

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

Plaintiffs,

vs.

Case No. 3AN-20-09532 CI

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

Defendants.

ALASKANS FOR BETTER ELECTIONS,
INC.,

Intervenor.

ORDER RE: ALL PENDING MOTIONS
(Case Motions 5, 7, 8, 12, 14)

I. INTRODUCTION

At issue in this case is “Ballot Measure 2,” which was a ballot measure that was passed by Alaska voters in November 2020. The now-passed measure revises Title 15 statutes that govern certain state and federal elections. Generally speaking, whereas the prior law permitted political parties to choose their nominees via primaries and to then have the general election ballot list that political party choice, the revised statute states that primaries shall be open and not controlled by political parties; that the ballot shall list candidates as being affiliated with whatever party they say they belong to; introduces a new “ranked-choice” voting method whereby the top four winners in the primary proceed

to the general election, regardless of party affiliation; and, seeks to make political contributions more transparent by eliminating “dark money” contributed from undisclosed sources.

Plaintiffs are a group of Alaskans who seek to have the new law deemed “unconstitutional on its face,” and to return to the political party method. At oral argument Plaintiffs were very candid in saying that they did not agree with parts of the new election method and that they think it is an “awful policy.” Specifically, Plaintiffs challenge the open primary and ranked choice parts of the new law, but Plaintiffs do not challenge the new law’s attempt to preclude “dark money.”

The State of Alaska opposes, and is joined by the group that sponsored the election ballot measure, “Alaskans for Better Elections, Inc.” The State is officially the “defendant,” and Alaskans for Better Elections joined the suit as an “intervenor.” In this Order, for convenience this court refers to the State and intervenor Alaskans for Better Elections collectively as “Defendants.” As to the merits of this case, Defendants argue that Plaintiffs’ policy arguments are just that – policy arguments – and that the voters, the legislature and the governor set policy, not courts. Defendants argue that Plaintiffs, who are seeking to have the new law deemed “facially unconstitutional,” have the burden of proving that unconstitutionality, that this is a heavy burden, and that Plaintiffs have not met that burden. Defendants argue that Plaintiffs ignore case law from the Alaska Supreme Court and the United States Supreme Court that directly supports *Defendants’* position.

The voters passed Ballot Measure 2 in the November 2020 general election. Plaintiffs filed their complaint for declaratory and injunctive relief on December 1, 2020.

The parties then agreed to a simultaneous briefing schedule, and on April 2, all parties filed summary judgment motions. On May 17, Plaintiffs filed another summary judgment motion. The briefing on all these motions raise the same issues, the motions are ripe, and oral argument was held on July 12. The material facts are not in dispute. For the reasons stated below, this court **GRANTS** the State's and Intervenor's summary judgment motions (case motions #5 and #7), and **DENIES** Plaintiffs' motions (motions #8 and #12). To be clear, this court is **DENYING** Plaintiffs' claim for declaratory judgment and Plaintiff's request for an injunction to stop the new law from being implemented in the 2022 election.¹

II. FACTS

The material facts of this case are not in dispute, and can be briefly stated. In November 2020, Ballot Measure 2 was voted on in Alaska's general election, and passed. As stated above, Ballot Measure 2 is now the law, and is codified at Title 15 of the Alaska Statutes. The new law replaces partisan primaries with an open top-four primary for state legislative, state executive, and federal congressional offices. The new law abolishes

