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Brief for William E. Brock and John McCain et al., California Democratic Party v. Jones, No. 99-401 (U.S. Mar. 30, 2000)

Viet D. Dinh
Georgetown University Law Center

Paul F. Rothstein
Georgetown University Law Center

Roy A. Schotland
Georgetown University Law Center

Don Wallace Jr.
Georgetown University Law Center

Docket No. 99-401

No. 99-401

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

BILL JONES,
Respondent.

BRIEF FOR AMICI WILLIAM E. BROCK AND JOHN MCCAIN; HISPANIC REPUBLICAN CAUCUS; AND UNIVERSITY LAW PROFESSORS LYNN A. BAKER, GORDON BREWSTER BALDWIN, VIET D. DINH, LINO A. GRAGLIA, DOUGLAS W. KMIEC, PAUL F. ROTHSTEIN, ROY A. SCHOTLAND, CHARLES A. SHANOR, AND DON WALLACE, JR. IN SUPPORT OF RESPONDENTS

Filed March 31, 2000

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INTERESTS OF AMICI[1]

Amici university law professors have extensive professional experience and personal interest in the study of constitutional law, particularly as applied to the American political system. They have concluded, as further indicated below, that the California blanket primary system fits well within the constitutional framework defining powers of states and protections for voters which this Court has developed. The California blanket primary – and the laws of many other states with blanket or open primaries which are implicated herein – should be upheld.

The Hispanic Republican Caucus has a particular concern in protecting rights of members of minorities to participate in the political system and has reached the conclusion that the California blanket primary is constitutionally valid because it serves to protect and advance compelling interests of such voters, including the long-term interests of the parties. Members include a recent minority leader of the California State Assembly.

William E. Brock and John McCain are long-time participants in the political process. Senator Brock was a United States Senator and Chair of the Republican National Committee for the years 1977-1980. Senator

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[1] Pursuant to Rule 37.6 of the Rules of this Court, Amici state the Respondent Californians for an Open Primary contributed to the preparation and submission of this brief, but that no counsel for a party authored this brief in whole or in part. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of the brief, and the consent letters have been filed with the clerk of the Court.

McCain has actively participated in the process both as a Senator and as a candidate for the Republican presidential nomination. Based on their experience, each has concluded the blanket primary actually *advances* important constitutional interests of parties and their adherents and members. These interests are advanced by opening the election process to allow broader candidate selection by voters which allows the development of competing parties in states and areas where single parties have dominated. Long term, the parties will and have benefitted from this open system.

During Mr. Brock's active participation, the Republican Party grew to competitive status in many southern states largely because open primary systems allowed and even encouraged affiliation with the party before many voters were willing to join formally. Senator McCain has concluded that "open" or blanket primaries have allowed him to attract many voters to the Republican Party who have not yet become formally identified with that party.

INTRODUCTION

Amici strongly argue that the adoption of the blanket primary in California was a "win-win" decision of the state for the voters *and* for political parties. The system advances compelling interests of voters through expanding opportunities for participation (without pre-condition) and allowing voters to exercise a free choice among all candidates. Concurrently, such a system actually enhances the associational rights of political parties in the long term by allowing each political party and each

potential candidate within the party to reach out to voters who have not yet determined to firmly affiliate with a party. The record below documents these benefits – quantified through increased voter participation and a numerical increase in *each* petitioner party's vote.

Such an election system is allowed to the states acting under state power to conduct elections.

ARGUMENT

I. THE POWER OF THE STATES TO REGULATE ELECTIONS TO ENHANCE THEIR CITIZENS' PARTICIPATION IS CONFIRMED BY TEXTUAL AND HISTORICAL ANALYSIS OF THE CONSTITUTION

Petitioners claim that political *parties* have a constitutional right to overrule the primary election system chosen by a *state*, here chosen directly by initiative vote of the people. The claim that political parties have such overriding constitutional right is not well founded as a matter of textual historical constitutional analysis. Political parties are not even mentioned in the Constitution and the election powers are explicitly reserved to the states (or to the people). One historic reason there is no mention of political parties is there were no parties in existence when the Constitution was conceived and ratified. Indeed, the Constitution was designed and intended to govern without political parties. *See, e.g.*, Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States 1780-1840*, at 40 (1969).

Article IV, Section 4 of the Constitution guarantees "to every state in this union a republican form of government." This section of the Constitution has never been held to impose a single conception of what it means to have "a Republican form of government." *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), much less to prescribe a single system of elections.

