No._____

In the Supreme Court of the United States

RAVALLI COUNTY REPUBLICAN CENTRAL COMMITTEE, *et al.*,

Petitioners,

v.

LINDA MCCULLOCH, in her capacity as Montana's Secretary of State, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state-mandated open primaries, which require members of a political party to join with nonmembers when selecting party nominees, severely burden a party's First Amendment associational rights as a matter of law.

PARTIES TO THE PROCEEDING

Petitioners, who were the Plaintiffs-Appellants in the court below, are: Ravalli County Republican Central Committee, Gallatin County Republican Central Committee, Sanders County Republican Central Committee, Dawson County Republican Central Committee, Stillwater County Republican Central Committee, Carbon County Republican Central Committee, Flathead County Republican Central Committee, and Madison County Republican Central Committee.

Respondents, who were the Defendants-Appelleess in the court below, are Linda McCulloch, Regina Plettenberg, Charlotte Mills, Bobbi Christenson, Shirley Kreiman, and Pauline Mishler.

CORPORATE DISCLOSURE STATEMENT

Petitioners are not publicly traded corporations, issue no stock, and have no parent corporation. There is no publicly held corporation that owns 10% or more ownership stake in any of the Petitioners.

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

Cases:

Statutory Provisions:

Other Authorities:

OPINIONS BELOW

The Ninth Circuit's decision summarily affirming the district court is reproduced in the appendix. Pet. App. 52-53. The Ninth Circuit based its decision on *Democratic Party of Hawaii v Nago*, 833 F.3d 1119 (9th Cir. 2016), petition for cert. pending, No. 16-652 (filed Nov. 14, 2016). Pet. App. 53. The *Nago* ruling is reproduced in the appendix. Pet. App. 1-12. The appendix also includes the district court's orders dismissing Petitioners' case, Pet. App. 13-17, and denying their summary judgment motion. Pet. App. 19-51.

JURISDICTION

The Ninth Circuit affirmed the district court's judgment on December 16, 2016. Pet. App. 52-53. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions establishing Montana's mandatory open primary system are reproduced at Pet. App. 54-57.

INTRODUCTION

Montana Republicans, like Hawaii Democrats,[1] are asking this Court to decide whether the First Amendment associational rights of a political party and its members are severely burdened as a matter of law if they are forced to join with nonmembers when selecting party nominees. In *Democratic Party of the United States v. Wisconsin ex rel. La Follette*,

[1] See *Democratic Party of Hawaii v Nago,* Pet. for Certiorari, No. 16-652 (filed Nov. 14, 2016).

450 U.S. 107 (1981), this Court recognized that mandatory open primaries harm political parties because "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions – thus impairing the party's essential functions. . . ." *Id.* at 122. Binding a party's presidential delegates to the results of an open primary constituted a "substantial intrusion" into party members' associational freedom as a matter of law. *Id.* at 126.

Despite *La Follette's* holding that states cannot force political parties to use open primaries to select their presidential nominees, Montana, Hawaii, and thirteen other states force parties to use them to select nominees for state and local offices. Any Montana voter can choose a party's ballot, including voters who are indifferent or even hostile to the party's platform. Montana does not register voters' party affiliation or record which party ballot a voter selects. Thus, open primaries permit outsiders the party cannot exclude or even identify to join in selecting party nominees – *i.e.*, the "standard bearer[s] who best represent[] the party's ideologies and preferences." *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (citations omitted).

The Ninth Circuit inexplicably ignored *La Follette* and held that political parties must prove a severe burden to their associational rights in order to successfully challenge open primaries. Pet. App. 10-12. The Fourth Circuit, by contrast, followed *La Follette* and held that open primaries severely burden associational rights as a matter of law. *Miller v. Brown*, 503 F.3d 360, 364-65, 368 (4th Cir. 2007)

("*Miller II*"). Certiorari is needed to resolve this split of authority on this important constitutional issue.

STATEMENT OF THE CASE

A. Statement of Facts

Voters participating in Montana's primary elections receive a party ballot for each registered political party. Mont. Code Ann. § 13-10-209(7). They may cast the party ballot of their choice – the others are discarded. Mont. Code Ann. § 13-10-301(2). This results in an "open" primary. Pet. App. 19, 59. Montana's two major political parties must participate in this system. *Id.*; Mont. Code Ann. § 13-10-601(1). The State does not register voters' party affiliation or record which party's ballot a voter chooses. Pet. App. 59. Montana's Secretary of State, Respondent Linda McCulloch, administers the state's primaries, which are held in June of every even-numbered year. *Id.*

The Petitioners are eight county Republican central committees in Montana (hereinafter, the "County Republican Committees" or "Committees"). They are established by statute and "make rules for the government of [their] political party in each county not inconsistent with any of the provisions of the election laws of this state or the rules of [their] state political party." Mont. Code Ann. § 13-38-203.

The MEA-MFT, the Montana affiliate of the National Education Association, is the state's largest union with 18,000 members. Pet. App. 61, 63. It endorsed candidates in all legislative races in Montana in the 2012 general election, all of whom were Democrats. Pet. App. 65-66. In 2014, however, it began endorsing "responsible" Republican

candidates during primaries and told the press that, for heavily Republican legislative districts, "those who usually vote Democratic should consider voting in the GOP primary to support the Republican that most clearly reflects their views." Pet. App. 68,69. The union's president testified that if the Republican Party "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." Pet. App. 69.

The union aggressively supports candidates it endorses, including Republican candidates, through campaign expenditures and get-out-the-vote efforts. Pet. App. 64. Republican candidates in Montana self-censor by avoiding issues that might provoke unions to encourage their members to crossover into Republican primaries. Pet. App. 36-37.

B. Procedural Background

The County Republican Committees filed a complaint on September 8, 2014, challenging Montana's open primary as applied to them and, later, filed an amended complaint in which the Montana Republican Party joined as a plaintiff. *See* Third Amended Complaint, *Ravalli County Republican Central Comm. et al. v. McCulloch, et al.*, No. 6:14-cv-00058-BMM (D. Mont. Jan. 22, 2015). On December 14, 2015, the district court denied their summary judgment and preliminary injunction motions. Pet. App. 51.

The Committees and the Montana Republican Party filed a preliminary injunction appeal in order

to obtain relief before Montana's June 2016 primary election. *See* Notice of Appeal, *Ravalli County Republican Central Comm. et al. v. McCulloch, et al.*, No. 6:14-cv-00058-BMM (D. Mont. Dec. 16, 2015). They also sought an injunction pending appeal from this Court on March 11, 2016. *See* No. 15A911. Justice Kennedy requested a response from the Respondents, but the Court later denied the application. *Id.*

The district court dismissed the action on May 2, 2016. Pet. App. 17. The Committees then filed an appeal on the merits.[2] *See* Notice of Appeal, *Ravalli County Republican Central Comm. et al. v. McCulloch, et al.*, No. 6:14-cv-00058-BMM (D. Mont. May 4, 2016). The Montana Republican Party declined to join that appeal. *Id.*

On August 15, 2016, the Ninth Circuit upheld the constitutionality of Hawaii's open primary in its decision in *Nago*. Pet. App. 12. Because *Nago* became the law of the circuit on the same constitutional issue raised in this case, the Committees petitioned for an initial hearing en banc, which the Ninth Circuit denied. *See* order denying petition for initial hearing en banc, *Ravalli County Republican Central Comm. et al. v. McCulloch, et al.*, No. 16-35375, DktEntry 22, (9th Cir. Oct. 27, 2016). On December 16, 2016, the Ninth Circuit summarily affirmed the district court's judgment because the appeal in this matter was "obviously controlled" by *Nago*. Pet. App. 53.

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[2] The Ninth Circuit dismissed the preliminary injunction appeal after Montana conducted its June 2016 primary. *See Ravalli County Republican Central Comm. et al. v. McCulloch, et al.*, No. 15-35967 (9th Cir. July 22, 2016).

REASONS FOR GRANTING CERTIORARI

I. The Ninth Circuit's Decision Is Clearly Wrong And Conflicts With Decisions From The Fourth Circuit

A. The Ninth Circuit Ignored *La Follette's* Holding That Open Primaries Are a "Substantial Intrusion" Upon a Party's Freedom of Association

The Ninth Circuit held in *Nago* that open primaries do not severely burden a political party's associational rights as a matter of law but rather the party must prove a severe burden as a factual matter. Pet. App. 10-12.[3] This holding flies in the face of over 30 years of this Court's precedents.

The First Amendment "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." *La Follette*, 450 U.S. at 122. This Court's 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." *Jones*, 530 U.S. at 575. A nomination "often determines the party's positions on the most significant public policy issues of the day, and even when those positions are

[3] The Ninth Circuit summarily affirmed the district court's judgment in this matter because *Nago* "obviously controlled" the outcome. Pet. App. 53. The Montana County Republican Committees therefore focus their analysis on *Nago*.

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 reviewed a Wisconsin law requiring that the state's delegates to a party's presidential convention vote in accordance with the results of the state's open primary. *La Follette*, 450 U.S. at 109. This law conflicted with the National Democratic Party's rule that only voters who publicly affiliated with the Party could participate in selecting its presidential delegates. *Id.* at 109. 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 Democratic Party's delegates to the results of an open primary thus constituted a "substantial intrusion" into Party members' associational freedom as a matter of law. *Id.* at 126. Notably, the Court rejected challenges by Wisconsin authorities to the accuracy of crossover voting 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.

The Court has repeatedly relied upon *La Follette* in holding that statutes impacting a party's core associational activities constitute a severe burden as

a matter of law. In *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), the Court struck down a Connecticut statute prohibiting independent voters from participating in Republican primaries 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, the Court granted relief without requiring Republicans to produce data showing how many independent voters actually desired to vote in Republican primaries.

The Court has characterized *Tashjian* as involving a party's "core associational activities." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 360 (1997). In *Timmons*, the Court distinguished the Connecticut statute in *Tashjian* from a Minnesota statute preventing a nominee from appearing on a ballot for multiple parties. Unlike the Connecticut statute, the Minnesota statute did not affect core associational activities and thus resulted in burdens that were "not severe." *Id*. at 363.

In striking down California's blanket primaries[4], this Court relied upon the principles established in *La Follette* and *Tashjian*: (1) party members have "the freedom to join together in furtherance of

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

common political beliefs," *Jones*, 530 U.S at 574, quoting *Tashjian* at 479 U.S. at 214-15, (2) parties have "the freedom to identify the people who constitute the association, and to limit the association to those people only," *id.*, quoting *La Follette*, 450 U.S. at 122, (3) "the moment of choosing the party's nominee" is the "crucial juncture at which the appeal to common principles may be translated into concerted action," *id.* at 575, quoting *Tashjian* at 479 U.S. at 216, and (4) "allowing non-party members to participate in the selection of the party's nominee" in violation of the party's rules constitutes "a substantial intrusion into the associational freedom" of party members. *Id.* at 576, quoting *La Follette*, 450 U.S. at 126.

Immediately after reciting these principles, the Court held that "California's blanket primary violates the principles set forth in these cases." *Jones*, 530 U.S. at 577. The cases to which the Court was referring included *La Follette* and *Tashjian*, both of which struck down restrictions on core associational activities of political parties without requiring parties to produce crossover voting data.

The principles in *La Follette*, *Tashjian,* and *Jones* apply regardless of the party's size or the office sought: "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 nominees (*in that case* its presidential nominee)." *Jones*, 530 U.S. at 576 n.7, quoting *La Follette*, 450 U.S. at 122 (emphasis added); see also *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (striking down state law prohibiting county party committees from endorsing

candidates during primaries because "partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments."). Thus, the same First Amendment that protects the National Democratic Party from forced association with nonmembers when it nominates its candidate for president also protects Montana's County Republican Committees from forced association with nonmembers when they nominate a candidate for sheriff.

The Ninth Circuit in *Nago* ignored *La Follette* and misapplied *Jones*. The court held that "*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." Pet. App. 9. But while this Court *cited* crossover voting data in *Jones*, it did not *require* such data. *Jones*, 530 U.S. at 578. Doing so would have constituted a significant departure from *La Follette* and *Tashjian,* both of which invalidated restrictions on political parties' core associational rights without crossover voting data.

