No. _____

In the Supreme Court of the United States

RAVALLI COUNTY REPUBLICAN CENTRAL COMMITTEE, GALLATIN COUNTY REPUBLICAN CENTRAL COMMITTEE, SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, DAWSON COUNTY REPUBLICAN CENTRAL COMMITTEE, RICHLAND COUNTY REPUBLICAN CENTRAL COMMITTEE, CARBON COUNTY REPUBLICAN CENTRAL COMMITTEE, FLATHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE, MADISON COUNTY REPUBLICAN CENTRAL COMMITTEE, and MONTANA REPUBLICAN PARTY,

Applicants,

v.

LINDA MCCULLOCH, Secretary of State of Montana, REGINA PLETTENBERG, Ravalli County Election Administrator, CHARLOTTE MILLS, Gallatin County Election Administrator, BOBBI CHRISTENSEN, Sanders County Election Administrator, SHIRLEY KREIMAN, Dawson County Election Administrator, PAULINE MISHLER, Stillwater County Election Administrator, STEPHANIE VERHASSELT, Richland County Election Administrator, JUDY CHRISTENSEN, Carbon County Election Administrator; PAULA ROBINSON, Flathead County Election Administrator, PEGGY STEMLER, Madison County Election Administrator; KIMBERLY YARLOTT, Big Horn County Election Administrator,

Respondents.

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

**Directed to the Honorable Anthony Kennedy,
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

FEDERAL STATUTES

MONTANA CODE ANNOTATED

To the Honorable Anthony Kennedy, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Montana's mandatory open primary system requires the Montana Republican Party[1] to allow nonparty members to participate in selecting its nominees for public office. The First Amendment, however, "protects the freedom to join together in furtherance of common political beliefs," which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000), quoting *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). These freedoms are critical during primary elections. *Jones*, 530 U.S. at 575 ("our cases vigorously affirm the special place the First Amendment reserves for, and the special protections it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences."). Forced association in an open primary between a political party and nonmembers constitutes a "substantial intrusion into the associational freedom" of party members, *La Follette*, 450 U.S. at 126, and can be devastating for the party. *Jones*, 530 U.S. at 579 ("a single election in which the party nominee is selected by nonparty members could be enough to destroy the party.").[2]

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[1] The Applicants, which include the Montana Republican Party and several of its county central committees, shall be referred to collectively as the "Montana Republican Party" or the "Party" unless the context dictates otherwise.

[2] This theory may soon be put to the test. See, *e.g.*, T. Zywicki, "So Far, Trump Wins Open Primaries and Cruz Wins Closed…." *Washington Post* (March 2, 2016), http://goo.gl/5G5TQu.

Montana's open primary system permits any elector to anonymously vote for Party nominees. The State is thereby violating the Party's right to identify its members as well as its right to exclude nonmembers from selecting its nominees.

The District Court erred by requiring the Party to produce detailed empirical data showing the rate at which Montana Democrats crossover into Republican primaries. See *La Follette*, 450 U.S. at 124 n.27 (crossover voting data held irrelevant in evaluating the constitutionality of Wisconsin's open primary); *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("*Miller I*") ("The only issue in this case is whether Virginia's open primary law violates the [Republicans'] First Amendment rights to freely associate, *which presents a purely legal question.*") (emphasis added). Forced association between the Montana Republican Party and nonparty members constitutes a "substantial intrusion" into the Party's associational freedom as a matter of law. *La Follette*, 450 U.S. at 126.

Injunctive relief under the All Writs Act, 28 U.S.C. § 1651, is necessary to prevent irreparable harm to the Party's right of association. Montana's primary election will be held on June 7, 2016, and the State will begin mailing ballots to absent military and overseas electors on April 22, 2016.[3] On March 3, 2016, the Ninth Circuit denied the Party's motion for an injunction pending appeal because the Party made an "insufficient showing of either likelihood of success on the merits or the likelihood of irreparable harm," App. 2a-3a,[4] strongly suggesting that no

[3] See <http://sos.mt.gov/Elections/documents/Election-Calendar.pdf>

[4] "D.C. Dkt." refers to docket entries in the District Court. "9th Cir Dkt." refers to Ninth Circuit docket entries. "App." refers to the appendix to this Application.

relief will be forthcoming from that court. The Ninth Circuit has scheduled oral argument in this matter for May 4, 2016, but even if it were inclined to grant relief, it probably could not do so at that time without disrupting Montana's primary. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (in determining whether to enjoin state redistricting plans, courts "should consider the proximity of a forthcoming election and the mechanical complexities of state election laws," as well as whether "a State's election machinery is already in progress.").

