S. at 362-63)).

45 *Green Party of Alaska*, 118 P.3d at 1068 (quoting *Clingman v. Beaver*, 544 U.S. 581, 609 (2005) (Stevens, J., dissenting)).

been able to choose to have their own registered political party affiliation listed on the ballot or none at all. This is nothing new.[46]

A candidate who is a registered member of a political party and who self-identifies as such in no way infringes on the rights of the party. Individual voters and candidates are constitutionally entitled to associate and identify with whatever political party they choose.[47] And although political parties have associational rights, those rights do not trump an individual's right to identify with a political party; there is no mechanism in Alaska law that lets a political party change or reject an individual's registered affiliation with that party.[48] And consistent with this Court's prior decisions that always favored increasing voter choice in the nominating process,[49] Ballot Measure 2 achieves that goal and enacts that policy by letting voters express their preferences in all primary races regardless of

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[46] Former AS 15.15.030(5) (2020); *see also* 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." (emphasis added)).

[47] *Washington State Grange*, 552 U.S. at 461 (Roberts, C.J., concurring) ("[T]here is no general right to stop an individual from saying 'I prefer this party,' even if the party would rather he not.").

[48] AS 15.07.050(b) ("[O]nly the voter or the individual authorized by the voter in a written power of attorney . . . may mark the voter's choice of party affiliation on the voter registration application form."); *see also Alaska Democratic Party*, 426 P.3d at 906 ("Alaskans may change their voting registration status at any time." (citing AS 15.07.040)).

[49] *See Alaska Democratic Party*, 426 P.3d at 908 ("[W]here a party invites a voter to participate in its primary and the voter seeks to do so, we should begin with the premise that there are significant associational interests at stake." (quoting *Green Party of Alaska*, 118 P.3d at 1064 n.74)).

party affiliation.[50] A return to the prior primary system would eliminate those choices for voters.[51]

Furthermore, because this is a facial challenge, "the mere *impression* of association" does not "place a severe burden on a group's First Amendment rights."[52] This is especially true because this Court has repeatedly "expressed confidence in Alaska['s] voters" to understand ballots.[53] In addition, as the *Washington State Grange* Court held, any hypothetical concerns about a party's associational rights related to a candidate's self-designation could be fixed by a prominent disclaimer on the ballot itself.[54] Ballot Measure 2 itself requires a "prominent disclaimer" on ballots explaining that a candidate's expressed party identification does not mean that the party has endorsed or supports that

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50 AS 15.15.025 ("A voter . . . 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.").

51 The prior primary system largely did not allow voters to support candidates of different parties in different races. *Compare* former AS 15.25.060 (2020) (requiring "a primary election ballot for each political party" and providing that "[a] voter may vote only one primary election ballot"), *with* AS 15.25.060 ("The director shall prepare and provide a primary election ballot that contains all of the candidates for elective state executive and state and national legislative offices and all of the ballot titles and propositions required to appear on the ballot at the primary election."). Under Ballot Measure 2, an Alaska primary voter can now support candidates from different parties in different races (e.g., a Republican for U.S. Senate and a Democrat for governor). *See* AS 15.25.060; *see also* AS 15.15.025.

52 *Washington State Grange*, 552 U.S. at 457 n.9 (emphasis in original).

53 *Alaska Democratic Party*, 426 P.3d at 913 (citing *Green Party of Alaska*, 118 P.3d at 1068).

54 *Washington State Grange*, 552 U.S. at 454-56.

candidate.[55] This type of disclaimer is precisely what the *Washington State Grange* Court held would be more than sufficient to satisfy political parties' constitutional concerns,[56] *especially* in the context of a facial challenge.[57]

In sum, Ballot Measure 2 is constitutionally indistinguishable from the top-two primary upheld in *Washington State Grange*. Just like Washington's law, Ballot Measure 2 does not interfere with political parties' internal processes in any way; parties remain free to identify endorsed or supported "candidates by whatever mechanism they choose."[58] And under Ballot Measure 2, ballots must disclaim that "[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."[59] The only distinguishing feature between Alaska's new primary system and the system analyzed in

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55 AS 15.15.030(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.' "); *see also* AS 15.15.060(e) (requiring the posting of a similar disclaimer "in a location conspicuous to a person who will be voting" "[i]n each polling place").

56 *Washington State Grange*, 552 U.S. at 456.

57 *Id.* at 455 ("Of course, it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down [Washington's law] on its face based on the mere possibility of voter confusion." (emphasis in original) (citing *Yazoo & Mississippi Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 (1912); *Pullman Co. v. Knott*, 235 U.S. 23, 26 (1914))).

58 *Id.* at 453.

59 AS 15.15.030(14); *see also* AS 15.15.030(15).

Washington State Grange is a distinction without a difference; the fact that four candidates advance to the general election instead of two does not implicate any constitutional right.[60]

Because Appellants have failed to identify any constitutional right impacted by Ballot Measure 2's open, nonpartisan top-four primary system, this Court should affirm the superior court's rejection of Appellants' facial challenge.

II. Ballot Measure 2's RCV System For The General Election Is Neither Confusing Nor Unconstitutional.

Appellants argue — without support — that Ballot Measure 2 is unconstitutional because it is too confusing; they suggest that under an RCV system voters will have to rank candidates "without knowing who the remaining candidates are."[61] [At. Br. 15-16] The superior court swiftly (and correctly) rejected this argument. [Exc. 408-409] Not only have Appellants failed to articulate an alleged constitutional harm, but Appellants' argument is premised on a misunderstanding of how RCV actually works across the country and under Ballot Measure 2.

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[60] A top-four primary is arguably *more* protective of party rights than a top-two system because it provides a clearer path for minor party candidates to qualify for the general election. [*See* Exc. 132-133]

[61] Although Appellants initially appeared to claim that RCV might create an equal protection problem by violating the principle of "one person, one vote," [*See* Exc. 6] Appellants quickly (and correctly) conceded this point before the superior court, [Exc. 210 n.10] and do not raise it on appeal. [At. Br. 15-16] This, and other arguments against RCV generally, should be deemed waived by this Court. *See Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991) ("[W]here a point is given only a cursory statement in the argument portion of a brief, the point will not be considered on appeal." (citing *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980); *Fairview Dev., Inc. v. City of Fairbanks*, 475 P.2d 35, 36 (Alaska 1970))). "Such a waiver is not correctable by arguing the issue in a reply brief." *Id.* (citing *Hitt v. J.B. Coghill, Inc.*, 641 P.2d 211, 213 n.4 (Alaska 1982)).

Alaska and Ballot Measure 2 are not unique in implementing RCV. Today, RCV is used by all voters in some elections in two states — Maine[62] and Alaska — and by some voters, mostly military and overseas voters, in five states.[63] Four more states have local option rules which authorize local jurisdictions to adopt RCV.[64] Finally, millions of Americans in cities and counties across eleven states use RCV,[65] and more will join them in the next few years.[66]

Courts have routinely upheld RCV systems as constitutional.[67] For example, in *Dudum v. Arntz*, the Ninth Circuit held that San Francisco's use of RCV did not violate the

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62 *See* Me. Stat. tit. 21–a, § 723-A.

63 *See* Ala. Code §17-13-8.1; Ark. Code Ann. §7-5-406; La. Stat. Ann. §18:1306(A)(4); tit. 1, part 10, ch. 4 Miss. Code R. §4.3(A), (B); S.C. Code Ann. §7-15-650.

64 *See* Colo. Rev. Stat. §§1-7-1001-1004; Mass. Gen. Laws ch. 43, §§93, 96; N.M. Code R. §1.10.14.8(F); Va. Code Ann. §15.2-705.1.

65 *See, e.g.*, Arden, Del., Charter §7(a); Basalt, Colo. Home Rule Charter art. II, § .8; Benton, Cnty., Or., Charter ch. VII, §25(1); Cambridge, Mass., Plan E Charter, §112; Las Cruces, N.M., Municipal Code §8-15; Minneapolis, Minn., Charter art. III, §3.1(b) and Minneapolis, Minn., Code tit. 8.5 §§167.20-.70; New York, N.Y., Charter, ch. 46, §1057-g; Oakland, Cal., Charter art. XI, §1105; Portland, Me., Charter art. II, §3; Takoma Park, Md., Charter art. VI, §606(b); *United States v. City of Eastpointe*, 2019 WL 2647355 (E.D. Mich. 2019) (approving RCV as a remedy for violation of §2 of the Voting Rights Act).