The Court has continued following this pattern in subsequent cases. For example, the Court held that an Oklahoma law did not severely burden associational rights because it "neither regulated [the party's] internal decision making process, *nor compelled it to associate with voters of any political persuasion*." *Clingman v. Beaver*, 544 U.S. 581, 595 (2005) (plurality opinion) (emphasis added). The Court more recently explained that California's blanket primary "severely burdened the parties' freedom of association 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). Blanket primaries thus violated associational rights simply by *allowing* nonmembers to participate in selecting party nominees, a conclusion that did not depend on crossover voting data. This same reasoning should apply to open primaries, which also allow nonmembers to participate in selecting party nominees.

The Ninth Circuit failed to acknowledge another harm open primaries inflict upon political parties. The First Amendment not only entitles a party to exclude nonmembers but also protects its "freedom to *identify* the people who constitute the association." *La Follette*, 450 U.S. at 122 (emphasis added). Montana, however, forces parties to participate in its open primary without registering the party affiliation of voters or recording the names of voters who select Republican ballots in primary elections. Pet. App. 59. And Montana conducts elections by secret ballot. Mont. Const. Art. IV, § 1. It is therefore impossible to know which voters in Montana cast Republican ballots during primary elections and thus impossible for the County Republican Committees to identify the persons who select their standard bearers.

The Ninth Circuit held that open primaries do not violate a party's associational rights because "crossover" voters become members of a party simply by selecting the party's ballot. Pet. App. 11, quoting *Clingman*, 544 U.S. at 590 ("anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by

registering within a state-defined reasonable period of time before an election."). *Clingman*, however, involved Oklahoma's semi-closed primary system, which required voters to register their party affiliation and allowed parties to exclude nonmembers, thereby enabling parties to identify the voters who selected party nominees. *Id.* at 584-85.

In Montana's open primary system, by contrast, voters do not register their party affiliation and do not "ask for the appropriate ballot at the appropriate time." Rather, they receive a party ballot for each registered party, then secretly and anonymously mark one of the party ballots and discard the other. Pet. App. 59. As stated previously, this system prevents a political party from exercising its First Amendment right to identify the persons who choose its standard bearers.

Indeed, this Court in *Clingman* recognized how destructive open primaries are to a party's brand: "Opening the [party's] primary to all voters. . .would render the [party's] *imprimatur* an unreliable index of its candidate's actual political philosophy." *Clingman* 544 U.S. at 595. *Clingman* does not support the Ninth Circuit's decision upholding mandatory open primaries, but rather undermines it, as do this Court's decisions in *La Follette*, *Tashjian*, *Jones*, and *Washington State Grange*.

B. The Ninth Circuit's Decision Conflicts With Several Fourth Circuit Decisions

In *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) ("*Miller I*"), a local Republican committee sued to prevent its nominee for the Virginia legislature from being selected in an open primary. The Fourth

Circuit held that the "only issue" was "whether Virginia's open primary law violates the [Republicans'] First Amendment rights to freely associate, which presents a purely legal question." *Id.* at 319. It rejected a ripeness challenge by state authorities and remanded the case to the district court, which then struck down Virginia's open primary as applied to the local Republican committee. *Miller v. Brown*, 465 F.Supp.2d 584, 595 (E.D.Va. 2006). Relying upon *La Follette* and *Tashjian*, the Fourth Circuit affirmed because "the type of forced association caused by a mandatory open primary causes significant injury to the First Amendment rights of a political party." *Miller II*, 503 F.3d at 364-65, 368. (citations omitted).

The conflicts between the Fourth Circuit's decisions in *Miller I* and *II* striking down Virginia's open primary and the Ninth Circuit's decision upholding Hawaii's open primary are irreconcilable. The Fourth Circuit held that the "only issue" was "whether Virginia's open primary law violates the [Republicans'] First Amendment rights to freely associate, *which presents a purely legal question*." *Miller I*, 462 F.3d at 319 (emphasis added). The Ninth Circuit, by contrast, held that "the severity of the burden that a primary system imposes on associational rights is a *factual, not a legal question*." Pet. App. 6 (emphasis added).

The reasoning underlying *Miller I and II* also conflicts with the Ninth Circuit's reasoning. The Fourth Circuit based its holding upon the principles in *La Follette* and *Tashjian*. *Miller II*, 503 F.3d at 364-65. The Ninth Circuit made no reference to either case. The Fourth Circuit and Ninth Circuit

disagree about the existence of crossover voting. Compare *Miller I*, 462 F.3d at 317 ("the participation of Democrats in the [Republicans'] upcoming primary is inevitable") with Pet. App. 10 (the Hawaii Democratic Party "wants us to infer that the approximately 185,000 people voting in its primaries who have not formally registered with the Party are participating in crossover voting."). They also disagree as to whether political parties react to the threat of crossover voting. Compare *Miller I*, 462 F.3d at 318 ("[k]nowing that voters unaffiliated with the [Republican Party] will participate in their primary dramatically changes the [Republican Party's] decisions about campaign financing, messages to stress, and candidates to recruit" and thus "the mere existence of the open primary law causes these decisions to be made differently than they would absent the law") with Pet. App. 12 ("the Party has not shown Hawaii's open primary system causes Democratic candidates to moderate their policy stances").

The conflict between the Ninth Circuit and the Fourth Circuit regarding the constitutionality of open primaries could not be more pronounced. A writ of certiorari from this Court is necessary to resolve this conflict.

II. The Constitutionality Of Open Primaries Is An Issue Of Nationwide Importance

The constitutionality of open primaries is an issue affecting every voter and candidate in every open primary state, which includes Montana, Hawaii, and

13 other states around the nation.[5] The issue is of particular importance to political parties in those states 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," *La Follette*, 450 U.S. at 122 n.22, quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW 791 (1978), and "in no area is the political association's right to exclude more important than in the process of selecting its nominee." *Jones*, 530 U.S. at 575.

The right of political parties and their adherents to select their standard bearers is a core associational right that should be applied uniformly throughout the nation. Instead, courts apply conflicting rules to open primaries depending upon geography and the office sought. For political parties selecting presidential nominees, and those selecting nominees for any office within the Fourth Circuit or Utah, the right to identify members and exclude nonmembers is a core associational right that open primaries severely burden as a matter of law. See *La Follette*, 450 U.S. at 126; *Miller II*, 503 F.3d at 368; *Utah Republican Party, v. Herbert,* 2015 WL 6695626 (D. Utah Nov. 3, 2015). In the Ninth Circuit, however, "the risk that nonparty members will skew either primary results or candidates' positions [is] a factual issue, with the plaintiffs having the burden of establishing that risk." Pet. App. 9. Thus, there is substantial disagreement among the lower courts

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[5] See National Conference of State Legislatures, *State Primary Election Types* (July 21, 2016), at ncsl.org/research/elections-and-campaigns/primary-types.aspx

regarding the severity of the burden imposed by open primary systems upon political parties and their adherents. This is an issue of nationwide importance that should be resolved by this Court.

III. This Case Complements The Hawaii Open Primary Case Pending Before This Court

Though Montana's County Republican Committees and Hawaii Democrats are both challenging the constitutionality of open primaries, they have differing perspectives regarding relief. Hawaii Democrats argue that the open primary system is *facially* unconstitutional. Pet. App. 2, 4; *Democratic Party of Hawaii v Nago,* Pet. for Certiorari at i, No. 16-652. If so, an open primary system would be barred in all circumstances even though, as the Ninth Circuit noted, "some political parties might embrace the system as consistent with their associational desires." Pet. App. 6 n.2.

Montana's County Republican Committees, by contrast, assert that the open primary system is unconstitutional *as applied* to them. Pet. App. 22, 42. Sustaining their as-applied challenge would allow states to continue conducting open primaries for political parties desiring to associate with nonmembers while protecting the associational rights of other parties desiring to exclude nonmembers. See *Miller II*, 503 F.3d at 368 (rejecting a facial challenge to Virginia's open primary system but sustaining local party's as-applied challenge).

The Ninth Circuit's ruling in *Nago* and the Fourth Circuit's contrary decisions in *Miller I* and *II*

provide differing perspectives regarding the constitutionality of open primaries. Granting certiorari to both the Hawaii Democrats' facial challenge and the Montana Republicans' as-applied challenge would provide the Court with differing perspectives regarding an appropriate remedy should it hold mandatory open primaries unconstitutional.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

Respectfully submitted,

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December 20, 2016

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOCRATIC PARTY OF HAWAII *Plaintiff-Appellant,* v. SCOTT T. NAGO, in his official capacity as Chief Election Officer of the State of Hawaii, *Defendant-Appellee*.	No. 13-17545 D.C No. 1:13-cv-00301-JMS-KSC OPINION

Appeal from the United States District Court
for the District of Hawaii
J. Michael Seabright, Chief District Judge, Presiding

Argued and Submitted May 4, 2016
Portland, Oregon
Filed August 15, 2016

Before: A. Wallace Tashima, Richard C. Tallman,
and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Tashima

TASHIMA, Circuit Judge:

In 2013, the Democratic Party of Hawaii (the "Democratic Party" or the "Party") brought a facial First Amendment challenge to Hawaii's open primary system. The Democratic Party seeks to limit the participants in its primary elections to its formal members or to voters who are otherwise willing publicly to declare their support for the Party. According to the Democratic Party, Hawaii's open primary system, which allows registered voters to participate in any party's primary without formally joining or declaring support for that party, severely burdens the Party's associational rights.

The Democratic Party and Scott Nago, Hawaii's chief election officer, brought cross-motions for summary judgment, both seeking judgment on the Party's First Amendment claim as a matter of law. The district court granted summary judgment to Nago. *Democratic Party of Haw. v. Nago*, 982 F. Supp. 2d 1166 (D. Haw. 2013). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

A. Hawaii's Open Primary System

In 1978, the Hawaii Constitution was amended to provide that "no person shall be required to declare a party preference or nonpartisanship as a condition of voting in any primary or special primary election. Secrecy of voting and choice of political party affiliation or nonpartisanship shall be preserved." Haw. Const. art. II, §4. Hawaii had previously utilized a closed primary system. The purpose of the

amendment was to protect voter privacy and to encourage voter participation in elections.

The Hawaii Legislature implemented the open primary by statute in 1979. The relevant statutory provisions specify that registered voters at primary polling sites "shall be issued the primary or special primary ballot for each party and the nonpartisan primary or special primary ballot. A voter shall be entitled to vote only for candidates of one party or only for nonpartisan candidates." Haw. Rev. Stat. § 12-31. Thus, voters must commit to one party's slate prior to voting; they may not choose a Republican nominee for one state office and a Democratic nominee for a different state office. Further, "a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election." *Id.* Hawaii voters do not register as members of any political party, and the State does not keep records regarding which party's ballot any particular voter chose in a primary election. *See id.* Political parties may not opt out of this open primary system. See *id.* §§ 12-1, 12-2.

B. The Democratic Party's Challenge to Hawaii's Open Primary System

In 2006, the Democratic Party amended its constitution, as follows:

> The Democratic Party of Hawaii believes that its primary election, a state-imposed mandatory nomination procedure, ought to be open to participation of only such persons as are willing to declare their affiliation with and support for the Party, either through

> public registration to vote, or through maintenance of membership with the Party. The Party further believes that the current Constitution and laws of the State of Hawaii, by maintaining secrecy of affiliation, and by compelling the Party to admit to its nomination procedures those who may have no interest in, or actually oppose the interests, values, and platform of the Party, do violence to the Party's associational freedoms and the individual freedoms of its membership to define their own political views, guaranteed under the Constitution of the United States.

As of July 2013, the Democratic Party had approximately 65,000 formal members. The Party generally does not terminate memberships unless the member is expelled for cause, resigns, or dies. The Party does not require its members to pay dues.

In June 2013, the Democratic Party commenced this action, claiming that Hawaii's open primary system violates the Party's First Amendment associational rights. The Party simultaneously filed a motion for a preliminary injunction and a motion for partial summary judgment, asking the district court to find Hawaii's open primary system facially unconstitutional. Nago then filed a cross-motion for summary judgment, arguing that Hawaii's open primary system is constitutional on its face. The parties agreed that there were no genuine issues of fact and that the district court should resolve the Democratic Party's facial constitutional challenge as

a matter of law.[1] The district court denied both of the Party's motions and granted summary judgment to Nago. The Democratic Party timely appealed.