Accordingly, the Montana Republican Party respectfully asks this Court to enter an injunction against Respondents under the All Writs Act during the pendency of this appeal. Specifically, the Party requests that Respondents be enjoined from forcing the Party to open its nomination process to nonmembers so that the Party may exercise its core constitutional right to have its nominees selected by its members.

JURISDICTION

The District Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983 because the Montana Republican Party's First Amendment associational claim raises a federal question. The Ninth Circuit has jurisdiction over the Party's appeal from the District Court's denial of its motion for a preliminary injunction. 28 U.S.C. § 1292(a)(1). On March 3, 2016, the Ninth Circuit denied the Party's motion for an injunction pending appeal. App. 1a. This Court has jurisdiction over the Party's Application under 28 U.S.C. § 1254(1) and has authority under 28 U.S.C. § 1651 to grant the relief sought by the Party.

BACKGROUND AND PROCEDURAL HISTORY

In primary elections, Montana electors receive a party ballot for each registered political party. App. 55a; Mont. Code Ann § 13-10-209(7).[5] They may mark only one ballot and must discard the other. App. 55a; § 13-10-301(2). This enables voters to choose which party's primary they will participate in, thereby establishing an "open" primary. App. 55a. Montana's political parties must participate in this system. App. 55a; § 13-10-601(1). The State does not register voters' party affiliation or record which party's ballot a particular voter chooses. App. 55a-56a.

The MEA-MFT is the Montana affiliate of the National Education Association and is the state's largest union with 18,000 members. App. 57a, 145a. The union contributed $55,000 to Montana Democrats in the last election cycle but none to the Montana Republican Party. App. 105a, 167a. The MEA-MFT endorsed candidates in all 125 legislative races in the 2012 general election, all of whom were Democrats. App. 152a-153a, 172a.

The MEA-MFT believed Democrats will not win a majority in the Legislature anytime soon, so shortly before the 2014 primary election it endorsed several "responsible" Republican legislative candidates and told the press that, in legislative districts that are heavily Republican, "those who usually vote Democratic should consider voting in the GOP primary to support the Republican that most clearly reflects their views." App. 156a-158a. As admitted by the union's president:

[5] All subsequent statutory references are to the Montana Code Annotated.

> Republicans should own their party. But if it is going to fracture along some ideological fissure points, I would prefer that the folks that fracture against our interests are in the minority in the Republican Party. And insofar as I can help make that happen, I'll help make that happen.

App. 165a. The MEA-MFT "aggressively promote[s]" candidates it endorses, including mailing political brochures to union members, phone banking, and door–to–door campaigning. App. 146a-149a, 168a-169a, 184a-185a.

The Montana Republican Party responded in June 2014 by amending its platform and bylaws to require the selection of its nominees by registered Republicans in closed primaries or party conventions. App. 214a-215a. State law prevents these rules from taking effect. § 13-10-601(1).

The MEA-MFT will likely seek to influence the upcoming Republican primary elections in June. App. 160a, 162a. The Party, its candidates, and campaign consultants are all cognizant of the union's efforts. App. 71a, 140a, 193a-197a. Many Republican primary candidates self–censor by avoiding issues that might provoke unions to encourage their members to crossover into Republican primaries. App. 196a-197a.

The Party filed its Third Amended Complaint on January 22, 2015. App. 205a. It moved the District Court for a preliminary injunction on August 28, 2015. D.C. Dkt. No. 70. The District Court issued an order on December 14, 2015, denying the motion as well as the parties' cross motions for summary judgment. App. 16a-52a. The Party appealed the denial of its preliminary injunction motion two days later. App. 10a. It also moved the District Court on January 4, 2016, for

an injunction pending appeal. D.C. Dkt. No. No. 118. The District Court denied the motion on January 21, 2016. App. 5a.

