

Opinion No. 2013-132

February 3, 2014

The Honorable Jake Files
State Senator
300 Free Ferry Landing
Fort Smith, Arkansas 72903

Dear Senator Files:

This is in response to your request for my opinion on the constitutionality of several hypothetical requirements for placing candidates on the ballot in an election in Arkansas. Your first set of questions involves a so-called “top-two” primary in which candidates of all parties, independents and write-ins run against each other in an “all comers” primary election.¹ The second method in question

¹ Louisiana, Washington, and California have adopted the “top-two” primary. See Chenwei Zhang, *Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races*, 73 Ohio St. L.J. 615 (2012). The top-two primary is derived from the “blanket primary” election scheme. *Id.* at 621 (footnote omitted). In the blanket primary, a single ballot lists all candidates from all political parties and all voters may vote for any candidate from any political party (with the top-two vote getters from each party advancing to the general election). *California Democratic Party v. Jones*, 530 U.S. 567, 570 (2000). In *California Democratic Primary*, the United States Supreme Court struck down California’s partisan blanket primary as violating political parties’ associational rights because it required them to allow non-members to vote in their primaries even when a party wished to exclude non-members. *Id.* The top-two primary is “a ‘nonpartisan’ variation on the blanket primary, where the top vote-getters can advance to the general election regardless of the political party to which they belong.” Zhang, *supra*, at 623-24. In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), the United States Supreme Court examined this scheme and rejected a facial challenge to Washington’s top-two primary because this primary by its terms did not choose the parties’ nominees. See *id.* at 453. The Court left open the possibility for an as-applied challenge that parties’ association rights might be implicated if voters misinterpreted candidates’ listed party preferences as reflecting endorsement by the parties. *Id.* at 455-56. Such a challenge was mounted. *Wash. State Republican Party v. Wash. State Grange*, No. C05-0927-JCC, 2011 WL 92032, at *7 (W.D. Wash. Jan. 11, 2011). But the district court held that Washington’s implementation of its top-two primary was constitutional because the ballot title eliminated the possibility of voter confusion. *Id.* at *5. The Ninth Circuit Court of Appeals affirmed. *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784 (9th Cir. 2012), cert. denied, 133 S.Ct. 110 (Oct. 1, 2012).

involves an open general election with a runoff system. You have asked, specifically:

1. May the state provide for a “top-two” primary in which the top two vote-getters, regardless of party affiliation (or lack thereof), and regardless of whether one candidate achieves a majority of the vote, advance to the general election? Under the hypothetical structure, a candidate who wished to run in a party affiliation listed on the ballot would receive a party certificate and be listed with a party affiliation if the candidate meets party requirements such as paying a fee or filing a petition. There would not be a party convention and parties could field multiple candidates in the primary. The top two vote-getters would advance to the general election even if one candidate received 99% of the vote and second place got just .5%.
2. Alternatively, may the state require the political parties to nominate candidates for such a primary by convention in which the parties could nominate as many candidates as they desire for a position?
3. Alternatively, may the state require the political parties to have a convention and nominate for the top-two primary any candidate who pays a fee, if required by the party, signs a party pledge, if required by the party, and submits an affidavit of eligibility to party officials?
4. In addition to party candidates, the “top two” structure would also allow independent candidates to access the primary ballot by petition, and would allow a procedure for write-in votes to be counted. Could such a structure accurately be characterized as a nonpartisan primary and thus not subject to any restrictions that may be contained in Amendment 29?
5. In light of Amendment 29 or any other constitutional provision, may the state allow candidates to file for the primary by paying a fee or filing a petition with the state or county and have a party affiliation of their choosing shown on the primary and general election ballot without filing with a party and without the consent of the party?