II.

We review de novo a district court's decision on cross-motions for summary judgment, "decid[ing] whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Council of Ins. Agents & Brokers* v. *Molasky Arman*, 522 F.3d 925, 930 (9th Cir. 2008). "We may affirm a grant of summary judgment on any ground supported by the record, even one not relied upon by the district court." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014).

III.

The Democratic Party argues that we can decide whether Hawaii's open primary system severely burdens its associational rights as a matter of law. Thus, the Party contends that it need not adduce any evidence to substantiate the claimed severity of the burden. We disagree. Under Supreme Court and Ninth Circuit precedent, the extent of the burden that a primary system imposes on associational rights is a factual question on which the plaintiff bears the burden of proof. Because the Democratic

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[1] The Democratic Party has noted that, if its facial challenge to Hawaii's open primary system fails, it may bring an as-applied challenge.

Party has not presented any evidence to meet its burden, its facial challenge fails.[2]

A. The Severity of the Burden That a Primary System Imposes on Associational Rights Is a Factual Issue on Which the Plaintiff Bears the Burden of Proof

"Election regulations that impose a severe burden on associational rights are subject to strict scrutiny . . . ." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451 (2008). Courts uphold such regulations only if they are narrowly tailored to serve a compelling state interest. Id. "If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Id.* at 452 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)).

Under *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the severity of the burden that a primary system imposes on associational rights is a factual, not a legal, question. In Jones, the Supreme Court held that California's "blanket primary"

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[2] The district court also granted summary judgment to Nago on the alternative ground that Hawaii's open primary system is facially constitutional because some political parties might embrace the system as consistent with their associational desires. See *Democratic Party of Haw.*, 982 F. Supp. 2d at 1180. Because we affirm the grant of summary judgment on the ground that the Party has failed to meet its burden of proof as to the severity of the burden on its associational rights, we do not reach this alternative holding.

system was facially unconstitutional. *Id.* at 586. Under the blanket primary system, every candidate, regardless of party affiliation, was listed on every voter's ballot. Id. at 570. Voters could thus choose a candidate from any party for each office. Id. The candidate from each party with the most votes then received his or her party's nomination for the general election. *Id.* The Court decided that this system severely burdened the associational freedom of political parties by not allowing them to exclude nonmembers from choosing the parties' nominees. *Id.* at 577.

To reach this ruling, the Court relied on data showing that in California, 20% of registered Democrats and 37% of registered Republicans planned to vote in the other party's primary in 1998. *Id.* at 578. An expert testified that it was "inevitable" under California's system "that parties will be forced in some circumstances to give their official designation to a candidate who's not preferred by a majority or even plurality of party members." *Id.* at 579. According to the Court, the evidence showed a "clear and present danger" that adherents of an opposing party would determine their rival's nominee. *Id.* at 578.

The Court reasoned that, as a result of crossover voting, candidates seeking nomination would be forced to take policy stances different than those of the party faithful. *Id.* at 579–80. Indeed, one of the defendants' experts reported that candidates in blanket primary states tend to be more ideologically moderate than candidates in states with other kinds of primaries. *Id.* at 580. The record also contained evidence that "the whole purpose of [the blanket

primary law] was to favor nominees with 'moderate' positions." *Id.* This second harm to plaintiffs' associational rights (alteration of policy stances) flowed from the first (crossover voting): the Court stated that "forced association has the likely outcome — indeed, in this case the intended outcome — of changing the parties' message." *Id.* at 581–82.

In *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277 (9th Cir. 2003), we clarified that, under Jones, the severity of the burden that a primary system imposes on a party's associational rights is a factual issue for the district court. In *Bayless*, the Arizona Libertarian Party brought a facial challenge to Arizona's semiclosed primary system.[3] *Id.* at 1280. Under this system, voters who were unaffiliated, registered as independents, or registered as members of parties that were not on the primary ballot were permitted to choose a primary in which to vote. *Id.* Voters who were registered with a party on the primary ballot were permitted to vote only in their party's primary. *Id.* The primary ballot listed candidates for all the offices to be filled in the general election, as well as party precinct committeeperson candidates, who were elected in the primary. *Id.*

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[3] Although the Libertarian Party argued that Arizona's primary system was unconstitutional on its face, we directed the district court to limit any remedy "to the Arizona Libertarian Party because the Democrats and Republicans are not parties to [the] suit, and because the record with respect to the impact on their associational rights has not been developed." *Id.* at 1281–82.

Although the parties asked us to decide "whether the participation of nonmembers in the selection of candidates is constitutional under" Jones, we declined to resolve the question as a matter of law. *Id.* at 1282. We "observe[d] that the [Supreme] Court in 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." *Id.* Because "the resolution of the constitutional issue turn[ed] on factual questions not decided by the district court," we "remand[ed] so that the district court [could] consider the severity of the burden this aspect of the primary system impose[d] on the Libertarian Party's associational rights" and "whether the state ha[d] sufficiently justified that burden." *Id.*; see also *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006) (noting that "whether certain restrictions create a 'severe burden' on . . . First Amendment rights" is a "constitutional question[] of fact"). Thus, under *Jones* and *Bayless*, the extent of the burden that Hawaii's open primary system imposes on the Democratic Party's associational rights is a factual question on which the Party bears the burden of proof.[4]

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[4] Our decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), is not to the contrary. In Reed, the Court struck down Washington's blanket primary as unconstitutional on its face under *Jones*. *Id.* at 1201. The Court noted that it was "not at all clear that the plaintiffs had any 'burden of proof'" to show the challenged statute severely burdened their First Amendment rights. *Id.* at 1203. *Reed,* however, was a challenge to a blanket primary system that was, on its face, "materially indistinguishable" from the system held unconstitutional in *Jones*. *See id.* In other words, there

B. The Democratic Party Has Failed to Adduce Evidence Showing the Extent of the Burden on Its Associational Rights

The Democratic Party's facial challenge fails because the Party has not developed evidence showing that Hawaii's open primary system severely burdens its associational rights. Indeed, the Party argues that such evidence is unnecessary. The Party has submitted only an excerpt from its constitution, which states that the Party prefers to limit its primary to voters who "are willing to declare their affiliation with and support for the Party, either through public registration to vote, or through maintenance of membership in the Party." Additionally, the Party claims that it has approximately 65,000 registered members, while a quarter of a million people participate in Democratic primaries in Hawaii. The Party thus wants us to infer that the approximately 185,000 people voting in its primaries who have not formally registered with the Party are participating in crossover voting.

The Democratic Party's preference for limiting primary participants to registered Party members, coupled with the fact that more people vote in Democratic primaries than are formally registered with the Party, is not sufficient to show that Hawaii's open primary system severely burdens the Party's associational rights. Under the blanket

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was no need to analyze the extent of the burden imposed by Washington's blanket primary system because the Supreme Court had ruled that an identical system in California was facially unconstitutional. Because a different kind of primary system is at issue in this case, *Reed* does not apply.

primary system struck down in *Jones*, when California citizens registered to vote, they listed their political affiliation. *Jones,* 530 U.S. at 570. As a result, the Court was able to ascertain that a significant portion of voters who publicly identified with a particular political party were voting in a different party's primary. *See id.* at 578. Hawaii, on the other hand, does not provide for partisan registration. Thus, the 185,000 people voting in Hawaii's Democratic primaries who are not formal Party members may nevertheless personally identify as Democrats.

Moreover, Hawaii's open primary, unlike a blanket primary, forces a voter to choose one party's primary ballot and thereby forego her opportunity to participate in a different party's primary. In a state without partisan registration, choosing to vote in only one party's primary may constitute a valid form of party affiliation. *Cf. Clingman v. Beaver,* 544 U.S. 581, 590 (2005) (plurality opinion) ("In general, 'anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election.'" (quoting *Jones,* 530 U.S. at 596 (Stevens, J., dissenting))).

Thus, unlike in *Jones*, the Democratic Party has provided no evidence showing a "clear and present danger" that adherents of opposing parties determine the Democratic Party's nominees.[5] See

[5] Because the Democratic Party has not attempted to proffer evidence showing the extent to which Hawaii's open primary system burdens its associational rights, we do not analyze

530 U.S. at 579. As explained above, the lone statistic the Party cites is ambiguous at best. Likewise, the Party has not shown that Hawaii's open primary system causes Democratic candidates to moderate their policy stances. *See id.* at 579–80. Absent evidence that Hawaii's system affects the Party's ability to select its nominees, the Party's facial challenge fails.

IV.

We hold that the extent to which Hawaii's open primary system burdens the Democratic Party's associational rights is a factual question on which the Party bears the burden of proof. Because the Party has not developed any evidence to meet this burden, its facial challenge fails. The district court's grant of summary judgment to Nago is

AFFIRMED.

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whether the primary system is narrowly tailored to compelling or important state interests.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

RAVALLI COUNTY REPUBLICAN CENT. COMM., GALLATIN COUNTY REPUBLICAN CENT. COMM., SANDERS COUNTY REPUBLICAN CENT. COMM., DAWSON COUNTY REPUBLICAN CENT. COMM., STILLWATER COUNTY REPUBLICAN CENT. COMM., RICHLAND COUNTY REPUBLICAN CENT. COMM., CARBON COUNTY REPUBLICAN CENT. COMM.,FLATHEAD COUNTY REPUBLICAN CENT. COMM., MADISON COUNTY REPUBLICAN CENT. COMM., BIG HORN COUNTY REPUBLICAN CENT. COMM., AND MONTANA REPUBLICAN PARTY, Plaintiffs, vs. LINDA MCCULLOCH, in her official capacity as Montana's Secretary of States, Defendants.	No. CV-14-58-H-058-H-BMM ORDER

I. Background

The County Committee Plaintiffs ("Central Committee") have moved the Court for an order dismissing this action with prejudice. Central Committee requests that the Court allow them to reserve the right to preserve its appeal of "all interlocutory rulings by this Court." (Doc. 138 at 3.) Central Committee and Plaintiff Montana Republican Party (the "Party) already have filed a notice of appeal from the Court's orders denying their motion for a preliminary injunction. Central Committee and the Party also filed with the Ninth Circuit a motion for an injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8(a)(1)(C). The Ninth Circuit denied the motion. (Doc. 129).

The Party takes no position on Central Committee's motion to dismiss. The State opposes the motion.

II. Discussion

A district court should grant a motion for voluntary dismissal unless the defendant shows that it will suffer some plain legal prejudice. *Smith v. Lenches,* 263 F.3d 972, 976 (9th Cir. 2001). The State argues that it will suffer legal prejudice as a result of Central Committee's reservation of appeal. The State cites to the fact that discovery has closed in this action. The State argues that Central Committee should not receive the benefit of avoiding trial and presenting their case to the Ninth Circuit.

Central Committee has appealed the Court's order denying its motion for a preliminary

injunction. Central Committee sought to prevent application of Montana's open primary law to the 2016 election. The record on this matter had been developed fully at the time that the Court issued its order on December 14, 2015. (Doc. 114.) The Ninth Circuit would resolve this appeal based on the record developed in this case as of December 14, 2015.

The Ninth Circuit has recognized that uncertainty resulting from the threat of future litigation does not amount to plain legal prejudice. Id. Likewise, it seems uncertainty resulting from the threat of an appeal should not amount to plain legal prejudice. The Ninth Circuit looks favorably on permitting appeals from voluntary dismissals with prejudice as it promotes judicial economy. *Concha v. London,* 62 F.3d 1493, 1508 (9th Cir. 1995). The Ninth Circuit has allowed plaintiffs to appeal voluntary dismissals with prejudice in cases where the plaintiff did not move to dismiss the action pursuant to a settlement agreement. *Id.* at 1507. "A voluntary dismissal with prejudice permits the appellate court to review the action of the district court that the plaintiff believes to be determinative of his claim— the action that caused him to dismiss his case." *Id.* at 1508. The Court does not find merit in the State's claim that the potential of an appeal creates plain legal prejudice.