The Party moved the Ninth Circuit on January 27, 2016, for an injunction pending appeal. 9th Cir. Dkt. No. 24. The Ninth Circuit denied the motion on March 3, 2016. App. 1a-3a.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent," (2) the legal rights at issue are "indisputably clear," and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations omitted); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers). The Party satisfies each of these requirements.

I. The Montana Republican Party Faces Critical and Exigent Circumstances Because Democrats Will Participate in Selecting Republican Nominees in Montana's Upcoming Open Primary Absent Relief from This Court

The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Accordingly, this Court has issued injunctions in election–related cases to preserve First Amendment rights that would otherwise be lost forever. See, *e.g.*, *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (ordering the names of third party candidates placed on the ballot pending appeal).

The District Court is essentially requiring the Party to produce Montana–specific data concerning crossover voting rates as a condition for relief. App. 50a-51a. This Court expressly held, however, that such evidence is unnecessary for a successful First Amendment challenge to an open primary system. *La Follette*, 450 U.S. at 124 n.27. Nevertheless, the Party is attempting to raise the necessary funds (estimated to be at least $60,000, money the Party does not currently have) to retain a polling firm in order to obtain crossover voting data specific to Montana.[6] The Party's expert witnesses, however, have testified (and Respondents do not dispute) that such surveys must be conducted during the primary election to be accurate and reliable. App. 95a n.5.

Thus, to obtain injunctive relief from the District Court before the June 2016 primary commences, the Party needs evidence that will not be available until after the June 2016 primary. The Party moved the lower courts for an injunction pending appeal in an attempt to extricate itself from this unwarranted, judicially created Catch-22, but was unsuccessful.

Relief from this Court is therefore necessary to prevent the State from violating the Party's constitutional right to a primary election in which Party members select Party nominees. Although Montana's primary election will occur on June 7, 2016, the Party is requesting relief before March 31, 2016, for two reasons.

First, Montana's open primary system is distorting the Party's message. A primary that is open to nonmembers "encourages candidates – and officeholders

[6] The Party's expert witnesses have already offered an opinion of crossover voting rates based upon averages obtained in other open primary states. App. 95a.

who hope to be renominated – to curry favor with persons whose views are more 'centrist' than those of the party base" and "simply move[s] the general election one step earlier in the process, at the expense of the parties' ability to perform the basic function of choosing their own leaders." *Jones*, 530 U.S. at 580; see also *Clingman v. Beaver,* 544 U.S. 581, 595 (2005) ("opening [a party's] primary to all voters . . . render[s] the [party's] *imprimatur* an unreliable index of its candidate's actual philosophy"); *Miller I,* 462 F.3d at 317-18 ("the mere existence of the open primary law causes [campaign] decisions to be made differently than they would absent the law."). This is particularly true in this case because crossover voting has essentially become institutionalized in Montana. The state's largest union publicly urged Democrats to crossover into certain Republican legislative primaries in 2014 and will do so again in this election cycle. App. 156a-158a, 160a, 162a. The Party's candidates know this and will react by shifting their messaging away from the Party's platform. App. 71a, 140a, 193a-197a.

Second, relief is needed soon because "court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," and, "[a]s an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 5-7 (2006). The issuance of an injunction by March 31 will give state authorities an opportunity to cure the defects in Montana's primary election system in time to avoid the risk of voter confusion and decreased voter turnout. [7]

[7] The curative options available to the State are detailed on page 21 of this Application.

II. The Montana Republican Party Has an Indisputably Clear Right to Have Its Nominees Selected By Its Members

A. Allowing Democrats to Select Republican Nominees in an Open Primary Severely Burdens the Party's First Amendment Right of Association As a Matter of Law

Protecting the First Amendment right of association between a party and its members during primaries is essential because "[t]he moment of choosing the party's nominee . . . is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Jones,* 530 U.S. at 575, quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). A party's nominee "often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* Freedom 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 574, quoting *La Follette*, 450 U.S. at 122 n.22.

In *La Follette*, this Court struck down Wisconsin's open primary as applied to the state's presidential delegates. Wisconsin required those delegates to vote for presidential nominees in accordance with the results of the state's open primary. *La Follette,* 450 U.S. at 109. The National Democratic Party's rules, however, required Democratic presidential delegates to be selected by registered Democrats. *Id.* at 118.

