

ILLINOIS HOUSE OF REPRESENTATIVES



SPRINGFIELD OFFICE:
316 STATE HOUSE
SPRINGFIELD, IL 62706
(217) 782-1331

TOM CROSS
HOUSE REPUBLICAN LEADER

DISTRICT OFFICE:
24047 W. LOCKPORT ST., SUITE 213
PLAINFIELD, IL 60544
(815) 254-0000

March 23, 2009

Honorable Lisa Madigan
Attorney General, State of Illinois
Office of the Opinions Bureau
500 South Second Street
Springfield, Illinois 62706

Dear Attorney General Madigan:

I am writing to you regarding the constitutionality of SB600, a bill currently pending in the Illinois Senate. I hereby request a Written Advisory Opinion on the questions detailed below so that members of the Illinois House and Senate may cast their votes with a full understanding of the measure. Because this legislation could be brought to a vote in the near future, we respectfully request that a Written Opinion be issued as quickly as possible.

FACTS

SB600 would amend 10 ILCS 5/7-8 by deleting the current "Alternative A" for selecting State Central Committeemen. *See Exhibit A.* By substituting new language for the deleted provision, the bill would eliminate both Parties' right to elect State Central Committeemen by ward, township, and precinct, robbing it of a grassroots nominating process that is crucial to its identity and internal governance – and for no particular reason other than the legislature's apparent subjective belief that the bill represents good policy.

QUESTIONS PRESENTED

We seek confirmation of the following statements:

- (1) SB600 heavily burdens the Illinois Republican Party's First Amendment rights.
- (2) SB600 is not narrowly tailored to serve a compelling government interest.

LEGAL ANALYSIS

By regulating political parties' internal affairs and governing processes, SB600 severely burdens the First Amendment associational rights of the Republican Party and its members, and thus cannot be constitutionally enforced against the Party unless narrowly tailored to serve a *compelling* government interest. No such interest has been, or can be, proffered here.

A. SB600 Burdens the Party's Associational Rights.

As you know, the Constitution vigorously "protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views.'" *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)). This First Amendment freedom of association includes the Party's fundamental right to control both its character and message, including the right to control its composition and leadership. "Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 229 (1989).

With respect to SB600 in particular, the Supreme Court's decision *Eu* is directly on point and controls. In that case, the State of California attempted to regulate the internal governance of political parties by banning certain endorsements, restricting the organization and composition of political parties' official governing bodies (including rules governing the selection and removal of committee members), limiting the terms of office for state central committee chairs, and requiring that such chairs rotate between residents of Northern and Southern California.

Explaining the First Amendment burdens imposed by the state's regulations, the *Eu* Court held:

The laws at issue burden [the party's] rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from *governing themselves with the structure they think best*. And by specifying who shall be the members of the parties' official governing bodies, *California interferes with the parties' choice of leaders*. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists, rather than Washington-based elected officials. . . . A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the state.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in *Tashjian*. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to associate with nonparty members, *but only with one another in freely choosing their party leaders.*

Eu, 489 U.S. at 230-231 (emphasis added). Accordingly, the Court firmly concluded that "[t]hese laws directly implicate the associational rights of political parties and their members. . . . Freedom of association . . . encompasses a political party's decisions *about the identity of, and the process for electing,* its leaders." *Id.* at 229 (emphasis added).

As the Court has explained on prior occasions, "determination . . . of the structure which best allows [the party] to pursue its political goals, is protected by the Constitution." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986) (striking down application of Connecticut's closed primary rule where the state Republican Party later voted to permit independent voters to participate in its primary). "[A] state *cannot substitute* its judgment for that of the party as to the desirability of a *particular internal party structure*, any more than it can tell a party that its proposed communication to party members is unwise." *Eu*, 489 U.S. at 233 (emphasis added). *See also Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981) ("[A] State, or a court, *may not constitutionally substitute its own judgment* for that of the Party[.]"). State efforts to regulate those internal governance decisions unconstitutionally burden the freedom of association guaranteed to the parties and their members by the First and Fourteenth Amendments.