For the federal offices for which the Constitution requires some form of election processes, the Constitution directly confirms in the states the authority and responsibility to establish and regulate the elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). This is most explicitly stated through the Constitution's grant to states of broad power to prescribe "the times, places and manner of holding elections for senators and representatives." U.S. Const., art. I, § 4, cl. 1. This election power is matched by state control over the election process for state offices.

Exercising this authority and their own authority to conduct the far more numerous state and local elections, the states have enacted diverse and comprehensive election codes. Constitutional interests in voting and in political association are both implicated and protected and enhanced hereby. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). These interests are derived both from the United States Constitution and from the states' own constitutions.

Primary elections are conducted through a variety of systems ranging from "closed" to "open" and "blanket" throughout the United States. *See Tashjian*, 479 U.S. at 222,

n.11, setting out the wide variety of state primary systems. The range of options for primary elections is illustrated in the historic changes made in this case. The people of California determined by initiative vote to go from a "closed" to "blanket" primary based on their experience and perceived interests.

This is as intended under the United States Constitution. At the time of the Constitution, the constituent states of the United States already had their own special systems of election to protect their citizens' rights. The "powers" to do so were surely among the powers "reserved to the states respectively or to the people" under the Tenth Amendment.

The states conducted these elections before and after ratification of the Constitution. Only later did political parties evolve. Concurrently, the states evolved differing systems to select candidates for the general election. In the earliest days of the Republic, candidates were often chosen informally by a consensus of locally prominent persons (similar to town meetings which continue today in some states).

With the emergence of more formal political parties, candidates were winnowed through differing state nomination processes, including petitions, caucuses, party conventions, and later a variety of primary election systems. The states then placed "party candidates" on general election ballots. Today, all states either require or make available primary elections for nomination of candidates for elections to the U.S. Congress and for most state legislative and executive positions. However, about

a third of the states still use caucuses for one or both parties' nomination of presidential candidates.

Two principal textual limitations on state power to regulate candidates for federal office elections are the qualification clauses governing the election of members of Congress, and the ban on religious tests for office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The text of the original Constitution is designedly silent concerning the rules governing candidate selection processes by states for elections at the state and local level. State and local elections were surely viewed as matters governed by powers of the states (preserved under the Tenth Amendment). *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Thomas, J. dissenting opinion at 845); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Decisions of this Court dealing with six constitutional amendments[2] have helped define modern contours of the right to vote, the right to run for office, and the right to fair representation. Within this framework the states remain free to experiment and decide how best to protect their citizens' rights. States are free to experiment with direct democracy, *e.g.*, through initiative and referendum, to use nonpartisan registration and elections for

[2] The Fifteenth Amendment protects the right to vote. The Seventeenth Amendment requires popular election of Senators. The Nineteenth Amendment guarantees the right to vote to women. The Twenty-third Amendment permits residents of the District of Columbia to vote for President. The Twenty-fourth Amendment bars the poll tax in federal elections. The Twenty-sixth Amendment grants the vote to persons over 18. Most importantly, this Court has construed the First and Fourteenth Amendments as protecting basic rights to participate in elections.

some offices and even term limits for state and local officials (which have been held invalid for congressional office only because of the specific "qualifications clause," art. I, § 2, cl. 2).

The power of states over elections for state offices is not so constrained as it is where the federal offices are involved. *Compare Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998) with *U.S. Term Limits, supra. See also Oregon v. Mitchell, supra.*

As a very general proposition, this Court has held laws excluding voters and closing elections to be suspect under the Fourteenth (or, more rarely, the Fifteenth) Amendment analysis. For example, the "white primary" cases, cited p. 10, *infra*, held invalid laws restricting voters who participated in the primary elections. Most recently *Rice v. Cayetano*, 68 U.S.L.W. 4138 (February 23, 2000), applied the Fifteenth Amendment to special state elections, holding that special Hawaiian elections could not be closed to most people of that state in violation of that amendment.

II. THE STATE MAY ACT TO ADVANCE IMPORTANT CONSTITUTIONAL INTERESTS BY INCREASING AND PROTECTING VOTER PARTICIPATION

This Court has frequently reflected the overriding importance to citizens and to our very democracy of the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

In our democracy, that all citizens should enjoy the right to vote is not just a theoretical value. The exercise of that right to vote must also be encouraged and protected. The actual application of the right through participation in the election process is separately important to the democracy.

