

No. 16-652

IN THE
Supreme Court of the United States

DEMOCRATIC PARTY OF HAWAII,
Petitioner,
v.

SCOTT T. NAGO, in his official capacity as
chief election officer of the State of Hawaii,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Democratic Party of Hawaii's facial challenge to Hawaii's open primary law must fail because the Party decided not to present any evidence of the impact of the law on the Party.

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BRIEF IN OPPOSITION

INTRODUCTION

The Democratic Party of Hawaii’s petition for certiorari does not ask this Court to decide whether Hawaii’s system of open primary elections violates the First Amendment. Nor does it ask this Court to decide whether that system severely burdens the Party’s associational rights. Rather, the petition seeks review of a far narrower—and far less important—question: Is the extent of the system’s impact on the Party’s associational rights a “matter of fact, to be proved on the record through evidence”? Pet. i.

That question does not warrant this Court’s attention. To begin, it does not implicate any split of

authority. The Party asserts a conflict between the opinion below and two decisions of the Fourth Circuit regarding Virginia's open primary law. But the first of those decisions addressed only issues of standing and ripeness. See *Miller v. Brown*, 462 F.3d 312, 316-321 (4th Cir. 2006) (*Miller I*). And though the second addressed the merits, it did not decide "whether [an] open primary statute, viewed in isolation, impermissibly burdens a political party's associational rights"—let alone whether any such impact must be proved on the record through evidence. *Miller v. Brown*, 503 F.3d 360, 367 n.6 (4th Cir. 2007) (*Miller II*). The asserted split is therefore illusory.

The petition also suffers from a number of vehicle problems. The Party's claim in this case is limited to a facial challenge to Hawaii's open primary system. That facial challenge would fail, even if the system's impact on the Party were "adjudged as a matter of law, in light of previously-decided cases." Pet. i. It would also fail for an independent reason, on which the District Court relied, having to do with the impact of the law on *other* political parties. And regardless of the fate of the Party's facial challenge, the Party could still bring an as-applied challenge and present the evidence of impact that it failed to present here. Because this Court's review would not affect the outcome of the Party's facial challenge, and because the Party could bring an as-applied challenge anyway, this case is a poor candidate for certiorari.

Finally, the decision below is correct: Without evidence, the Party cannot demonstrate that the open primary system severely burdens its associational rights. In case after case, this Court has looked to

evidence in the record to decide whether the burden imposed by an election law was severe. And yet, the Party decided “intentionally” not to introduce any evidence of the impact of the open primary system here. Pet. 3. In the absence of such evidence, the Court of Appeals properly rejected the Party’s facial challenge to Hawaii’s open primary law.

The petition for certiorari should be denied.

STATEMENT

Under Hawaii law, all candidates for elective office, except for the Presidency, must be nominated in a primary election. Haw. Rev. Stat. §§ 12-1, 12-2. Before 1978, Hawaii maintained a “closed” primary system; the only people who could vote in a party’s primary were people who publicly declared their preference for that party. Pet. App. 17a. In 1978, “to protect voter privacy and to encourage voter participation,” the people of Hawaii amended the State’s constitution to provide that “no person shall be required to declare a party preference” as a “condition of voting in any primary.” *Id.* at 2a; Haw. Const. art. II, § 4. The following year, the Legislature enacted an “open” primary law, Pet. App. 2a, allowing people to vote in a party’s primary *without* publicly declaring a “party preference,” Haw. Rev. Stat. § 12-31.

Under Hawaii’s open primary law, voters are given a primary ballot for each party (as well as a nonpartisan ballot) when they arrive at the polling site. *Id.* They may then vote “the ballot of any one party or nonpartisan,” regardless of which ballot they voted in a previous primary. *Id.* Although Hawaii does not record the ballot they choose, they must indicate which they have chosen and vote only in those races.

Id.; Pet. App. 3a; C.A. Supp. E.R. 16-3. Thus, a person cannot vote in the Republican race for governor but in the Democratic race for U.S. Senator; rather, “voters must commit to one party’s slate prior to voting.” Pet. App. 3a.