As a result of this cherished principle, time and time again, the Court has struck down meddlesome state statutes similar to the one at issue here. For example, in *Cousins v. Wigoda*, 419 U.S. 477 (1975), the Supreme Court strongly cautioned that an Illinois state law should *not* be given primacy over the National Democratic Party's rules determining the qualifications and eligibility of delegates to the Party's National Convention, because "Illinois' [claimed] interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." *Id.* at 491. The Court concluded that "[t]he National Democratic Party and its adherents enjoy a constitutionally protected right of political association" that could not be taken away by the Illinois legislature. *Id.* at 487.

In *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), the Supreme Court considered whether Wisconsin could insist that its delegates to the Democratic National Convention be seated, even though those delegates were chosen through a process that violated the Democratic National Committee's rules. In ruling against the state, the Court concluded that "a State, or a court, *may not constitutionally substitute its own judgment* for that of the Party. A political party's choice among the various ways of determining the makeup of a State's

delegation to the party's national convention is protected by the Constitution.” *Id.* at 123-24 (emphasis added). This is so because “[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association’s being.” *Id.* at 122 n.22 (internal quotations omitted).

In *Tashjian v. Republican Party of Connecticut*, the Supreme Court addressed whether Connecticut could enforce a closed primary law on a political party that sought to open its primary to independent voters. The Court observed that “[t]he Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.” *Id.* at 224. The closed primary law therefore improperly burdened the party’s associational rights by placing limits upon the group of registered voters it could invite to participate in the “basic function” of selecting its candidates. As such, the Supreme Court held the statute unconstitutional. *Id.* at 225.

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the Supreme Court overturned a California law passed by a majority of California voters, because the law would have forced California political parties to conform to a blanket primary system they did not wish to adopt.¹ The Republican, Democratic, Libertarian, and Peace and Freedom Parties banded together to challenge the law. The Court explained: “we have continually stressed that when States regulate parties’ internal processes they must act within limits imposed by the Constitution.” *Id.* at 573. While “[California’s] legitimate state interests and [the parties’] First Amendment rights are not inherently incompatible[,] . . . the State of California has made them so by *forcing* political parties to associate with those who do not share their beliefs. And it has done this at the ‘crucial juncture’ at which party members traditionally find their collective voice and select their spokesman.” *Id.* at 586 (emphasis added) (quoting *Tashjian*, 479 U.S. at 216).

In *Clingman v. Beaver*, the court reaffirmed the continuing applicability of *Tashjian*, ruling against the Oklahoma Libertarian Party’s challenge to Oklahoma’s semi-open primary only because the law imposed a “less substantial burden than did the Connecticut closed primary at issue in *Tashjian*.” 544 U.S. 581, 592 (2005). Although Oklahoma’s law prohibited voters who were registered *in other parties* from participating in the LPO’s primary, it did permit *unaffiliated* or registered independent voters to participate, unlike the law at issue in *Tashjian*.

¹ Following the Court’s decision in *Jones*, Washington state legislators sought to create a blanket primary that *did* conform with the Court’s requirements. This legislation was examined in *Washington State Grange v. Washington State Republican Party*, wherein the Court stressed the continuing applicability of the *Tashjian* line of cases, upholding the state’s nonpartisan blanket primary rule only because, “unlike the California primary [at issue in *Jones*], the [Washington] primary does not, by its terms, choose parties’ nominees.” 128 S.Ct. 1184, 1192 (2008). Unlike the law in *Jones*, the Washington law never referred to the candidates as nominees of any party, nor did it treat them as such. To the contrary, the Washington law specifically provided that the primary “does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election.” *Id.* at 1192 (quoting law). Given the limited context of this case to a blanket primary that did not attempt to regulate internal party decisionmaking, it has minimal relevance to SB600’s constitutionality here.

Id. at 588; 592-93. The Court therefore concluded that “a voter who is unwilling to disaffiliate from another party to vote in the LPO’s primary forms little ‘association’ with the LPO – nor the LPO with him.” *Id.* at 589. Such a regulation contrasts starkly with the invasive rules proposed in SB600, and the *Clingman* Court itself distinguished, “Oklahoma’s law does not regulate the LPO’s internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public.” *Id.* at 590.