Elections do not just serve to select officials. Participation in the election process serves the separate purpose of legitimizing the government. "Public participation in the election of government officers is the essence of the American system of representative democracy. It is through elections, including primary elections . . . that government is legitimized." *State ex rel. LaFollette v. Democratic Party*, 93 Wis.2d 473 (1980), *rev'd on other grounds, Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). This important purpose is served by state and local elections as well as those for national office. This important legitimizing purpose is served to a degree roughly proportionate to the amount or percentage of participation by the citizenry in elections. Thus, when the participation is increased as the blanket primary has done, the government is further legitimized.

Soon after the Constitution's ratification, the Framers adopted the Bill of Rights with the understanding they would thereby further protect the citizens and the states. The avowed intent was also to reinforce the newly created democracy. The First Amendment serves to protect individuals *and* to reinforce democracy by preserving the freedom of individuals to engage in behaviors important to democracy. Public participation through exercise of the right to vote is "the essence" of the democratic process.

The Constitution allows states to balance other constitutional interests and even to restrict First Amendment rights where necessary to preserve and expand participation in the democratic election process. In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court upheld a ban involving core First Amendment interests; political speech in the election poll area. The absolute ban was upheld where the state determined this protection was necessary to improve the experience of voters who participate in elections.

The interests served in adopting the blanket *primary* system are similar; to enhance voter participation while broadening each voter's choices. These interests in a primary election are as important as those in the *general* election because the primary is a critical step in the process of selecting public officials. *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986).

In many states and many elections the only opportunity to cast a meaningful vote occurs in the primary. Often because of factors, such as one-party dominance, "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry v. United States*, 256 U.S. 232, 286 (1921) (Pitney, J., concurring); *United States v. Classic*, 313 U.S. 299, 319 (1941); *Morse v. Republican Party of Va.*, 517 U.S. 186, 205-06 (1996). The same is often true in California where a majority of legislative districts are "safe" for one party according to expert analysis and testimony below. JA 191.

This makes doubly important the need to consider and protect the rights and opportunities of voters in

primary elections. This Court recognized this factor first in the "white primary" cases: *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 491 (1953). The decisive character of primary elections weighed strongly in this Court's determination to invalidate the laws allowing political parties to control primaries (rebuffing a similar claim of associational rights to that advanced by the political parties here). It can now be concluded that the long-term effects on both parties from these decisions were undoubtedly beneficial. Minorities thus allowed to participate in elections later joined and strengthened *both* parties.

Here the State and its people (by initiative) have acted to expand the ability of all California's people to participate in the democratic process. California's primary system likely has a beneficial impact even on parties – thus serving directly to implement and protect rights of all citizens of the State.

Indeed, the contrary argument of the political parties that the citizens were deprived of their rights is especially disingenuous where overwhelming numbers of Californians of all parties and demographic groups and regions voted to adopt this blanket primary to protect their accurately perceived constitutional interests. (*See* expert testimony below analyzing support for blanket primary, JA 176-178.) Further, the political parties have each already benefitted by receiving increased vote totals (ultimately reflected at other levels such as party volunteers or contributions).

When the state acts to protect and expand participation in the democratic process, First Amendment values support the state action. This is especially true where the state action was adopted by direct vote of the people, and majorities supported the initiative from all parties, demographics and geographic areas. The people are especially suited to determine their own interests and how to protect them.

Each court which has considered a blanket primary has upheld such a primary law and confirmed the constitutional interests thereby advanced. Several courts have also specifically concluded that the political parties' fears and claims were unsubstantiated (or exaggerated as found by the court below). It is significant that these courts have usually been state supreme courts closely conversant with the citizens' interests – these state judiciaries are often directly elected.

In *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 120-21 (1981), this Court summarized one state supreme court decision:

> The Wisconsin Supreme Court considered the question before it to be the constitutionality of the "open" feature of the state primary election law. . . . by encouraging voter participation, the court held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct.

Democratic Party at 120-21 referencing *State ex rel. LaFollette, supra.*

The Supreme Court of Alaska similarly upheld Alaska's blanket primary system against a First Amendment challenge, specifically recognizing that encouraging voter turnout was among the important state interests advanced by the blanket primary. *O'Callaghan v. State of Alaska*, 914 P.2d 1250, 1262-63 (Alaska 1996).

The Supreme Court of Washington after considering 55 years' implementation of that state's blanket primary found that there were three separate compelling interests served by Washington's system *and* that the political parties had demonstrated no substantial burden on fundamental rights:

> Have plaintiffs shown a substantial burden? Not only have they not shown a substantial burden, but they concede they cannot do so. . . .
>
> . . . .
>
> . . . [There are three] compelling state interests which support a blanket primary . . . allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary.