The State suggests that a voluntary dismissal may be appealed only when a stipulation exists between the parties for dismissal with preservation of the right to appeal. The State cites to *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), in support of this proposition. The Court in Berger denied Berger's motion for class certification.

Id. at 1064-65. Berger then stipulated with Defendant Home Depot to dismiss the action with prejudice. *Id.* at 1065. Berger noted his intent to appeal the denial of class certification in the stipulation. *Id.*

The parties in Berger did not stipulate to preserve Berger's right to appeal the denial of class certification as the State suggests. In fact, the defendant disputed Berger's ability to appeal. *Id.* The district court dismissed the action. Id. Berger appealed. *Id.* The Ninth Circuit nevertheless determined that the dismissal qualified as an appealable final action based on the fact that the district court had dismissed the action with prejudice. The Ninth Circuit heard the appeal. *Id.*

The State also argues that dismissal with prejudice of Central Committee's claim does not represent a sufficiently adverse action for the purpose of the voluntary dismissal appeal standard. A voluntary dismissal without prejudice does not represent a sufficiently adverse action when the plaintiff still can seek an adjudication of the issue at another time. *Concha,* 62 F.3d at 1507. A plaintiff who files a motion to dismiss with prejudice, however, submits to a judgment that serves to bar his claims forever. *Id.*

The State argues that the action should not be considered adverse to Central Committee when the Party may be able to bring the same claims in the future. The Party has sought dismissal without prejudice. The State argues that the Party's potential future claims would subsume the Committee's interests. The Court agrees that

Central Committee would stand to benefit collaterally if the Party re-filed the action and succeeded in its efforts to invalidate Montana's open primary. This collateral relief does not diminish, however, the dismissal's adverse effect on the Central Committee. Central Committee will forfeit its rights to relitigate this matter on the existing record developed by the parties regardless of the Party's decisions. A dismissal with prejudice as to County Committee meets the adversity requirement for an appealable judgment.

IT IS ORDERED that the Motion of the County Committee Plaintiffs for Dismissal with Prejudice (Doc. 137) is **GRANTED**. The Clerk of Court is directed to enter Judgment accordingly.

DATED this 2nd day of May, 2016.

/s/ Brian Morris
Brian Morris
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

RAVALLI COUNTY REPUBLICAN CENT. COMM., GALLATIN COUNTY REPUBLICAN CENT. COMM., SANDERS COUNTY REPUBLICAN CENT. COMM., DAWSON COUNTY REPUBLICAN CENT. COMM., STILLWATER COUNTY REPUBLICAN CENT. COMM., RICHLAND COUNTY REPUBLICAN CENT. COMM., CARBON COUNTY REPUBLICAN CENT. COMM.,FLATHEAD COUNTY REPUBLICAN CENT. COMM., MADISON COUNTY REPUBLICAN CENT. COMM., BIG HORN COUNTY REPUBLICAN CENT. COMM., AND MONTANA REPUBLICAN PARTY, Plaintiffs, vs. LINDA MCCULLOCH, in her official capacity as Montana's Secretary of States, Defendants.	No. CV-14-58-H-058-H-BMM ORDER

This order addresses the following motions filed by the parties: Plaintiffs' motion for summary judgment (Doc. 88); the State's motion for summary judgment (Doc. 91); and Plaintiffs' motion for a preliminary injunction. (Doc. 70.)

I. BACKGROUND

Montana voters in 1912 approved an initiative that requires the political parties to choose their nominee through an open primary. The American Year Book 60-61 (Franci G. Wickware ed., 1913). This system has governed Montana's primary elections, with only slight modifications, for the last century. The two major political parties must use this primary system to determine their candidates. Mont. Code Ann. § 13–10–601. The system promotes the notion that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The State prepares separate ballots for each party. Mont. Code Ann. § 13–10–209. Voters choose to vote either the Republican or the Democratic ballot. Mont. Code Ann. § 13–10–301(2). This "open" primary system allows a person to vote without being "required to declare publicly a party preference or to have that preference publically recorded." *Democratic Party of the U.S. v. LaFollette*, 450 U.S. 107, 111 n.4 (1981).

Montana's system, like most open primary states, limits a voter to one party's nominees for all offices. A voter may not support, for example, a "Republican

nominee for Governor and a Democratic nominee for attorney general." *California Democratic Party v. Jones,* 530 U.S. 567, 575 n. 6 (2000). The candidate from each party who receives the most votes receives the party's nomination for public office. Mont. Code. Ann. § 13–1–103.

Plaintiffs have challenged Montana's open primary requirement as unconstitutional. (Doc. 1.) Plaintiffs argue that Montana's open primary inflicts First Amendment injuries upon them by forcing them to associate with non-Republican voters. Plaintiffs allege that non-Republican voters may vote strategically in a closely-contested Republican primary race instead of a run-away Democratic primary race in order to elect a Republican candidate whose "views are more centrist than those of the party base." This strategic voting represents a phenomenon described as "crossover voting." Plaintiffs assert that Montana's system as applied to the Republican Party inflicts First Amendment injuries by preventing Plaintiffs from identifying their members, affecting election outcomes, and changing campaign messaging by candidates.

II. DISCUSSION

A. Political Parties' Associational Rights in Primary Elections

The United States Supreme Court has addressed challenges to a blanket primary system, *Jones*, 530 U.S. 567; a jungle primary system, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008); a closed primary, *Tashijian v. Republican Party of Connecticut,* 479 U.S. 208 (1986); prohibitions on "fusion" candidates, *Timmons*

v. Twin Cities Area New Party, 520 U.S. 351 (1997); and a semi-closed primary, *Clingman v. Beaver*, 544 U.S. 581 (2005). The Supreme Court has yet to address directly the constitutionality of an open primary system of the type employed in Montana. The Court will attempt to analyze these decisions of the Supreme Court to determine the appropriate framework under which to address Plaintiffs' challenge to Montana's open primary system.

Blanket Primary.

The California Democratic Party challenged California's blanket primary system. *Jones*, 530 U.S. at 567. California's blanket primary system listed every candidate regardless of party affiliation on each ballot. *Id.* A voter could choose freely among the candidates for each office regardless of the candidate's party. The highest vote-winner of each party received that party's nomination for the general election. *Id.*

The Supreme Court reasoned that a political association's right to exclude proves most important when the political party selects its nominee. Id. at 575. California's blanket primary system "forc[ed] political parties to associate with . . . those who at best, have refused to affiliate with the party, and at worst, have expressly affiliated with a rival." Id. at 577. The Supreme Court also noted, however, that associational rights of political parties should be construed neither, as absolute, nor as comprehensive, as rights enjoyed by wholly private associations. *Jones,* 530 U.S. at 593 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360 (1997).

Jungle Primary.

Washington replaced its blanket primary after the Supreme Court's decision in Jones with what is known as a "jungle primary." *Washington State Grange,* 552 U.S. at 447. The primary ballot lists all of the candidates for each office. *Id.* at 447-48. The candidates themselves remain free to attach a party designation to their name on the ballot. The top two vote getters advance to the general election regardless of party affiliation. *Id.* The Court rejected a facial challenge that the system violated the Washington State Republican Party's right to freedom of association. *Id.* at 458-59. The Supreme Court reasoned that the primary election did not select the party nominee and the parties remain free to endorse, support, or withdraw support from any candidate. *Id.* at 453-54.

Closed Primary.

The Connecticut Republican Party sought to invite independents to vote in the primary. *Tashjian,* 479 U.S. at 211. A divided Supreme Court struck down a Connecticut law that limited a party's primary election to voters who previously had registered as members of that party. *Tashjian,* 479 U.S. at 210-11. The Supreme Court concluded that no substantial state interest supported Connecticut's decision to limit the primary election to registered party members. *Id.* at 225.

Fusion Ban.

Timmons addressed the very narrow question of whether Minnesota could prevent a candidate from appearing on the ballot for more than one party.

Timmons, 520 U.S. at 353-54. This ban on "fusion" candidates imposed only a minor burden on the party's associational rights. *Id.* at 369. The party remained free to nominate any qualified candidate other than a candidate who appeared on the ballot of another party. *Id.* The Supreme Court further recognized that the regulation of access to ballots does not implicate parties' internal affairs and core associational activities. *Timmons*, 520 U.S. at 360.

Semi-closed Primary.

The Libertarian Party of Oklahoma ("LPO") wanted to open its primary to all registered Oklahoma voters regardless of party affiliation. *Clingman*, 544 U.S. at 583. Oklahoma's semi-closed primary system allows only registered members of a political party to vote in the party's primary, unless the party opened its primary to registered independent voters. *Id.* The law did not regulate the "LPO's internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public." Id. As a result, the Supreme Court declined to apply strict scrutiny. *Id.* at 593. The Supreme Court recognized that "anyone can join a political party merely by asking for the appropriate ballot at the appropriate a time." *Id.* at 590-91 (citing *Jones,* 530 U.S. at 596 (Stevens, J., dissenting)).

B. Summary Judgment Motions

The parties have submitted competing motions for summary judgment. Plaintiffs rely on the Supreme Court's reasoning in Jones to allege that Montana's open primary system "inflicts several First Amendment injuries upon [Plaintiffs]." (Doc. 93

at 5.) The State contends that Plaintiffs have failed to meet the burden of proof required for the Court to award summary judgment. (Doc. 89 at 4.) The State argues that Plaintiffs cannot provide an objective way to determine who qualifies as a "Republican." The State argues further that the Court cannot assess whether non-Republicans actually vote in the Republican primary.

1. Plaintiffs' Motion for Summary Judgment

The Elections Clause of the United States Constitution, Article I, § 4, cl. 1, provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." This same broad power afforded to the state legislature for federal elections applies with equal force to "state control over the election process for state offices." *Tashjian,* 479 U.S. at 217. Elections represent a quintessential form of state action. *Jones,* 530 U.S. at 590. As the Supreme Court decisions recognize, states must regulate elections reasonably to reduce election and campaign related disorder. *Timmons*, 520 U.S. at 359 (1997).

States may regulate these elections as long as they act within the limits imposed by the Constitution. *Jones,* 530 U.S. at 573. The Supreme Court repeatedly has announced that it is "too plain for argument" that "a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Jones,* 530 U.S. at 572. In this regard, "the State's interest in enhancing the democratic character of the election

process overrides whatever interest the Party has in designing its own rules for nominating candidates." *Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992).

States retain broad power to regulate the election process. *Clingman*, 544 U.S. at 586. A regulation that imposes a severe burden on First Amendment associational rights must survive strict scrutiny. *Id.* The State must show only an "important regulatory interest," however, when a "reasonable, nondiscriminatory" regulation imposes a less severe burden. *Id.* The Court must determine whether Montana's open primary requirement imposes a severe burden on Plaintiffs. *Id.* The Court should not be tasked with determining "whether the state legislature was acting wisely in enacting a [specific primary system] . . . , or whether the Republican Party makes a mistake in seeking to depart from the practice." *Tashjian,* 479 U.S. at 223.

Identification of Party Members.

Plaintiffs first argue that Montana's open primary prevents the Party from identifying its members. Plaintiffs assert that the freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association." *La Follette,* 450 U.S. at 122. Plaintiffs further cite *La Follette* for the proposition that an open primary necessarily invalidates their right to freedom of association. Plaintiffs misplace reliance on *La Follette.*

The Supreme Court in *La Follette* addressed only the very narrow question of whether Wisconsin, once it had chosen to operate a Presidential preference open primary, may bind the Democratic Party of the

United States to honor the binding primary results, even though those results had been reached in a manner contrary to National Democratic Party rules. *La Follette*, 450 U.S. at 120. The Supreme Court expressly disavowed the Wisconsin Supreme Court's framing of the question to be the constitutionality of the State's "open" primary law. *Id.* at 120-21. In fact, in dicta, the Supreme Court noted that the Wisconsin Supreme Court's decision to uphold the constitutionality of the open primary "may well be correct." *Id.* at 121. The Supreme Court instead focused on the narrow question of whether Wisconsin could compel the National Democratic Party to seat a delegate at its Convention chosen in a way that violates the rules of the National Democratic Party. *Id.*

The Supreme Court relied on its earlier decision in *Cousins v. Wigoda*, 419 U.S. 477 (1975), in which it rejected the notion that Illinois possessed a compelling interest in the selection process of delegates to the Democratic National Convention. The Supreme Court stated flatly that the disposition in Cousins "controls here." *La Follette*, 450 U.S. at 121. Wisconsin had asserted that its interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participating in primaries, and preventing harassment of voters, proved sufficiently compelling to support the constitutionality of the law. *Id.* at 124-26. The Supreme Court disagreed. *Id.* at 125-26. All of the asserted compelling interests, as noted by the Supreme Court, "go to the conduct of the Presidential preference primary." *Id.* at 125. By contrast, none of these asserted compelling interests

supported the narrow question presented to the Supreme Court of whether Wisconsin could impose "voting requirements upon those who, in a separate process, are eventually selected as delegates." *Id.* at 126. (emphasis added).