Another method used in at least one state is for the general election to be open to all comers with a runoff between the top two vote-getters being held some weeks after the general election if no candidate receives a majority of the vote. My questions involving such a runoff system are as follows:

6. May the state require the political parties to nominate candidates for the *general* election by convention in which the parties could nominate as many candidates as they desire for a position? [Emphasis original.]
7. Alternatively, may the state require the political parties to nominate for the *general* election any candidate who pays a fee or files a petition? [Emphasis original.]
8. Alternatively, may the state require the political parties to have a convention and nominate for the *general* election any candidate who pays a fee, if required by the party, signs a party pledge, if required by the party, and submits an affidavit of eligibility to party officials? [Emphasis original.]
9. May the state allow candidates to file for the *general* election by paying a fee or filing a petition with the state or county and have a party affiliation of their choosing shown on the ballot without filing with a party and without the consent of the party? [Emphasis original.]

RESPONSE

It is my opinion in response to your first set of questions that a so-called “top two” primary would be highly suspect as conflicting with Amendment 29 to the Arkansas Constitution.² The answer to your sixth question is in all likelihood generally “yes.” It is my opinion that the answer to Questions 7 and 8 is probably “no,” because these alternatives would likely fail to withstand constitutional

² Although it does not bear directly on your questions, it should be noted in passing that the district court in *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), ordered the State of Arkansas to preclear, pursuant to Section 3(c) of the Voting Rights Act, “any further statutes, ordinances, regulations, practices, or standards imposing or relating to a majority-vote requirement in general elections in this State...” *Id.* at 601.

scrutiny. With regard to Question 9, while I question the filing fee, a petition-of-electors requirement would be authorized. But consideration must be given to the parties' First Amendment associational rights when implementing any such requirement.

Question 1 - May the state provide for a “top-two” primary in which the top two vote-getters, regardless of party affiliation (or lack thereof), and regardless of whether one candidate achieves a majority of the vote, advance to the general election? Under the hypothetical structure, a candidate who wished to run in a party affiliation listed on the ballot would receive a party certificate and be listed with a party affiliation if the candidate meets party requirements such as paying a fee or filing a petition. There would not be a party convention and parties could field multiple candidates in the primary. The top two vote-getters would advance to the general election even if one candidate received 99% of the vote and second place got just .5%.

This question and your remaining questions regarding a “top-two” primary call for the interpretation of Section 5 of Amendment 29 to the Arkansas Constitution (hereinafter “Section 5”), which states:

Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.³

³ Amendment 29 was initiated by the voters and adopted on November 8, 1938. As codified, it states in full:

§ 1. Elective offices — Exceptions.

Vacancies in the office of United States Senator, and in all elective state, district, circuit, county, and township offices except those of Lieutenant Governor, Member of the General Assembly and Representative in the Congress of the United States, shall be filled by appointment by the Governor.

§ 2. Ineligible persons — Nepotism.

The Governor, Lieutenant Governor and Acting Governor shall be ineligible for appointment to fill any vacancies occurring or any office or position created, and resignation shall not remove such ineligibility. Husbands and wives of such officers, and relatives of such officers, or of their husbands and wives within the fourth degree of

Section 5 identifies three nomination methods for the placement of candidates on the official election ballot: political party convention action, primary action, or petition of electors.⁴ If the nomination is by primary, such nomination must be made by majority vote. Under the proposed “top-two” primary, a candidate will advance to the general election notwithstanding that he or she did not poll a majority in the primary. At issue, therefore, is the scope of Section 5’s majority vote requirement.

While Amendment 29 has been the subject of a number of Arkansas Supreme Court decisions, most involve either a threshold question under Section 1 concerning the amendment’s applicability, or Section 2’s succession prohibition.⁵

consanguinity or affinity, shall likewise be ineligible. No person appointed under Section 1 shall be eligible for appointment or election to succeed himself.

§ 3. Violation of amendment — Compensation withheld.

No person holding office contrary to this amendment shall be paid any compensation for his services. Any warrant, voucher or evidence of indebtedness issued in payment for such services shall be void.

§ 4. Duration of term of appointee — Election to fill vacancy.

The appointee shall serve during the entire unexpired term in the office in which the vacancy occurs if such office would in regular course be filled at the next General Election if no vacancy had occurred. If such office would not in regular course be filled at such next general election the vacancy shall be filled as follows: At the next General Election, if the vacancy occurs four months or more prior thereto, and at the second General Election after the vacancy occurs if the vacancy occurs less than four months before the next General Election after it occurs. The person so elected shall take office on the 1st day of January following his election.