66 *See, e.g.*, Albany, Cal., Code ch. 7; Amherst, Mass., Home Rule Charter art. 10, §10.10; Bloomington, Minn., Charter §4.07; Boulder, Colo, Ballot Measure 2E (Nov. 4, 2020), https://bouldercolorado.gov/newsroom/city-of-boulder-november-2020-election-results; Easthampton, Mass., Home Rule Charter art. 7, §§7-1.1-.2.

67 *See, e.g.*, *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011) (upholding San Francisco's use of RCV in elections for several city offices); *Baber v. Dunlap*, 349 F. Supp. 3d 68 (D. Me. 2018) (affirming the constitutionality of RCV for electing federal congressional officials); *Campbell v. Bd. of Educ.*, 310 F. Supp. 94 (E.D.N.Y. 1970) (upholding New York City's use of RCV in school board elections); *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (concluding that RCV does not violate the state constitution); *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996)

First or Fourteenth Amendments to the United States Constitution.[68] As the Ninth Circuit explained, RCV simply does not offend the "one person, one vote" requirement, as implicitly argued by Appellants:

> [A]ll voters participating in a[n RCV] election are afforded a single and equal opportunity to express their preferences for . . . candidates; voters can use all [of their ranking] preferences, or fewer if they choose. Most notably, once the polls close and calculations begin, no new *votes* are cast . . . . The ballots . . . are the initial inputs; the sequence of calculations mandated by [RCV] is used to arrive at a single output—one winning candidate. The series of calculations required . . . to produce the winning candidate are simply steps of a single tabulation, not separate rounds of voting.[69]

The Ninth Circuit rejected a similar claim that the "exhausted" ballots in an RCV voting system somehow made it unconstitutional, explaining that " '[e]xhausted' ballots are not disregarded in tabulating election results"; they just "represent votes for losing candidates," a feature of every election with more than one candidate.[70] Other federal courts have also affirmed the constitutionality of RCV.[71]

(upholding RCV in at-large city council elections); *Reutener v. City of Cleveland*, 141 N.E. 27 (Ohio 1923) (concluding that RCV does not violate the state constitution); *Orpen v. Watson*, 93 A. 853 (N.J. 1915) (same).

68 *See* 640 F.3d at 1117.

69 *Id.* at 1107 (emphasis in original) (footnote omitted); *see also id.* at 1112 ("[T]he option to rank multiple *preferences* is not the same as providing additional *votes*, or more heavily-weighted votes, relative to other votes cast." (emphases in original)).

70 *Id.* at 1111; *see also McSweeney*, 665 N.E.2d at 14 ("[I]t is no more accurate to say that [exhausted] ballots are not counted than to say that the ballots designating a losing candidate in a two-person, winner-take-all race are not counted.").

71 *See Baber*, 349 F. Supp. 3d at 76-78; *Campbell*, 310 F. Supp. at 102-04.

Courts in other states have agreed with the Ninth Circuit's reasoning, upholding RCV against both state and federal constitutional challenges. For example, the Minnesota Supreme Court concluded that RCV does not lead to an unequal weighting of some votes or the dilution of others since "[e]very voter has the same opportunity to rank candidates when she casts her ballot, and in each round every voter's vote carries the same value."[72] The Massachusetts Supreme Court likewise recognized that RCV, "far from seeking to infringe on each citizen's equal franchise, seeks more accurately to reflect voter sentiment . . . 'by giving [the voter] an opportunity to express more than one preference among candidates.' This purpose is not a derogation from the principle of equality but an attempt to reflect it with more exquisite accuracy."[73]

Under Ballot Measure 2, a maximum of four candidates are listed on the general election ballot.[74] Most voters — those who rank one of the top two finishers first — will *never* have their first vote transferred to another choice because those candidates will *never* be eliminated in subsequent rounds of tabulation.[75] For voters whose first choice ends up with the fewest votes and is eliminated, those voters will know who was eliminated because

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[72] *Minn. Voters All.*, 766 N.W.2d at 693; *see also Johnson*, 9 N.E.2d at 35 ("[RCV] treats all electors alike, and does not prevent a man from voting for the candidate of his choice."); *Reutener*, 141 N.E. at 33 (noting that, under RCV, every voter "has exactly the same voting power and right as every other elector").

[73] *McSweeney*, 665 N.E.2d at 15 (second alteration in original) (citations omitted) (quoting *Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 239 (Mass. 1941)).

[74] *See* AS 15.25.100(a); *see also* AS 15.25.010.

[75] *See* AS 15.15.350(d).

otherwise their vote would not transfer, giving them an equal opportunity to rank the candidates when they cast their ballots.

In sum, the situation voters face under an RCV system is not complex or unconstitutionally confusing. Voters simply must ask themselves, "if my preferred candidate is eliminated, which of the remaining three candidates (if any) do I want to support?"[76] Alaskans can count to four in the general election voting booth. RCV is not so confusing so as to be unconstitutional.

III. Article III, Section 3 Of The Alaska Constitution Does Not Prohibit RCV, And Ballot Measure 2 Satisfies "The Greatest Number Of Votes" Requirement.

Both Appellants and Amici argue that Ballot Measure 2's RCV system for the general election is incompatible with article III, section 3 of the Alaska Constitution, which

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[76] *See* Rob Richie et al., *Instant Runoffs: A Cheaper, Fairer, Better Way to Conduct Elections*, 89.1 NAT'L CIVIC REV. 95, 105 (Spring 2000) ("Consider asking a small child about her favorite ice cream. Chocolate, she might say. And what if there is no chocolate[,] you ask. Then she will have strawberry. And if there is no strawberry, she will settle with vanilla. The child just ranked three candidates: chocolate, strawberry, vanilla. That is all there is to [RCV]."). Indeed, studies regarding other jurisdictions have demonstrated that voters have very little problem understanding RCV when put into practice. *See, e.g.*, Sarah John & Andrew Douglas, *Candidate Civility and Voter Engagement in Seven Cities with Ranked Choice Voting*, 106.1 NAT'L CIVIC REV. 25, 26 (Spring 2017) (explaining that, in a 2013 survey of American cities using RCV, 90% of respondents found the ballot easy to understand); Michael Lewyn, *Two Cheers for Instant Runoff Voting*, 6 PHOENIX L. REV. 117, 132 (2012) (noting that, in survey of voters in Minneapolis, Minnesota after the city's first election using RCV, 90 percent of respondents indicated that they understood RCV "perfectly well" or "fairly well"); Matthew Germer, *An Analysis of Ranked Choice Voting in Maine*, R STREET, at 2-4 (Sept. 2021), https://www.rstreet.org/wp-content/uploads/2021/09/Final-Short-106.pdf (concluding that "RCV is not too complicated for voters to understand").

they assert mandates that Alaska's governor be elected by a "plurality" vote. [At. Br. 17-18; Am. Br. 4-16] The superior court correctly rejected this argument. [Exc. 408]

Unlike several other state constitutions, the Alaska Constitution does *not* use the specific term "plurality;" instead, our Constitution uses the word "greatest," which simply means that the candidate for governor who receives the most votes in a single election wins.[77] History from the constitutional convention confirms the underlying purpose of this provision: To avoid runoff elections for governor by prohibiting a future *requirement* that the winning candidate receive *at least* a majority of the votes cast. Because Ballot Measure 2's RCV provisions guarantee that the gubernatorial "candidate with the greatest number of votes"[78] is "chosen by the . . . voters . . . at a general election," by its terms it is consistent with the Alaska Constitution and does not violate article III, section 3. Furthermore, it does so without requiring that the winning candidate receive a majority of the total votes cast.

