SUPPLEMENT TO
FREQUENTLY ASKED QUESTIONS
ON THE BLANKET PRIMARY

Prepared by the Office of the Attorney General
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Q. Does the *California Democratic Party v. Jones* decision indicate that the state is required to automatically grant ballot access to candidates nominated by the parties through a private process?

A. No. A plain reading of the Court's opinion merely suggests the possibility that a state might choose a system under which parties' nominees appear in the primary. The opinion of the Court, authored by Justice Scalia, says that the state may include nominees of the parties but does not say the state is required to do so:

> Finally, we may observe that even if all these state interests [argued by California] were compelling ones, [California's blanket primary] is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, *the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates*. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.

Cal. Demo. Party v. Jones , 530 U.S. 567, 585-86, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) (first emphasis in original, second emphasis added).

Thus, the Court approved a system in which the voters can choose from among all the candidates, but partisan affiliation is not taken into account in determining which candidates progress to the general election. The Court described this as a system in which "the *State* determines what qualifications it requires for a candidate to have a place on the primary ballot—which *may* include nomination by established parties". *Cal. Dem. Party*, 530 U.S. at 585 (*emphasis added*.) Surely the Court would not have used this discretionary language if it had intended to indicate the state does not have discretion. Rather, a plain reading of the Court's opinion merely suggests the possibility that a state might choose a system under which parties' nominees appear in the primary.

Some argue that "may" should be read as "must" by assuming that the Court's opinion silently adopted an assumption that appears in a footnote in Justice Stevens' dissenting opinion. Justice Stevens described a "nonpartisan primary" as, "a system presently used in Louisiana—in which candidates previously nominated by the various political parties and independent candidates compete." *Id.*, 530 U.S. at 598 n.8 (Stevens, J., dissenting). This conclusion is incorrect for several reasons.

Most obviously, the description by Justice Stevens occurs in a dissent. A dissenting opinion does not speak for the Court. Further, to the extent the dissenting opinion assumes that party nominees *would*, rather than merely *could,* be part of the system, there is no indication the

assumption was shared by the opinion of the Court—the opinion that is authoritative. To the contrary, the statement that the state *may* include such a process demonstrates the Court's opinion was not based on the assumption that a nonpartisan blanket primary would include party nominees.

Second, although Justice Stevens described Louisiana's system as including a party nominating process, Louisiana law does not provide for party nominations separate from the primary. *See* La. Rev. Stat. Ann. § 18:461 (setting forth the manner in which candidates qualify to the primary ballot); La. Rev. Stat. Ann § 18:465 (describing nominating petition).

Finally, in context, Justice Stevens' argument is more of a warning against another argument that the political parties have advanced than it is an embrace of their view that the opinion requires a party nominating process in order for a "top two" primary to be valid. The quoted language comes immediately after a sentence in which Justice Stevens warns against a "slippery slope" approach to reviewing state primary systems. He warns against concluding that, "the only nominating options open for the States to choose without party consent are: (1) not to have primary elections, or (2) to have what the Court calls a 'nonpartisan primary' ". *Cal. Dem. Party*, 530 U.S. at 598 n.8 (Stevens, J., dissenting). Justice Stevens opposed the notion that the parties could simply "order up" the form of primary they prefer as if the State were a short order cook. *Cal. Dem. Party*, 530 U.S. at 598 n.8 (Stevens, J., dissenting). In this context, it makes little sense to read the dissent as requiring precisely what Justice Stevens warned against—the authority of the parties to dictate the process despite the provisions of state law.

For these reasons, the reference to a nonpartisan blanket primary in Justice Stevens' dissenting opinion does not establish as a matter of law that a nonpartisan blanket primary is only constitutional if it includes a party nominating process that precedes the primary. The Supreme Court opinion recognized that "the constitutionally crucial element" with regard to a primary is whether voters are choosing a party's nominee. A "nonpartisan blanket primary" does not select any party's nominee and, therefore, there is no basis for a claim that it violates the political parties' freedom of association. *California Democratic Party v. Jones* does not establish that parties have any right to transform a "nonpartisan blanket primary" into a vehicle for nominating candidates by convention or other private process.

Q. Is there legal precedent providing a political party with a constitutional right to prevent candidates from identifying themselves with the party when filing for election to an office?

A. There is no established legal precedent that a state political party can limit the use of partisan identifiers and prevent a candidate from seeking office using such identifiers.

The cases that have been put forth in support of this argument do not establish such a right. The first is a case relating to Georgia's system for conducting presidential primaries, *Duke v. Massey*, 87 F.3d 1226, 1228-29 (11th Cir. 1996). This case relates to a presidential primary, which is part of the process for selecting the national party's nominee, and the constitutionality of a Georgia statute that affirmatively granted the political parties the right to exclude candidates from the presidential primary. The case stands for the proposition that a state can enact such a statute if it so chooses. The court did not decide any broader issue, because no other issue was presented. Under Georgia law, after the Secretary of State developed an initial list of candidates to appear on the presidential primary ballot, a party committee established under state law was given the option of excluding candidates. *Id.* at 1229 n.3 (quoting Ga. Code Ann. § 21-2-193(a)). The court noted that the committee's power to exclude candidates derived from Georgia law. *Id.* at 1232. Accordingly, *Duke* does not stand for the proposition that a party would have the constitutional right to exclude a candidate in the absence of a state law and in a system that did not lead to selection of a party nominee.

The second case cited is a Massachusetts state court decision, *Opinion of the Justices to the Governor*, 434 N.E.2d 960 (Mass. 1982). The Massachusetts law at issue did not use the primary to winnow the field of candidates to the general election without selecting party nominees. Rather, it concerned a conflict between a proposed state law and the charter of the state Democratic Party regarding which candidates could seek the party's nomination at a primary designed to select the party nominee. The party's charter would have required a candidate to first obtain the support of 15% of the delegates to the state party convention. *Id.* at 960-61. A proposed state law would have permitted any candidate to seek the party nomination at the primary. *Id.* at 960. The Massachusetts court concluded that the proposed state law could not override the party's 15% convention requirement. *Id.* at 963. Both the charter and the proposed law described a system that involved selection of a party's nominee. Further, we note that neither the Washington courts nor the federal courts would, in any event, be bound by this state court decision.

These cases do not support a claim that there is a settled right to restrict the use of partisan identifiers in a primary that does not select a party nominee. The Legislature could conceivably grant parties discretion in this area as a matter of policy choice, but there is no established constitutional principle compelling such a policy choice.