

**LETTER OPINION
2020-L-02**

June 8, 2020

The Honorable Mike Schatz
House of Representatives District 36
400 E 9th St
New England, ND 58647-7528

The Honorable Rick C. Becker
House of Representatives District 7
6140 Ponderosa Ave
Bismarck, ND 58503-9156

Dear Representative Schatz and Representative Becker:

Thank you for your letter in which you ask whether the primary system of selecting candidates for election set forth in N.D.C.C. ch. 16.1-11 is an unconstitutional infringement on the freedom of association guaranteed by the First Amendment of the United States Constitution. It is my opinion that the primary method of selecting candidates set forth in North Dakota law is presumed constitutional until declared otherwise by a court.

Further, you ask if the primary system does infringe on a party's freedom of association, may candidates nominated by a political party skip the primary election and be put directly onto the election ballot. It is my opinion that the current law does not provide a mechanism for a party to forego the primary election and place the names of its candidates directly on the general election ballot.

ANALYSIS

It has been this office's policy to refrain from calling into question the constitutionality of a statute unless it is clearly and patently unconstitutional. All statutes are presumed constitutional,¹ and the unconstitutionality of a statute must be proven beyond a reasonable doubt.² All doubts about constitutionality of a statute are resolved in favor of its constitutionality.³ At least four justices of the North Dakota Supreme Court must

¹ N.D.C.C. § 1-02-38; *Stokka v. Cass Cnty. Elec. Coop., Inc.*, 373 N.W.2d 911, 914 (N.D. 1985).

² *MCI Telecomms. Corp. v. Heitkamp*, 523 N.W.2d 548, 552 (N.D. 1994).

³ *Id.*

agree that a statute is unconstitutional.⁴ Finally, proving that a statute is unconstitutional on its face is especially difficult. The challenger must establish that no set of circumstances exists under which the law would be valid.⁵

North Dakota's current method of nominating candidates was first enacted in 1905,⁶ at a time when other states were moving away from the use of legislative caucuses and party conventions to nominate candidates for state office in favor of some form of elective system.⁷

The North Dakota Supreme Court, in 1912, explained "in our state, the primary is the means of nomination of all officers, state, district, and county, as well as the method of choice by election, instead of nomination, of all party committeemen and delegates belonging to the party organizations of those parties entitled to participate at the primaries."⁸ Later, the North Dakota Supreme Court noted:

[A] primary election is not an election within the meaning of [current N.D. Const. art. IV, § 12], nor within the common acceptance of the term. It merely takes the place of the former nominating conventions, and it is improper to say that the successful candidate at such primary is elected to any office. He is merely placed in nomination as a candidate for election to the office.⁹

Each state implements its own primary election system through its statutes. While no single primary election classification scheme exists, generally primaries are classified as closed, semi-closed, nonpartisan, open and blanket.¹⁰

⁴ *Id.*; N.D. Const. art. VI, § 4.

⁵ *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). See also *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (facial invalidation of a statute is "strong medicine" employed "sparingly and only as a last resort" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973))).

⁶ N.D.C.C. § 16.1-11-01. The original language was: "On the Tuesday following the third Monday of June of each year during which occurs a general election, there shall be held, in lieu of caucuses and conventions, a primary election in the various voting precincts of this state for the nomination of candidates for the following offices, to be voted for at the ensuing general election," 1905 N.D. Sess. Laws. ch. 109 § 2.

⁷ Lauren Hancock, *The Life Of The Party: Analyzing Political Parties' First Amendment Associational Rights When The Primary Election Process Is Construed Along A Continuum*, 88 Minn. L. Rev. 159 (2003). See also, 1905 N.D. Sess. Laws. ch. 109 § 1 ([i]t is the intention of this act to purify and reform the methods by which organized political parties shall make nominations of candidates for the several public offices, . . .).

⁸ *State v. Flaherty*, 136 N.W. 76 (N.D. 1912).

⁹ N.D.A.G. 2006-L-11 (citing *Leu v. Montgomery*, 148 N.W. 662, 663 (1914)).

