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Office of the Lieutenant Governor

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Enforcement of
Republican Party
prior registration
requirement

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I. INTRODUCTION

The Republican Party (Party) has adopted an internal rule that candidates who seek the Party nomination for elective office must have been members of the Party for at least six months, unless the candidate receives a two-thirds vote of his or her district committee to waive the rule. Based on this rule, the Party has recently challenged the eligibility of five candidates who filed for office as Republicans. You inquired whether the state is obligated to investigate these challenges and enforce the Party's rule. For the 1992 primary, we recommended that the division of elections not enforce the Party's rule regarding candidate eligibility. This memorandum confirms, and explains the legal basis for, our recommendation.

II. FACTS

At its March 2, 1991, special convention, the Party adopted a rule requiring that "[i]n order to be a candidate in any Republican Party primary election, a person must have been a registered voter of the Republican Party of Alaska for a continuous period of six months immediately prior to the filing deadline for the primary election." Party Rule, Article XIV, § 5. This rule was precleared on May 21, 1991.¹ The Party amended

¹ The Voting Rights Act requires the Attorney General of the United States to preclear any changes in voting procedure in Alaska before those changes are implemented. 42 U.S.C.A. 1973c (1981). The Attorney General will grant preclearance when he or she determines that the change will not have a retrogressive effect on the opportunity of minority voters to "exercise their elective franchise effectively." 28 C.F.R. § 51.54 (1991).

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this rule at a 1992 Party convention by adding the clause "unless he receives a two-thirds vote of their [sic] respective District Committee to waive the rule." To the best of our knowledge, this amended rule has not been precleared.

In May 1992, the Party filed an action in federal court (Zawacki v. State, No. A92-414-Civ. (D. Alaska 1992)) seeking to force the state to enforce one aspect of the Party's precleared rules: the requirement that voters affiliated with other political parties be prevented from voting in the Party's primary election.

However, the Party did not seek to have any other rule enforced in that litigation. Indeed, representatives of the Party indicated to state officials that it would not seek enforcement of its other rules, including the prior registration requirement.²

In July 1992, the Party sent you two letters requesting that five candidates be declared ineligible because they did not comply with the Party's prior registration rule. In one letter, the Party quoted the waiver clause, and stated that "[s]hould the waiver be received for any of the these candidates prior to the submittal of names for ballot printing, I will notify the Division of Election [sic] immediately." In the other letter, the Party did not mention the waiver clause, and quoted only the original language of the rule. However, both letters cite the May 1, 1992, certified copy of the Party rules, which presumably includes the amended language.

III. DISCUSSION

The Party has associational rights that are implicated in the procedures adopted by the state for the conduct of a primary election. See Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). Thus, the Party has the right to prescribe certain conditions regarding the nomination of its own candidates. The Party's six-month rule may fall within the range of those rights protected by the First Amendment. If so,

Changes in political party rules that relate to conduct of primary elections must also be precleared before being implemented. 28 C.F.R. § 51.7 (1991).

² During the time that Zawacki was pending, Party Chair Connie Zawacki informed Tuckerman Babcock, an administration official, that the Party would not request enforcement of the prior registration requirement in 1992. This office relied in part on this understanding in making our initial recommendation that the state decline to enforce the prior registration requirement.

then, arguably, the state not only might be precluded from taking actions that are contrary to the Party rule, but might also be required to take action necessary to protect those rights.³

Here, however, the rule, in the form that the Party seeks to have it enforced, has not been precleared. Additionally, no statutory or regulatory authority, or court order, requires enforcement of this rule. Because many difficult questions are raised by this rule, it should not be enforced at this time.

- A. Alaska statutes and regulations do not allow the division of elections to enforce party rules concerning candidate eligibility for a party's nomination

Under existing Alaska law, the division of elections does not have statutory authority to declare a candidate ineligible based on a political party rule. Alaska Statute 15.25.042 states that "[i]f the director receives a complaint regarding the eligibility of a candidate for a particular office, the director shall determine eligibility under regulations adopted by the director." (Emphasis added.) Thus, the only statutorily recognized eligibility criteria concern eligibility for a particular office, not eligibility for a Party's nomination. No complaint has been received that any of the candidates challenged by the Party are ineligible for the office they seek.

In addition, the statute requires that eligibility determinations be pursuant to regulations. Such regulations put potential candidates on notice as to what criteria the director will employ in determining eligibility for elective office.