These efforts by Wisconsin to control the delegate selection process to the Democratic Party's National Party Convention seem more analogous to the invalid efforts by California to control internal party rules in *Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214 (1989). There the Supreme Court struck down regulations regarding terms of office for party leadership. *Id.* at 232. The Court thus determines the reasoning in *La Follette* to be of limited assistance in evaluating the constitutionality of Montana's open primary law beyond the dicta that the Wisconsin Supreme Court may well have been "correct" in upholding Wisconsin's open primary law. *La Follette*, 450 U.S. at 121. The Court instead looks to *Jones* and *Clingman* to evaluate the severity of the burden that Montana's open primary system imposes on Plaintiff's associational rights.

Plaintiffs claim that *Clingman* supports their position that Montana's open primary requirement violates Plaintiffs' right to identify members. Plaintiffs argue that the State has deprived the Republican Party of its First Amendment right to identify voters who associate with the Republican Party during the primary election. Plaintiffs allege that their inability to identify voters, in turn, imposes a severe burden upon their First Amendment right to associate. The State argues that it has taken no affirmative steps to inhibit the

Republican Party from internally identifying a list of people who associate with the Republican Party. The State plays no role to administer party registration.

The Oklahoma State Election Board in *Clingman* denied the Libertarian Party's request to open its upcoming primary election to all registered voters regardless of party affiliation. *Clingman,* 544 U.S. at 585. The Libertarian Party of Oklahoma challenged the State Election Board's decision. *Id.* The Supreme Court addressed Oklahoma's "important regulatory interests" in its semi-closed primary system. *Id.* at 593.

The Court recognized that the system aided parties by providing "essential information" through voter registration lists. *Id.* at 594. Nothing in the First Amendment requires that a state administer or fund voter registration lists. Oklahoma remained "free to allow the [Libertarian Party] to invite registered voters of other parties to vote in its primary." *Id.* at 598. The Court reasoned, however, that the "democratic process" rather than the Court should make that choice. *Id. Clingman* expressly declined to apply strict scrutiny as the law did not regulate party's internal processes or its capacity to communicate with the public. *Id.* at 583. *Clingman* provides little support for Plaintiffs' claim that Montana's open primary system impedes their ability to identify members.

The Republican Party creates lists of potential members for fundraising purposes. (Doc. 93-1 at 18.) Plaintiffs make no claim that the State limits the Republican Party's ability to maintain its own party lists. The Republican Party mails "membership"

cards to potential Republicans and "ask [them] to renew their membership in the Republican Party" with a donation. *Id.* at 16. The First Amendment imposes no duty on a state to fund or administer voter registration lists. *Clingman,* 544 U.S. at 594. Moreover, the Supreme Court in Washington State Grange rejected a challenge to a jungle primary. *Washington State Grange,* 552 at 444. Washington does not register voters by party. Wash. Rev. Code Ann. § 29A.08.166. The Court remains unconvinced that Montana has a constitutional obligation to register voters by party in light of *Washington State Grange.*

Crossover Voting.

Plaintiffs have submitted expert reports from Kyle Saunders, Ph.D, and Steven Greene, Ph.D (collectively the "Party Experts") to support their position that crossover voting occurs in Montana. The Party Experts' report evaluates "both empirical and anecdotal [evidence]" regarding Montana's open primary elections. (Doc. 71-2 at 1.) The State points out that Party Experts conducted no independent data collection in Montana to determine the percentage of crossover voters in Montana.

Plaintiffs instead have used data collected in other states and applied it to Montana's open primary. Party Experts have concluded that 10% of Montana voters participate in crossover voting. Party Experts have suggested that a 10% rate of crossover voting has the potential to affect election outcomes. Plaintiffs argue that this crossover rate provided sufficient evidence in *Jones,* 530 U.S. at 568, and *Idaho Republican Party v. Ysursa,* 765 F.

Supp. 2d 1266, 1274 (D. Idaho 2011), to determine that an election could be "severely transform[ed]" by crossover voters. *Jones,* 530 U.S. at 579.

The Party Experts estimate that 10% of partisan Montana voters crossover in Montana's open primary (Doc. 93 at 30.) Plaintiffs assert that the mere threat of crossover voting may change the outcome of an election. As discussed, however, Plaintiffs have failed to corroborate the Party Experts' crossover rate with state specific statistical information, similar to that provided in *Jones*.

Plaintiffs' lack of Montana specific data complicates the Court's evaluation of whether Montana's open primary system imposes a severe burden in light of the Supreme Court's opinion in *Jones,* 530 U.S. at 567. Plaintiffs assert a crossover voting rate of 10%, but fail to provide evidence of whether that crossover rate accounts only for non Republican voters voting in the Republican primary. Plaintiffs have provided no evidence to rebut the claim that a portion of the 10% of crossover voters could be voting in Democratic primaries.

The State focuses on this lack of Montana specific evidence of crossover voting in arguing that genuine issues of material fact exist that should defeat Plaintiffs' motion for summary judgment. The State further argues that Plaintiffs cannot show that non-Republican voters have voted, or will vote, in the Republican primary. Plaintiffs rely on *Ysursa* for the proposition that expert testimony that estimates a 10% crossover voting rate provides sufficient evidence to conclude that crossover voters actually alter election outcomes. (Doc. 71 at 27-28.)

The court in *Ysursa* concluded that Idaho's open primary statute violated the Idaho Republican Party's First Amendment rights. *Ysursa*, 765 F. Supp. 2d at 1277. The court relied on the Supreme Court's reasoning in *Jones*. *Id.* at 1269-75. The court determined that no "meaningful distinction" existed between the open primary in Idaho and the blanket primary in Jones. *Ysursa,* 765 F. Supp. 2d at 1275. Idaho's open primary, like Montana's open primary, required voters to choose one party's ballot. *Id.* at 1268-69. Idaho voters, like Montana voters, did not register a party affiliation. *Id.*

The court in *Ysursa* decided the case after a bench trial. *Id.* at 1272. The court denied summary judgment based on "concerns that the record was inadequate" to determine whether crossover voting actually existed in Idaho's open primary comparable to the evidence of crossover voting in California's blanket primary. *Id.* The court noted that it "could not simply borrow the statistics, opinions, and surveys from Jones because that case dealt with a blanket primary instead of an open primary." *Id.* The court stated that a trial would be necessary to determine to what extent crossover voting exists in Idaho and whether and to what extent the threat of any "crossover" voting affects the campaign messaging of the party and its candidates. *Id.*

The Court likewise here possesses concerns that the record proves inadequate to determine on summary judgment whether crossover voting actually occurs in Montana. The Court declines to rely on data for California voters from *Jones* when that case involved a blanket primary rather than an open primary. A voter could choose candidates from

any party who all were listed on the same ballot. Jones, 530 U.S. at 570. The Court similarly declines to rely too heavily on data from Ysursa when Idaho's political environment differs dramatically from Montana's political environment. Defendant's experts in Ysursa, the same Party Experts here, described Idaho as the "most one-party state and least electorally competitive state in the United States." *Id.* at 1273. Montana represents a more electorally competitive environment (Doc. 71-3 at 12.)

The Party Experts acknowledged that the Republican Party primaries represent the "only game in town" in a one-party state like Idaho. *Ysursa,* 765 F. Supp. 2d at 1273. This crossover voting allowed non-Republicans in Idaho to exert some "meaningful influence in elections." *Id.* The district court determined that the Idaho political landscape supported these theories. For instance, Republicans held 28 of the 35 seats in the Idaho State Senate; Republicans held 57 of the 70 seats in the Idaho House of Representatives; and Republicans held all five state-wide elected offices, both United States Senate seats, and both United States Representatives. *Id.* at 1273.

The State's expert alleges that only 1% of the total Montana Republican primaries where no Democratic candidate appeared on the ballot could be considered highly competitive. (Doc. 93-3 at 12.) The State's expert defines highly competitive as an election with less than a 5% victory margin. *Id.* The State's expert further alleges that only an additional 2% of the total Montana Republican primaries where no Democratic candidate appeared on the ballot

could be considered highly competitive. *Id.* The State's expert alleges that this evidence demonstrates that "very few Republican primaries" potentially could be affected by crossover voters. *Id.* These differing interpretations of the Idaho data and its applicability to Montana further highlights the need to develop a factual record upon which to evaluate the burden on Plaintiffs' associational rights. *Ysursa,* 765 F. Supp. 2d at 1272.

The court's analysis in *Alaskan Indep. Party v. Alaska,* 545 F.3d 1173 (9th Cir. 2008), proves instructive to the question of a political party's control over a primary election. The Alaska Independence Party alleged that Alaska's primary system burdened its associational rights "because a candidate may seek the party's nomination against the wishes of the party's leadership." *Id.* at 1180. The court acknowledged that the Alaska system undoubtedly intruded on the party's associational rights because it limited the party's ability to "choose a candidate selection process that will in its view produce the nominee who best represents its political platform." *Id.* at 1176 (quoting *N.Y. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008)).

The court considered the conflict between the party's desire to enforce "greater top-down control and the State's mandate that rank-and-file party voters have the opportunity to vote for any affiliated member who seeks the nomination." *Alaskan Indep. Party,* 545 F.3d at 1179. The court expressed skepticism that such a conflict imposes a severe burden on the party's associational rights. *Id.* at 1179-80. The court discounted the burden in prohibiting the party's leadership from selecting or

screening prospective candidates in favor of selecting the party's nominee democratically from a slate of all qualified candidates who seek the party's nomination. *Id.* at 1180. The court expressed further doubt that Alaska's system imposed a severe burden on the party's associational rights when the party possesses the right to endorse or distance itself from any candidate who appears on the primary ballot. *Id.* at 1180 (citing *Eu,* 489 U.S. at 223).

Plaintiffs similarly possess the ability to endorse or distance itself from candidates who appear on the primary ballot. Unlike Alaska, which required the party to accept any candidate who registered with the party to appear on its primary ballot, Montana requires Plaintiffs to allow any voter to participate in its primary election who seeks its ballot. The Court returns then to the question of how to determine whether non-Republicans actually vote in Republican primary elections in Montana.

Plaintiffs have yet to articulate how to determine whether a Montana voter qualifies as a "Republican." Plaintiffs have cited to no rule or directive of the Montana Republican Party that defines party membership. Counsel for the Plaintiffs argued at the hearing that a person must "register and publically affiliate with the Republican Party." A state possesses no constitutional responsibility to administer or fund voter registration lists. *Clingman,* 544 U.S. at 594. How a person publically affiliates remains unclear.

As noted by one commentator, the fact remains that in any closed-primary state "you are a Democrat if you say you are; no one can effectively say you are

not; and you can become a Republican any time that the spirit moves you simply by saying that you have become one." Austin Ranney, Curing the Mischiefs of Faction: Party Reform in America 166-167 (1975). In other words, the close primaries appear to be "just a hair more closed" than open primaries. *Id.*

Plaintiffs have failed to show that a citizen voting in a Republican primary remains "unaffiliated" with the Republican Party. Plaintiffs rely on Jones to support their assertion that choosing a ballot or a candidate at the ballot box fails to constitute affiliation. (Doc. 103 at 9.) The blanket primary system challenged in Jones differs, however, from Montana's open primary. Voters in California's blanket primary could choose among candidates of any party without having to forego the right to vote for candidates of other parties. *Jones,* 530 U.S. at 570. Montana's open primary system forces voters affirmatively to choose to vote one party's ballot in every race before casting a vote.