§ 5. Election to fill — Placing names on ballots.

Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.

Ark. Const. amend. 29 (Repl. 2004).

⁴ *Accord Newton County Republican Central Committee v. Clark*, 228 Ark. 965, 974, 311 S.W.2d 774 (1958) (observing that “[t]he words [of Ark. Const. amend. 29, § 5] are separated by the disjunctive ‘or’, so that a candidate selected by any one of the three methods – convention, primary, or petition – could have his name placed on the ballot”).

⁵ *E.g.*, *Brewer v. Fergus*, 348 Ark. 577, 79 S.W.3d 831 (2002); *Oliver v. Simmons*, 318 Ark. 402, 885 S.W.2d 859 (1994); *Johnson Co. Election Comm’rs v. Holman*, 280 Ark. 128, 655 S.W.2d 408 (1983);

By contrast, very few involve Section 5 and none squarely addresses the issue at hand regarding the precise scope of this section, more specifically, whether it prohibits a top-two primary system.

In addressing this matter, we must start by recognizing that our state constitution is not a grant or enumeration of powers, but is only a limitation of power.⁶ Its provisions list what government cannot do. The legislature may rightfully exercise its powers subject only to the express or implied limitations and restrictions of the Constitution of the United States and of the State of Arkansas.⁷

Additionally, in matters relating to constitutional amendments, the primary goal is to give effect to the intent of the people.⁸ Constitutional and statutory provisions are considered in the same manner.⁹ The intent of the people is ordinarily determined by reference to the plain meaning of the words used.¹⁰ When the language of a constitutional provision is plain and unambiguous, each word must be given its obvious and common meaning.¹¹ The court will read the language under discussion in light of its context.¹² Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision.¹³ When a constitutional provision is ambiguous, however, such that interpretation is necessary, the Arkansas Supreme Court has stated that it may be helpful to determine what changes the provision was intended

Hawkins v. Stover, 274 Ark. 125, 622 S.W.2d 667 (1981); *McCraw v. Pate*, 254 Ark. 357, 494 S.W.2d 94 (1973); *Glover v. Henry*, 231 Ark. 111, 328 S.W.2d 382 (1959).

⁶ *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979); *Jones v. Mears*, 256 Ark. 825, 510 S.W.2d 857 (1974); *State v. Green and Rock*, 206 Ark. 361, 175 S.W.2d 575 (1943).

⁷ *Black v. Cockrill*, 239 Ark. 367, 389 S.W.2d 881 (1965).

⁸ *Rockefeller v. Hogue*, 244 Ark. 1029, 429 S.W.2d 85 (1968); *Bailey v. Abington*, 201 Ark. 1072, 148 S.W.2d 176 (1941).

⁹ *Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 686 S.W.2d 391 (1985).

¹⁰ *Hercules, Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995).

¹¹ *Gatzke v. Weiss*, 375 Ark. 207, 210, 289 S.W.3d 455 (2008); *Brewer*, *supra* n. 5, at 580-81.

¹² *See Gatzke*, *supra*; *Glover*, *supra* n. 5; *Drennen v. Bennett*, 230 Ark. 330, 322 S.W.2d 585 (1959).

¹³ *Bayer v. Cropscience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822 (2011).

to make.¹⁴ The court has stated further that “in order to determine the meaning and the extent of coverage of a constitutional amendment, [a court] may look to the history of the times and the condition existing at the time of the adoption of the amendment in order to ascertain the mischief to be remedied and the remedy adopted.”¹⁵

Applying these principles, it must first be noted that Section 5 plainly limits the legislature’s power when it provides that “[o]nly the names of candidates” nominated by one of three methods “shall be placed on the ballot in **any election.**” At issue is the precise scope of that limitation. As an initial matter, the words “any election,” viewed only in the context of Section 5, seem unlimited in scope. But Section 5 cannot properly be viewed in isolation. Rather, it must be considered in context with the entire amendment. Viewed in that light, the reference to “any election” may be seen as more limited. Amendment 29 comprises five sections. *See* n. 2, *supra*. The first four have to do with the filling of vacancies in certain offices. In particular, Section 4 deals with the term lengths of appointees and outlines a procedure for filling the office at a general election, depending upon whether the office would in regular course be filled at the next general election. In light of Section 4 and the other sections having to do with filling vacancies, the words “any election” in Section 5 might be taken to mean an election under Section 4 to fill a vacancy.