Likewise, in *Timmons v. Twin Cities Area New Party*, the Court ruled against the New Party only because the burdens imposed by the state’s “anti-fusion candidacy” law “though not trivial [are] not severe.” 520 U.S. 351, 363 (1997). Although the New Party was prohibited from putting forward the same candidate as a major party (i.e., a “fusion” candidate), Minnesota had “neither regulated the New Party’s internal decision-making process, nor compelled it to associate with voters of any political persuasion . . . The New Party and its members simply could not nominate as their candidate any of ‘those few individuals who both have already agreed to be another party’s candidate and also, if forced to choose, themselves prefer that other party.’” *Clingman*, 544 U.S. at 590 (quoting *Timmons*, 520 U.S. at 363) (emphasis added). Indeed, in concluding that the Minnesota law imposed only minor burdens not warranting strict scrutiny, the Court relied primarily on its findings that the New Party and its members remained free to govern themselves internally and that the challenged laws were “silent on parties’ internal structure, governance, and policymaking.” *Id.* at 363. The Minnesota law in *Timmons*, like the Oklahoma law in *Clingman*, thus differs materially from SB600 in its attempt to control the Republican Party’s internal governance and leadership-selection processes.

Together, whether the Court held for the political party or the state, the aforementioned cases make clear that political parties have not only a right to affirmatively associate, but also a right to define, confine, and control the Party as necessary to preserve its character, purpose, and effectiveness. *See, e.g., Ray v. Blair*, 343 U.S. 214, 221-22 (1952) (political parties may protect themselves from “intrusion by those with adverse political principles”). As noted, this right specifically includes the Party’s right to make “decisions about the identity of, and the process for electing, its leaders.” *Eu*, 489 U.S. at 229.

Pursuant to these principles, there can be no serious question that the rules proposed by SB600 would burden the Illinois Republican Party’s First Amendment rights, just as in *Cousins*, *La Follette*, *Tashjian*, *Eu*, and *Jones*. SB600 would block party members from “governing themselves with the structure they think best.” *Eu*, 489 U.S. at 230. It would “interfer[e] with the parties’ choice of leaders.” *Id.* It would eliminate the Party’s discretion “in how to organize itself [and] conduct its affairs.” *Id.* It would “regulat[e] the . . . Party’s internal decision-making process.” *Clingman*, 544 U.S. at 590 (emphasis added). As the Court has made clear, *none* of these burdens are constitutionally permissible.

As the Supreme Court has made abundantly clear, the Party has every right to remain free from such forced associations, as the right to associate “necessarily presupposes the freedom to

identify the people who constitute the association, and to limit the association to those people only.” *La Follette*, 450 U.S. at 122. That is to say, “a corollary of the right to associate is the right not to associate.” *Jones*, 530 U.S. at 574. See also *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1188 (2008) (“a party’s right to exclude is central to its freedom of association”).

Notably, the state’s intrusion is no less unconstitutional now simply because the Party did not challenge previous statutory regulation: In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Supreme Court held unconstitutional a closed primary law that had been enforced against the State Republican Party for *thirty years* before the Party commenced its challenge. The Court reaffirmed this rule in *Eu*, explaining that “[w]e have never held that a political party’s consent will cure a statute that otherwise violates the First Amendment.” *Eu*, 489 U.S. at 225 n.15.

Furthermore, it is legally immaterial that SB600 might be imposed on the Republican Party with the support of some of its own members in the legislature. “Simply because a legislator belongs to a political party does not make her at all times a representative of party interests. In supporting the [unconstitutional statute in question], an individual legislator may be acting on her understanding of the public good or her interest in reelection.” *Id.* Indeed, the rule challenged by the Democratic Party in *La Follette* was passed into law by Wisconsin State Democrats, and the rule challenged by the Republican and Democratic Parties in *Jones* was approved by a majority of Republican *and* Democratic voters. Moreover, the Court has recognized that focusing on alleged consent of parties or enacting legislators “ignores the independent First Amendment rights of the parties’ members.” *Eu*, 489 U.S. at 225 n.15.

B. SB600 Is Not Narrowly Tailored to Serve Any State Interest Sufficiently Compelling to Justify its Severe Burden on Associational Rights.