As noted by Justice O'Connor the act of casting a ballot in a given primary election may "constitute a form of association that is at least as important as the act of registering." *Clingman*, 544 U.S. at 600 (O'Connor, J., concurring). Justice O'Connor further recognized that the episodic nature of voting does not undermine its association significance: "it simply represents the special character of the electoral process, which allows citizens to join together at regular intervals to shape government through the choice of public officials." *Id.*

Campaign Messaging.

Plaintiffs argue that, even if a genuine dispute

exists as to whether crossover voting actually occurs in Montana, they still should be granted summary judgment on their claim that Republican candidates are forced to change their message to reach more centrist voters. Specifically, Plaintiffs argue that non-Republican voters' intervention in Republican primaries has caused consultants to advise candidates to avoid issues that may encourage non Republicans, such as the MEA-MFT union members, to vote in the Republican primary.

Plaintiffs allege that the Montana Education Association-Montana Federation of Teachers ("MEA-MFT") engages in a "concerted effort" to encourage "non-Republican identifying voters" to vote in state legislative Republican primaries. (Doc. 71-2 at 19-21.) The Party Experts allege that MEA-MFT, Montana's largest labor union, allies with the Democratic Party. Id. The Party Experts' report points to an email sent by MEA-MFT's President as evidence of MEA-MFT's effort to influence Republican primaries. (Doc. 71-2 at 20.) The email purportedly directs MEA-MFT members to vote for moderate Republicans. *Id.*

Plaintiffs argue that Montana's open primary severely burdens Plaintiffs' right to associate by forcing candidates to alter their messaging. Plaintiffs have submitted the Declaration of Brad Molnar in support. Plaintiffs also have submitted declarations from Republican Party candidates. These candidates claim to have changed their campaign messaging to account for crossover voting. (Doc. 71-8, Doc. 71-9, Doc. 71-11.) The State dismisses this type of "anecdotal" evidence as insufficient to evaluate a possible constitutional

violation.

Molnar informs that he conducts seminars for Republican candidates and that he has advised numerous candidates on how to run for office. (Doc. 93-7 at 2.) He explains that he advises Republican candidates, particularly those who run in contested primaries, "to attempt to avoid issues that may antagonize unions, environmental organizations, pro-abortion and as importantly their supportive 'dark money' organizations." *Id.* Molnar further urges these Republican candidates "to avoid discussing right-to-work issues, global warming, federal land transfer, as well as support for school choice unless specifically asked by legitimate voters." *Id.*

Plaintiffs cite *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), to support their argument that the Court should strike down the open primary requirement based solely on the assertion that Republican Party candidates perceive that they must change their campaign messaging in the open primary system. Plaintiffs overstate Miller's reliance on campaign messaging.

The Virginia law in *Miller* allowed the incumbent state legislator to select the method of nomination for his seat. *Id.* at 316. The incumbent indicated that he planned to run and selected the open primary system. *Id.* A Republican district committee ("Committee") wished to exclude voters who had voted in another party's primary in the last five years. *Id.* Once a primary had been selected, however, the Virginia law allowed "all persons qualified to vote" to vote in the primary regardless of

party affiliation. *Id.*

The Fourth Circuit reversed the district court's decision to dismiss the Committee's claim for lack of standing. The court determined that the Committee's claims of having to associate with members of other parties during their candidate selection process and having to account for these members of other parties in framing their campaign messaging bestowed standing upon the Committee to bring a constitutional challenge. *Id.* at 317-18.

On remand, the district court in *Miller v. Brown,* 465 F. Supp. 2d 584 (E.D.Va. 2006) *aff'd*, 503 F.3d 360 (4th Cir. 2007), found that Virginia's law imposed a severe burden on the associational rights of the Committee. The district court provided no factual analysis, however, as *Jones,* 530 U.S. at 578, *Bayless*, 351 F.3d at 1282, and *Democratic Party of Hawaii v. Nago,* 982 F.Supp.2d 1166, 1181-82 (D. Haw. 2013), require to analyze the severity of the burden.

The Fourth Circuit later analyzed the merits of the Committee's challenge. The Virginia Board of Elections did not challenge on appeal the district court's conclusion that the open primary severely burdened the Committee's right of free association as applied in that election. *Id.* As a result, the court accepted, without analysis, the Committee's claim that the threat of crossover voters or forced changes to campaign messaging imposed a severe burden on the Committee. *Id.* at 368-69. *Miller* failed to perform the same factual analysis that courts in the Ninth Circuit have performed when evaluating the severity of the burden imposed by a primary

election.

Plaintiff's reliance on *Miller* for the proposition that the potential effect on campaign messaging supports the invalidation of Montana's open primary law without the benefit of an evidentiary record also ignores the more recent decision in *Greenville County Republican Party Exec. Comm. v. South Carolina*, 824 F.Supp. 2d 655 (D.S.C. 2011). A local Republican Party asserted a facial challenge to South Carolina's open primary system. The court recognized that any election law will "impose some burden upon individual voters and political organizations." *Id.* at 662 (citing *Burdick v. Takushi*, 504 U.S. 428, 430 (1992)). The mere fact that a state's system "creates barriers does not of itself compel close scrutiny." *Greenville County Republican Party*, 824 F.Supp.2d at 662 (quoting *Burdick*, 504 U.S. at 433).

The court acknowledged that under South Carolina's open primary system a registered voter may request, on election day, the ballot for any party's primary in which the voter intends to vote, regardless of whether the voter previously had registered as a member of the party. *Greenville County Republican Party,* 824 F.Supp.2d at 663. The court noted, however, that "the voter may only vote in one party's primary election." *Id.* The court declined to uphold a facial challenge to the South Carolina law that would contradict precedent, including *Miller,* 503 F.3d 360 (4th Cir. 2007), that generally requires an evidentiary record to assess the burden imposed on the political party's associational rights. *Greenville County Republican Party,* 824 F.Supp.2d at 664.

Need for Evidentiary Records.

A facial challenge considers a statute's application to all conceivable parties. *Washington State Grange,* 552 U.S. at 449. An as-applied challenge, which Plaintiffs bring here, tests the application of the statute to a plaintiff's specific factual circumstances. See *Washington State Grange, 552* U.S. at 444. A party generally must develop an evidentiary record to prove that a voting system imposes a severe burden on their associational rights. *Nago*, 982 F.Supp.2d at 1177.

Jones relied on survey data to conclude that the "prospect of having a party's nominee determined by adherents of an opposing party" presented "a clear and present danger." *Jones,* 530 U.S. at 578. The survey in Jones showed that 37% of self-identified Republicans planned to vote in the Democratic primary. The Supreme Court also considered data that showed that "the total votes cast for party candidates in some races was more than double the total number of registered party members." *Id.* (emphasis in original). The evidentiary record in *Jones* supported the theory that the blanket primary system in California likely had altered the identity of the nominee and changed candidate messaging.

Understanding that *Jones* relied on empirical evidence to establish that the political parties in that case had suffered a severe burden, the Ninth Circuit has determined that a constitutional challenge to a primary election presents a factual issue that must be proven. See *Bayless*, 351 F.3d at 1282; See also *Alaskan Indep. Party,* 545 F.3d at 1179-80. The district court in *Nago* addressed a facial challenge to

Hawaii's open primary election system brought by the Democratic Party of Hawaii ("DPH"). *Nago,* 982 F. Supp. 2d at 1168.

Hawaii law required candidates to be nominated by primary election. *Id.* at 1169. Voters in Hawaii could cast votes in a primary election without declaring a party preference. *Id.* The court denied the facial challenge for two reasons: (1) The DPH failed to show that the open primary should be considered "unconstitutional in all of its applications," and (2) the DPH "failed to prove a severe burden." *Id.* at 1177. "Proving a severe burden must be done 'as-applied' with an evidentiary record." *Id.*

The court cited Jones's characterization of the unconstitutional blanket primary as "qualitatively different from a closed primary." *Nago,* 982 F. Supp. 2d at 1176 (citing Jones, 530 U.S. at 577). Jones distinguished the blanket primary from an open primary system "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 'crossover.'" *Id.* Jones reasoned that in an open primary "at least [a voter] must formally become a member of the party; and once he does so, he is limited to voting for candidates of that party." *Nago,* 982 F. Supp. 2d at 1176 (quoting *Jones*, 530 U.S. at 577).

Nago recognized that even in *Jones*, where the Court invalidated the blanket primary system, the Court relied on evidence in the form of statistical surveys of past primary elections and expert witness testimony to determine that the blanket primary presented a "clear and present danger" that a party's

nominees could be determined by "adherents of an opposing party." *Nago,* 982 F.Supp.2d at 1176 (quoting *Jones,* 530 U.S. at 570).

Nago addressed a challenge brought by the DHP — the largest party in the state. The evidence in Jones indicated that "the impact of voting by non-party members is much greater upon minor parties." *Nago,* 982 F.Supp.2d at 1176 (quoting *Jones,* 530 U.S. at 570). *Nago* declined to import the California evidence in *Jones* due to questions about its applicability to a major party in Hawaii. *Id.* at 1182-83.

The court could not determine that the DPH had been "severely" burdened based on the mere assertion that "it will be, or can be, forced to 'associate' with voters who are 'adherents of opposing parties.'" *Id.* at 1182. The court recognized the possibility that crossover voting exists in Hawaii, but also recognized the possibility that "a large percentage of primary voters who were not formally registered with the DPH" but who affiliated with the DPH by voting in the Democratic primary "fully considered themselves to be Democrats." *Id.* The court pointed out that the DPH lacked "empirical evidence" that had been present in *Jones. Id.*

Nago further recognized that the Ninth Circuit in *Bayless* had interpreted Jones in a similar manner. *Id.* at 1181. *Bayless* remanded the district court's grant of summary judgment in favor of the Arizona Libertarian Party regarding the constitutionality of Arizona's semi-closed primary system. *Bayless*, 351 F.3d at 1282. The Libertarian Party challenged Arizona's election law that prohibited registered

members of other political parties from voting in the Libertarian Party primary. The court first cited Jones's conclusion that minor parties, such as the Arizona Libertarian Party, stood at "greater risk" of having non-party members influence the choice of the party's nominee and of having partisan candidate choose their message to appeal to a more centrist voter base. *Bayless,* 351 F.3d at 1282 (citing *Jones,* 530 at 578).

Even with respect to minor parties, however, Jones treated the risk "that nonparty members will skew either primary results or candidates' positions as a factual issue." *Id.* A plaintiff bears the burden "of establishing that risk." *Id.* It seems self-evident under the court's reasoning in *Bayless* that to force, Arizona Libertarian Party, a minor party, at greater risk of harm, to establish these risks, also would require a major party, such as the Montana Republican Party, to bear the burden to establish these risks. *Nago,* 982 F.Supp.2d at 1179.

The Court agrees that the question of whether Montana's open primary requirement imposes a severe burden on a party's associational rights "turns on factual questions." *Arizona Libertarian Party, Inc. v. Bayless,* 351 F.3d 1277, 1282 (9th Cir. 2003). The Court in *Bayless* remanded the matter back to the district court to develop a factual record and analyze that factual record in light of Jones. Id. The court noted the distinction between the blanket primary system in Jones with its unlimited potential for crossover voting and the Arizona system that limits a voter to one party's ballot. *Id.*

Plaintiffs must establish these risks through the

development of an evidentiary record. The Court has no method to measure the burden, if any, that Montana's open primary system imposes on Plaintiffs without proof that such a burden exists. Proof in this case "requires an evidentiary record." *Nago,* 982 F.Supp.2d at 1180. See also *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (emphasizing the inherently factual nature of the inquiry when a court assesses the potential burden that an election law imposes).

A genuine issue of material fact exists that precludes the entry of summary judgment. Whether non-Republicans in Montana can vote, or actually have voted in a Republican primary, remains unresolved. The related question of whether the possibility of these non-Republican voters in primary elections causes Republican candidates to alter their campaign messaging also remains unresolved without the benefit of cross-examination.