¹ There is one additional motion, case motion #14. That is a July 8 motion to strike filed by Intervenor, and became ripe only last Monday, July 19. Intervenor argues that the parties long ago agreed to a simultaneous briefing schedule, that this court accepted that agreement and made it an order, that the briefing has concluded, but that since that deadline Plaintiffs have filed three additional political commentaries and one political cartoon. Intervenor argues that Plaintiffs have not filed any motions to accept these late filings, and that Plaintiffs even concede in writing that the recent submissions "are probably not relevant." Intervenor argues that this is just a continuation of Plaintiffs ignoring relevant law and instead "citing" to Wikipedia and various news commentators. The State joins Intervenor's motion, and additionally points out that Plaintiffs are still just making policy arguments, not a legal argument that the new law is unconstitutional on its face. Plaintiffs indeed acknowledge all of this in their July 12 and 19 oppositions to Intervenor's motion to strike. Plaintiffs instead argue in their July 19 opposition that their supplementations are "for the record only" and that Plaintiffs are "totally confident that this Court will be able to sort out the issues and appropriately consider them." This court hereby **DENIES** Intervenor's motion to strike, for two reasons. First, let the parties make their record. But perhaps more importantly, that Plaintiffs continue to rely on "probably not relevant" political commentators and cartoons serves to show the weakness and absence of Plaintiffs' *legal* arguments.

But with this said, the record is now closed.

party primaries, and instead allows any candidate, regardless of political affiliation, to file a declaration of candidacy and to run in the primaries. This means that candidates will no longer be nominated by political parties, but candidates can have the ballot put their declared political party designation next to their name. The law also establishes ranked-choice voting for general elections. In ranked-choice voting, voters rank candidates as their first-, second-, third-, and fourth-choices, and the candidates with the greatest number of votes advance to the general election regardless of political affiliation. Finally, the new law attempts to require more disclosures to political contributions, and to thereby eliminate “dark money” contributions. Ranked-choice voting is new to Alaska, but various forms are being used in Maine, New York, in various local elections in other states, and in Australia, England and Ireland.

No Alaska election has been held since Ballot Measure 2 was passed. Its first use will come with the 2022 elections. It is for this reason that the parties agreed to a briefing schedule, so any challenges to the new law could be resolved in time for the 2022 ballots to be printed. And it is also for this reason that this court scheduled oral argument as soon as the parties wanted, i.e., on July 12.

III. APPLICABLE LAW

Plaintiffs and Defendants agree that there are only two provisions in the Alaska Constitution that are specifically applicable to this election dispute.² The first provision is Article III, Section 3. It is quite short, and states in full as follows:

² Plaintiffs also raise more general “freedom of speech” and “freedom of association” arguments under the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 5 of the Alaska Constitution.

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.

The second provision is Article III, Section 8, and it states in full that:

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.

The parties to this case agree that Alaska statewide elections are controlled by Alaska law, that the “provided by law” language in Article III, Section 8 above means “Alaska statutes,” that such statutes can be passed by either the legislature during its legislative sessions or by the voters via a ballot measure, and that here, the language of Ballot Measure 2 is now the “provided by law” election method for certain Alaska state elections.

Numerous cases in Alaska and from the United States Supreme Court give guidance on who has what burdens of proof for constitutional challenges. Here too, the parties do not dispute these legal standards. First is that “A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation.”³ “Statutes may be found to be unconstitutional as applied or unconstitutional on their face.”⁴ “A presumption of constitutionality applies to a challenged statute, and doubts are resolved in favor of constitutionality.”⁵ “Interpretation of a statute begins with its text.”⁶ “When we engage in statutory construction, we must, whenever possible, ‘interpret each

³ *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).

⁴ *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 372 (Alaska 2009).

⁵ *Andrade*, 23 P.3d at 71.

⁶ *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 458–59 (Alaska 2006).

part or section of a statute with every other part or section, so as to create a harmonious whole.”⁷ “We must also presume ‘that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.’”⁸

The parties in this case also agree that Plaintiffs are making a “facial challenge” to the constitutionality of the new law. In other words, no Alaska election has yet been held since Ballot Measure 2 became law, and thus there are no facts as to whether the election proceeded smoothly. But where a party makes a “facial challenge,” the burden is quite high. “A plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ *i.e.*, that the law is unconstitutional in all of its applications.”⁹ “In determining whether a law is facially invalid, we must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.”¹⁰ “Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation.”¹¹ “Facial challenges 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. We must keep in mind that ‘[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’”¹²

⁷ *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999) (quoting *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526 (Alaska 1993)).

⁸ *Id.*

⁹ *Washington State Grange v. Washington State Republican Party*, 552 U.S. 444, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739 (1987)).