On the other hand, Section 4 is primarily concerned with the duration of an appointee’s service, not the naming of candidates on the ballot in an election. This observation, coupled with the breadth of the words “*any election,*” makes it difficult to conclude that these words are necessarily limited or particular to a general election held under Section 4. Indeed, the Arkansas Supreme Court appears to have presumed in its few opinions involving Section 5 that this section of Amendment 29 is not limited to elections to fill vacancies.¹⁶ Because the court has never squarely faced the question, however, we cannot assume these cases are controlling.

¹⁴ *Gatzke, supra*. *See also State v. Oldner*, 361 Ark. 316, 79 S.W.3d 831 (2005); *Bryant v. English*, 311 Ark. 187; 843 S.W.2d 308 (1992); *Glover, supra* n. 5.

¹⁵ *Bryant, supra* n. 14, at 193 (citation omitted); *see also Brewer, supra* n. 5.

¹⁶ *See Lewis v. West*, 318 Ark. 334, 885 S.W.2d 663 (1994) (referring to Section 5 in the context of a gubernatorial election dispute); *Clark, supra* n. 4 (mandamus action involving election to the House of Representatives).

In my opinion, Section 5's reference to "any election" presents some ambiguity with respect to the precise elections contemplated. We must therefore resort to rules of construction to determine the people's intent. One possible source for resolving the ambiguity is Section 5's heading, which states: "Elections to fill – placing names on ballots." This certainly suggests Section 5 only applies to the filling of vacancies. It appears, however, that this heading was added to the codification of Amendment 29, as it was not included in the amendment's original text.¹⁷ Because the heading is not part of Amendment 29 as adopted by the people, a court faced with the question might say it cannot be relied upon in determining the people's intent.¹⁸

In any event, even if some significance attaches to the heading,¹⁹ I believe a court would be compelled to look beyond the heading and undertake an assessment of Amendment 29's history and conditions existing at the time of its adoption to determine what changes were intended. Thankfully, we have the benefit of an extensive historical analysis of the amendment. A 1944 *Arkansas Historical Quarterly* article details events leading up to Arkansas's 1938 adoption of Amendment 29 and its majority-vote runoff system.²⁰ The author of this article, Mr. Henry Alexander, explains that this "double primary" system was of a "general pattern" among a number of states at the time.²¹ He relates that in his January 1933 inaugural address, Governor Futrell stated: "Nominations for public office should be made by a majority of the qualified electors voting at an election. By no means should an insubstantial minority be allowed to make a nomination."²² Agitation for a run-off primary system was reportedly stimulated by the Democratic primaries of 1932, where winners of several races failed to poll

¹⁷ See *Arkansas Democrat*, October 9, 1938.

¹⁸ See, e.g., *State ex rel. Palagi v. Regan*, 126 P.2d 818 (Mont. 1942) (stating that a particular act's title could not help in determining the people's intent, where the title was not in the act as adopted by the people but was instead added by the codifier); *State v. T.A.W.*, 186 P.3d 1076 (Wash. App. 2008) (same).

¹⁹ See *U.S. v. Zuger*, 602 F. Supp. 889 (D. Conn. 1984) (observing that a title of the U.S. Code is only prima facie or rebuttable evidence of the law where the title, as such, has not been enacted into positive law).

²⁰ Henry M. Alexander, "The Double Primary," *The Arkansas Historical Quarterly* (Vol. III, Autumn 1944).

²¹ *Id.* at 220.