¹⁰ David A. Chase, *Clingman v. Beaver: Shifting Power from the Parties to the States*, 40 U.C. Davis L. Rev. 1935, 1939-40 (2007). See also Charles E. Borden, *Primary Elections* 38 Harv. J. on Legis. 263 (2001) (several of the categories of primaries feature variations).

If a primary is closed, only party members who have been affiliated with the party for some specified period of time may vote.¹¹ A semi-closed primary does not allow for voters registered with one party to vote in another party's primary but generally allows for individuals who are unregistered voters or registered independents to vote in the primary of the party of their choice.¹²

In a nonpartisan primary, all candidates for office appear on the same ballot and the top two vote-getters, regardless of party, face each other in the general election.¹³

In an open primary, voters participate without ever disclosing their party affiliation, whereas in a semi-open primary voters are required to declare their party affiliation when they request a ballot.¹⁴

A blanket primary borrows elements from both the nonpartisan primary and the open primary but adds unique features.¹⁵ All candidates for an office appear on one ballot and the top finisher in each party advances to the general election.¹⁶ Voters may participate in any party's primary regardless of personal party affiliation, and the voter may participate in one party's primary for one office and then switch to another party's primary for a different office.¹⁷

North Dakota uses an open primary system in which a voter may only vote in one party's primary election, but does not have to be a registered member of that party.¹⁸ The name of candidates for statewide office who receive the highest number of votes within their political party designation during the June primary are then automatically placed on the November general election ballot.

You indicate in your letter that North Dakota's primary process could lead to a candidate, who is not the choice of the party, winning the primary because voters who usually do not align themselves with a particular party may choose to vote for candidates of that party at

¹¹ Borden, *supra* note 10, 38 Harv. J. on Legis. 263 (2001).

¹² C. Alan Carrillo, *I Pledge Allegiance to the Party: Reclaiming the Associational Rights of Independent Voters in Open Primaries*, 24 Wash. & Lee J. Civil Rts. & Soc. Just. 563 (2018).

¹³ Borden, *supra* note 10, 38 Harv. J. on Legis. 263 (2001).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ N.D.C.C. § 16.1-11-22. Registration is not required at all for voting in North Dakota. N.D.C.C. § 16.1-01-04 (setting forth voter qualifications). Sara Stenberg-Miller, *Elections-Nominations And Primary Elections: The Supreme Court Finds That California's "Blanket Primary" Violates Political Parties' First Amendment Right Of Association* 77 NDLR 827 (2001).

the primary election. This is commonly called “party raiding” when voters from Party A vote in Party B's primary to skew B's primary.¹⁹

You question whether the right of association guaranteed by the First Amendment of the Constitution is violated if a candidate who does not share the same political philosophy of the nominating party wins the primary. Freedom of association plays an important role in politics because it allows citizens to seek change by furthering common political beliefs.²⁰ Political parties have a First Amendment right to freely associate, but certain state regulations infringe this right.²¹ A court must conduct a balancing analysis to determine the legitimacy of a regulation that infringes upon a constitutional right.²² Courts weigh the regulatory burdens placed on individuals' rights against state interests that the regulation seeks to promote.²³ When the regulation imposes severe burdens on the aggrieved party's rights, a court strictly scrutinizes the asserted state interest.²⁴

¹⁹ David A. Chase, *Clingman v. Beaver: Shifting Power from the Parties to the States*, 40 U.C. Davis L. Rev. 1935, 1945 (2007). The United States Supreme Court has recognized that raiding is a legitimate concern but found that it is more likely to occur in a blanket primary system than in a partially closed primary. See Sara Stenberg-Miller, *Elections-Nominations and Primary Elections: The Supreme Court Finds That California's "Blanket Primary" Violates Political Parties' First Amendment Right of Association*, 77 N.D. L. Rev. 827, 840 (2001). See also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 219 (1986).

²⁰ David A. Chase, *Clingman v. Beaver: Shifting Power from the Parties to the States*, 40 U.C. Davis L. Rev. 1935, 1941-42 (2007).