When faced with a constitutional challenge, the State of Illinois will be unable to meet the strict scrutiny standard necessary to justify the aforementioned burden on the Republican Party’s First Amendment Rights. See *Eu*, 489 U.S. at 222 (“If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.”); *Williams v. Rhodes*, 393 U.S. 23, 31 (“only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms” (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *Clingman*, 544 U.S. at 586 (burdensome election regulations are upheld only if they are “narrowly tailored to serve a compelling state interest”).

This high standard is rarely met, and it cannot be met here. For instance, a mere “interest in the ‘democratic management of the political party’s internal affairs,’” *Eu*, 489 U.S. at 232 (quoting Appellant’s brief), is not a compelling interest. See also *id.* at 232-33 (“a State cannot substitute

its judgment for that of the party as to the desirability of a particular internal party structure”). “[P]roducing [leaders] who better represent the electorate and expanding candidate debate” is not a compelling interest. *Jones*, 530 U.S. at 582. “Nonmembers’ desire to participate in the party’s affairs” is not a compelling interest. *Tashjian*, 479 U.S. at 215-16 n.6. *See also Jones*, 530 U.S. at 583 (“nonmembers desire to participate in the party’s affairs” is not a compelling interest). And vague notions of “fairness, affording voters greater choice, [and] increasing voter participation” cannot be applicable in the “abstract,” and certainly were not applicable in *Jones*. *Jones*, 530 U.S. at 584.

Indeed, a “compelling interest” is present only in the most egregious cases, such as “where intervention is necessary to prevent the derogation of the civil rights of party adherents.” *Eu*, 489 U.S. at 232 (citing *Smith v. Allwright*, 321 U.S. 6349 (1944) (striking down rules that prohibited African American voters from participating in Democratic primary process)). Such cases “do not stand for the proposition that party affairs are public affairs, free of First Amendment protections.” *Id.* at 573. *Clingman* and *Timmons*, notably, held for the state not because a compelling interest was present, but because—unlike here—the state’s regulation was not particularly burdensome and thus not subject to strict scrutiny.

In light of the clear precedent on this issue, it is clear that the state cannot now articulate, and will not be able to articulate to a federal court in the future, *any* cognizable state interest sufficiently compelling to justify the burdensome regulations proposed by SB600.

CONCLUSION

SB600 would unconstitutionally burden the Republican Party’s and its members’ First Amendment rights, and is not narrowly tailored to any “compelling interest” sufficient to justify this intrusion. Given the decisive Supreme Court precedent protecting these well-established associational rights, it would violate the First and Fourteenth Amendments to the United States Constitution for the Illinois legislature to interfere in the Republican Party’s internal governance by forcing it to adopt a leadership selection scheme contrary to that of its own choosing.

In addition to SB600, there has been similar language filed on HB825 and HB2620 in the form of hostile amendments. The hostile amendments were filed by a Deputy Majority Leader in the House, who is from a political party opposite of the Senate Bill 600’s lead sponsor.

As shown by the attached Resolution and Amendment to the Party Bylaws, the Republican Party of Illinois is strongly opposed to SB600 and considers it an unconstitutional burden on the Party’s First Amendment rights to freedom of association. *See Exhibits B and C.* Indeed, the direct-election scheme proposed in SB600 was presented directly to party members for a vote at the 2008 Illinois Republican Party Convention, and those party members overwhelmingly

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rejected that scheme by a vote of 556 (78%) to 160 (22%). The Republican Party, its leaders, and its members thus have demonstrated that they all oppose the regulation imposed by SB600.

I seek your confirmation that such an interpretation is correct, and that SB600 is therefore unconstitutional, both facially and as it would be applied to the Illinois Republican Party if passed.

Thank you for your assistance with this matter.

Sincerely,

A handwritten signature in black ink that reads "Tom Cross". The signature is written in a cursive style with a long horizontal stroke at the end.