This Court "recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions – thus impairing the party's essential functions – and that political parties may accordingly protect themselves from intrusion by those with adverse political principles." *Id.* at 122 (citations omitted). Binding the National Democratic Party's presidential delegates to the results of an open primary thus constituted a "substantial intrusion" into the Party's associational freedom as a matter of law. *Id.* at 126. Notably, this Court rejected challenges to the accuracy of crossover data offered by the National Party – criticism of such data "should be addressed to the National Party. . . and not to the judiciary." *Id.* at 124 n. 27.

This Court has repeatedly reaffirmed the principle that governmental interference with a political party's associational choices during primaries severely burdens the party's First Amendment associational rights as a matter of law. In *Tashjian*, for example, Connecticut Republicans challenged a state statute prohibiting independent voters from participating in Republican primaries. *Tashjian* 479 U.S. at 210-11. This Court struck down the statute because "the Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association," a right that "necessarily presupposes the freedom to identify the people who constitute the association." *Id.* at 214-15, quoting *La Follette*, 450 U.S. at 122. Notably, this Court did not rely upon any empirical data showing how many independent voters actually desired to participate in a Republican primary.

This Court has since characterized *Tashjian* as involving the "regulation of political parties' internal affairs and *core associational activities*." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360 (1997) (emphasis added). The Court distinguished Connecticut's regulation in *Tashjian* of a party's core associational activity of choosing nominees from a Minnesota regulation preventing a nominee from appearing on a general election ballot for more than one party. The latter regulation, unlike the one in *Tashjian*, resulted in burdens that were "not severe." *Id.* at 363.

As it did with the primary election regulations in *La Follette* and *Tashjian*, this Court held in *Jones* that California's blanket primary[8] unconstitutionally burdened parties' associational rights as a matter of law. While the Court reviewed survey data showing crossover voting rates in blanket primaries, nowhere in the opinion did this Court *require* such evidence. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003) (*Jones* "does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones infers the burden from the face of the blanket primary statutes."*) (emphasis added).

The Court subsequently reiterated this point when it stated that California's blanket primary "severely burdened the parties' freedom of association

[8] In a blanket primary, all candidates from each party are included on one ballot, thereby enabling voters to choose, for example, a Republican for governor and a Democrat for senator. *Jones*, 530 U.S. at 576 n.6. In an open primary, by contrast, a voter selects one party's ballot, marks all of his or her choices for partisan offices on that ballot, and discards the other party's ballot. *Id.*

because it forced them to *allow* nonmembers to participate in selecting the parties' nominees." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 445-46 (2008), citing *Jones*, 530 U.S. at 581 (emphasis added). This Court thus held that blanket primaries violate political parties' associational rights simply by *allowing* nonmembers to participate in party primaries, a holding that was not dependent upon crossover voting data.

La Follette and its progeny make indisputably clear that forced association between a political party and nonmembers severely burdens a political party's core associational rights as a matter of law. The District Court made several errors in failing to follow this rule.

First, the District Court mischaracterized *La Follette's* holding as limited to state regulations concerning "internal party rules." App. 26a. The District Court's reasoning echoes the dissenting opinion in *Jones*: "*La Follette* is a case about state regulation of internal party processes, not about regulation of primary elections." *Jones*, 530 U.S. at 593 n.3 (Stevens, J., dissenting). The *Jones* majority, however, expressly rejected this attempt to "rewrite" *La Follette* - the "state-imposed burden at issue in *La Follette*" was "the intrusion by those with adverse political principles upon the selection of the party's nominee (in that case its presidential nominee)." *Id.* at 576, n.7 (internal quotation marks omitted).

The District Court cited *La Follette's* dictum that "the Wisconsin Supreme Court's decision to uphold the constitutionality of the open primary 'may well be

correct.'" App. 24a-25a, quoting *La Follette*, 450 U.S. at 121. This Court's actual statement, however, was much narrower:

> Concluding that the open primary serves [a] compelling state interest by encouraging voter participation, the [Wisconsin Supreme Court] held the state open primary constitutionally valid. *Upon this issue*, the Wisconsin Supreme Court may well be correct.