²² *Id.* at 228.

a majority.²³ A double primary law was enacted during the 1933 legislative session in response to the numerous minority nominations in the 1932 primaries, and previous years.²⁴ That act was repealed during the 1935 session, prompting a movement to embody the majority-vote runoff system into the Arkansas Constitution where it would be “beyond reach of legislative power.”²⁵ Mr. Alexander further explains Amendment 28’s background:

Sponsors of the proposed amendment were moved, primarily, by hostility to committee nominations and special elections and, secondarily, by hostility to plurality nominations. The latter, however, should not be minimized. The section of Amendment 29 requiring the double primary was included in earliest drafts of the proposal. Suggestions, at one time considered, to incorporate provision for a double primary in a separate amendment were discarded. Writing on August 31, 1937, Abe Collins stated, with reference to the section of the proposed amendment requiring the double primary, “I think it is the most important part of it (draft of Amendment 29).” Opposition to minority nominations was strengthened in some quarters when, in the primary of August 11, 1936, Carl E. Bailey won the gubernatorial nomination in a five-man race by a plurality of less than thirty-two percent of the votes cast.

Amendment 29 was laboriously drafted during a period of almost a year by Abe Collins, Judge B.E. Isbell of DeQueen, and Doctor Robert A. Leflar of Fayetteville. C.T. Coleman of Little Rock and Doctor J.S. Waterman of Fayetteville cooperated.²⁶

It is abundantly clear from this historical treatise that the drafters of Amendment 29 did not intend for Section 5’s reference to “any election” to only mean elections to fill vacancies. Nor can such intent reasonably be ascribed to the voters, given

²³ *Id.* at 229.

²⁴ *Id.* at 228-29 (discussing Act 38 of 1933).

²⁵ *Id.* at 230.

²⁶ *Id.* at 234-35.

the ballot title used at the election at which Amendment 29 was adopted.²⁷ Although the “short title” – “Filling Vacancies in Public Office” – was “definitely incomplete,”²⁸ it was clear from the ballot title that the measure extended beyond the matter of filling vacancies.²⁹

If the court is persuaded that the drafters of Amendment 29 and the voters who approved it knew that it addressed candidate selection outside the vacancy context, then the proponents of a top-two primary system will face the argument that such a system is contrary to Section 5’s majority-vote requirement in primary elections. The language of Section 5 appears on its face to foreclose the legislature from authorizing any nomination election that does not have a majority vote requirement associated with it.

One possible response is that this requirement only applies to political party primaries.³⁰ The history plainly reveals that when nominees are selected at a primary by a political party, such nominations must, by provision of Amendment 29, be made by majority vote.³¹ But is the majority-vote requirement possibly limited to party nominations? One might argue “yes” because this aspect of Amendment 29 was in response to plurality elections that occur in a one-party

²⁷ In cases of ambiguity, it is proper to refer to the title of a constitutional amendment as an aid to its interpretation. *Miller v. Leathers*, 311 Ark. 372, 843 S.W.2d 850 (1992); *McCoy v. Story*, 243 Ark. 1, 417 S.W.2d 954 (1967).

²⁸ Alexander, *supra* n. 20, at 236 (citing *Arkansas Gazette*, October 15, 1938).

²⁹ The ballot title read: “An amendment to the constitution abolishing committee nominations, special elections and minority rule; providing the method for and regulating the filling of vacancies in office and the placing of the names of candidates for office on the ballots in elections, and for other purposes” *Arkansas Democrat*, October 9, 1938.

³⁰ I have also considered whether Section 5 might only apply to party nominations, that is, the procedure for placing party candidates on the general election ballot. In *Newton County Republican Central Committee v. Clark*, *supra* n. 4, the court rejected the claim that Section 5 mandates a convention of delegates. In so ruling, the court referred to the “three methods” of candidate selection under Section 5 and stated that the parties have no vested right “to any one of the methods mentioned....” 228 Ark. at 974. One might read into this very loose language the suggestion that Section 5 is limited to how party candidates get on the ballot. But such a reading cannot reasonably be squared with the “petition of electors” language. To the contrary, this language is strong evidence that the entirety of Section 5 is not concerned with political parties. And of course, the court in that case was not addressing the precise scope of Section 5, but was only addressing the argument that a convention was mandatory. The *Clark* decision is, in my opinion, therefore *sui generis* (restricted to its own facts).