1. Alaska's Constitution requires only that the gubernatorial candidate with "the greatest number of votes" be elected.

Article III, section 3 of the Alaska Constitution provides, in full, that: "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."[79] The term "plurality" is not

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77 Alaska Const. art. III, §3.

78 AS 15.15.350(d)(1) (providing that "the candidate with the greatest number of votes is elected").

79 Alaska Const. art. III, §3 (emphasis added).

used in Alaska's Constitution at all,[80] and this Court has repeatedly confirmed that it is "not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result."[81]

Appellants and Amici may wish the delegates had used the term "plurality" in article III, section 3, but this Court's "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself."[82] There is no question that the word "greatest" is not the same as the word "plurality."

The term "greatest" has a plain and unambiguous meaning in this context; the candidate for governor who receives the most votes — i.e., more than any other candidate — shall be elected. The term "great" was likely understood at the time of Alaska's

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80 *See* Alaska Const. art. III, §3; *see also* Alaska Const. art. II, §3 ("Legislators shall be elected at general elections.").

81 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (alteration in original) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994)).

82 *Id.* (quoting *Hickel*, 874 P.2d at 927). Alaska's Constitution: A Citizen's Guide — cited heavily by Amici [Am. Br. 6, 20, 22, 35] — has only been cited by this Court twice. *See Meyer v. Alaskans for Better Elections*, 465 P.3d 470, 481-82 (Alaska 2020) (citing GORDON HARRISON, ALASKA LEGIS. AFFAIRS AGENCY, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE (rev. 5th ed. Jan. 2021), http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf); *Grunert v. State*, 109 P.3d 924, 933 (Alaska 2005) (citing HARRISON, *supra*). This Court has never relied on this Citizen's Guide for precedent. Furthermore, the latest (apparently revised) fifth edition was published before Ballot Measure 2 became effective. This Court should not consider the language in the Citizen's Guide binding — or even persuasive — when interpreting Alaska's constitution. *See* HARRISON, *supra*, at 2 ("Although *Alaska's Constitution: A Citizen's Guide* is published by the Legislative Affairs Agency, *it has no standing as an official publication of state government and carries no endorsement by the legislature*." (second emphasis added)).

constitutional convention to mean "large in number, or numerous,"[83] and because the word "greatest" is the superlative of "great,"[84] "greatest" in this context meant "largest in size of those under consideration."[85] Not only is this precisely what Ballot Measure 2 measures, but its provisions use the same phrase — "the greatest number of votes" — when determining which candidate wins an election.[86]

The common sense, practical meaning of "greatest" is the most votes of any candidate running for that office. It is a broader, more inclusive term than either "plurality" or "majority" — neither of which are mandated by Alaska's Constitution — and allows a governor to be elected by either measure, so long as he or she receives the greatest number of votes of all the candidates.

Alaska's delegates could have included the word "plurality" if they intended to — indeed, the word "plurality" appears in the state constitutions of Florida, Maine, Maryland, Nevada, and New Hampshire[87] — but they declined to do so. This key difference alone is

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83 *Great*, THE NEW CENTURY DICTIONARY (1946); *see also Great*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1949) ("Large in number; numerous[.]").

84 *See Most*, MERRIAM WEBSTER DICTIONARY (2021) (defining "most" as "*greatest in quantity*, extent, or degree" (emphasis added)).

85 *Greatest*, THE COLLABORATIVE INTERNATIONAL DICTIONARY (2021).

86 AS 15.15.350(d)(1) ("[T]he candidate with the greatest number of votes is elected[.]"); *see* Alaska Const. art. III, §3 ("The candidate receiving the greatest number of votes shall be governor.").

87 Fla. Const. art. VI, §1 ("General elections shall be determined by a plurality of votes cast."); Me. Const. art. IV, pt. 1, §5 (requiring election "by a plurality of the votes"); Me. Const. art. IV, pt. 2, §§4-5 (same); Md. Const. art. IV, §25 (electing circuit court clerks "by a plurality of the qualified voters"); Nev. Const. art. XV, §14 ("A plurality of votes given at an election by the people, shall constitute a choice, where not otherwise provided by this Constitution."); N.H. Const. pt. II, arts. 33, 42, 61 (requiring "a plurality of votes").

enough for this Court to reject the reasoning adopted by the Maine Supreme Court in an advisory opinion.[88] The delegates' decision to use the word "greatest" instead of "plurality" must be given meaning.[89] And because the delegates did not mandate that a governor wins by a "plurality" — instead using the broader term "the greatest number of votes" — our Constitution allows flexibility for new voting systems like RCV, so long as the winning candidate has "the greatest number of votes" and a majority of all votes is not mandated.

Alaska's constitutional convention history confirms the limited purpose behind this provision. The framers did not want to require a majority in case there were three or more candidates, triggering a runoff election that would delay the seating of the governor. Unlike all other candidates for office who take their seat in January,[90] Alaska's governor is seated in the first week in December to allow for "time to review [the new governor's] various departments of government, to go over and provide his program and his message

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88 *See In re: Opinion of the Justices of the Supreme Judicial Court*, 162 A.3d 188, 209-211 (Me. 2017) (opining that Maine's Constitution requires that "an election is won by the candidate that *first* obtains 'a plurality of' all votes returned," with minimal analysis and by reading the word "first" into its constitution (emphasis added) (citations omitted)). For additional analysis on why that advisory opinion was wrongly decided, see Pildes & Parsons, *supra* note 6, at 1809-18.

89 *Wielechowski*, 403 P.3d at 1146 ("We are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result." (alteration in original) (quoting *Hickel*, 874 P.2d at 927-28)).

90 *See* Alaska Const. art. II, §3 ("Legislators shall be elected at general elections. Their terms begin on the fourth Monday of the January following election unless otherwise provided by law."); *see also* AS 24.05.080 (providing by law that a legislator's term "begins on the third Tuesday in January").

to the legislature."[91] In doing so, the delegates sought to ensure that the candidate with the "greatest" support would be elected without the delay required by conducting a runoff election.

While considering this provision, Delegate George Sundborg moved to strike the very sentence Appellants and Amici now rely upon to support their arguments.[92] He did so because he believed that the language, if anything, was either "meaningless" or confusing.[93] But in response, Delegate Katherine Nordale explained that the language served to prevent "the legislature [from] . . . say[ing] that the candidate receiving a majority of the votes cast" would be elected governor.[94] This restriction on future legislatures was preferrable because "it is conceivable that there may be three tickets in the field for governor at some future time, and why allow the possibility of *requiring* a majority of the

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91 3 Proceedings of the Alaska Constitutional Convention (PACC) at 1987 (Jan. 13, 1956) (comments of Delegate Victor Rivers, chair of the Executive Branch Committee); *see id.* (comments of Delegate V. Rivers) ("[I]n the matter of seating the governor, and his term of office, we deemed it desirable to seat the governor on the first Monday in December. . . . It would give him a chance in other words, to get his feet on the ground, so that is one of the reasons for seating him in the first week in December."); *see also* Alaska Const. art. III, §4 ("The term of office of the governor is four years, beginning at noon on the first Monday in December following his election and ending at noon on the first Monday in December four years later.").

92 3 PACC at 2065 (Jan. 13, 1956); *see* Alaska Const. art. III, §3 ("The candidate receiving the greatest number of votes shall be governor.").

93 3 PACC at 2065 (Jan. 13, 1956) (comments of Delegate Sundborg). Specifically, Delegate Sundborg thought that, perhaps "it means that the person running at that election who gets the greatest number of votes, no matter what he is running for, shall be the governor." *Id.*

94 *Id.* at 2066.

votes cast to elect the governor?"[95] After Delegate Frank Barr noted that some states explicitly "say that a majority of the votes cast will select the governor," the delegates swiftly voted down Delegate Sundborg's motion in a voice vote.[96]

The delegates' discussion confirms their intent: The framers of Alaska's Constitution simply wanted to prohibit *mandating* a majority *threshold* requirement to elect Alaska's governor, nothing more.[97] In doing so, the framers certainly did not intend to *prevent* a governor from being elected through a majority of votes cast; they just wanted to ensure that the candidate who received "the greatest number of votes" cast in the general election would win.[98] Stated another way, the Alaska Constitution does not prohibit electing a candidate by a majority; the Alaska Constitution *only* prohibits *requiring* a

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95 *Id.* (emphasis added).