Tom Cross
House Republican Leader
State Representative, 84th District

TC:mlb

Attachments

Exhibit "B"

**A RESOLUTION OF THE CENTRAL COMMITTEE
OF THE ILLINOIS REPUBLICAN PARTY**

WHEREAS, pursuant to Bylaw Article IX, Section B, any provision of the Bylaws of the Illinois Republican Party ("Bylaws") may be suspended by the Central Committee upon the vote of two-thirds (2/3) of the weighted vote; and

WHEREAS, the Republican Party of Illinois has a First Amendment right to freedom of association, and must be permitted to govern its own affairs, including its own nominating processes, without unconstitutional and burdensome meddling by the state legislature; and

WHEREAS, neither the Illinois Senate, nor the state of Illinois, may, under the United States Constitution, force the Illinois Republican Party to adopt a particular nominating process contrary to the Party's wishes; and

WHEREAS, the Supreme Court has explained this principle time and time again, *see, e.g., Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (holding that the state of Wisconsin could not constitutionally compel the National Democratic Party to seat a delegation chosen in a way that violates the Party's rules); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (refusing to permit the state to apply its closed primary rule to the state Republican Party after the state Republican Party adopted a rule permitting Independent voters to participate in its primary); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989) (striking down restrictions on organization and composition of official governing bodies of political parties); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down blanket primary law passed by California voters but opposed by the state Democratic, Republican, Libertarian, and Peace and Freedom Parties).

WHEREAS, the Illinois Republican State Central Committee ("Central Committee"), as the Official Governing Body of the Illinois Republican Party, believes that SB600 as passed by the Illinois Senate Elections Committee on March 10, 2009, in its current form or future amended form, runs contrary to the best interests of the Party, would greatly damage the grassroots composition of the Party, and would overturn the will of the overwhelming majority of delegates at the 2008 Illinois Republican Party Convention; therefore:

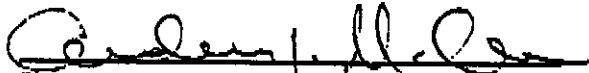
BE IT RESOLVED, that the Central Committee, as the Official Governing Body of the Illinois Republican Party, publicly states its strong opposition to SB600; and

BE IT RESOLVED, the Republican Party of Illinois will expend whatever resources are necessary to defend its rights under the United States Constitution and to ensure that SB600, even if passed, is never enforced; and

BE IT RESOLVED, that the Republican Party of Illinois strongly encourages the individuals responsible for SB600 to reconsider the measure before such actions become necessary; and

BE IT RESOLVED, that the Central Committee shall suspend the meeting notice provisions of Bylaw Article V, Section C, pursuant to Bylaw Article IX, Section B, for purposes of voting on and passing this Resolution.

Passed by the Illinois Central Committee on 3-11-09



Signature

Andrew J. McKenna

Chairman

Name/Title

Exhibit "C"

AN AMENDMENT TO THE ILLINOIS REPUBLICAN PARTY BYLAWS

WHEREAS, pursuant to Bylaw Article IX, Section A, Amendments to the Bylaws of the Illinois Republican Party ("Bylaws") may be adopted by the Illinois Republican State Central Committee ("Central Committee") upon receiving two-thirds (2/3) of the weighted vote of those present on the question; and

WHEREAS, pursuant to Bylaw Article IX, Section B, any provision of the Bylaws may be suspended by the Central Committee upon the vote of two-thirds (2/3) of the weighted vote; and

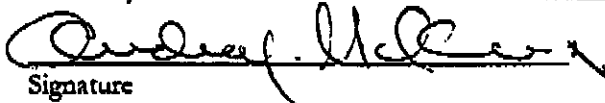
WHEREAS, it is of utmost importance that the Party retain the right to oversee its own affairs, including its own nominating processes, without unconstitutional and burdensome meddling by the state legislature; therefore:

BE IT RESOLVED, that the Central Committee shall suspend the meeting notice provisions of Bylaw Article V, Section C, pursuant to Bylaw Article IX, Section B, for purposes of voting on and passing this Amendment;

BE IT RESOLVED, that the Bylaws shall be amended to add Bylaw Article X, as follows:

The Central Committee and the Illinois Republican Party shall not cede to the Illinois state legislature, governor, secretary of state, or any other state official, agency, or governing body, its rights under the United States Constitution to oversee its own affairs, including its own nominating processes.

Passed by the Illinois Central Committee on 3-11-09


Signature

Andrew J. McKenna, Chairman
Name/Title