²¹ David A. Chase, *Clingman v. Beaver: Shifting Power from the Parties to the States*, 40 U.C. Davis L. Rev. 1935, 1941-42 (2007). See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (holding that California's blanket primary system unconstitutionally burdens party's First Amendment rights); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986) (holding that Connecticut's enforcement of its closed primary system burdens parties' First Amendment rights); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); Joseph E. Haviland, *Constitutional Law - First Amendment - Fourteenth Amendment - Freedom Of Association - Equal Protection- The Supreme Court Of The United States Held That, Notwithstanding The First Amendment Right Of Political Parties To Express The Shared Views And Ideals Of Their Members, States May Enact Statutes That Ban "Fusion Candidacies," Provided That The Statutes Are A Reasonable And Nondiscriminatory Means Of Furthering A Legitimate State Interest*, 36 Duq. L. Rev. 207, 218 (1997) (describing how statute at issue in *Tashjian* infringed Republican Party's First Amendment right of association by limiting who Republican Party could associate within its primary); Michael L. Stokes, *When Freedoms Conflict: Party Discipline and the First Amendment*, 11 J.L. & Pol. 751, 776 (1995) (stating that parties have First Amendment right to determine their own membership).

²² David A. Chase, *Clingman v. Beaver: Shifting Power from the Parties to the States*, 40 U.C. Davis L. Rev. 1935, 1941-42 (2007).

²³ *Id.* See *Anderson v. Celebrezze*, 460 U.S. 780, 787-90 (1983).

²⁴ David A. Chase, *Clingman v. Beaver: Shifting Power from the Parties to the States*, 40 U.C. Davis L. Rev. 1935, 1941-42 (2007). See *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1122 (2016).

You specifically point to the United States Supreme Court case of *California Democratic Party v. Jones*, 530 U.S. 567 (2000), in your letter. In the *Jones* case, the United States Supreme Court found the “blanket” primary system to be facially unconstitutional.²⁵ The Court decided, in *Jones*, that this blanket system severely burdened the associational freedom of political parties by not allowing them to exclude nonmembers from choosing the parties’ nominees.²⁶ The Court acknowledged that open primaries differ from blanket primaries since in open primaries voters must select the ballot of one party and may only vote for candidates of that party.²⁷ Moreover, the Court expressly noted that in *Jones* it was not deciding the constitutionality of open primaries in which a voter is limited to one party’s ballot, and expressly limited its hold to the blanket primary at issue in that case.²⁸ In a previous case, the Court also found a state’s closed primary system unconstitutional.²⁹

Regarding open primaries, the Court in the *Jones* case suggested that these “may” be constitutionally different from the blanket primaries since a voter is limited to one party’s ballot in the open primary.³⁰ Voting for only one party can be seen as an act of affiliation with that party, making it different from the blanket primary that was ruled unconstitutional in *Jones*.³¹

Open primaries, like North Dakota’s, have not generally been found to be facially unconstitutional.³² A statute should not be held to be unconstitutional either in whole or in part unless its unconstitutionality is clearly established.³³

In your letter, you ask if a political party “may have its endorsed candidates placed on the general election ballot without participating in the primary election.” Until or unless the current North Dakota process is determined to violate the state or federal Constitution, the mechanism provided in N.D.C.C. ch. 16.1-11 is the only method for candidates to have their names printed on the general election ballot. Absent a determination that this method

²⁵ See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000).

²⁶ *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1123 (2016), citing *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577, 120 (2000).

²⁷ Ariz. Op. Atty. Gen. No. 100-019 (Ariz. A.G.), 2000.

²⁸ *Id.*

²⁹ *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

³⁰ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 598 (2000).

³¹ *Id.* See *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1125 (2016). See Sara Stenberg-Miller, *Elections-Nominations and Primary Elections: The Supreme Court Finds That California’s “Blanket Primary” Violates Political Parties’ First Amendment Right of Association* 77 N.D. L. Rev. 827, 850 (2001).

³² See *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (2016). The Arizona Attorney General opined that Arizona’s open primary system was not unconstitutional after the *Jones* opinion was issued. See Ariz. Op. Atty. Gen. No. 100-019 (Ariz. A.G.), 2000.

³³ N.D.A.G. 2018-L-05; N.D.A.G. 80-67.

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violates the Constitution, any change to the current process would be within the province of the Legislative Assembly.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.³⁴

³⁴ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).