³¹ Alexander, *supra* n. 20, at 245.

state (where the dominant party's nominee fails to poll a majority in the primary and nomination is tantamount to winning the election).³² The ballot title's reference to "minority rule" might bolster that response.³³ In a top-two primary, there is no possibility that anyone will, in effect, be elected by virtue of receiving less than a majority vote in the primary. Assuming, therefore, that the "top-two" primary is not a party primary, it might be contended that such a primary falls outside the mandate of majority nominations.³⁴

While the foregoing argument may find some support in the constitutional history, the contrary argument based on Section 5's express language is substantial. As written, Section 5 requires that any primary system assures nomination by majority. This plain reading is also consistent with the impetus for Amendment 29, as the amendment clearly was a response to dissatisfaction with plurality nominations. The top-two primary would plainly authorize nomination by plurality.

While it is difficult to definitively predict a judicial outcome in the absence of direct legal precedent on the scope of Section 5, I must conclude that a top-two primary system would be highly suspect as conflicting with Amendment 29, regardless of whether it was structured as a nonpartisan primary. Accordingly, it is unnecessary to address the various alternatives posed by Question 2 through 5.

Question 6 - May the state require the political parties to nominate candidates for the general election by convention in which the parties could nominate as many candidates as they desire for a position? [Emphasis original.]

In addressing this and your remaining questions, I must first note that my responses must necessarily be couched in general terms, in recognition of the fact

³² See *id.* at 229-32.

³³ See n. 29, *supra* (text of ballot title). See also *Whitfield v. Democratic Party of State of Arkansas*, 686 F. Supp. 1365, 1371 (E.D. Ark. 1988), *aff'd* on rehearing, 902 F.2d 15 (8th Cir. 1990) (en banc) (rejecting a Voting Rights Act challenge to Amendment 29 after reviewing what motivated the adoption of Amendment 29 and noting that "the perceived perversion of democratic principles (where plurality elections were permitted) was the overwhelming motivating factor").

³⁴ I note in this regard that with the exception of your fifth question, each alternative posed involves the parties fielding candidates – suggesting that they might be viewed as party primaries and thus outside the scope of any potential argument in favor of a nonpartisan top-two primary.

that the validity of any particular election scheme will likely depend upon the combination of its features, and not one feature considered in isolation.

With this caveat, it is my opinion that the answer to your sixth question is in all likelihood “yes,” as a general matter, given that nomination by political party convention is one of the three nomination methods identified under Section 5 of Amendment 29. The Arkansas Supreme Court has held, moreover, that “[u]nder [Amendment 29], the Legislature [is] free to allow either convention action, or primary action, or petition of electors.”³⁵

Question 7 - Alternatively, may the state require the political parties to nominate for the general election any candidate who pays a fee or files a petition? [Emphasis original].

Unlike the alternative at issue in Question 6, this alternative would appear, based on this limited description, to severely burden the parties’ associational rights. The United States Supreme Court in *Washington State Grange*, *supra* n. 1, identified “the choice of a party representative” as [t]he essence of nomination³⁶ and noted that it has “emphasized the importance of the nomination process as ‘the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.’”³⁷ The Court further noted:

We observed [in *California Democratic Party*, 530 U.S. at 575] that a party’s right to exclude is central to its freedom of association, and is never ‘more important than in the process of selecting its nominee.’ That the parties retained the right to endorse their preferred candidates did not render the burden any less severe, as

³⁵ *Newton County Republican Central Committee v. Clark*, *supra* n. 4, at 974. See also *Greenville Cty. Republican Party v. South Carolina*, 824 F. Supp. 655, n. 7 (D.S.C. 2011) (“The state is not required to offer alternative nomination methods but may actually mandate that a single nomination method be used by all candidates and political parties[.]” citing *Am. Party of Texas v. White*, 415 U.S. 767, 781-82 (1974)). See also *Washington State Grange*, *supra* n. 1, at n. 7 (2008) (“The First Amendment does not give political parties a right to have their nominees designated as such on the ballot[.]” citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)).