¹⁰ *Id.* at 449-50 (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)).

¹¹ *Id.* at 450.

¹² *Id.* at 451 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). The parties also discuss a four-step test articulated in *State, Div. of Elections v. Green Party of Alaska*, 118 P.3d 1054 (Alaska 2005). “The court 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

Also at issue in this case is the summary judgment standard. Here, all three parties filed summary judgment motions. Alaska Rule of Civil Procedure 56(c) states that “[j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” Rule 56(e) in turn states that “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” A court may grant summary judgment “only when no reasonable person could discern a genuine factual dispute on a material issue.”¹³ Here, the parties agree that there are no factual disputes, and thus that the only question is whether any of the parties have proven that they are entitled to judgment “as a matter of law.”

As to case law applicable to the precise election law issues now before this court, the parties discuss three cases. One is from Alaska, one is from the U.S. Supreme Court, and one is from the Ninth Circuit Court of Appeals.

The first case was decided by the Alaska Supreme Court in 2020, and that case discussed this same Ballot Measure 2. In *Meyer v. Alaskans for Better Elections*,¹⁴ at

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 state’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 State’s interest must be closer.” *Green Party of Alaska*, 118 P.3d at 1061 (quoting *Burdick v. Takushi*, 504 U.S. 428,434 (1992)).

¹³ *Christensen v. Alaska Sales & Service, Inc.*, 335 P.3d 514, 520 (Alaska 2014).

¹⁴ *Meyer v. Alaskans for Better Elections*, 465 P.3d 477 (Alaska 2020).

issue was whether this ballot measure should be allowed to be placed on the 2020 ballot. Lieutenant Governor Meyer, in his role as administrator of elections,¹⁵ had the statutory duty of determining if the ballot measure was confined to “one subject.”¹⁶ The lieutenant governor requested legal review by then-attorney general Kevin Clarkson.¹⁷ AG Clarkson concluded that the ballot measure violated the “one subject” rule, and recommended certification denial. The lieutenant governor in turn denied certification based on the attorney general’s opinion.¹⁸ The ballot measure’s sponsors sued in state court, and the superior court assigned to that case found that the initiative did not violate that rule. Lt. Gov. Meyer and the State (collectively “the State”) appealed to the Alaska Supreme Court. At oral argument before the Supreme Court, the State “conceded that, had the initiative bill been passed by the legislature, the bill would comply with the one-subject rule.”¹⁹ But the State then asked the Supreme Court to create a new standard: that voter initiatives should be held to a stricter “one-subject” test than the “one-subject” law imposed on the legislature by the Alaska Constitution.²⁰ In making that request, the State acknowledged that it was asking the Supreme Court to overrule its case law going back to 1974 and 1985.²¹ A unanimous Supreme Court stated that:

We agree with the [initiative sponsors] that imposing a stricter one-subject standard to initiatives than to legislation would run counter to the [Constitutional] delegates’ intent that the initiative serve as the people’s check on the legislature. Under our system of checks and

¹⁵ See AS 44.19.020(1).

¹⁶ See AS 15.45.040(1) and 15.45.080(1).

¹⁷ *Meyer*, 465 P.3d at 490.

¹⁸ *Id.* at 490-91.

¹⁹ *Id.* at 492.

²⁰ Compare AS 15.45.040(1) with Article II, Section 13 of the Alaska Constitution.

²¹ *Id.* at 494-95, discussing *Gellert v. State*, 522 P.2d 1120, 1123 (Alaska 1974), and *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1175 (Alaska 1985).

balances, when the legislature fails to pass laws the people believe are needed, the people have the initiative power to create those laws.²²

....