La Follette, 450 U.S. at 121 (emphasis added). The Court has since held that increasing voter participation is not a compelling interest and, even if it was, nonpartisan primaries could advance it without burdening parties' associational rights. *Washington State Grange*, 552 U.S. at 446, citing *Jones*, 530 U.S. at 585-86.

The District Court held that the Party can mitigate the injury to its associational rights by "endors[ing] or distanc[ing] itself from candidates who appear on the ballot." App. 33a. California authorities made the same argument in *Jones*. This Court expressly rejected it. *Jones*, 530 U.S. at 580 ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.").

Finally, the District Court erred by relying upon *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003), a case in which the Ninth Circuit misinterpreted this Court's holdings in *Timmons* and *Jones*. *Bayless* involved a challenge to a semi–closed primary system[9] permitting independent voters to participate in the Libertarian Party's primary. The Ninth Circuit cited *Timmons*

[9] In semi-closed primaries, independent voters may participate in a party's primary but registered members of other parties cannot do so. *Bayless*, 351 F.3d at 1280. Open primaries, by contrast, permit any elector to vote in a party's primary. *La Follette*, 450 U.S. at 111 n.4.

for the proposition that courts "apply a balancing test to determine whether an election law violates a political party's associational rights." *Bayless*, 351 F.3d at 1281, citing *Timmons*, 520 U.S. at 358. As stated earlier, however, this Court held that First Amendment rights should *not* be balanced against state interests when the government burdens "core associational activities," such as selecting party nominees. *Timmons,* 520 U.S. at 360. The Ninth Circuit also misinterpreted *Jones* and, in so doing, contradicted a prior Ninth Circuit decision. Compare *Bayless*, 351 F.3d at 1282 ("*Jones* treated the risk that nonparty members will skew either primary results or candidates' positions as a factual issue, with the plaintiffs having the burden of establishing that risk"), with *Reed*, 343 F.3d at 1203 (*Jones* "does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones* infers the burden from the face of the blanket primary statutes.").

There is no difference under the First Amendment between forcing a party to open its primaries for president to nonmembers, as Wisconsin did in *La Follette*, and forcing a party to open its primaries for other federal and state offices to nonmembers, as Montana does. In both cases, forced association in open primaries substantially burdens First Amendment associational rights as a matter of law. The District Court erred in holding otherwise.

B. Montana Exacerbates the Party's First Amendment Injury By Refusing To Register Voters' Party Affiliation

The First Amendment not only entitles a political party to exclude nonmembers, it also protects the party's "freedom to *identify* the people who

constitute the association." *La Follette*, 450 U.S. at 122 (emphasis added). Montana forces parties to participate in its open primary but does not register voters' party affiliation or record the names of voters who select Republican ballots in primary elections. App. 55a-56a. And Montana conducts elections by secret ballot. Mont. Const. Art. IV, § 1. The Montana Republican Party therefore cannot identify the persons who select its nominees. This constitutes another First Amendment injury.

The District Court downplayed this violation by stating that "anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time." App. 50a, quoting *Clingman*, 544 U.S. at 591. The District Court's point seems to be that voters choosing Republican ballots in an open primary election become "Republicans" and therefore the Party suffers no violation of its associational rights when those "Republicans" select Party nominees.

This reasoning is flawed. In states with closed primaries, voters who "join" a party by voting in its primary must necessarily register their party affiliation, thereby enabling the party to identify them. But Montana's open primary system lacks party registration. App. 55a-56a. Thus, voters who "join" the Montana Republican Party by selecting its primary ballot do so anonymously, thereby depriving the Party of its right to identify them. As explained by Justice Powell in his dissent in *La Follette*:

> [T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. The real issue in this case is whether the Party has the right to decide that only *publicly* affiliated voters may participate.

La Follette, 460 U.S. at 130 n.2 (Powell, J., dissenting) (emphasis in original). The *La Follette* majority made clear that parties have that right. *Id.* at 123-24.