In 2006—after Hawaii had been holding open primaries for decades—the Democratic Party of Hawaii came to “believe[] that its primary election * * * 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.” *Id.* Acting on that belief in 2013, the Party sued Hawaii’s chief election officer, Scott Nago, claiming that the State’s open primary system violates the Party’s First Amendment right to freedom of association. *Id.* at 4a. According to the Party’s constitution, the State’s open primary system does “violence” to the Party’s “associational freedoms” 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.” *Id.*

The Party and Nago filed cross-motions for summary judgment, and the Party also moved for a preliminary injunction. *Id.* at 14a. The Party clarified that its claim was “limited to a *facial* attack on Hawaii’s open primary.” *Id.* at 25a; see 2 C.A. E.R. 43-46. It also submitted two declarations of three pages each by the Party’s chairperson—the first, reciting sections of the Party’s constitution; the second, reporting the Party’s statewide membership numbers. 2 C.A. E.R. 100-106. But the Party “intentionally” did “not introduce[] evidence of the impact

of the open primary on [its] ideology or candidates.” Pet. 3.

The District Court denied the Party’s motions and granted summary judgment for Nago. Pet. App. 14a-15a. The court began by identifying two competing standards for evaluating a facial challenge to a law. Under the so-called *Salerno* standard, see *United States v. Salerno*, 481 U.S. 739, 745 (1987), “[a] successful facial challenge to a law requires ‘establishing that no set of circumstances exists under which the [law] would be valid, *i.e.*, that the law is unconstitutional in all of its applications.’” Pet. App. 26a (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation marks omitted)). Under the other, less-demanding standard, “a facial challenge must fail where the [law] has a plainly legitimate sweep.” *Id.* (quoting *Wash. State Grange*, 552 U.S. at 449 (internal quotation marks omitted)).

The District Court held that the Party’s facial challenge failed under either standard, *id.* at 27a, and it identified two independent reasons why, *id.* at 34a. First, the court concluded, other parties “might well have a preference different from” the Party’s. *Id.* at 38a. “Another party,” for instance, “might happily embrace any voter willing to affiliate with it in any manner—even voters affiliating anonymously in the privacy of the ballot booth.” *Id.* An open primary would not impinge on that party’s “associational rights.” *Id.* at 40a. The court thus held that “[t]here are ‘at least some’ constitutional applications of Hawaii’s open primary”—causing the Party’s facial challenge to fail. *Id.* at 40a-41a (quoting *Wash. State Grange*, 552 U.S. at 457).

Second, the court concluded, the Party's arguments regarding the severity of the burden on a party's associational rights "rest on assumptions about voter behavior that cannot be judged without evidence." *Id.* at 47a. According to the Party, open primaries force it to "associate" with voters who are "adherents of opposing parties." *Id.* at 45a. But the court found no basis to assume that such "'non-adherents' have burdened the [Party] by voting in a Democratic primary in the past." *Id.* Indeed, the court explained, given that "Hawaii is a heavily Democratic State," "it is also *possible* (even likely) that * * * a large percentage of primary voters who were not formally registered with the [Party], but who affiliated with it by voting in a Democratic primary, fully considered themselves to be Democrats, and thus were *not* working to 'undermine and oppose' the [Party]." *Id.* at 46a & n.14. Such factual issues, the court concluded, could not be resolved in the context of a facial attack; rather, the court held, "[p]roving a severe burden must be done 'as-applied,' with an evidentiary record, and the current record is simply insufficient." *Id.* at 35a (quoting *Wash. State Grange*, 552 U.S. at 457-458).

A unanimous panel of the Court of Appeals affirmed. *Id.* at 12a. "Under Supreme Court and Ninth Circuit precedent," the court explained, "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." *Id.* at 5a. And like the District Court, the Court of Appeals concluded that the Party "provided no evidence showing a 'clear and present danger' that adherents of opposing parties determine the Democratic Party's nominees." *Id.* at 11a (quoting *Cal. Democratic Party*

v. *Jones*, 530 U.S. 567, 579 (2000)). The Court of Appeals therefore rejected the Party’s facial challenge for the District Court’s second reason, without reaching the first. *Id.* at 5a n.2.