...In effect, the State asks us to put our judicial thumb on the scale to limit the people's constitutional check against legislative inaction, limiting the people's lawmaking power to only piecemeal legislation.²³

The Court expressly rejected the State's request to essentially ignore the doctrine of *stare decisis* and to overrule its 1974 and 1985 holdings.²⁴ The Court then discussed the language of what would become Ballot Measure 2:

A plain reading of the initiative shows that its provisions embrace the single subject of "election reform" and share the nexus of election administration. All substantive provisions fall under the same subject matter of elections, seek to institute an election reform process, and, as the superior court noted, change a single statutory title, Title 15, Alaska's Election Code.²⁵

The Court stated that it was "up to the people to decide whether the initiative's provisions should become law," and affirmed the superior court's decision to let the ballot measure appear on the 2020 ballot.²⁶ The voters then passed the measure. It is this same Ballot Measure 2 that is now at issue in this instant case, albeit now on a new constitutional challenge.

The second case is a 2008 United States Supreme Court case, *Washington State Grange v. Washington State Republican Party*.²⁷ In 2004, Washington state voters passed an initiative called I-872, which requires candidates in the primary to file a "'declaration of candidacy' form, on which he/she declare[s] his 'major or minor party

²² *Id.* at 493-94.

²³ *Id.* at 494-95

²⁴ *Id.* at 495-97.

²⁵ *Id.* at 498.

²⁶ *Id.* at 499.

²⁷ *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

preference, or independent status.”²⁸ Under that new law, “[a] political party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference.”²⁹ In other words, the law creates an “open primary” process. The names of the two highest vote-getters are then voted on in the general election, and “[t]hus, the general election may pit two candidates with the same party preference against one another.”³⁰ This voter initiative was an effort to cure defects the U.S. Supreme Court and the Ninth Circuit had identified in three earlier cases.³¹ The Washington State Republican Party sued, claiming that I-872 was unconstitutional “on its face,” and that “the new system violates its associational rights by usurping its right to nominate its own candidates and by forcing it to associate with candidates it does not endorse.”³² The Washington State Democratic Central Committee and the Libertarian Party joined as plaintiffs.³³ The federal district court agreed with the plaintiffs, and held that I-872 still violated the 2000 U.S. Supreme Court holding announced in *California Democratic Party v. Jones*. The trial court thus granted the plaintiffs’ motion for an injunction to stop any future election from applying the new I-872 process. The Ninth Circuit Court of Appeals affirmed the trial court. The Supreme Court granted certiorari.³⁴

Justice Clarence Thomas wrote for a 7-2 majority:

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation... [and] facial challenges threaten to short circuit the democratic process by preventing laws

²⁸ *Id.* at 447 (citing Wash. Rev. Code §29A.24.030 (Supp. 2005)).

²⁹ *Id.*

³⁰ *Id.* at 448.

³¹ *Id.* at 445-47, discussing *Tashjian v. Republican Party of Conn.*, 479 U.S.208 (1986); *California Democratic Party v. Jones*, 530 U.S. 567 (2000); and *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

³² *Id.* at 448.

³³ *Id.*

³⁴ *Id.*

embodying the will of the people from being implemented in a manner consistent with the Constitution.³⁵

....

The flaw in [the political party's] argument is that, unlike the California primary, the I-872 primary does not, by its terms, choose parties' nominees. The essence of nomination – the choice of a party representative – does not occur under I-872. The law never refers to the candidates as nominees of any party, nor does it treat them as such. To the contrary, the election regulations specifically provide that the primary “does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election.”³⁶

....

We reject each of these contentions for the same reason: They all depend, not on any facial requirement of I-872, but on the possibility that voters will be confused as to the meaning of the party-preference designation. But respondents' assertion that voters will misinterpret the party-preference designation is sheer speculation. It depends upon the belief that voters can be “misled” by party labels. But “[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.”³⁷

...There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate.³⁸

....

... We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion. And without the specter of widespread voter confusion, respondents' arguments about forced association and compelled speech fall flat.³⁹

³⁵ *Id.* at 450.

³⁶ *Id.* at 453.

³⁷ *Id.* at 454 (citations omitted).

³⁸ *Id.* (emphasis added).

³⁹ *Id.* at 456-57.