The declarations presented by Plaintiffs assert general claims regarding Republican candidates. Plaintiffs further cite to alleged efforts by the MEA-MFT to influence Republican primary elections for state legislative races. MEA-MFT claims to endorse candidates who share their interests, regardless of party affiliation. MEA-MFT endorsed candidates in 24 contested primary elections in 2014. (Doc. 93-5 at 188.) The MEA-MFT claims that 18 of its endorsed candidates for the Montana legislature won primary elections, including 9 Democrats and 9 Republicans.

Plaintiffs have attempted to identify MEA-MFT's political interests. Plaintiffs have not identified the actual party affiliation, if any, of individual MEA-

MFT members. Plaintiffs have not provided evidence to allow the Court to assess whether MEA-MFT's efforts in endorsing Democratic and Republican candidates actually have had any effect on primary elections. The Court cannot yet determine from the evidentiary record what level of burden Montana's open primary system imposes on Plaintiffs' associational rights in form of changes to campaign messaging. In turn, the Court cannot weigh Plaintiffs' asserted injury against the State's justification for such burden imposed by its open primary law.

2.The State's Motion for Summary Judgment

The State argues that it should be entitled to summary judgment. The State alleges that Plaintiffs have failed to meet their burden of establishing that Montana's open primary requirement imposes a severe burden on their associational rights. The State essentially argues that Plaintiffs have failed to present evidence that shows Montana's open primary system actually causes crossover voting or a change in campaign messaging. The State argues that it must show only an "important regulatory interest" when no severe burden on First Amendment rights has been established. *Clingman,* 544 U.S. at 586. The State contends that its interests in "preserving the integrity of its election process," "protecting the privacy of a person's vote" and "encouraging voter participation" qualify as important regulatory interest that justify Montana's open primary requirement. (Doc. 89 at 29-30.)

Plaintiffs have failed to provide Montana specific data to warrant summary judgment. Plaintiffs have

presented sufficient evidence, however, to raise a genuine issue of material fact to prevent the Court from awarding summary judgment in favor of the State. Plaintiffs allege that a candidate may make decisions based on knowledge that unaffiliated voters participate in the primary. Plaintiffs allege that the mere threat of crossover voters could cause candidates to change decisions about campaign messaging. The Supreme Court has recognized that the effect can be deleterious to the Party when candidates change their message to "curry favor" with persons who are more "centrist than those of the party base." *Jones,* 530 U.S.at 580.

Plaintiffs' expert testimony provides an estimated rate of crossover voters in Montana based on peer reviewed studies from other states. (Doc. 93-2 at 10.) Plaintiffs also have provided expert testimony that Republican candidates in Montana have shifted their message to appeal to potential crossover voters. Plaintiffs have submitted evidence of MEA-MFT speech that may indicate an effort to encourage crossover voting. This evidence represents admissible and relevant evidence. Plaintiffs have submitted sufficient evidence to show that genuine issues of material fact exists as to whether crossover voting actually occurs in Montana and to whether Republican candidates reasonably change their campaign messaging to attract potential crossover voters. These issues must be resolved at trial.

C. Preliminary Injunction

Plaintiffs request that this Court enjoin the State from "forcing the Montana Republican Party to associate during primary elections with non-

members." (Doc. 71 at 33.) A plaintiff who seeks a preliminary injunction must satisfy four requirements. The plaintiff first must establish that the plaintiff likely will succeed on the merits. Second, the plaintiff must establish that the plaintiff likely will suffer irreparable harm in the absence of preliminary relief. Third, the plaintiff must establish that the balance of equities tip in the plaintiff's favor. Fourth, the plaintiff must establish that an injunction serves the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Injunctive relief constitutes an "extraordinary remedy" that never should be awarded as a matter of right. *Id.* at 22–24.

A party generally must develop an evidentiary record to prove that a voting system imposes a severe burden on their associational rights. *Nago*, 982 F.Supp.2d at 1177. As discussed, Plaintiffs have failed to develop an evidentiary record that establishes that Montana's open primary law imposes a severe burden on their associational rights. The State must show only an "important regulatory interest" when a law imposes a "less than severe burden." *Clingman,* 544 U.S. at 586. The Court cannot yet determine from the evidentiary record what level of burden, if any, the open primary system imposes on Plaintiffs' associational rights. Plaintiffs cannot show that they are likely to succeed on the merits without an evidentiary record that shows Montana's open primary law severely burdens their associational rights. *Nago,* 982 F. Supp. 2d at 1177.

Plaintiffs rely on the recent decision in *Utah Republican Party, v. Herbert,* 2015 WL 6695626 (D.

Utah Nov. 3, 2015), to support their position that open primary elections force association with unaffiliated voters and thus should be deemed unconstitutional regardless of whether an evidentiary record has been established. A new law in Utah enacted in 2014 required that a qualified political party must allow unaffiliated voters to participate in the primary. *Id.* at *1. The Republican Party and the Constitution Party of Utah ("CPU") promptly challenged the provision of Utah's law that allowed unaffiliated voters to vote in their primary elections. *Id.* at *4-5.

Voters in Utah have the option to register party affiliation and become a member of a party or remain unaffiliated. *Id.* at *3–4. Utah's voter-base consisted of 610,654 unaffiliated registered voters, 640,000 registered Republicans, and 4,183 registered members of the CPU. *Id.*

The district court in Utah determined that the unaffiliated voter provision severely burdened the political party's rights. *Id.* at *11. The court reasoned that the election law unconstitutionally forced the political parties to associate with unaffiliated voters in the primary. *Id.* at *12. The state offered no narrowly tailored compelling interests to support imposition of the burden. *Id.* at *13–14.

It remains unclear in Montana that the open primary system forces the Republican Party to associate with unaffiliated voters. The district court in Utah evaluated evidence of 610,654 unaffiliated voters who potentially could vote in the Republican Party primary or CPU primary. *Id.* at *4. In Montana, unlike in Utah, voters do not register a

party affiliation before voting. Party Expert Green admitted that conducting a phone survey or reviewing the ballot box would be the only ways to determine party affiliation in Montana. (Doc. 87-1 at 88.) Green also admitted that no survey has been conducted in this case. *Id.* In other words, all Montana voters remain unaffiliated until they select a ballot. *Clingman,* 544 U.S. at 591.

Factual questions still exist regarding whether any non-Republicans actually have voted or can vote in the Republican primary. The former executive director of the Montana Republican Party conceded that "there is no exact way to become a member" of the Montana Republican Party. (Doc. 71-1 at 15.) The State suggests that a voter affiliates with the Republican Party when the voter selects the Republican primary ballot. The Supreme Court has recognized that "anyone can join a political party merely by asking for the appropriate ballot at the appropriate a time." *Clingman,* 544 U.S. at 591 (citing *Jones,* 530 U.S. at 596 (Stevens, J., dissenting)). Plaintiffs have not shown yet that a voter who selects the Republican primary ballot, and foregoes the opportunity to vote for candidates of any other party, fails to qualify as a Republican. *Cf. Jones,* 530 U.S. at 570-79.

The Court shares Justice O'Connor's skepticism whether "judicial inquiry into the genuineness, intensity, or duration of a given voter's association with a given party" represents a fruitful vehicle to approach constitutional challenges to election laws. *Clingman,* 544 U.S. at 602 (O'Connor, J, concurring). The skepticism seems appropriate in light of Party Expert Green's admission that Plaintiffs' percentage

of crossover voters represents "an estimate" based on scholarly research, rather than Montana specific data. (Doc. 87-1 at 89.) Plaintiffs will struggle to succeed on the merits without being able to demonstrate that non-Republicans in Montana actually vote in the Republican primary.

Plaintiffs also have failed to establish that a preliminary injunction would be necessary to prevent irreparable harm. A court typically grants a preliminary injunction when the plaintiff presents an urgent need for speedy action to protect the plaintiff's rights. *Lydo v. Enterprises, Inc. v. City of Las Vegas,* 745 F.2d 1211, 1213 (9th Cir. 1984). The Court has attempted to address Plaintiffs' claims in a timely manner due to the importance of the issues raised. Plaintiffs' conduct has not expedited the process.

Plaintiffs have amended their complaint on four separate occasions. Each amendment required a delay to allow the State to file an amended answer. The Court denied Plaintiffs' first motion for summary judgment on January 8, 2015 (Doc. 40.) Plaintiffs, as is their right, timely filed an interlocutory appeal. (Doc. 41.) Plaintiffs eventually abandoned the appeal on May 14, 2015, but not before nearly five months had lapsed. The Court also set multiple hearings to consider Plaintiffs' motion to disqualify opposing counsel. The Court vacated each of those hearings at the request of Plaintiffs. The Court cites these examples not to criticize Plaintiffs, but to demonstrate that any urgency regarding the need for a speedy decision in the matter arises, at least in part, from Plaintiffs' conduct during the course of this litigation.

Plaintiffs challenge a century-old primary election system. Plaintiffs' claim focuses on a specific event—the 2016 primary election. The relief sought demonstrates no urgent need for action to prevent irreparable harm under these circumstances.

ORDER

The Court DENIES Plaintiffs' Motion for Preliminary Injunction. (Doc. 70.)

The Court DENIES Defendant's Motion for Summary Judgment. (Doc. 88.)

The Court DENIES Plaintiffs' Motion for Summary Judgment. (Doc. 91.)

DATED this 14th day of December, 2015.

/s/ Brian Morris
Brian Morris
United States District Court Judge

APPENDIX D

Filed Dec 16, 2016
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAVALLI COUNTY REPUBLICAN CENT. COMM.; et al., Plaintiffs-Appellants, and RICHLAND COUNTY REPUBLICAN CENT COMM., et al. Plaintiffs, v. LINDA MCCULLOCH, in her official capacity as Montana's Secretary of State; et al., Defendant-Appellees.	No. 16-35375 D.C. No. 6:14-cv-58-BMM District of Montana, Helena ORDER

Before: THOMAS, Chief Judge, LEAVY and SILVERMAN, Circuit Judges.

The unopposed motion for summary affirmance (Docket Entry No. 23) is granted. See *Democratic Party of Hawaii v. Nago,* 833 F.3d 1119 (9th Cir. 2016); see also *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (summary affirmance is appropriate for appeals obviously controlled by precedent).

Accordingly, we summarily affirm the district court's judgment.

All other pending motions are denied as moot.

AFFIRMED.

APPENDIX E

PERTINENT PROVISIONS OF THE MONTANA CODE ANNOTATED

§ 13-10-209. Arrangement and preparing of primary ballots.

(1) (a) Ballots for a primary election must be arranged and prepared in the same manner and number as provided in chapter 12 for general election ballots, except that there must be separate ballots for each political party entitled to participate. The name of the political party must appear at the top of the separate ballot for that party and need not appear with each candidate's name.

(b) Nonpartisan offices and ballot issues may be prepared on separate ballots or may appear on the same ballot as partisan offices if:

(i) each section is clearly identified as separate; and

(ii) the nonpartisan offices and ballot issues appear on each party's ballot.

(2) Except as provided in subsection (3), an election administrator does not need to prepare a primary ballot for a political party if:

(a) the party does not have candidates for more than half of the offices to appear on the ballot; and

(b) no more than one candidate files for nomination by that party for any of the offices to appear on the ballot.

(3) Subsection (2) does not apply to elections for precinct committee offices. If more than one candidate files for a precinct committee office from a party that will not have a primary ballot prepared, that party shall select the candidate to fill the office.

(4) If, pursuant to subsection (2), in a primary election held in an even-numbered year a primary ballot for a political party is not prepared, the secretary of state shall certify that a primary election is unnecessary for that party and shall instruct the election administrator to certify the names of the candidates for that party for the general election ballot only.

(5) The separate ballots for each party must have the same appearance. Each set of party ballots must bear the same number. If prepared as a separate ballot, the nonpartisan ballot may have a different appearance than the party ballots but must be numbered in the same order as the party ballots.

(6) If a ballot issue is to be voted on at a primary election, it may be placed on the nonpartisan ballot or a separate ballot. A separate ballot may have a different appearance than the other ballots in the election but must be numbered in the same order.

(7) Each elector must receive a set of ballots that includes the party, nonpartisan, and ballot issue choices.

§ 13-10-301. Casting of ballot.

