No. 99-401

IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

BILL JONES,
Respondent.

BRIEF OF AMICUS CURIAE ALASKAN VOTERS FOR AN OPEN PRIMARY (AVOP) IN SUPPORT OF RESPONDENTS

Filed March 31, 2000

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

TABLE OF AUTHORITIES

Page

CASES

California Democratic Party v. Jones, 169 F.3d 646 (9th Cir. 1999) 10

Heavey v. Chapman, 93 Wash.2d 700, 611 P.2d 1256 (1980) 10

O'Callaghan v. State of Alaska, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 520 U.S. 1209 (1997) 1, 2, 6, 10

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 6, 9, 10, 11

CONSTITUTIONS

US Const. Art. I § 4 Cl. 1 8

Alaska Const. Art. V § 3 8

STATUTES

AS 15.25.010 .... 3, 5

AS 15.25.030 .... 3, 5, 7

AS 15.25.056 7

AS 15.25.060 .... 5, 8

AS 15.25.070 .... 4, 5

AS 15.25.080 .... 3, 4, 5, 6

AS 15.25.110-.130 7

Section 231, Ch. 100, SLA 1980 6

Ch. 41 SLA 1959 3

Ch. 1 SLA 1967 5

I

INTERESTS OF AMICUS CURIAE[1]

Alaskan Voters for an Open Primary (AVOP) is a group of about 80 Alaskan voters of all political persuasions. The Alaska Women's Political Caucus, with over 300 members (both men and women), is also a member. AVOP's interest is to uphold the constitutionality of the Alaska blanket primary statutes and retain for all Alaskan voters the broadest possible choice in the primary election. AVOP was allowed to intervene before the Alaska Supreme Court in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 520 U.S. 1209 (1997), which upheld Alaska's blanket primary statutes against a similar constitutional challenge.

II

SUMMARY

AVOP submits this brief for two reasons:

1. to explain how the Alaska blanket primary election (popularly termed the "open" primary in Alaska) has historically worked and the very limited role that political parties play in it,[2] and

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[1] This brief is filed with the written consent of all parties. These have been filed with the clerk of the court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or counsel make a monetary contribution to the preparation or submission of this brief.

[2] At the trial in this case, though "substantial evidence" was presented as to how the blanket primary has operated in

2. to comment briefly on important points raised in the other briefs insofar as they affect Alaskan voters.

III

ARGUMENT

A. HISTORY OF ALASKA'S BLANKET PRIMARY AND THE ROLE OF POLITICAL PARTIES UNDER ALASKA'S BLANKET PRIMARY STATUTES.

Prior to 1947 the Territory of Alaska had an open primary.[3] Voters were given a single ballot listing candidates by party in columns separated by black lines. Voters could cast ballots in only one column. Crossing the line disqualified the entire ballot. This was popularly known as the "black line" ballot.

In 1946 a blanket primary bill was introduced in the territorial legislature, but did not pass. As a compromise, the question was put to the voters in a referendum at that year's general election. It passed by a wide margin. Unofficial returns from 46 of 60 precincts showed 4,225 favoring the blanket primary and only 878 opposed (83% – 17%). The next territorial legislature passed the blanket primary bill. In the house the vote was unanimous. Four senators voted "no."

Washington for the past 60 years, such historical evidence was not presented about Alaska. According to Respondents, Petitioners' experts acknowledged that they were unfamiliar with this history. Respondents' Brief Section IV A.

[3] See Gordon S. Harrison, *Alaska's Blanket Primary: Background Information and Legislative History* (Research Request 90.294, May 23, 1990) at 2 ("Harrison"), attached as Appendix "A." This was quoted extensively by the Alaska Supreme Court in *O'Callaghan* at 1255-56.

The blanket primary issue, however, became increasingly partisan. Democrats generally opposed it and Republicans supported it. Democrats believed it eroded party loyalty and discipline and feared Republicans were using it to "raid" the Democratic primary to elect the weakest Democratic candidates. Republicans hoped to use the blanket primary to attract conservative Democrats and Independents. Independents favored the measure and party loyalists in both camps opposed it. As Dr. Harrison said,

> "Party loyalty has not been strong in Alaska, and legislators from both parties have responded to widespread public support for the blanket primary."[4]

In the first session of the first state legislature in 1959, with the Democrats controlling both houses and a Democratic governor, the blanket primary statutes were repealed and the "black line" primary reinstated.[5]

That primary was called the "**party** primary nomination." (emphasis added).[6] AS 15.25.010 provided:

> "At the party primary nomination, political parties shall nominate their candidates for the elective state executive and state and national legislative offices to be placed on the next general election ballot."

AS 15.25.030(12) required each candidate to sign a declaration under oath "that the candidate if nominated

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[4] Harrison at 5.