³⁶ *Washington State Grange*, 552 U.S. at 453.

³⁷ *Id.* at 445 (quoting *California Democratic Party*, 530 U.S. at 575, [quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216]).

‘[t]here is simply no substitute for a party’s selecting its own candidates.’³⁸

A nomination method that severely burdens political parties’ associational rights is subject to strict scrutiny and will be upheld only if it is “narrowly tailored to serve a compelling state interest.”³⁹ I believe a requirement of the sort identified in your question would be highly suspect and unlikely to pass constitutional muster under this test.

Question 8 - Alternatively, may the state require the political parties to have a convention and nominate for the general election any candidate who pays a fee, if required by the party, signs a party pledge, if required by the party, and submits an affidavit of eligibility to party officials? [Emphasis original.]

This alternative seems contrary to the general concept of a political party “convention of delegates” method of nomination. An organized political party’s “convention of delegates” is of course included among the nomination methods permitted by Amendment 29.⁴⁰ As commonly understood in the political context, a “convention” is “an assembly of delegates chosen by a political party ... to nominate candidates for an approaching election.”⁴¹ This common meaning will ordinarily be controlling.⁴² The alternative you posit would appear to bypass the convention process altogether, causing me to suspect that it would fail to withstand scrutiny under Amendment 29 to the Arkansas Constitution.⁴³

³⁸ *Id.* (quoting *California Democratic Party*, 530 U.S. at 581).

³⁹ *Clingman v. Beaver*, 544 U.S. 581, 586 (2005).

⁴⁰ Ark. Const. amend. 29, § 5.

⁴¹ *Black’s Law Dictionary* 299 (5th ed. 1979). See also Jamie Gregorian, *How Primary Election Laws Adversely Affect the Associational Rights of Political Parties in the Commonwealth of Virginia and How To Fix Them*, 18 Geo. Mason U. Civ. Rts. L.J. 135, 140 (2007) (noting that “a convention allows the leaders of a party to determine who participates in the selection of a candidate....”).

⁴² See *Brewer*, *supra* n. 5, at 583 (noting that the words of the constitution should ordinarily be given their obvious and natural meaning).

⁴³ This alternative would also implicate the political parties’ associational rights under the U.S. Constitution if it regulated some aspect of the parties’ internal governance. See generally *Eu v. San Francisco Democratic Committee*, 489 U.S. 214 (1989); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975). The decisions in this area have not invalidated any part of a state law except on an “as applied” basis, in cases of direct conflicts with certain kinds of party or convention rules. Indeterminate questions of fact are therefore necessarily involved in any such analysis.

Question 9 - May the state allow candidates to file for the general election by paying a fee or filing a petition with the state or county and have a party affiliation of their choosing shown on the ballot without filing with a party and without the consent of the party? [Emphasis original.]

I must question whether paying a fee would, standing alone, generally be a valid means of ballot access, given that this is not one of the three nomination methods identified in Amendment 29 to the Arkansas Constitution. With regard to a “petition,” a *petition of electors* is a candidate selection method permitted by Amendment 29. As far as party affiliation is concerned, it may be concluded as a general matter that the absence of any party filing or party consent will serve to avoid a claim that the scheme, on its face, violates a party’s associational rights.⁴⁴ But the law’s implementation will ultimately be determinative of the First Amendment issue of association.⁴⁵

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:EAW/cyh

⁴⁴ See *Washington State Grange*, *supra* n. 1, at 453 (rejecting a facial challenge to Washington’s top-two nonpartisan primary scheme because “[t]he law never refers to the candidates as nominees of any party, nor does it treat them as such.”)

⁴⁵ See *id.* at 455 (“Of course, it is *possible* that voters will misinterpret the candidate’s party-preference designations as reflecting the endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion.”); *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784 (9th Cir. 2012) (concluding, based on the design of the ballot and the absence of evidence of actual voter confusion, that the State of Washington’s top-two primary system did not violate the parties’ First Amendment associational rights).