To: The Honorable Betsey Bayless

August 11, 2000
Re:Constitutionality of the Arizona Open Primary Law

Secretary of State

I00-019
(R00-038)

Question Presented

You have asked whether Arizona's open primary law is constitutional in light of the recent United States Supreme Court decision in *California Democratic Party v. Jones,* __ U.S. __ , 120 S.Ct. 2402 (June 26, 2000).

Summary Answers

The Supreme Court's ruling in *California Democratic Party v. Jones* does not invalidate Arizona's open primary law.

Background

In 1998, Arizona voters amended our State Constitution to allow voting in the primary election by voters who are registered as "no party preference," independent, or members of parties that are not represented on the ballot to vote in primary elections. Ariz. Const. art. VII, § 10; Arizona Secretary of State, 1998 Ballot Propositions for the General Election of November 3, 1998 at 26-32 (1998) (Proposition 103) ("1998 Publicity Pamphlet"). Before this constitutional amendment, Arizona had a "closed primary" in which only members of parties represented on the ballot could participate. As amended by Proposition 103, Article VII, § 10 of the Constitution provides:

The Legislature shall enact a direct primary election law, which shall provide for the nomination of candidates for all elective State, county and city offices, including candidates for United States Senator and for Representative in Congress. *Any person who is registered as no party preference or independent as the party preference or who is registered with a political party that is not qualified for representation on the ballot may vote in the primary election of any one of the political parties that is qualified for the ballot.*

(Emphasis added.)[(1)] The Legislature subsequently amended the statutes to allow any Proposition 103 voter to designate, at the time of voting or requesting an early ballot, one of the parties that will be on the ballot and to receive the ballot for that party. A.R.S. §§ 16-467, -542. The 2000 primary will be the first primary election conducted under Arizona's new open primary law.

In *Jones,* __ U.S. __, 120 S.Ct. 2402, the United States Supreme Court ruled that California's blanket primary law violated the political parties' First Amendment rights of association. You have asked whether Arizona's open primary law is constitutional in light of *Jones*.

Analysis

In *Jones,* the Supreme Court invalidated California's blanket primary system, in which any voter could vote for any candidate in the primary election, regardless of party affiliation. Under California's blanket primary law, each voter received a ballot that listed every candidate, regardless of party affiliation, and the voter could then vote for the candidates of his or her choice. *Jones*, at 2406. The candidate of each party receiving the most votes advanced to the

general election as the nominee of that party. According to the Supreme Court, the blanket primary "in effect, . . . simply moved the general election one step earlier in the process." *Id.* at 2411.

The Supreme Court concluded that the blanket primary law imposed a severe burden on a party's rights of association. The Court was particularly concerned about the ability of a party's opponents to select a party's nominee, noting that with a blanket primary, "the prospect of having a party's nominee determined by adherents of an opposing party is far from remote - indeed it is a clear and present danger." *Id.* at 2410. The Court was also troubled that the blanket primary would change the parties' message. *Id.* at 2411. The Court noted that the purpose of California's blanket primary initiative "was to favor nominees with 'moderate' positions." *Id.* at 2411.

In light of the heavy burden on the rights of political parties, the blanket primary was valid only if "it [was] narrowly tailored to serve a compelling state interest." *Id.* at 2412. The Court found that none of the asserted state interests justified the heavy burden on the parties' rights and, therefore, the California law was unconstitutional.(2) The Supreme Court also indicated in *Jones* that a "narrowly tailored" means of furthering the asserted State interests without burdening the rights of the political parties would be a purely non-partisan primary election in which the top "vote getters" advance to the general election. *Jones* at 2414. The Court, however, did not conclude that a non-partisan primary is the only viable alternative to a closed primary system.

In *Jones,* the Court acknowledged that open primaries differ from blanket primaries in that in open primaries voters must select the ballot of one party and can only vote for candidates of that party. *Id.* at 2409, n 6. 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.(3) *Id.* at 2409, n 8. Because the Supreme Court expressly limited its holding in *Jones* to the blanket primary at issue in that case, *Jones* does not invalidate Arizona's open primary law.

Not all burdens on political parties are subject to the strict scrutiny test applied in *Jones. See Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997). The Supreme Court previously established that if the burden on a political party is not severe, the state is not required to show that its law is narrowly tailored to serve a compelling state interest. Rather, a state showing of an important regulatory interest "will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* at 358 (citations omitted). The state's asserted regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on the party. *Id.* at 363. "No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Id.* at 358.

Arizona's open primary law does not burden the political parties to the degree the blanket primary analyzed in *Jones* did. Unlike the law analyzed in *Jones,* Arizona's open primary law was not designed to change the message of parties -- it was designed to allow voting by certain registered voters who were excluded from the closed primary. It also does not pose the same risk of party opponents selecting a party nominee because it applies only to independents and others who could not vote in the closed primary system. The open primary law does not alter how members of parties represented on the ballot participate in the primary election; they must vote the ballot of their party. Indeed, various party leaders supported Proposition 103 as a means of increasing voter participation without harming political parties. *See* 1998 PUBLICITY PAMPHLET, PROP. 103 at 27-29*; cf. Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986) (Connecticut closed primary law violated Republican Party's First Amendment right of association where party rule allowed independents to vote). Moreover, by requiring Proposition 103 voters to designate a particular party for the purpose of voting in a primary, these voters are,

in a sense, "affiliating" with the party, unlike the blanket primary voters in *Jones. See Jones* at 2409, n. 8.

Because Arizona's open primary law does not severely burden the rights of political parties, Arizona's law should be subject to the less stringent standard applied in *Timmons*, rather than the strict scrutiny used in *Jones.* Under *Timmons,* "important regulatory interests" justify reasonable, nondiscriminatory restrictions. *Timmons*, 520 U.S. at 358. Arizona's open primary promotes voter participation by extending voting rights to Proposition 103 voters. Arizona's open primary law also promotes fairness by ensuring that voters who help pay for publicly-financed primaries are permitted to vote in the elections. In addition, the open primary promotes the legitimacy of the elections by ensuring that *all* registered voters have an opportunity to vote. Although the Supreme Court in *Jones* rejected some of these interests as justification for the blanket primary, the Court made it clear that the state interests must be analyzed, not in the abstract, but in the context of a specific law. These important -- even compelling -- state interests justify the burden that is placed on political parties through Arizona's narrow open primary law.

Conclusion

Because of the differences between Arizona's open primary law and California's blanket primary, the Supreme Court ruling in *Jones* does not invalidate Arizona's open primary law.

Janet Napolitano
Attorney General

1. For convenience, this Opinion refers to people registered as "no party preference," independents or members of parties that have not qualified for the ballot collectively as "Proposition 103 voters."

2. The Court rejected seven asserted state interests: (1) "producing elected officials who better represent the electorate;" (2) "expanding candidate debate beyond the scope of partisan concerns;" (3) ensuring "that disenfranchised persons enjoy the right to an effective vote;" (4) "promoting fairness;" (5) "affording voters greater choice;" (6) "increasing voter participation;" and (7) "protecting privacy." *Id*. at 2412-13. Rather than analyze these issues in the abstract, the Court analyzed the interests of fairness, voter choice, voter participation and privacy as "addressed by the law at issue." *Id*. at 2413.

3. According to the dissent, the district court indicated that three states had blanket primaries, 21 open primaries, and 8 "semi-closed" primaries in which independents may participate. *Jones* at 2420 (J. Stevens, dissenting).

Back to 2000 Opinions

return to top