96 *Id.*

97 *See* Pildes & Parsons, *supra* note 6, at 1797-1800; *see also Wielechowski*, 403 P.3d at 1147 ("Legislative history and the historical context, including events preceding ratification, help define the constitution." (quoting *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016))).

98 Pildes & Parsons, *supra* note 6, at 1789 ("[T]he provision[] prevent[s] the legislature from imposing any kind of *threshold* that would preclude the candidate with the most votes at the conclusion of a single popular election from being elected. In other words, the . . . provision foreclosed the legislature from adopting any arrangement that could result in a complete non-election." (emphasis in original)); *id.* at 1796 ("[T]he purpose behind these . . . provisions appears consistent and clear: the candidate with the most popular support should win and voters should select that candidate through a single election."); *see id.* at 1788 (noting that this requirement "stand[s] for a very simple, fundamental, and unambiguous proposition: the candidate who receives the most votes in a popular balloting should win the relevant office" (citations omitted)); *id.* at 1798-1800 (explaining how state constitutions with similar provisions enacted such provisions to: (1) encourage "finality by determining the result in one election"; (2) improve "administrative efficiency, economy, and ease"; and (3) minimize "partisan control over outcomes by removing contingencies and ensuring that the popular election itself determines the result" (citations omitted)).

majority for a gubernatorial candidate to be elected. Any other interpretation contradicts both the plain language of the Alaska Constitution and the delegates' intent.

The plain meaning and framers' intent of article III, section 3 is clear: Voters must have the opportunity to express their preferences for governor at the general election, and once their votes are counted, the person who "receiv[es] the greatest number of votes" wins.[99] Nothing in section 3 proscribes the *method* of voting (including methods of voting intended to more accurately measure support); it instead sets forth just "a numerical concept" of what is required to win (i.e., obtaining more votes than any other candidate),[100] to avoid runoff elections for the governor. This provision of Alaska's Constitution requires and achieves nothing more.

2. Application of RCV to the governor's race conforms with article III, section 3 of the Alaska Constitution.

Ballot Measure 2 expressly provides that "the candidate with the greatest number of votes is elected."[101] Ballot Measure 2 also conforms to article III, section 3 of the Alaska Constitution because the measure's RCV provisions do not require that the winner receive a majority of the total votes cast, and because the RCV system elects candidates through a single election without the need for a separate runoff election.

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99 Alaska Const. art. III, §3.

100 Pildes & Parsons, *supra* note 6, at 1804 ("The text . . . refers to a numerical concept ('[greatest number] of votes') rather than a balloting method ('plurality voting')." (citations omitted)).

101 AS 15.15.350(d)(1).

First, critically, Ballot Measure 2's RCV provisions *do not require* that the winner in an election receives a *majority* of the votes cast in an election. RCV is simply a different method for calculating votes, i.e., "*how* the level of popular support should be *measured*."[102] In contrast, article III, section 3 addresses the "precise *level* of popular support [that a successful candidate] *must* . . . attain[]" to be elected.[103] Ballot Measure 2's RCV *system*, just like Alaska's prior election *system*, is the only thing that changed.[104]

When a candidate receives "the greatest number of votes" under Ballot Measure 2,[105] it is entirely possible that a majority of the voters will not have chosen the winning candidate as their first choice, or that the winner will not obtain a majority of the total votes cast even at the end of the tabulations.[106] Indeed, the latter is precisely what happened in one of Maine's most recent RCV elections, where the successful candidate won without ever receiving a majority of the total votes cast.[107] This is because some

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102 Pildes & Parsons, *surpa* note 6, at 1801 (emphasis added).

103 *Id.* (emphasis added).

104 *Id.* at 1820 ("Consider, for example, a[single-choice voting] election: sometimes it produces a majority and sometimes it does not. When the latter occurs, the . . . threshold [in states requiring a majority] is not met and the constitutional contingency is triggered. But no one asks whether this makes [single-choice voting] *unconstitutional*. And for good reason: the relevant question is simply whether the electoral process set out in the statute cleared the necessary constitutional threshold." (emphasis in original)).

105 AS 15.15.350(d).

106 Pildes & Parsons, *surpa* note 6, at 1778 ("In other words, the number of total votes cast in a race might be higher than the number of total votes received by the two candidates remaining in the final round of tabulation.").

107 *Id.* at 1819-20 (explaining how a candidate "won with a majority (50.6 percent) of the *final votes*, [even though] he won with a plurality (49.2 percent) of the *total number of*

voters may decide to rank only an eliminated candidate (i.e., a candidate who receives the fewest votes in any round of tabulation), which means those voters choose to no longer have their votes included in subsequent tabulations.[108] But in any event, because the candidate for governor who receives "the greatest number of votes" is always elected under Ballot Measure 2, RCV is quite compatible with the Constitution's requirement.

Second, Ballot Measure 2's RCV system undisputedly elects candidates through a single election without the need for a separate run-off election, despite Appellants' (and Amici's) suggestions to the contrary.[109] [At. Br. 17-18 (characterizing RCV as "a series of run-off elections"); *see also* Am. Br. 4-16 (referring to Ballot Measure 2's RCV provisions as "instant-runoff voting")] Courts across the country have confirmed that RCV gives each voter only one chance to cast a ballot, and that RCV equates to a single election, for over a hundred years.[110] The Ninth Circuit in *Dudum v. Arntz* explained RCV in the same way.[111] Indeed, a central benefit of RCV is that it "eliminate[s] the need for a separate

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ballots on which voters had expressed a preference for at least one candidate in the race" (emphases in original) (citations omitted)).

[108] AS 15.15.350(e)(2) ("If the next ranking is . . . skipped . . ., the ballot shall be considered an inactive ballot[.]"); *see also* AS 15.15.350(e)(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[.]").

[109] Amici emphasize the constitution's prohibition against requiring a gubernatorial candidate to receive a majority of the total votes cast, [*See* Am. Br. 13] while Appellants also claim that RCV improperly establishes "a series of run-off elections." [At. Br. 17-18]. Neither argument is well-taken.

[110] *See Orpen v. Watson*, 93 A. 853, 855 (N.J. 1915).

[111] *See* 640 F.3d 1098, 1101 (9th Cir. 2011).

runoff,"[112] while prohibiting voters from being able to "reconsider their choices after seeing which candidates have a chance of winning," i.e., in a new election.[113]

Put differently, voters participating in an RCV system "are afforded a single and equal opportunity to express their preferences for . . . candidates . . . . Most notably, once the polls close and calculations begin, no new *votes* are cast."[114] Simply giving voters the option of "rank[ing] multiple *preferences* is not the same as providing additional *votes*."[115] "[Although] a ranked-choice vote conveys greater nuance and information than a single-choice vote, . . . it still reflects a *single input* that is then counted in an authorized manner to produce an aggregate measure of popular support."[116] Appellants' mischaracterization — that Ballot Measure 2 establishes "a series of run-off elections" — so fundamentally misses the mark that no court in *any* jurisdiction has ever reached that conclusion. [At. Br. 17]

"Whether one likes RCV as a matter of policy or not, legislatures and voters should be permitted to experiment with RCV should they choose to do so unless the unambiguous

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112 *Id.* at 1104.

113 *Id.* at 1105 (emphasis omitted).

114 *Id.* at 1107 (emphasis in original); *see id.* ("The series of calculations required by [RCV] . . . to produce the winning candidate are simply steps of a single tabulation, not separate rounds of voting."); *see also id.* ("[I]f [a] voter [in an RCV system] chooses a successful candidate in one round, he is *not* afforded the opportunity to switch his vote to a different candidate as the tabulation progresses. That is so because [RCV] considers only one round of inputs, i.e., votes." (emphasis in original)).

115 *Id.* at 1112 (emphasis in original).