Heavey v. Chapman, 611 P.2d 1256 at 1258-9 (Wash. 1980).

Washington does not allow party registration of voters and has constitutional provision requiring "absolute secrecy in preparing and depositing his ballot." Wash. Const. art. 6, § 6. The interest in voter privacy is important, and Washington voters have resisted any state requirement of party identification. Of course, the blanket primary serves the same privacy interests of voters in

California. The political parties' argument here would frustrate this interest by making voters declare a party – before they are willing to do so – which then becomes a "public record."

III. THE RECORD CONFIRMS THE STATE'S (VOTERS') JUDGMENT THAT A BLANKET PRIMARY SERVES TO SIGNIFICANTLY ADVANCE COMPELLING INTERESTS AND BENEFITS THE PARTIES

A state is not required to quantify or prove problems in the election system – or a "cost-benefit" analysis – *before* improving the election process. "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively. *Munro*, 479 U.S. at 195-196. Here, however the record proves both the problems of the old closed primary system and benefits of the blanket primary. This record confirms the judgment of the states that a blanket primary enhances the rights of voters and democratic interests.

Under the blanket primary, each voter has a broader range of choices, and every voter has a chance to participate in both important stages of the election process. Even a careful and conscientious voter who doesn't finally decide until the date of the primary is not barred from expressing that opinion by vote (even if it *is* too late to change party registration). The satisfaction derived by each voter from participation, and the concurrent incentive to participate and support, is also unquantifiable.

However, it can be said that the voters are the appropriate judges of these intangible interests and their relative importance (relative to the same voters' associational interests in political parties).

Other results from adoption of the blanket primary are quantifiable. The most important is probably voter participation, a matter of significant concern throughout this Country. For many years, California primary elections had showed a dramatic decline in participation. A similar decline in general election turnout in California – but different in amount – also was cause for great concern. *See* expert Field, showing a 15-20% decline in last 30 years – "marked and significant decline over the last 30 years." JA 201. The decline in turnouts in the two phases of the election are related.

Historical data also showed that there was a significant difference between the lower California turnout *before* adopting the blanket primary and the substantially better turnout record of western states which had previously adopted the blanket primary. *E.g.*, in 1996, congressional races in California had a 43% turnout whereas the blanket primary states enjoyed turnout over 55%. Gerber RT 682. This strongly supported the argument that blanket primaries would encourage voter participation in both primary and general elections.

Election statistics from California's first blanket primary elections confirmed the expectation that primary voting participation would dramatically increase with implementation of the blanket primary. It was conceded below by the political parties in 1997 that allowing the

(approximately) 1.5 million independent voters to vote in the blanket primary would likely boost turnout. Field JA at 202. (RT 658-659). By 2,000 there were 1.8 million California independent voters able to vote in the primary. This increase alone could be argued to justify the change to a blanket primary.

By the time of trial, the blanket primaries which had been conducted in California also confirmed the anticipated dramatic increase in voter turnout. (*See also* Respondent Second Lodging for public records of June 1998 and March 2000 California elections.) This aspect of the State's (voters') judgment as to the merits of the blanket primary is clearly vindicated. There was a total increase of over a million and a half votes. Separately *each* of the petitioner political parties enjoyed a substantial increase in votes for their party. The mid-term general election turnout also increased approximately 2.4%, partially reflecting the effects of drawing more voters into the election in the primary. (Issues and candidates at all levels undoubtedly also have significant impacts on turnout.)

Similar fears to those of the parties here had been considered by this Court in *Tashjian*, 479 U.S. 208:

> . . . appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 states which have chosen to permit more substantial openness in their primary systems . . . .

479 U.S. at 233, n. 12.

It has become apparent that a blanket primary does not significantly infringe other rights (nor harm the political parties' less tangible interests). The experience of the blanket primary states with respect to these other areas of impact also confirms each state's judgment in adopting the blanket primary system. (*See* Brief of Amici Curiae Alaska and Washington for description and more detailed explanation of those states' different systems.) Not only did the blanket primary have the positive impacts just discussed, but the negative impacts feared by political parties did not occur or were actually positive (or at least "insignificant," as the court below found).

One of the experts, David Olson, had intensively studied the 65-year history and effects of Washington's blanket primary. First implemented in 1936 (adopted 1935 Wash Laws 26), that Washington system could be analyzed in its effects – on both major and minor parties – to determine whether there were disruptive impacts on political parties.