[5] Ch. 41 SLA 1959.

[6] AS 15.25.010-.080.

and elected will support the principles of the party he seeks to represent." AS 15.25.070 provided that no one could vote for a person whose name was not on the ballot "or vote for candidates in more than one column." "[V]otes for candidates in more than one party column shall not be counted, and [if so voted] the entire ballot is invalid." AS 15.25.080 allowed voters to declare their party preference, but did not require them to do so. Election judges were required to ask each voter if they desired to declare a party preference before giving them a ballot. The official was required to record the preference, if one was declared. *Id.*

During the next four legislatures, Republicans sought to reinstitute the blanket primary. Many Democrats also wanted it. Legislation was regularly introduced, but died in committee.

In 1966, a blanket primary bill passed the house and almost passed the senate. Legislators of both parties supported the reform. Senator Robert Ziegler (D. Ketchikan) stated,

> "The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voting want to vote for the man, not the party."[7]

Nonetheless, the bill failed.

That year the Republicans swept both houses and took the governor's mansion. In keeping with Governor Walter Hickel's campaign promise, HB1 was introduced

[7] Harrison at 4.

at his request. It passed 34-5 in the house, 18-2 in the senate, and was enacted as Ch. 1 SLA 1967.

The bill was entitled:

> "An act giving voters the right to vote for candidates without regard to party affiliation in primary elections."

It generally did away with all reference to the "party primary nomination," and called the August ballot the "primary election." AS 15.25.010 now provided:

> "Candidates for . . . elective . . . offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter."

The term "primary election" was also substituted throughout.

AS 15.25.030(12) continued to require a loyalty oath. AS 15.25.060 was amended to read,

> "The secretary of state shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation."

AS 15.25.070 struck all references limiting a voter's participation to one party's primary. AS 15.25.080 was amended to require the secretary of state to provide a space in the official voter registration book where a voter might, if desired, record his or her party preference. No longer would the election judge be required to ask a party preference before handing the voter a ballot. At some point between 1967 and 1980, the loyalty oath statute was repealed. There is no longer a requirement that a candidate, even if nominated and elected, must support the

principles of their party. Nor is there any longer a statute even permitting voters to declare their party preference when they vote.[8]

On March 31, 1990, the Republican Party of Alaska ("RPA") enacted new party rules to limit its primary election to registered Republicans, registered Independents, and those who declined to state a party preference. The RPA sued the state in federal court, claiming it had a right under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), to hold its own partly closed primary. The state entered into a consent decree, under which the Director of Elections agreed, despite the blanket primary statutes, to promulgate regulations implementing the Republican closed primary election along with a blanket primary for all other candidates and voters. Republican candidates were limited to their primary and all other candidates to the blanket primary. Eligible voters could choose either ballot, but voters registered to other political parties were limited to the blanket primary.

Two partly closed Republican primary elections, in 1992 and 1994, were conducted under the regulations. An Alaskan voter, Michael O'Callaghan, challenged the regulations in state court and in March 1996 the Alaskan Supreme Court declared them unconstitutional.[9] Since then Alaska has conducted its primaries under the blanket primary statutes.

Our state has one of the highest, if not the highest, percentages of non-partisan and independent voters. As

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[8] Section 231, Ch. 100, SLA 1980 repealed AS 15.25.080.

[9] *O'Callaghan, supra.*

of March 1 of this year, out of a total of 462,423 registered voters in the state, 112,621 were registered Republicans (24%), 76,401 registered Democrats (17%), 18,933 registered members of the Alaska Independence Party (4%), 6,966 registered Libertarians (1.5%), 3,327 registered members of the Green party (0.7%), 1,524 Republican Moderates[10] (0.3%), and 4,970 members of other parties (1%). There were also 159,231 undeclareds (34%), and 78,450 non-partisans (17%).[11] 51% of all voters register as either undeclared or non-partisan.

Under Alaska law the political parties play virtually no role in the conduct of the blanket primary. Candidates self-declare their party affiliation when they file for office.[12] As noted above, voters do not have to declare a party affiliation.[13] The parties traditionally do not endorse in the primary. Their role is mainly confined to recruiting candidates, helping to raise money, and coordinating efforts between campaigns. Under state law their only official role is to place on the primary ballot by petition a substitute candidate, if an unopposed incumbent dies before the primary election,[14] or to replace, by petition, on the general election ballot a nominee who has died, become disqualified, withdrawn, or resigned after the primary.[15]

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[10] Not to be confused with Republicans.

[11] Source: Alaska State Division of Elections printout. See Appendix "B."

[12] AS 15.25.030(a)(5) and (16).

[13] See n.10, supra, and accompanying text.