The Supreme Court therefore held that I-872 was facially constitutional, and reversed the Ninth Circuit.⁴⁰

The final case is the 2011 case *Dudum v. Arntz*.⁴¹ At issue was the “instant run off voting” (IRV) law in the city of San Francisco. In 2002, the voters passed a ballot initiative that adopted IRV. IRV is similar to ranked-choice voting in that IRV “allows voters to rank, in order of preference, candidates for a single office.”⁴² Dudum and five other voters sued the Director of Elections (Arntz), the City of San Francisco, and the Elections Commission. Dudum sued in federal court and sought injunctive relief, claiming that the new law violates the First and Fourteenth Amendments of the U.S. Constitution and the Civil Rights Act (42 U.S.C. Sec. 1983). Both sides filed cross-motions for summary judgment, and agreed that there were no disputed facts. The federal district court granted summary judgment for the City on all claims, and denied Dudum’s motion. Dudum appealed to the Ninth Circuit Court of Appeals.⁴³ The Ninth Circuit discussed at some length that states and local governments have the right to establish voting methods, that for at least the last century various systems have been tried, that no system is perfect, that all systems have pros and cons, but that just because a group of voters may not like a system does not mean it violates constitutional rights. The Court stated that:

Like all electoral systems, including widely-used systems such as plurality voting and two-round runoff elections, IRV offers a “package of potential advantages and disadvantages.”⁴⁴

....

⁴⁰ *Id.* at 458.

⁴¹ *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011).

⁴² *Id.*

⁴³ *Id.* at 1102-03.

⁴⁴ *Id.* at 1103.

Unrestricted and restricted IRV systems eliminate the need for a separate runoff and ordinarily will result in the election of a candidate with more widespread support than would simple plurality voting.⁴⁵

....

... While both IRV systems allow voters to rank their preferences, neither system allows voters to *reconsider* their choices after seeing which candidates have a chance of winning.⁴⁶

....

Moreover, all voting systems in elections with more than two candidates can be manipulated through strategic voting. In a plurality voting scheme, a voter might choose a candidate who is not his first-choice preference, but who he believes has a realistic chance of winning... The risk of strategic voting exists in IRV but is less severe than in plurality voting or the first stage of a runoff election: Voters are more free to vote their true preferences, because they face less of a threat of having their votes entirely “wasted” on unsuccessful candidates.⁴⁷

....

In actuality, all voters participating in a restricted IRV election are afforded a single and equal opportunity to express their preferences for three candidates; voters can use all three preferences, or fewer if they choose. Most notably, once the polls close and calculations begin, no new *votes* are cast.⁴⁸

....

Dudum’s contention that restricted IRV threatens to exclude some voters from *voting* is therefore incorrect. The contention sidesteps the basic fact that there is only one round of voting in restricted IRV.⁴⁹

....

... At its core, Dudum’s argument is that some voters are literally allowed more than one vote (i.e., they may cast votes for their first-, second-, and third-choice candidates), while others are not. Once again, Dudum’s contention mischaracterizes the actual operation of San Francisco’s restricted IRV system and so cannot prevail. In fact, the option to rank multiple *preferences* is not the same as providing additional *votes*, or more heavily-weighted votes, relative to other votes cast. Each ballot is counted as no more than one vote at each tabulation

⁴⁵ *Id.*

⁴⁶ *Id.* at 1105 (italics in original).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1107 (italics in original).

⁴⁹ *Id.* at 1108 (italics in original).

step, whether representing the voters' first-choice candidate or the voters' second- or third-choice candidate...⁵⁰

The Court of Appeals stated that “In the end, Dudum is effectively asking the court to choose between electoral systems,” but that “absent a truly serious burden on voting rights, ‘it is the job of democratically-elected representatives to weight the pros and cons of various [election] systems’.”⁵¹ The Court held that Dudum had failed to meet his burden of proving such a “serious burden” or that the law was otherwise unconstitutional; the Court therefore affirmed the trial court’s granting of summary judgment to the City.⁵²

