June 29, 2000

The Honorable Fran Ulmer
Lieutenant Governor
Office of the Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Effect of *California Democratic Party v. Jones* on the State's Primary Election on August 22, 2000
A.G. file no: 663-00-0218
2000 Op. Att'y Gen. No. 2

Dear Lt. Governor Ulmer:

I. Introduction

I write to advise you that, based upon a United States Supreme Court decision issued this week striking down California's blanket primary,[1] the Division of Elections should modify the manner in which the August 22, 2000, Alaska primary election will be conducted.

[1] A blanket primary permits a registered voter, regardless of political affiliation, to cast a vote on a single ballot for a candidate of any political party running for that office. The top vote-getter from each political party then advances to the general election ballot. By statute enacted by the legislature, Alaska uses a blanket primary similar in all relevant respects to that of California. AS 15.25.060.

II. Alaska State Supreme Court Decisions Have Upheld Alaska's Blanket Primary Election

Alaska's blanket primary has been subject to legal challenge in the state courts in the past decade. *See O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995) (*O'Callaghan I*); and *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 520 U.S. 1209 (1997) (*O'Callaghan II*).[2]

In *O'Callaghan II*, the Alaska Supreme Court employed a balancing test in upholding Alaska's blanket primary. While acknowledging that a blanket primary might create some degree of interference with the Republican Party of Alaska's associational rights, the Alaska court concluded that this interference was outweighed by three important state interests: encouraging voter turnout, maximizing voters' choice among candidates, and ensuring that elected officials have broad-based constituencies. 914 P.2d at 1263.

Recognizing its duty to follow controlling United States Supreme Court precedent, the Alaska court considered *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208

[2] *O'Callaghan I* and *O'Callaghan II* are different stages of the same case. In *O'Callaghan I*, the Alaska Supreme Court held that Alaska's blanket primary was not "clearly unconstitutional" under the standards set out in the United States Supreme Court's opinion in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The court in *O'Callaghan I* also requested additional briefing to further evaluate the constitutionality of Alaska's blanket primary. In *O'Callaghan II*, the court considered the additional briefing provided by the parties and ruled that Alaska's blanket primary was not unconstitutional.

(1986)(striking down a closed primary statute), and determined that Alaska's blanket primary was not "clearly unconstitutional" under the Court's analysis in *Tashijian*.[3]

III. The *Jones* Case Invalidates Certain Blanket Primary Requirements Where Political Party Rules Do Not Authorize Participation in a Blanket Primary Election

On June 26, 2000, the United States Supreme Court issued its decision in *California Democratic Party v. Jones*, 530 U.S. ____, 2000 WL 807188 (2000). In the *Jones* case, four statewide political parties challenged California's blanket primary, alleging that this form of primary election violated their First Amendment rights of association under the United States Constitution. The political parties argued that the blanket primary would inject into each party's primary substantial numbers of voters unaffiliated with the party and that this might result in selection of a nominee different from the one party members would select, or at least cause the same nominee to adhere to different positions.

In response, the State of California advanced seven state interests in support of the blanket primary. California argued that the blanket primary: (1) produced elected

---

[3] The issue decided in *Tashjian* concerned Connecticut's closed primary. The Republican Party of Connecticut adopted a rule broadening the franchise for Republican Party primaries to include voters who were not registered as members of any other political party. The party sought a declaration from the courts that the Connecticut closed primary statute violated the party's freedom of association. The United States Supreme Court found the closed primary statute unconstitutional under these circumstances. The Supreme Court found that the party's freedom of association was unconstitutionally limited by the Connecticut closed primary statute by

…continued

officials who better represented the electorate; (2) expanded candidate debate beyond the scope of partisan concerns; (3) ensured that disenfranchised persons enjoyed the right to an effective vote; (4) promoted fairness; (5) afforded voters greater choice; (6) increased voter participation; and (7) protected voter privacy. The State of Alaska joined the State of Washington in submitting an *amicus* brief in support of California's position in the *Jones* case.

The Supreme Court rejected each of California's arguments and held that the state could not require political parties to participate in the state's blanket primary because participation in the blanket primary unconstitutionally burdened their rights of political association under the First Amendment to the United States Constitution. In rejecting California's arguments, the Court declared that political parties should be free to select their own nominees even when those nominees might not be "congenial" to the majority of voters. *Jones*, 2000 WL 807188 at 7 (U.S.). The Court reasoned that the rights of disenfranchised voters were outweighed by the right of the political party to determine its own membership qualifications. Fairness would be better served by not allowing nonparty members to "hijack the party." *Jones*, 2000 WL 807188 at 9 (U.S.).

---

continued…
placing limits upon the group of registered voters whom the party could invite to participate in the basic function of selecting the party's candidates.