³ The Party argues that the state must enforce the Party's rules, citing Langone v. Secretary of Massachusetts, 446 N.E.2d 43 (Mass. 1983); Hopfmann v. Connolly, 769 F.2d 24 (1st Cir. 1985). While Langone did require enforcement of a party rule that restricted access to the ballot, it did so only after harmonizing the party rule with the state statute, and after determining that enforcement of the rule would not defeat the legislative purpose in providing for a primary election. Hopfmann merely affirmed that enforcement of a party rule limiting access to a primary election ballot would not violate the candidate's associational rights. Certainly, even if the state must enforce some political party rules, the scope of these rules is subject to certain limitations. At this time, no determination has been made that the prior registration rule falls within the scope of rules that must be enforced.

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Potential candidates should be able to rely on existing regulations in deciding to file for elective office.

Under current regulations, after receiving a complaint regarding the eligibility of a candidate, "[t]he director will review only those [issues] in the complaint related to candidate qualifications established by the United States Constitution, the Alaska Constitution, or the Alaska Statutes." 6 AAC 25.260 (1988). These regulations do not permit the director to consider eligibility criteria established by party rule when ruling on a complaint.⁴ Additionally, they do not put candidates on notice that, after they have filed for office, the state might declare them ineligible for a particular party's nomination even though they are statutorily and constitutionally eligible for the particular office.

In sum, the director should not enforce party rules in the absence of regulations establishing the criteria and procedure for such enforcement. Here, no such regulations have been adopted or precleared. In addition, promulgation of such regulations would be in contravention of AS 15.25.042, which does not explicitly authorize such regulations. The question that remains is whether the director should promulgate emergency regulations to allow her to enforce the Party's rule.

B. The current circumstances do not warrant enforcement of the prior registration rule

a. No emergency exists that would require emergency regulations

In Zawacki v. State, the Party had requested that the

⁴ The term "established by the United States Constitution" refers to the explicit eligibility criteria of articles I and II. It does not refer to eligibility criteria established by party rules, even though these rules might be entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution.

state enforce its precleared rule requiring the Party's primary to be closed to members of other political parties. Zawacki was resolved by a stipulation, under which the state agreed to adopt emergency regulations. In short, the state agreed to enforce a political party rule in order to vindicate the associational rights of the party, even though such enforcement contravened a state statute, because, in that case, the First Amendment rights of the party members took precedence over the state statute.

Similarly, here, if necessary, the state could adopt emergency regulations to enforce the Party's prior registration rule, even though state statutes do not provide that candidates may be declared ineligible on this basis. This situation, however, is distinguishable from the situation in Zawacki. In Zawacki, the federal district court determined that, under existing United States Supreme Court precedents, the Party had associational rights to decline to participate in Alaska's statutorily mandated blanket primary. Here, there has been no court determination that the Party has a right to disqualify candidates on the basis of prior registration.⁵ Indeed, the actions of the Party indicate that it has relatively minimal interest in enforcing the prior registration rule. The Party has recently changed the prior registration rule, it did not seek judicial confirmation of the rule in Zawacki, and it indicated to state officials that it would not seek enforcement of the rule in 1992. In this circumstance, adoption of emergency regulations is not warranted.

b. The changed rule has not been precleared and may be beyond the scope of state enforcement

The rule that the Party seeks to enforce allows the Party District Committee to waive the prior registration requirement for district candidates. Adoption of this rule changes the former rule, which did not authorize a waiver. However, because the change has not been precleared, it cannot be enforced. 28 C.F.R. 51.7 (1991).

Moreover, this rule raises several questions. For

⁵ For the next election cycle, should the Party provide timely notification that it will be seeking enforcement of its final, precleared rules, this office could furnish an opinion on whether the state should enforce those rules in the face of a countervailing statute. At this time there is neither a prior attorney general opinion nor a court opinion on whether this rule should be enforced by the state.

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example, the existence of a waiver capability raises the possibility of discriminatory enforcement.⁶ Additionally, some political party rules may well be beyond the scope of what the state must enforce to protect the associational rights of party members. Accordingly, the state should enforce this rule only after adopting carefully considered regulations or legislation that will fulfill its obligation to protect the associational rights of party members in a nondiscriminatory manner. In sum, the state should not act here by emergency regulation to enforce a rule that has not been precleared.

IV. CONCLUSION

For this election cycle, the state should not enforce the Party's prior registration rule. The rule is inconsistent with the current statutes and regulations on candidate eligibility, the promulgation of emergency regulations to implement the rule is not warranted, and the Party rule in question has not been precleared.

⁶ Moreover, a reasonable rule of administrative convenience would require the state to consider disqualifying only those candidates about whom the Party has made a final decision. Here, the Party has requested that the state begin its investigation while the Party's waiver decision is still pending.