116 Pildes & Parsons, *supra* note 6, at 1806 (emphasis in original).

text of a constitutional provision stands in their way."[117] This Court must avoid unconstitutional interpretations of the law where possible,[118] and there is certainly a constitutional interpretation of the word "greatest" consistent with Ballot Measure 2 (which also uses the term "greatest"). Because there will never be a runoff election for governor, because RCV does not mandate majority winners, and because governors are still elected by receiving "the greatest number of votes," this Court should decline Appellants' and Amici's invitation to declare RCV unconstitutional with respect to the race for Alaska's governor, and conclude that Ballot Measure 2 does not violate article III, section 3 of the Alaska Constitution.

IV. Ballot Measure 2 Does Not Violate Article III, Section 8 Of The Alaska Constitution By Pairing Lieutenant Governor Candidates With Gubernatorial Candidates Before The Primary.

1. Ballot Measure 2's process for electing the lieutenant governor satisfies the plain language and intent of the Alaska Constitution.

Amici argue that Ballot Measure 2's pairing method for lieutenant governor candidates and gubernatorial candidates is incompatible with the first sentence in article III, section 8 of the Alaska Constitution, which provides: "The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices."[119] [Am. Br. 19-31] Amici claim "[t]he plain meaning of this provision" somehow

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117 *Id.* at 1777; *see also id.* at 1787 ("In the absence of any specific constitutional restriction, the decision to adopt and implement one system over another belongs to policymakers." (citations omitted)).

118 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019); *State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009).

119 Alaska Const. art. III, §8.

requires "the lieutenant governor [to] run[] *solo in a partisan primary*[.]" [Am. Br. 20 (emphasis added)] This argument was not made below, and therefore was not addressed by the superior court.[120] [*See* Exc. 409-411] In addition to being waived,[121] Amici's novel reading and interpretation of this never-before-interpreted provision of the Alaska Constitution should be rejected on its merits.[122]

Ballot Measure 2 establishes a comprehensive system for pairing future candidates for governor and lieutenant governor for both primary and general elections. Most pertinent is section 38, which does not permit a candidate to file a declaration of candidacy to run for either governor or lieutenant governor unless it also includes "the name of the [other] candidate . . . running jointly."[123] [Exc. 23-24] This section ensures that candidates run as a pair from the very beginning. A host of other provisions further cement this system and require that the two candidates run as a joint ticket, from filing all the way through

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120 Appellants — contrary to Amici's arguments— argued below and on appeal that Ballot Measure 2's provisions violate article III, section 8 of the Alaska Constitution because Ballot Measure 2 does *not* require candidates for governor and lieutenant governor to run together jointly during the new open, nonpartisan top-four primary. [At. Br. 18-20; *see* Exc. 151 ("[A] primary election team is not what is mandated or authorized by [Ballot Measure] 2.")] But Appellants misread Ballot Measure 2's provisions. Ballot Measure 2 plainly does not *prohibit* the governor and lieutenant governor from running as a joint team for both the primary and general elections, and instead *requires* it.

121 *See Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991) (citing *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980); *Fairview Dev., Inc. v. City of Fairbanks*, 475 P.2d 35, 36 (Alaska 1970)).

122 Amici's interpretation is also inconsistent with their concession that the State does *not* have to nominate candidates through a state-run primary at all, let alone a party primary. [Am. Br. 30 n.10]

123 *See* AS 15.25.030(a)(16)-(17).

their appearance together on the general election ballot, should they qualify.[124] [*See* Exc. 13, 17, 24-26]

First, the plain language of article III, section 8 does *not* require that candidates for lieutenant governor be selected *only* through a *partisan primary* election as Amici suggest. [Am. Br. 20] Article III, section 8 of the Alaska Constitution provides:

> The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him. The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor.[125]

Although voters changed the title of Alaska's second-in-command executive from "secretary of state" to "lieutenant governor" in 1970, this provision of Alaska's Constitution has otherwise remained unchanged and apparently unchallenged.[126]

Amici read language into article III, section 8 that simply is not there. Again, this Court has repeatedly confirmed that it is "not vested with the authority to add missing terms

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124 *See* AS 15.13.070(b)-(c), (g) (allowing candidates running "a joint campaign for governor and lieutenant governor" to collect twice the normal individual campaign contribution limits); AS 15.15.030(5) (confirming that "[t]he lieutenant governor and the governor shall be included under the same section" in the general election); AS 15.25.100(a) (noting that the candidates for governor and lieutenant governor "are treated as a single paired unit" for the general election ballot); AS 15.25.100(d) (establishing what happens if a running mate is withdrawn or otherwise becomes unable to continue to be listed as a candidate); AS 15.25.105(b) (requiring any write-in candidates for governor or lieutenant governor to "file a joint letter of intent together").

125 Alaska Const. art. III, §8.

126 *See* 1970 Senate Joint Resolution 2.

or hypothesize differently worded provisions . . . to reach a particular result."[127] Notably, the plain language of this provision says *nothing* suggesting that a lieutenant governor can be nominated *only* through a primary election — partisan or otherwise — as Amici summarily claim. [Am. Br. 20 ("The plain meaning of this provision is that the lieutenant governor runs solo *in a partisan primary*[.]") (emphasis added)] Notably, Amici otherwise concede that the Alaska Constitution even allows abolishing the primary in its entirety, and that a party's candidates may be chosen by other means. [Am. Br. 30 n.10 (acknowledging that "the adopted language . . . allow[s] enough flexibility to [elect a secretary of state] . . . if the primary system [is] abolished")] Indeed, that is exactly what Ballot Measure 2 accomplished; Alaska's partisan primary has been abolished, and the primary now only serves to identify which top four candidates in each race, regardless of party affiliation, will reach the general election ballot.[128]

This provision of Alaska's Constitution simply contains permissive language giving the legislature (or voters by initiative) the ability to "provide[] by law" *any* "manner" "for nominating candidates for . . . elective offices."[129] Stated differently, this provision merely requires that a lieutenant governor undergo a legal process to reach the general election ballot, just like candidates for other elective offices. It is not and should not be more

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127 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (alteration in original) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994)).

128 AS 15.25.100(a). Furthermore, all political parties are free to hold conventions or otherwise endorse their preferred candidates — including a governor and lieutenant governor pairing — before Alaska's top-four primary. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 (2008).

129 Alaska Const. art. III, §8.

difficult for the lieutenant governor to reach the general election ballot than any other candidate for elected office.

Now that Ballot Measure 2 is law, AS 15.25.010 makes the purpose of Alaska's primary election crystal clear: "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."[130] The constitutional requirement that candidates for governor and lieutenant governor must run jointly in the general election simply calls for some mechanism for a pair of candidates to reach the general election ballot "in the manner" as "candidates for other elective offices."[131] Ballot Measure 2's top-four primary creates that mechanism and therefore meets this requirement.[132] The plain language of Alaska's Constitution does not prohibit this change in Alaska's nomination process.

The constitutional convention discussion surrounding article III, section 8 confirms that the delegates debated whether Alaska's second-in-command executive should be an elected or appointed position, and they ultimately settled on flexible compromise language which does not prohibit Ballot Measure 2's pairing mechanism. By cherry-picking citations to the convention history discussing how a pairing could work in a partisan primary, Amici completely miss the main point: The delegates provided great flexibility to the legislature (or the voters through initiative) about how to elect the lieutenant governor,

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130 AS 15.25.010.

131 Alaska Const. art. III, §8.

132 *See* AS 15.25.100(a), (e).

who all delegates recognized must eventually be paired with a gubernatorial candidate before the general election. [Am. Br. 21-28]

Before the constitutional convention began, consultants with the Public Administration Service provided the delegates with materials about other state constitutions.[133] And the paper on the executive branch, ignored by Amici, helped frame the eventual discussion about the State of Alaska's second-in-command: Determining the line of "succession in case of vacancy in the office of the governor."[134]

The Committee on the Executive Branch extensively considered the question of who would succeed the governor, and the Committee's proposed language to the delegates[135]

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133 *See* Public Administration Service, 2 Constitutional Studies: The Executive Department (Nov. 1955) (folder 180.2).