IV. The Effect of the *Jones* Decision Is To Overturn the Alaska Supreme Court's Validation of Alaska's Blanket Primary Insofar As a Political Party Objects To That Manner of Candidate Selection

In *Jones*, the Court determined that it was unconstitutional for the State of California to apply its blanket primary law to four political parties that objected to participation in the blanket primary and whose rules prohibited participation. The State of Alaska faces similar objections to participation in the blanket primary, and at least one party's rules prohibit participation in this state's blanket primary.[4]

It is my view that there is no rational basis for concluding that the *Jones* decision is somehow distinguishable or inapplicable to Alaska's system. In *O'Callaghan II*, the Alaska Supreme Court was able to distinguish the United States Supreme Court's decision in the *Tashjian* case, finding that the Court had not considered the important interests advanced by the state in support of the blanket primary: *i.e.*, encouraging voter turnout, maximizing voters' choice among candidates, and ensuring that elected officials have broad-based constituencies. However, the *Jones* Court did squarely address each of these interests and rejected all of these arguments.

---

[4] The Republican Party of Alaska (RPA) objects to participation in the State of Alaska's blanket primary election. In the *Jones* case the RPA filed an *amicus* brief in support of the opponents to California's blanket primary. The RPA's party rules prohibit the RPA from participating in a blanket primary. The RPA's party rules concerning conduct of the primary election for the RPA have been precleared by the United States Department of Justice, Voting Rights Section.

Fortunately, the Alaska Supreme Court has provided guidance to the executive in the event that a state law or practice is determined to be "clearly unconstitutional." In *O'Callaghan I* the court declared:

> We agree with the State that authority exists supporting the proposition that the executive branch may abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional.

888 P.2d at 1304.

The court goes on to analyze several cases in support of the proposition that the executive may implement a decision of the United States Supreme Court, even in the absence of legislative or judicial action. 888 P.2d at 1304. Among the cases discussed is *Wade v. Nolan*, 414 P.2d 689 (Alaska 1966), in which the Alaska Supreme Court upheld the action of the governor in reapportioning the Alaska Senate districts to comply with the United States Supreme Court ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964). The governor took this action in the face of a contrary provision in the Alaska Constitution, and without judicial or legislative authorization. *O'Callaghan I* also cites *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), in which the Court held that the governor and legislature of Arkansas were bound by the Supreme Court's previous desegregation decisions although

they were not parties to those decisions, stating that the Court's interpretations of the Constitution are "the supreme law of the land."[5]

It follows from the Court's analysis in *O'Callaghan I* that the executive is allowed, and perhaps even obliged to, modify the state's primary system to conform to the United States Supreme Court decision in *Jones*, even in the absence of legislative action. Indeed, it is my judgment that the executive is under a duty to implement the decision immediately unless to do so would impose a nearly insurmountable administrative burden upon election officials or pose a grave risk to the primary election itself.[6] I have been assured by your staff that the division is able to implement the

---

[5] In *Cooper* the Court held as follows:

> It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown [v. Board of Education]* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State."

358 U.S. at 18.

[6] I understand that the Secretary of State for Washington has determined that he will not implement the *Jones* decision during this election cycle. Although Washington's primary is not scheduled until September 18, 2000, two circumstances not present in Alaska weigh strongly in favor of his decision for that state: (a) no party has protested the blanket primary system in Washington State, and (b) Washington does not record the party affiliation of its voters.

Court's opinion without risk of disrupting the primary, conditioned on an immediate decision to move forward and recognition that substantial additional costs will of necessity be incurred. I have a high level of confidence in those assurances in light of the fact that the division has twice before implemented parallel closed and blanket primary ballots (1992 and 1994).

V. Conclusion

For the reasons set forth above, I conclude that the State of Alaska should no longer require a political party to participate in the blanket primary over the party's objections and contrary to the rules of the party, so long as those party rules have been precleared by the United States Department of Justice, Voting Rights Section, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.[7] However, Alaska may continue to use the blanket primary for those political parties that have not objected to participating in the blanket primary, or whose party rules do not prohibit participation in the blanket primary.

[7] Alaska is one of a number of states that are required by law to submit statutory and regulatory changes that impact voting to the United States Department of Justice for review, also known as "preclearance."

I urge you to adopt emergency regulations to allow a political party in Alaska to opt out of the blanket primary.[8] Under these regulations, political parties in Alaska whose party rules prohibit participation in the blanket primary and whose rules have been precleared by the Department of Justice would be entitled to a separate ballot for the upcoming primary election. I pledge you my department's full cooperation in reviewing these regulations.

Finally, I recommend that these emergency regulations remain in place only for the 2000 primary election so that the Alaska State Legislature may consider a permanent solution in its next regular session.

Sincerely,

Bruce M. Botelho
Attorney General

cc: Janet Kowalski
Director of Elections

[8] In the recent past the Division of Elections promulgated regulations to facilitate a separate primary ballot for the RPA, to accommodate the RPA's objection to participation in the blanket primary, and the RPA's party rules prohibiting its participation in a blanket primary. Those regulations were effective in 1993 and repealed in 1996. However, the text of the regulations is available to use as a model for drafting the emergency regulations used to implement the *Jones* case.