Thus, while an open primary enables voters to anonymously and metaphysically "join" a party, it has the same constitutional defect as a blanket primary – neither requires voters to become formal members of a party, leaving parties unable to identify the persons who choose their standard bearers. In closed primaries, by contrast, "even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'cross over,' at least he must formally *become a member of the party. . . .*" *Jones*, 530 U.S. at 577 (emphasis in original). Because closed primary systems necessarily include party affiliation registration, voters who become formal party members can be identified by the party, which can then seek to form a meaningful association with them.

Preventing a party from identifying those who vote in its primaries hobbles it during the "moment of choosing the party's nominee," which is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Jones*, 530 U.S. at 575, quoting *Tashjian*, 479 U.S. at 216. This Court has held that "voter registration lists, *with voter affiliation information*, provide *essential information* to the party state committees." *Clingman,* 544 U.S. at 595 (emphasis added). These lists are needed for "direct solicitation of party members – by mail, telephone, or face-to-face contact, and by the candidates themselves or by their active supporters," which is "part of

any primary election campaign." *Id.* They are also necessary "for other campaign and party–building activities, including canvassing and fundraising." *Id.*

By refusing to register voters' party affiliation, the State fails to provide what this Court has called "essential information" needed by the Montana Republican Party to perform its functions during primary elections. *Clingman*, 544 U.S. at 595. The Party must instead attempt on its own to identify its adherents among the over 626,000 registered voters in the state. App. 53a. This task is impossible. The Party is not able to identify all voters who self–identify as Republicans or effectively turn them out for primary elections. App. 70a. It attempts to compile member lists but they are never accurate or reliable. App. 70a. Additionally, "people move, people get married, people die and that changes, and their affiliations change." App. 62a. The Party is forced to spend "much more of our time and our money trying to identify voters rather than turning out people we know to be Republicans." App. 62a-63a.

The Montana Republican Party, like the National Democratic Party in *La Follette*, has a constitutional right to require those who select Party nominees to register as Party members. This is the Party's only membership requirement, App. 85a, but one the Party desires because it rejects the notion of anonymous "Republicans." App. 67a. Montana law deprives the Party of this right. The District Court's theory that voters should be permitted to anonymously select Republican nominees therefore lacks merit.

C. The State Has No Compelling Interest in Allowing Democrats to Select Republican Nominees

Because Montana's open primary system severely burdens the Party's First Amendment right of association, it can survive strict scrutiny only if it is narrowly tailored to achieve a compelling interest. *Jones*, 530 U.S. at 582. The State cannot make this showing:

> Given that open primaries are supported by essentially the same state interests that the Court disparages today and are not as "narrow" as nonpartisan primaries, there is surely a danger that open primaries will fare no better against a First Amendment challenge than blanket primaries have.

Id. at 597-98 (Stevens, J., dissenting).

The District Court did not determine whether Montana's open primary system advanced a compelling interest. In prior filings, the State has argued that "because the right to privacy is one of the strongest protections enshrined in Montana's Constitution, the State's interest in protecting voters' privacy is compelling." D.C. Doc. No. 89, p. 26. This Court, however, has already ruled on this issue:

> The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one.

Jones, 530 U.S. at 585.

The State has referenced several other purported interests, including "perfect[ing] the direct power of the voters over their state and local government in

all its branches and officers that the people may rule" and, correspondingly, to "destroy the power of the corporation-controlled machine boss." D.C. Doc. No. 89, p. 30. The State does not explain how Montana's open primary system advances any of these interests, or why they should be considered compelling.

Additionally, Montana's open primary system is not narrowly tailored. This is because the State can protect all of its interests by relying upon a *nonpartisan* primary. *Jones*, 530 U.S. at 585. Because a nonpartisan primary provides an alternative that would achieve the State's interests without infringing upon the Party's First Amendment rights, Montana's open primary system is not narrowly tailored.

III. Injunctive Relief Would Aid This Court's Jurisdiction

Issuing an injunction under the All Writs Act in this case would be "in aid of" this Court's certiorari jurisdiction. 28 U.S.C. § 1651(a). The Court's authority under the Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 603 (1966).

Cases involving circuit splits are ones over which this Court traditionally assumes jurisdiction. *Wheaton College v. Burwell*, 134 S.Ct. 2806, 2807 (2014). Cases raising issues of national importance are also good candidates for review. See, *e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 371-72 (2000).