134 *Id.* at 6-7 ("All state constitutions include a provision for establishing succession in case of vacancy in the office of the governor by reason of death, resignation, impeachment, or other cause. The most common provision, obtaining in 37 states, names a lieutenant governor as the first successor to the office of the governor. In the states without a lieutenant governor, eight provide for succession by the president of the senate and three states designate the secretary of state. Thus in the typical state, the first successor would be the lieutenant governor, followed by the presiding officer of the senate. The secretary of state and speaker of the house are the others who figure prominently in the line of succession." (footnotes omitted)).

135 *See* Alaska Constitutional Convention, Committee Proposals 10 (Dec. 15, 1955) (folder 208) ("There shall be a secretary of state, who shall have the same qualifications as the governor. He shall be elected at the same time and for the same term as the governor, and the election procedure prescribed by law shall provide that the electors, in casting their vote for governor shall also be deemed to be casting their vote for the candidate for secretary of state shown on the ballot as running jointly with the respective candidate for governor. The candidate for secretary of state who runs jointly with the successful candidate for governor shall be elected secretary of state. The secretary of state shall perform such duties as may be prescribed by law and as may be delegated to him by the governor."), 10a (Jan. 12, 1956) (same); *see also* Commentary to Committee Proposal 10, at 2-3 (Dec. 16, 1955) (folder 208) ("The Committee believes that only persons who hold an elective office should succeed to the Office of Governor. However, the successor should

made it possible for candidates to "be nominated jointly and elected on a joint ballot."[136] As later explained by Executive Branch Committee member Delegate John Boswell, the Committee chose this language after debating: (1) the title for the governor's successor; (2) whether that person should be elected or appointed; and (3) how to ensure compatibility between the two positions.[137]

This multi-step process is critical to understanding the debate at the constitutional convention over the line of succession. Ultimately, after debating for two days what would later become article III, section 8,[138] the delegates reached compromise language that left the details of the nominating process up to future legislatures and voters.[139]

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be of the same political party as the governor to avoid unnecessary confusion or waste when a vacancy occurs. These considerations led the committee to adopt a plan of election similar to that in effect in New York and also the same in principle as the arrangement for election of President and Vice-president of the United States. It calls for voters to cast a single vote applicable to both offices. The respective persons having the highest number of votes cast jointly for them for governor and secretary of state respectively would be elected. With respect to the duties of the Secretary of State, the Committee felt that he should have a full time job in the administration and that he should not preside over the Senate.").

136 3 PACC at 2005 (Jan. 13, 1956) (comments of Delegate V. Rivers, chair of the Executive Branch Committee).

137 3 PACC at 2128 (Jan. 14, 1956).

138 *See* 3 PACC at 1981-2157 (Jan. 13-14, 1956).

139 3 PACC at 2145 (Jan. 14, 1956); *see id.* at 2071 (Jan. 13, 1956) (comments of Delegate Thomas Harris) (noting that the proposed language did "not set any definite rules of how they are to be tied up on the ticket," and acknowledged that this would "be done later on by the legislature"); *see also id.* at 2010, 2044-45 (comments of Delegate V. Rivers) (confirming that the legislature would have flexibility in determining the manner of nomination). In fact, Delegate Maynard Londborg — another member of the Executive Branch Committee — noted that the Committee wanted to make the language flexible enough so that independent candidates for governor could run outside of a party system. *Id.* at 2011-12 (comments of Delegate Londborg) ("I would like to point out something

Some of the proposed amendments on the road to the delegates' compromise were contentious. One delegate, Delegate George Cooper, favored a system that avoided the pairing of the governor and secretary of state entirely.[140] But Delegate Cooper's amendment to establish that framework failed in a 19-33 vote.[141] Another delegate, Delegate Seaborn Buckalew, believed electing a secretary of state "makes it possible for a political hack with no qualifications whatsoever" to get elected[142] — instead favoring an appointed secretary of state and establishing the line of succession from the legislature[143] — and proposed an amendment to remove the section on the secretary of state altogether.[144]

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else that went on in the Committee thinking, the possibility of leaving it open for someone other than maybe someone right within the party. There may be an independent or someone who has no particular affiliations. The one running for governor may wish to choose that one, or maybe work as a team or maybe a strong independent who would have a very good chance of becoming governor. We left all reference to party out of this, I think, for that purpose that whatever team could win the election should be the one in office and above all, the governor should have one working with him with like mind. If the people want something else for a check and balance then they don't want that man, and they don't want a strong executive, but with this you have not only someone working in harmony right in the office, but should the governor leave the office vacant through death or some other reason, you have someone to step in and there should not be such a disruption of the function of the office.").

140 3 PACC at 2080 (Jan. 13, 1956); *see also id.* at 2011 (comments of Delegate Cooper) ("I am not particularly in favor of the elected primary. I happen to be in favor of something different altogether.").

141 3 PACC at 2088. The delegates later rejected a similar amendment by a voice vote. *See* 3 PACC at 2145-51 (Jan. 14, 1956).

142 3 PACC at 2004 (Jan. 13, 1956).

143 3 PACC at 2067; *see also id.* at 2007 (comments of Delegate Buckalew) ("Do you feel as an over-all picture that in the line of succession we would probably get a better man if the first person in line of succession was the president of the senate?").

144 *See* 3 PACC at 2067, 2089.

The delegates initially adopted Delegate Buckalew's amendment, which would have made the secretary of state appointed by the governor, in a 26-25 vote (with four members absent).[145]

But after one of the delegates who had voted for the motion gave notice of intent to reconsider later that evening,[146] the delegates took up the question again the following day.[147] As Delegate Maynard Londborg summed up, at this point, the delegates' main disagreement was over "a time element as far as *when* the governor picks his partner."[148]

The delegates then discussed the compromise language where candidates would need to run jointly for governor and secretary of state at the general election.[149] Delegate President William Egan — who had voted to remove the section altogether the night before — indicated that he would support "an amendment that will definitely guarantee to the people of Alaska that the man who will become secretary of state will be elected by the people in a primary election."[150] But the delegate who drafted the compromise language, Delegate Ralph Rivers, explained that the amendment actually served only to ensure that "[t]he secretary of state would run as provided by law for all other candidates, and if they

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145 3 PACC at 2092-93.

146 *See* 3 PACC at 2114.

147 See 3 PACC at 2127 (Jan. 14, 1956).

148 3 PACC at 2130 (emphasis added).

149 *See* 3 PACC at 2131-45.

150 3 PACC at 2135.

ever abolished the system of primary election and went back to the convention system, [the Constitution's] language would still be *broad enough to make it flexible*."[151]

After further discussion, the delegates overwhelmingly voted to reinstate the section making the secretary of state elective,[152] and then quickly adopted the compromise language through a voice vote.[153] The Committee on Style & Drafting later moved the section and streamlined other portions, but retained the language of the first sentence in what would later become article III, section 8 of the Alaska Constitution.[154]

From this history, it is clear that the delegates certainly *could* have chosen to adopt language which explicitly required a party primary as Amici claim, but they deliberately chose not to. [Am. Br. 20] Instead, the delegates adopted language that kept the secretary of state as an elective position, while leaving the exact mechanics of the nominating process "flexible" so long as candidates for governor and secretary of state ran jointly in the general election.[155] This compromise position — required to move past the close votes and extensive debate on the issue — does not show an intent by the majority of the delegates to require the secretary of state to "run[] solo in a partisan primary," [Am. Br. 20] nor does it explicitly require a separate nominating process for that office. Ballot Measure 2's

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151 3 PACC at 2140 (emphasis added).

152 3 PACC at 2143.

153 3 PACC at 2145. A subsequent attempt to make the secretary of state an appointed position was summarily rejected in a voice vote with no further discussion. *See* 3 PACC at 2155-56.

154 *See* Report of Committee on Style and Drafting, article III, section 8 (Jan. 26, 1956) (folder 203.032).

155 3 PACC at 2140 (Jan. 14, 1956) (comments of Delegate R. Rivers).

pairing mechanism is fully consistent with both the plain language of the Alaska Constitution and the framers' intent.

2. Under Amici's interpretation, Alaska's prior system, and prior elections conducted under it, would also have violated the Alaska Constitution.