(1) Unless otherwise provided by law, the conduct of the primary election, the voting procedure, the counting, tallying, and return of ballots and all election records and supplies, the canvass of votes, the certification and notification of nominees, recounts, procedures upon tie votes, and any other necessary election procedures must be at the same times and in the same manner as provided for in the laws for the general election.

(2) At a primary election, the elector shall cast votes on only one of the party ballots, preparing the ballot as provided in 13-13-117. After casting votes on any other ballots received other than the party ballots, the elector shall ensure the proper disposition of the ballots in accordance with instructions provided pursuant to 13-13-112.

(3) The elector's ballot must be handled as prescribed in 13-13-117.

§13-10-601. Parties eligible for primary election -- petitions by minor parties.

(1) Each political party that had a candidate for a statewide office in either of the last two general elections who received a total vote that was 5% or more of the total votes cast for the most recent successful candidate for governor shall nominate its candidates for public office, except for presidential electors, by a primary election as provided in this chapter.

(2) (a) A political party that does not qualify to hold a primary election under subsection (1) may

qualify to nominate its candidates by primary election by presenting a petition, in a form prescribed by the secretary of state, requesting the primary election.

(b) The petition must be signed by a number of registered voters equal to 5% or more of the total votes cast for the successful candidate for governor at the last general election or 5,000 electors, whichever is less. The number must include the registered voters in more than one-third of the legislative districts equal to 5% or more of the total votes cast for the successful candidate for governor at the last general election in those districts or 150 electors in those districts, whichever is less.

(c) At least 1 week before the deadline provided in subsection (2)(d), the petition and the affidavits of circulation required by 13-27-302 must be presented to the election administrator of the county in which the signatures were gathered to be verified under the procedures provided in 13-27-303 through 13-27-306.

(d) The election administrator shall forward the verified petition to the secretary of state at least 85 days before the date of the primary.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

RAVALLI COUNTY REPUBLICAN CENT. COMM., GALLATIN COUNTY REPUBLICAN CENT. COMM., SANDERS COUNTY REPUBLICAN CENT. COMM., DAWSON COUNTY REPUBLICAN CENT. COMM., STILLWATER COUNTY REPUBLICAN CENT. COMM., RICHLAND COUNTY REPUBLICAN CENT. COMM., CARBON COUNTY REPUBLICAN CENT. COMM.,FLATHEAD COUNTY REPUBLICAN CENT. COMM., MADISON COUNTY REPUBLICAN CENT. COMM., BIG HORN COUNTY REPUBLICAN CENT. COMM., AND MONTANA REPUBLICAN PARTY, Plaintiffs, vs. LINDA MCCULLOCH, in her official capacity as Montana's Secretary of States, Defendants.	No. CV-14-58-H-058-H-BMM JOINT STATEMENT OF STIPULATED FACTS

The parties, through counsel, have conferred and hereby agree and stipulate that the following facts are not in dispute and require no proof:

1. Montana's Secretary of State, Defendant Linda McCulloch, is the State's chief election officer.

2. Secretary McCulloch is responsible to "obtain and maintain uniformity in the application, operation, and interpretation of the election laws" of Montana.

3. Secretary McCulloch oversees primary elections held in June of every even-numbered year.

4. Montana voters receive a complete set of party ballots during primary elections.

5. Each voter may cast votes on only one party ballot and must dispose of the other ballot.

6. These rules establish what is commonly referred to as an "open" primary.

7. Montana requires the two major parties to participate in this system.

8. Montana law does not require voters to declare a political party affiliation to register or vote in primary or general elections, nor is there a statutory mechanism to register a person's political party affiliation.

9. Eligible citizens of Montana are allowed to register to vote at any time, including same-day registration.

10. Montana does not record which primary ballot a particular elector chooses.

11. In 2012, Scott Boulanger was a candidate for

the Republican Party nomination for Montana's House District 87.

12. Two other candidates sought the nomination as well: Pat Connell and Jeff Burrows.

13. The results of the June 2012 primary were as follows:

Boulanger: 934
Connell: 1,013
Burrows: 179

14. Connell went on to win the general election in November 2012 for HD 87.

15. Shortly after the November 2012 elections, the state senator elected for SD 43 resigned.

16. Ravalli County commissioners appointed Boulanger to fill SD 43.

17. In 2014 Connell challenged Boulanger for the Republican nomination for SD 43.

18. The results of the June 2014 Republican primary for SD 43 were as follows:

Boulanger: 2,369 (49.64%)
Connell: 2,403 (50.36%)

19. Brad Molnar was elected to the Montana House of Representatives in 1992 and reelected in 1994, 1996, and 1998.

20. He was subsequently elected as a Republican to the Montana Public Service Commission in 2004.

21. The Montana Public Service Commission is a five-member board that regulates utilities operating in Montana.

22. He was reelected to his position on the

Montana Public Service Commission in 2008.

23. The MEA-MFT has around 18,000 members with members in every legislative district.

24. Republicans held a majority of seats in Montana's legislative chambers in the 2015 session, with 29 of 50 Senate seats and 59 of 100 House seats.

DATED: September 8, 2015

Respectfully submitted,
Monforton Law Offices, PLLC
/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for the County Central Committee Plaintiffs

The James Brown Law Office, PLLC
/s/ James E. Brown
James E. Brown

Attorney for Plaintiff Montana Republican Party

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MONTANA

RAVALLI COUNTY REPUBLICAN CENTRAL COMMITTEE, et al,	) CV-14-0058-H-BMM
Plaintiffs,	)
vs.	)
LINDA MCCULLOCH, et al.	)
Defendants.	)

DEPOSITION OF ERIC FEAVER

BE IT REMEMBERED, that the deposition upon oral examination of ERIC FEAVER, appearing at the instance of the Plaintiff and Counter-Defendant herein, was taken at the offices of MEA-MFT, 1232 East Sixth Avenue, Helena, Montana, on Friday, June 26 2015, beginning at the hour of 11:00 a.m., pursuant to the Federal Rules of Civil Procedure, before KATHY C. HILTON, Court Reporter and Notary Public.

A. Or disadvantageous, again, depending on the bill or amendment at hand. So, it's a two-edged sword in a hypothetical sort of way. So, there might be a bill passed that we support -- could only support if there were a legislative majority that could go along with the governor. That would be good. But if there were some other event, maybe the governor was of a different party and you had a different party yet again in the legislature, and there might be a bill introduced that we would oppose that we could have killed under some circumstances, but a majority of legislators came together and agreed with the governor. That would be bad.

Q. What's the total number of members that the union has?

A. 18,000.

Q. Is your union the largest union in Montana?

A. Yes, it is.

Q. And perhaps I should have been more clear with that question. Is it the largest public employees union or the largest union period?

A. Largest union both, period and public employees.

Q. I know you've talked about some of the categories of workers that are members of the union. You've mentioned public school employees, university faculty. Are there -- What other categories of members does your union have?

candidate or not. The only requirement is they be members of the MEA-MFT.

Q. What are the ways in which the union publicizes its endorsement of candidates once it's decided to endorse a candidate?

A. Put out a news release.

Q. Anything else?

A. Publicize? We fairly aggressively promote our candidates to our members, which we do. And that might be by postcard. It might be by phone call. It might be by Listserv. It might be by any method that would get our message out to our members.

Q. How about local union meetings?

A. Well, sure. I mean, any time -- We can talk to our members at any time about candidates, and we do.

Q. How about MEA-MFT Today? Do you publicize endorsements in that?

A. Yes, we do.

Q. Do you send out letters and flyers containing endorsement information?

A. To our members, yes, we do.

Q. Does the MEA-MFT have field organizers who communicate member to member about endorsements?

A. Yes, we do. Our field organizers are also members of MEA-MFT.

had a discussion off the record. And Eric, you had a chance to take a look at a list of candidates who were endorsed by the union in 2012 for the primary election. It appears that all of the union endorsements for the primary were Democratic candidates; is that correct?

A. Yes.

Q. Were there any endorsements of Republican candidates in 2012 for the primary?

A. If that is the accurate list, and I have no reason to believe it is not, the answer is no.

Q. Eric, I'm going to show you another document which I will represent to you is pulled from the union website. And it has on its -- It's a two page document. It has on its second page the union logo and what appears to be candidates endorsed by the union for the 2012 general election. Does that appear to be an accurate list of union endorsements for the 2012 general election?

A. Yes, it does.

MR. RISKEN: Matthew, did you say this is 9?

MR. MONFORTON: I'm not going to mark it.

MR. RISKEN: Oh, okay.

Q. (BY MR. MONFORTON, continuing) And I've looked through the list of candidates that are on -- that have been endorsed by the union for the 2012 general election. It does not appear to me that any of those candidates are

Republican candidates. Am I correct on that?

A. That appears to be the case.

MR. MONFORTON: Let's go ahead and have this marked as Exhibit 9.

* * * * *

(Whereupon, Deposition Exhibit No. 9 was marked for identification.)

* * * * *

Q. Eric, and just to make sure the record is clear, does Exhibit 9 appear to be an accurate list of candidates endorsed by the union in the 2012 general election?

A. Yes, it does.

Q. Now, handing to you, Eric, a copy of MEA-MFT Today published in July and August of 2014. What I'd like you to do is, again, take a moment and make sure that appears to you to be an accurate copy of that particular copy of MEA-MFT Today.

A. It is an accurate copy.

Q. First, I'd like to direct you to Page 14 of that document.

MR. MONFORTON: And let's have that marked as Exhibit 10.

* * * * *

(Whereupon, Deposition Exhibit No. 10 was marked for identification.)

* * * * *

A. Yes.

MR. MONFORTON: Let's ask the reporter to mark this as Exhibit 12.

* * * * *

(Whereupon, Deposition Exhibit No. 12 was marked for identification.)

* * * * *

Q. Thank you. I'll read the second to the last sentence on the first page into the record. "Feaver said in some legislative districts, whoever wins the Republican primary is going to win the general election because the district leans heavily Republican." Is that an accurate statement, Eric, of what you said to Mike Dennison?

A. Yes. Even though it's not in quotes here, it is a paraphrasing. But that would be accurate.

Q. How did the union go into determining which district leans heavily Republican?

A. Election results. There's only about 20 legislative districts that are in play from one election to another.

Q. So, you would look at prior election results to determine which districts were primarily Republican?

A. Absolutely.

Q. Did you endorse any Democratic candidates in those districts that you identified as heavily Republican?

A. Almost invariably, and I don't believe I'm wrong here, if we endorsed in the primary, we endorsed in the general. But a candidate we may have endorsed in the primary loses, we probably just walked away from the race.

Q. I'm going to read the second -- Or I'm sorry, the last sentence of the first page of that exhibit. "If that's the case, those who usually vote Democratic should consider voting in the GOP primary to support the Republican that most closely reflects their views, he said." I presume that Mr. Dennison is referring to you in that last sentence --

A. I'm the he.

Q. Yes. Is that last sentence an accurate summary of a statement that you made to Mike Dennison?

A. Yes.

Q. What was the purpose of directing Democratic members in the union to vote in the Republican primaries?

MR. RISKEN: I object to the form. It misstates the documents.

THE DEPONENT: I answered the question that Mike Dennison asked me. So, if your members are Democrats, what are you thinking? I'm thinking they should vote Republican if they are interested in supporting the candidates we've endorsed.

Q. (BY MR. MONFORTON, continuing) Have you ever expressed this kind of opinion on other occasions besides in

just talking rhetorical flourishes again. But 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.

Q. I want to go to the second sentence of that e-mail on Exhibit 14 where you state vote for, quote, "solution driven, problem solving, responsible Republicans," close quote. And then the next sentence that follows states "They do exist, you know." Let's start with that last sentence that I just read. What was the purpose of putting that sentence in?

A. Not all Republicans are the same. Some are of a different ideological bent than another. But they prefer -- I'm talking Republican legislators now. This is all in the context of actual folks we know are Republicans. Because they ran for office as Republicans. So, it isn't, you know, some uncertainty here. We know they are Republicans. And there are some Republicans, as I say right here, who want to solve problems. Responsible Republican is not my term. They were also called common sense Republicans and just moderates generally speaking. Those are terms that are around in the media a lot. I don't know what you all called each other in your caucus, but -- By the way, I've never