[14] AS 15.25.056.

[15] AS 15.25.110-.130.

Candidates are identified by party affiliation on both primary and general election ballots.[16] However these party labels simply help voters identify candidates politically. They do not signify endorsement or any involvement by political party organizations in the primary election process.

There is a crucial distinction between candidates labeling themselves politically and the party organizations having any authority to conduct the election. Although they participate in election campaigns, Alaskan political parties do not participate in the primary election itself any more than they participate in the conduct of the general election.

B. RESPONSE TO CERTAIN ARGUMENTS OF PETITIONERS AND SUPPORTING AMICI

1. AVOP respectfully suggests that the core issue is probably best put in the amicus brief of the Northern California Committee for Party Renewal et al., at 14: "Whether a political party or the state has the right to establish the type of primary – blanket or closed."

2. The parties claim their right of association is paramount. The states claim their right to govern the "time, manner and place of elections, is most important,[17] and the voters claim their right to vote is paramount.

[16] AS 15.25.060, AS 15.15.030(5).

[17] US Const. Art. I § 4 Clause 1. For the equivalent state constitutional provision, see Alaska Const. Art. V § 3 ("Methods of voting, including absentee voting, shall be prescribed by law.")

That the federal constitution explicitly directs state legislators to establish federal elections and that the constitution was drafted before there were political parties should provide some weight to the states' (and the voters') position here. The constitution directs state legislatures, not political parties, to establish the method of federal elections. Unless the state is unable to justify curtailing the associational rights of political parties (as in *Tashjian*), its efforts to enfranchise large members of voters should not be struck down.

3. The Political Parties and their supporting amici generally proceed from the premise that they have the constitutional right to control blanket primary elections, even in the face of state law. They must concede that, if this premise fails, so does their argument.

Yet:

a. 23 states "use some version of the open primary,"[18] three have blanket primaries,[19] and Louisiana has a nonpartisan primary. The primaries in these 27 states have been free from control by political parties for many years. This is powerful evidence of their constitutionality.

On the other hand, invalidating California's blanket primary will have severely disruptive political consequences across the country. This Court should not take such a step lightly.

[18] Amicus brief for the Brennan Center at 5 n. 8 and accompanying text.

[19] Alaska, California, and Washington.

None of the 23 open primary states or Louisiana has participated in this case (nor has the federal government which, itself, has an interest in maintaining political stability in the states). Surely, if they felt their primary election systems were seriously threatened, these states would be participating. If the Court is inclined to declare most states' primary election laws unconstitutional, they should at least be notified and invited to participate. And there may well be other citizen groups like AVOP, who would want to file amicus briefs. (This was the step the Alaska Supreme Court took when the Alaska case was initially argued).[20]

b. Every court that has considered the constitutionality of blanket primary statutes against the challenge raised here has upheld it. *Heavey v. Chapman*, 93 Wash.2d 700, 611 P.2d 1256 (1980), *O'Callaghan v. State of Alaska*, supra, and *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999). Only one jurist, Justice Rabinowitz of the Alaska Supreme Court, has even dissented. *O'Callaghan v. State of Alaska*, supra, at 1264.

c. As the other briefs have pointed out, the case upon which the Political Parties primarily rely, *Tashjian v. Republican Party of Connecticut*, supra, was the opposite factual situation. There one political party wanted to open up its primary and the state wanted to close it. The issue and the important public policies of expanding the franchise are different here.

[20] See *O'Callagahn v. Coghill*, 888 P.2d 1302 (Alaska 1995) (Order and Memorandum Opinion). That published order was virtually without precedence since statehood.

But something else is different, too. That case was decided on a 5-4 vote in this Court. All members of that majority are gone, and all the dissenters remain. Now may be a good time to re-examine the holding in *Tashjian* to determine whether it has any application beyond the unusual factual pattern presented. Does this Court want that case to be the legal precedent for overturning the open, blanket, and nonpartisan primary election statutes in 27 states? Was this result envisioned when that case was decided? And, most importantly, did it represent the best public policy decision at the time?

AVOP suggests that it **did** (because it expanded the franchise), but the contours of that case should be carefully delineated now, so that it cannot be similarly misinterpreted in the future. This case presents the opportunity to clarify *Tashjian* and, at the same time, strengthen the right to vote.

Political parties may not like it if they cannot seize control of the blanket and open primary election process, but they certainly will understand why. And that, too, will provide important stability to the political process.

IV.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

MAX F. GRUENBERG, JR.
Counsel of Record

GRUENBERG, CLOVER AND HOLLAND
880 H Street, Suite 201
Anchorage, Alaska 99501
(907) 279-9970
Counsel for Amicus Curiae
Alaskan Voters for an Open Primary