If Amici's interpretation of article III, section 8 were adopted by this Court, then Alaska's election system prior to Ballot Measure 2 — which is what Amici seek to return to [Am. Br. 31-33] — would *also* be unconstitutional, and we would have already had not one, but *two* unconstitutionally-elected gubernatorial administrations in Alaska's short history as a state. Additionally, Amici's interpretation would foreclose the election of a governor and lieutenant governor through previously-legal means (such as petition candidacies, party substitutions, or write-in campaigns), and could lead to absurd and undesirable results (like a candidate being forced to run with a deceased or incapacitated running mate).

As this Court explained in *O'Callaghan v. State* (*O'Callaghan II*):

> In the 1990 state primary election, Jack Coghill won the Republican Party's nomination for lieutenant governor. The Republican Party ticket was therefore Coghill and Arliss Sturgulewski, the Republican Party's candidate for governor. John Lindauer and Jerry Ward had won the Alaska Independence Party's (AIP's) primary election nominations for governor and lieutenant governor respectively. On September 19, 1990, Lindauer and Ward withdrew as the AIP candidates. The same day, which was before the statutory forty-eight day deadline, Coghill withdrew as the Republican Party candidate and joined Walter Hickel to form the new

> ticket for the AIP. The Republican Party substituted Jim Campbell as the party candidate for lieutenant governor.[156]

This last-minute, party-substituted AIP team — which included Coghill (a delegate to Alaska's constitutional convention)[157] — was ultimately "elected to office in the November 6, 1990 general election."[158]

A similar last-minute change in nominees occurred in 2014. That year, the Democratic Party's candidate for governor was Byron Mallott, and Hollis French was the party's candidate for lieutenant governor.[159] Both Mallott and French withdrew on the same day, and the Democratic Party opted not to replace them. Instead, petition candidate Bill Walker replaced his running mate, Craig Fleener, with Mallott. The Walker and Mallott "unity ticket" won election in the November 2014 general election.[160]

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156 920 P.2d 1387, 1387-88 (Alaska 1996) (citations omitted) (citing *O'Callaghan v. State (O'Callaghan I)*, 826 P.2d 1132, 1133 (Alaska 1992)).

157 *See* Alaska Constitutional Convention, The Delegates (folder 101) (listing "John B. Coghill" as a constitutional convention delegate from Nenana, Alaska).

158 *O'Callaghan I*, 826 P.2d at 1134. Such party substitutions have occurred in elections "for other elective offices" in the past. For example, Joe Miller ended up substituting in for the Libertarian Party nominee after not participating in the primary for U.S. Senate in 2016. *Compare* Alaska Division of Elections, 2016 Primary Election Summary Report (Aug. 16, 2016), https://www.elections.alaska.gov/results/16PRIM/data/Results.pdf (showing Cean Stevens as winning the Libertarian Party nomination), *with* Alaska Division of Elections, 2016 General Election Official Results (Nov. 8, 2016), https://www.elections.alaska.gov/results/16GENR/data/results.pdf (showing Joe Miller running as the Libertarian Party candidate).

159 Alaska Division of Elections, 2014 Primary Election Summary Report (Aug. 19, 2014), https://www.elections.alaska.gov/results/14PRIM/data/results.pdf.

160 Alaska Division of Elections, 2014 General Election Official Results (Nov. 4, 2014), https://www.elections.alaska.gov/results/14GENR/data/results.pdf [hereinafter 2014 General Election Results].

In both instances, the ultimately-successful candidates for lieutenant governor did not stand for election in the general election because they had won a party primary. Instead, they were selected by either a political party apparatus or a petition candidate for governor.[161] The fact that they had won a party primary was immaterial to their appearance on the general election ballot, since they ended up running on behalf of an entirely different party or a petition ticket. But either way, both Coghill and Mallott reached the general election ballot outside of the closed political party primary system, and no constitutional issues arose.

Critically, these two pathways for a joint ticket to reach the general election ballot outside of the primary process — the party substitution and independent petition processes — were enacted by Alaska's first legislature in 1960, confirming and exercising the legislature's flexibility in establishing nominating procedures under the Alaska Constitution.[162] In over sixty years, no one has claimed that these processes — by which

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161 *See* former AS 15.25.110 (2020) (party substitution); former AS 15.25.140-.205 (2020) (petition).

162 Ch. 83, §5.11, SLA 1960 ("If any candidate nominated at the party primary nomination dies, withdraws, or becomes disqualified from holding office for which he is nominated after the primary nomination and 10 days or more before the general election, the vacancy may be filled by party petition. The secretary of state shall place the name of the person nominated by party petition on the general election ballot[.]"); Ch. 83, §5.53, SLA 1960 ("Petitions for the nomination of candidates for the office of governor, secretary of state, United States senator and United States representative shall be signed by not less than 1,000 qualified voters. *Candidates for the office of governor and secretary of state must file jointly*." (emphasis added)); *see* Ch. 83, §5.56, SLA 1960 ("The secretary of state shall place the names and the political group affiliation of persons who have been properly nominated by petition on the general election ballot."); *see also O'Callaghan I*, 826 P.2d at 1137 n.8 (noting that section 5.11 was "the predecessor to AS 15.25.110.").

a candidate for lieutenant governor can avoid the primary entirely — violate article III, section 8 of the Alaska Constitution. And because many of the drafters of the Constitution also enacted those first laws, this Court has repeatedly recognized that there is a presumption that the framers would have intended those laws to be constitutional.[163]

Even without substituting candidates after the primary, the nominating petition system that Ballot Measure 2 partially replaces would violate Amici's novel "rule" that a lieutenant governor must run "solo" through a "partisan" primary.[164] [Am. Br. 20] Under that system — which it is uncontested would revive if Ballot Measure 2 were invalidated — candidates for governor and lieutenant governor pair up *before* gathering the signatures required to qualify for the general election, and *neither candidate* ever appears on *any* primary ballot.[165]

It is also entirely conceivable that candidates for governor and lieutenant governor could win election through a write-in campaign, which indeed occurred in Lisa

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163 *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 (Alaska 1980) ("[S]ince [the statute] was passed by the first state legislature, several members of which had served in the Alaska Constitutional Convention, and was approved by Governor Egan, who had been chairman of the Convention, a stronger than usual presumption of constitutionality should be applied."); *Bradner v. Hammond*, 553 P.2d 1, 4 n.4 (Alaska 1976) ("Contemporaneous interpretation of fundamental law by those participating in its drafting has traditionally been viewed as especially weighty evidence of the framers' intent." (citing *Myers v. United States*, 272 U.S. 52 (1926); *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727 (1885); *Norfolk & W. Ry. Co. v. Bd. of Pub. Works*, 21 S.E.2d 143 (W.Va. 1942); *Jones v. Williams*, 45 S.W.2d 130 (Tex. 1931))); *see also Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020) (" 'Legislative history and the historical context' assist in our task of defining constitutional terms as understood by the framers." (quoting *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016))).

164 *See* former AS 15.25.140-.205 (2020).

165 *See* former AS 15.25.180 (2020); former AS 15.25.190 (2020).

Murkowski's successful statewide 2010 write-in campaign for the U.S. Senate.[166] Murkowski ran a write-in campaign after losing the Republican Party's nomination. But the fact that Republican primary voters narrowly rejected Murkowski's candidacy did not prevent her from running, and ultimately winning, re-election as a write-in. Likewise, candidates could run for governor and lieutenant governor as write-ins and be elected even if they had never run in a primary at all.[167]

These examples show several different "manner[s] provided by law" from Alaska's prior election system which permitted candidates for office to run in the general election after either not running in, or *losing*, a primary election. Under Alaska's prior election system, candidates for lieutenant governor: (1) have been "substituted in" prior to the general election by political parties;[168] (2) made it onto the general election ballot by petition;[169] and (3) were permitted to run write-in campaigns.[170] These examples also show that candidates for governor and lieutenant governor need not come from the same political parties.[171] And *not once* has there ever been a ruling that the two lieutenant governors

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166 *See generally Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

167 *See* former AS 15.25.105(b) (2020) ("If a write-in candidate is running for the office of governor, the candidate must file a joint letter of intent together with a candidate for lieutenant governor. *Both candidates must be of the same political party or group*." (emphasis added)). Ballot Measure 2 repealed the second sentence of former AS 15.25.105(b). [Exc. 26] *See* AS 15.25.105(b) .