IV. APPLICATION OF THE FACTS TO THE LAW

Plaintiffs make several arguments. First, Plaintiffs argue that the entirety of Ballot Measure 2 should be deemed unconstitutional because its parts are not “severable” from each other.⁵³ As used in Plaintiffs’ motion, this is essentially another way of framing the “one subject” issue. But the “one subject” issue as to Ballot Measure 2 was decided by our Alaska Supreme Court in *Meyer v. Alaskans for Better Elections*.⁵⁴ That Court affirmed the trial court’s determination that the ballot measure complied with the one subject rule, and permitted the ballot measure to be voted on at the general election.⁵⁵ Plaintiffs offer no applicable law for their novel argument that this trial court now has the authority to ignore the Supreme Court’s very clear holding. As Defendants succinctly stated at oral argument, “that ship has sailed.” But even if not, Plaintiffs’ first argument must be rejected because this court is finding that Plaintiffs have not met their burden of

⁵⁰ *Id.* at 1112 (parenthetical statement and italics in original).

⁵¹ *Id.* at 1107 (brackets in original; citation omitted).

⁵² *Id.* at 1115-17.

⁵³ See Plaintiffs’ May 17 Joint Opposition, at 18. *see also* Plaintiffs’ Second Amended Complaint, at 7.

⁵⁴ *Meyer v. Alaskans for Better Elections*, 465 P.3d 477 (Alaska 2020).

⁵⁵ *Id.* at 498.

showing that any part of the new law is unconstitutional on its face. This is discussed next.

Plaintiffs' main argument challenges the new law's "open primary" provision. Plaintiffs want to maintain the prior method whereby the major political parties control the primary election process and, thus, the nomination of that parties' candidates that make it onto the general election ballot.⁵⁶ As part of this argument, Plaintiffs want to have ballots show which candidates that *party* has "nominated," and not permit a *candidate* to list whatever party that individual says he/she "identifies" with. Plaintiffs are candid in saying they want the party to control this process, and that they believe such control guards against an individual lying about their party affiliation.⁵⁷ Plaintiffs frame this as their right to "freedom of association."⁵⁸ They acknowledge that the U.S. Supreme Court in *Washington State Grange* specifically held that states have the right to adopt various election methods, that the "freedom to associate" carries with it the equal right to *not* associate, and that political parties do not have the constitutional right to force states to run the parties' nominating process.⁵⁹ Justice Thomas discussed generally that although political parties have the constitutional right to nominate whomever they want, the parties do not have the right to force states to run the primaries in the manner desired by the parties, i.e., by compelling the ballots to list candidates as "nominees."⁶⁰ Apparently recognizing this result, Plaintiffs instead argue that the "freedom of association" right

⁵⁶ See Plaintiffs' May 17 Joint Opposition, at 7-9.

⁵⁷ See Plaintiffs' Second Amended Complaint, at 2-3, 9; see also May 17 Joint Opposition, at 4-5, 11, 14.

⁵⁸ See Plaintiffs' Second Amended Complaint, at 3, 5. see also Plaintiffs' May 17 Joint Opposition, at 7-8.

⁵⁹ See Plaintiffs' May 17 Joint Opposition, at 11, 14-16.

⁶⁰ *Washington State Grange*, 552 US at 453. The Court further held that the plaintiffs had not met their burden of proving that I-872 imposed a "severe burden" on the voters, and thus that no further analysis was needed on that issue. *Id.* at 458. That is the situation here, too.

found in the Alaska Constitution is more protective than that same right in the U.S. Constitution, and that this court should therefore ignore the holding of *Washington Grange*.⁶¹

There are several flaws in Plaintiffs' logic. First is the plain language of Article I, Section 5 of the Alaska Constitution. Like most provisions in the Alaska and U.S. Constitution, this section is very brief. It reads in full:

Sec. 5. Freedom of Speech – Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Simply put, it says nothing about political parties' right to mandate what words appear on a ballot. Nor do the two constitutional sections specifically at issue in this case that do discuss elections (Article 3, Sections 3 and 8). Indeed, Plaintiffs simply never mention those sections in this respect. And, although Plaintiffs urge at pages 5 through 8 of their June 1 brief that this court should strictly construe what Plaintiffs, at least, believe was the intent of the framers of the Alaska Constitution, Plaintiffs ignore the plain language, above, that the framers adopted.⁶² Plaintiffs further ignore the holdings of our Alaska Supreme Court that, when interpreting a constitutional provision or statute, “[i]nterpretation of a statute begins with its text,”⁶³ and that “[w]hen we engage in statutory construction, we must, whenever possible, ‘interpret each part or section of a statute with every other part or section, so as to create a harmonious whole.’”⁶⁴