Secondary source analysis of poll data separately confirm that after 65 years' experience, the Washington voters strongly view the system as favorable. *See* William F. Mullen & John C. Pierce, *Political Life in Washington* 66 (Thor Swanson, *et al.*, eds., 1985) (citing statistical data). As previously suggested, it is reasonable to presume that the voters will accurately perceive their own interests. The assumption is further supported where voters cumulatively have had 65 years of experience with the Washington blanket primary system.

Indeed, since Washington also allows voter initiatives and has an extensive history of such changes to its system, it is likely that a public perception that voter rights were harmed would have long since generated change through another initiative. To the contrary, a later Washington initiative extended the system to a presidential primary specifically crafted to allow – but not compel – a party declaration to assure compliance with party rules for convention delegate selection.[3] Professor Olson of the University of Washington was one of the experts below because he had studied in depth the Washington experience with the blanket primary and contrasted parties in that state with those in other states. The professor specifically considered and evaluated historical evidence as bearing on the political parties' fears of detrimental impact on parties. First, he analyzed the concern over "raiding" and found that the historical records disclose that the issue of raiding "generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience." JA 37. The parties also expressed a fear of "phony candidates," as to which Professor Olson' study found "there is no valid empirical evidence [and] nothing distinctive about the blanket primary that would encourage phony candidates . . . " JA 138.

As to the more general fears expressed by political party leaders of erosion in party stability, Professor Olson analyzed the Washington record and compared it with that of other states to conclude: "Washington parties are

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[3] "Presidential primary," Wash. Rev. Code 29.19.045-.055 (1996).

among if not *the* most, highly competitive at last [sic] in part due to the blanket primary." JA 142.

The expert testimony to the court below about Washington's experience generally updated and reflected similar proof submitted to Washington courts when the Washington Supreme Court had upheld the Washington blanket primary years earlier. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980) quoted supra, p. 6.

The historical evidence thus addressed – and rebutted – the arguments or fears of the political parties which are repeated here. The Court below made a specific holding on the issue of the impact on parties finding the blanket primary system to be a "significant but *not* severe burden on their associational rights." (Br. in Opp., App. at 27, 35.) As noted above, there is a strong reason to conclude the long-term impacts on political parties are actually positive. *See, also,* Professor Olson's Summary Report, JA 133-152.

An important separate concern is the effect of the blanket primary on minority voters and candidates. The Washington expert (Dr. Olson) considered the historical record and concluded: "Thus, the blanket primary appears to be a neutral instrument when it comes to favoring or disfavoring racial minority voters and candidates." JA 149. *See, also,* JA 129.

Other expert testimony in the court below was much more positive about the empowering impact of the Washington blanket primary on minorities and women: "Any allegation that the blanket primary inhibits women and minorities from winning office is also refuted by Washington's experience," going on to document the fact

Washington has unusually high minority and women participation – *e.g.*, the highest percentage of women in any states legislature JA 194 (Quinn Report, favorably cited through Circuit Court Opinion).

A similar conclusion has been reached by the California Hispanic Republican Caucus, indicated by their participation as amici in this brief supporting the blanket primary. Especially with long-term demographic changes in minority populations, the parties will benefit through a primary system which allows or encourages early affiliation by minority voters through primary participation – leading to general election and other longer term support.

Amicus William E. Brock, a former national party chairman, had observed similar effects: the Republican Party was benefitted by the opening of primaries in that party's efforts to become viable in previously one-party southern states. The party became competitive and now often enjoys a majority in some states – in part because of the open primary system. Of course, *Tashjian*, 479 U.S. 208 (1986), reflected a similar conclusion by the same party in another state. A party rule sought to open its primary – but was frustrated by state law (dictated by the other party). Indeed, the facts in *Tashjian* reflect that both parties expected a positive effect on the minority party's building efforts.

Amicus John McCain has recent experience illustrating the related conclusion that either national party could benefit through attracting and allowing voters to participate in that party's primary – without first requiring full party registration.

CONCLUSION

The blanket primary is a constitutionally valid state regulation of elections which protects the constitutional interests of voters. The decision below should be affirmed.

Respectfully submitted,

JAMES M. JOHNSON*
Attorney at Law
Capitol Court, Suite 225
1110 S. Capitol Way
Olympia, WA 98501
(360) 357-3104

**Counsel of Record*