There is a circuit split regarding the key issue in this case: whether forced association between a political party and nonmembers violates the First

Amendment as a matter of law. The Fourth Circuit has expressly held that it does. *Miller I,* 462 F.3d at 319 ("The only issue in this case is whether Virginia's open primary law violates the [Republicans'] First Amendment rights to freely associate, *which presents a purely legal question.*") (emphasis added). The Ninth Circuit disagrees. *Bayless*, 351 F.3d at 1282 ("*Jones* treated the risk that nonparty members will skew either primary results or candidates' positions as a factual issue, with the plaintiffs having the burden of establishing that risk.").

This issue has nationwide significance. Eleven states require nominations for state and congressional offices to be conducted by open primaries.[10] Along with this case, the Ninth Circuit currently has pending before it a challenge by Hawaii Democrats to their state's open primary. *Democratic Party of Hawaii v. Nago*, 983 F.Supp.2d 1166 (D. Hawaii 2013), *appeal pending*, 9th Cir. No. 13-17545. App. 4a. It should also be noted that federal courts in several states have recently struck down open primary systems. See, *e.g.*, *Miller v. Brown*, 503 F.3d 360, 371 (4th Cir. 2007) ("*Miller II*"); *Utah Republican Party v. Herbert,* 2015 WL 6695626, *22 (D. Utah Nov. 3, 2015) (Utah's open primary held unconstitutional because "a state *may not force a political party to allow unaffiliated voters in its primary election*. Such a requirement is a "severe" burden on the political party's First Amendment rights because it dilutes the party's ability to determine its candidates….") (emphasis in original).

[10] See <ballotpedia.org/Open_primary#cite_note-3>, accessed March 7, 2016.

The Montana Republican Party is not asking this Court to cure the defects in Montana's open primary system but to simply prohibit the State from applying that system to the Party. State authorities have a number of options for curing the constitutional defects in Montana's primary system in response to an injunction issued by this Court. For example, Montana's Secretary of State, Respondent Linda McCulloch, has statutory authority to promulgate temporary regulations. §§ 13-1-201, 13-1-202; *cf. O'Callaghan v. State of Alaska, Director of Elections*, 6 P.3d 728, 730-31 (Alaska 2000) (statutory power of state's director of elections authorized her to promulgate temporary regulations establishing a closed primary after Alaska's blanket primary was declared unconstitutional).[11]

Relief is needed because there will never be another 2016 primary election. Without relief from this Court, nonmembers and Democratic–aligned institutions will soon exploit Montana's open primary (again) and seek to nominate Republican candidates opposed by the majority of Republican voters. App. 156a-158a, 160a, 162a. Other Republican candidates are reacting to this threat by shifting their campaign messaging away from the Party platform. App. 196a-197a. An injunction

[11] Additionally, the issuance of an injunction by this Court in the next few weeks would enable the Montana Legislature to convene in special session to cure the defects in the state's primary election system. Mont. Const., Art. V, § 6; see also *Page v. Virginia State Bd. of Elections*, 2015 WL 763997 (E.D. Va. 2015) (federal court struck down Virginia's redistricting plan expecting the legislature would have an opportunity to prepare a new plan by convening in special session). It could enact any of several solutions, including (1) a closed primary, (2) a nonpartisan, top-two primary as suggested by this Court, *Jones,* 530 U.S. at 586-87, or (3) an open primary with an "opt-out" procedure for political parties to select nominees via party convention, a solution other states have adopted. See, *e.g.*, Va. Code Ann. § 24.2-509(A).

issued by this Court will protect the Montana Republican Party and Montana voters from an unconstitutional election while preserving this Court's jurisdiction over this matter should additional proceedings become necessary.

CONCLUSION

This Court's "cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Jones*, 530 U.S. at 575 (citations omitted). Accordingly, the Court has enjoined states from forcing parties to associate in open primaries with nonmembers when selecting presidential nominees – and done so without requiring empirical data concerning crossover voting. *La Follette*, 450 U.S. at 124 n.27. Neither the District Court nor the State can explain why the First Amendment should apply differently in open primaries for nominations for other federal and state offices. The Montana Republican Party therefore respectfully requests an injunction pending appeal prohibiting Respondents from applying Montana's open primary system to the Party.

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Respectfully submitted,

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