But it appears that Plaintiffs have now abandoned this argument. Although they initially urged at page 11 and 14 of their May 17 Joint Opposition brief that political parties

⁶¹ See Plaintiffs' May 17 Joint Opposition, at 8, 14-15.

⁶² See Plaintiffs' June 1 Reply to Opposition, at 5-8.

⁶³ *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 458–59 (Alaska 2006).

⁶⁴ *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999) (quoting *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526 (Alaska 1993)).

have a constitutional right to have their nominees identified on the ballot, in their oral argument they conceded that political parties do *not* have this right.⁶⁵ Plaintiffs' concession is appropriate. Plaintiffs' initial argument is simply not supported by any applicable law.

Plaintiffs' third argument is that Ballot Measure 2's method of choosing the governor runs afoul of the Alaska Constitution's Article III, Section 3, which states 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.⁶⁶

At page three of Plaintiffs' April 2 brief, Plaintiffs argue that Ballot Measure 2 creates "in essence, a series of run-off elections," which Plaintiffs say then violates Article III, Section 3. But Plaintiffs never quote the new law's language and then compare it to the constitutional language, above. They simply make this argument in a vacuum. By oral argument, Plaintiffs seemed to concede that the new law does not do that, although they still were quite vocal about not liking the new law. But this is far from Plaintiffs meeting their heavy burden of proving that the law is "unconstitutional on its face."

Fourth, Plaintiffs initially seemed to argue that the ranked-choice method is unconstitutional because it is confusing.⁶⁷ As a matter of law, "[a] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its

⁶⁵ See Plaintiffs' Second Amended Complaint, at 3-7 and Plaintiffs' May 17 Joint Opposition, at 11-14; see also July 12 Oral Argument, at 3:15 p.m.

⁶⁶ See Plaintiffs' Second Amended Complaint, at 8-9; see also Plaintiffs' April 2 Motion for Partial Summary Judgment, at 1-5.

⁶⁷ See generally Plaintiffs' May 17 Joint Opposition, at 17-18.

applications.”⁶⁸ And as Justice Thomas further wrote, a clearly-worded ranked-choice ballot is easily achievable:

[i]t is not difficult to conceive of such a ballot... We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion. And without the specter of widespread voter confusion, respondents’ arguments about forced association and compelled speech fall flat.⁶⁹

In Plaintiffs’ subsequent briefs and then at oral argument, Plaintiffs acknowledged that the law is very “straightforward.”⁷⁰ In this respect, Plaintiffs initially seemed to argue that the law impermissibly would give some people “multiple” votes but others only “one vote,” and/or that there would be “successive” rounds of runoffs.⁷¹ Again by oral argument, Plaintiffs acknowledged that there would just be the one primary and the one general election, and that people could “vote” only once in each of these elections. At oral argument, this court read from the Ninth Circuit’s *Dudum* decision that explained the difference in ranked-choice voting between “voting only once” and ranking “preferences.”⁷² Plaintiffs acknowledged the difference, but suggested that this court “doesn’t have to follow that law.”⁷³ Yet Plaintiffs did not suggest that the Ninth Circuit holding was legally wrong. This court is following that law, and is not putting its “judicial thumb” on the voters’ policy decision.⁷⁴

Finally is Plaintiffs’ argument that Ballot Measure 2’s method of pairing the candidates for governor and lieutenant governor violates Article III, Section 8 of the

⁶⁸ *Washington State Grange*, 552 U.S. at 449 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)).

⁶⁹ *Id.* at 456-57.

⁷⁰ See Plaintiffs’ April 2 Motion for Partial Summary Judgment, at 4.