168 *See* former AS 15.25.110 (2020).

169 *See* former AS 15.25.140-.205 (2020).

170 *See* former AS 15.25.105(b) (2020).

171 *See* 2014 General Election Results.

discussed above — including one who also served as a constitutional convention delegate — reached the general election ballot unconstitutionally.

What these statutes — most of which were first enacted in 1960 — confirm is that the framers fully recognized that a lawful "manner" for a joint ticket to reach the general election ballot could — and in fact did — exist outside of the traditional party primary framework, and that the legislature (or voters through initiative) would have great leeway in adopting "the manner provided by law" for the nomination of a lieutenant governor under article III, section 8.

Additionally, Amici's interpretation of this language would deprive the lieutenant governor — and *only* the lieutenant governor — of the other methods of qualifying for the general election ballot (e.g., petition, party substitution, write-in). Far from obeying the Constitution, Amici's interpretation would force the lieutenant governor to be *treated differently from all other candidates for elected offices*, in direct conflict with their own interpretation of the Constitution's mandate that they be nominated "in the [same] manner" as other offices.[172]

Amici's explication of article III, section 8 defies its plain language, the framers' intent, and Alaska's prior electoral history. It would also render Alaska's prior election system unconstitutional. Accordingly, this Court should reject Amici's interpretation of article III, section 8. Voters' expressed desire to establish a new nominating system for all

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172 Alaska Const. art. III, §8.

candidates — which also honors Alaska's constitutional requirement that the governor and lieutenant governor must run jointly in the general election — should be upheld.

V. Ballot Measure 2's Individual Provisions Are Severable.

Appellants' conclusory mention of severability in its opening brief should be treated as a waiver of the issue by this Court.[173] Their *entire* discussion of the scope of their challenge is as follows: "[Ballot Measure] 2 must be voided in its entirety." [At. Br. 20] And Amici somehow failed to realize that there *is* a severability clause in Ballot Measure 2 before filing their brief, [Exc. 34] which dooms their severability analysis.[174] [Am. Br. 16, 17, 31 (repeatedly claiming that Ballot Measure 2 "does not contain a savings clause"); *see also* Am. Br. 32 (asserting that "the lack of such clause . . . suggests the voters did not intend the provisions to be severable")] Although ABE firmly believes the entirety of Ballot Measure 2 will be upheld as constitutional, it is evident that Ballot Measure 2 satisfies the severability test, allowing this Court to sever any offending provision while allowing the rest of Ballot Measure 2 to stand.

This Court explained how it analyzes the severability of ballot initiatives in *Alaskans for a Common Language, Inc. v. Kritz*,[175] holding that the same two-part severability analysis which applies to legislatively-enacted statutes also applies to statutes

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173 *See Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991) (citing *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980); *Fairview Dev., Inc. v. City of Fairbanks*, 475 P.2d 35, 36 (Alaska 1970)).

174 It is also worth noting that even if the measure did not contain a severability clause, one would automatically be inferred by operation of law. *See* AS 01.10.030.

175 170 P.3d 183, 209-14 (Alaska 2007).

enacted through ballot initiatives.[176] That two-part test asks: "(1) whether 'legal effect can be given' to the severed statute";[177] and (2) "whether the voters 'intended the provision to stand' in the event that portions of it were stuck down."[178]

This Court has explained that the first part of the test "is a relatively low threshold test that merely requires an enforceable command to implement the law."[179] And for the second part of the test, "[t]he key question is whether the portion remaining, once the offending portion of the statute is severed, is independent and complete in itself so that it may be presumed that the [voters] would have enacted the valid parts without the invalid part."[180] Furthermore, the existence of a "severability clause places on those challenging the statute the burden of showing that the [severability] test is *not* satisfied by a redaction."[181]

With respect to the first part of this Court's severability analysis, each of the three main components of Ballot Measure 2 — the new open nonpartisan primary system, RCV for general elections, and campaign finance disclosure requirements — could each function

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176 *Id.* at 210.

177 *Id.* at 209 (quoting *Lynden Transp., Inc. v. State*, 532 P.2d 700, 713 (Alaska 1975)).

178 *Id.* at 212 (quoting *Lynden Transp.*, 532 P.2d at 713).

179 *Id.* (citing *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 94 (Alaska 1998)); *see also id.* (indicating that a provision should remain "if, 'standing alone, legal effect can be given to' the provisions that remain after severance of an invalid provision" (quoting *Lynden Transp.*, 532 P.2d at 713)).

180 *Id.* (alterations in original) (quoting *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992)).

181 *Id.* at 210-11 (emphasis in original) (citing *Lynden Transp.*, 532 P.2d at 711-12).

by itself, even if it or only a portion of it were left standing. Further, it is evident that a solution accommodating Appellants' and Amici's specific and technical challenges to Ballot Measure 2 would be even more narrowly tailored.

To their concern that the top-four primary violates political parties' associational rights, one solution is obvious: This Court could eliminate their concern by leaving the top-four primary system intact while removing partisan information from the ballot.

With respect to arguments that the RCV and candidate pairing systems are unconstitutional as applied to the governor's race, this Court's solutions would be similarly obvious. On "the greatest number of votes," this Court could simply make RCV inapplicable to the governor's race alone and leave that system applicable to the other 63 races decided under state elections.[182]

For Ballot Measure 2's pairing mechanism, this Court could permit candidates for governor and lieutenant governor to each be listed separately on the top-four primary ballot, and then have the top four finishers in each race pair up with each other afterwards for the general election.[183] These options easily satisfy the first factor required by this

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[182] *See* Alaska Const. art. III, §3.

[183] Although this would address the point raised by Amici, doing so could easily create pairings which would run contrary to the framers' intent of ensuring that the governor's second-in-command would be at least somewhat aligned with "a strong executive." *See* 3 PACC at 2012 (Jan. 13, 1956) (comments of Delegate Londborg) ("[T]he governor should have one working with him with like mind. If the people want something else for a check and balance then they don't want that man, and they don't want a strong executive, but with this you have not only someone working in harmony right in the office, but should the governor leave the office vacant through death or some other reason, you have someone to step in and there should not be such a disruption of the function of the office.").

Court for a severability analysis, because " 'legal effect can be given' to the [remainder of the] severed statute."[184]

Second, despite Amici's repeated assertions to the contrary, [Am. Br. 16, 17, 31, 32] Ballot Measure 2 *does* contain an explicit severability clause just like the measure at issue in *Alaskans for a Common Language*. [Exc. 34] Section 73 of Ballot Measure 2 provides:

> The provisions of this act are independent and severable. If any provisions 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. [Exc. 34]

This language, in addition to the statutory savings clause that infers severability,[185] should be more than sufficient for this Court to conclude that voters intended for any unconstitutional provision of Ballot Measure 2 to be severable.[186]

Appellants' and Amici's conclusory and factually incorrect arguments trying to jettison the entirety of Ballot Measure 2 all fail to meet their burden of proof. All they do is express to this Court a desired outcome; there is no legal basis to support their requests. Because Appellants and Amici have not — and cannot — meet their burden to show that voters did not intend for Ballot Measure 2's severability clause to apply, this Court should

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184 *Alaskans for a Common Language*, 170 P.3d at 209 (quoting *Lynden Transp.*, 532 P.2d at 713).

185 AS 01.10.030.

186 *Alaskans for a Common Language*, 170 P.3d at 212-14.

reject their attempt to invalidate the entirety of Ballot Measure 2 in the unlikely event this Court finds any one provision unconstitutional.

CONCLUSION

Because neither Appellants nor Amici can show that any portion of Ballot Measure 2 is facially unconstitutional, this Court should uphold the measure and AFFIRM the superior court's decision in this case.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 6th day of December, 2021.

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