⁷¹ See Plaintiffs’ Second Amended Complaint, at 6; see also Oral Argument, at 2:33 p.m. and 3:17 p.m.

⁷² See Oral Argument, at 3:15 p.m.

⁷³ *Id.*, at 3:17 p.m.

⁷⁴ *Meyer*, 465 P.3d at 494-95.

Alaska Constitution.⁷⁵ Plaintiffs have not, however, pointed to what specific language of the new law they think is facially unconstitutional. Article III, Section 8 requires that the pairing of candidates for governor and lieutenant governor be shown on the general election ballot. It says no more than that.⁷⁶ It does not *prohibit* earlier pairing. Plaintiffs want the pairing to occur as a *result* of the political parties' primary election.⁷⁷ Conversely, the new law requires that the pairing occur *before* the primary. Under the new law, yes, the names appear as a pair on the general election ballot, but they also appear as a pair on the primary ballot. Plaintiffs urge that this violates their freedom of association, but they fail to explain how.⁷⁸ They say that this may result in candidates from different parties being forced to run as a "team."⁷⁹ But as explained by Defendants in their briefs and then seemingly conceded by Plaintiffs at oral argument, here too that is simply not how the law works. No candidate is being "forced" to team up with another candidate; rather, they choose, early on. Plaintiffs' argument of "forced association" fails for another reason. In the prior law, the winners of the "party primary" were listed as a "team" on the general election. They might have little in common except that they were both in the same political party. That could lead to a "forced" association and voters then having to live with that forced pairing. That is no longer the case under the Ballot Measure 2 method: the pairing occurs prior to the primary, is purely the choice of the candidates,

⁷⁵ See Plaintiffs' April 2 Motion for Partial Summary Judgment, at 1-5; see also Oral Argument, at 2:33 p.m.

⁷⁶ Article III, Section 8 reads in full: "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.*" (Italics added.)

⁷⁷ See Plaintiffs' June 1 Reply to Opposition, at 2-4.

⁷⁸ See Plaintiffs' April 2 Motion for Partial Summary Judgment, at 5; Plaintiff's June 1 Reply to Opposition, at 8; and Oral Argument at 2:33 p.m.

⁷⁹ See Plaintiffs' April 2 Motion for Partial Summary Judgment at, 4; see also Plaintiffs' June 1 Reply to Opposition, at 2.

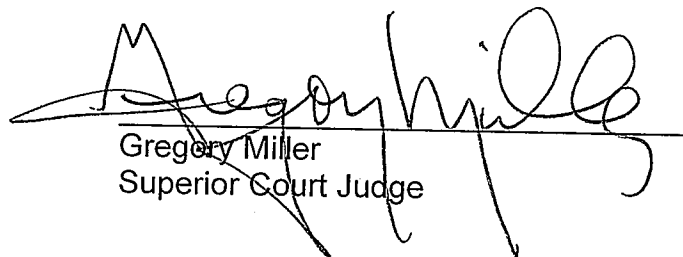
and then the voters know early on who is on what team. As stated above, there is no provision in the Constitution that prohibits candidates for governor and lieutenant governor from declaring themselves a "team" in the primaries. As a matter of law, Alaska has the legal right to continue using the old system or to adopt a new system; that the voters in November 2020 chose one system over the other does not make the new law facially unconstitutional.

V. CONCLUSION

For the reasons stated above, this court hereby **GRANTS** summary judgment to defendant State of Alaska, et al., and intervenor Alaskans for Better Elections, Inc. (case motions #5 and #7), and **DENIES** plaintiff Kohlhaas, et. al.'s, summary judgment motions (#8 and #12). Finally, this court **DENIES** Intervenor's motion to strike Plaintiffs' late-filed submissions, and hereby allows those filings to become part of the record (motion #14).

This resolves all pending motions.

DATED this 29th day of July 2021.


Gregory Miller
Superior Court Judge

I certify that on 7/29/21
a copy of the above was emailed to:

S. Spraker K. Jacobs
 M. Paton-Walsh
 T. Flynn
S. Spraker, Judicial Administrative Assistant