The Party did not seek rehearing en banc. Instead, it filed a petition for certiorari.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

The Party gives a single reason for certiorari: that the Court of Appeals’ decision conflicts with the Fourth Circuit’s decisions in *Miller I* and *Miller II*. Pet. 5-6. The asserted conflict is illusory.

1. *Miller I* involved a First Amendment challenge to Virginia’s open primary law, but the only issue before the Fourth Circuit was the *justiciability* of that challenge. 462 F.3d at 314. The plaintiffs were a local Republican committee and its chairman, *id.*, who were in charge of overseeing the nomination process for the Republican candidate for Virginia’s 11th Senatorial District, *id.* at 315. “Under Virginia law, an incumbent state legislator [wa]s entitled to select the method of nomination for his seat.” *Miller II*, 503 F.3d at 362. The possible methods included a primary, a convention, and a caucus. *Id.* For the 2007 election, the 11th District’s incumbent, a Republican, chose as his method a primary. *Miller I*, 462 F.3d at 315. And under Virginia law, that primary was to be conducted as an “open” one. *Id.*

The plaintiffs brought their First Amendment challenge to Virginia’s open primary law in 2005, two years before the primary was to take place. *Id.* at 316. The district court ruled that they lacked stand-

ing and that the challenge was not ripe. *Id.* Addressing only those matters of justiciability, the Fourth Circuit in *Miller I* reversed. *Id.* at 314. In holding that the case was ripe for judicial review, the court observed that “[t]he only issue in this case is whether Virginia’s open primary law violates the plaintiffs’ First Amendment rights to freely associate, which presents a purely legal question.” *Id.* at 319. The court also acknowledged that there might be no need for a primary at all, if no one emerged to challenge the incumbent. *Id.* But it held that the case was “fit for judicial review despite this uncertainty.” *Id.* The Fourth Circuit accordingly remanded for “consideration of the merits.” *Id.* at 321.

On remand, the district court held that Virginia’s open primary law “survive[d] facial constitutional challenge,” but was “constitutionally infirm as applied to the narrow facts of th[e] case.” *Miller v. Brown*, 465 F. Supp. 2d 584, 595 (E.D. Va. 2006). In *Miller II*, the Fourth Circuit affirmed. 503 F.3d at 362. It held that Virginia’s open primary law did not “*facially* burden political parties’ associational rights” because an open primary was “only one of several options for candidate nomination.” *Id.* at 367 (emphasis added). The court explained that “by merely choosing any of these other options,” a party could “limit its candidate selection process to voters who share its political views”—thereby avoiding any “forced association.” *Id.* (internal quotation marks omitted).

The Fourth Circuit then considered the constitutionality of Virginia’s open primary law as applied to the facts before it, involving an *incumbent’s* choice of a primary. The court held that, in those circumstances, the incumbent effectively “force[s]” the party

to select its nominee by open primary. *Id.* at 369. And importantly, Virginia did not dispute that “forcing the [party] to select its candidate through an open primary severely burdens its right of free association”; in fact, Virginia “concede[d] that if a political party is compelled to select its candidates by means of a state-run primary, the State may not force the party to include . . . voters in that primary.” *Id.* at 368 (internal quotation marks and brackets omitted). In light of that concession, the court held that Virginia’s open primary law was unconstitutional “as applied” to the facts before it. *Id.* at 371.

In rendering its opinion, the Fourth Circuit made clear what it was *not* deciding. As the court emphasized, “we do not decide whether the open primary statute, viewed in isolation, impermissibly burdens a political party’s associational rights, because it clearly does not do so in light of the other methods of nomination permitted by Virginia law.” *Id.* at 367 n.6; *see also id.* at 367 (similar). Moreover, the court continued, “we need not decide this question in reviewing the as-applied ruling because [Virginia] does not challenge the holding of the district court that forcing the [party] to conduct an open primary severely burdens its right of free association.” *Id.* at 367 n.6.

2. There is no conflict between the decision below and the Fourth Circuit’s decisions in *Miller*.

In *Miller I*, the Fourth Circuit said that “whether Virginia’s open primary law violates the plaintiffs’ First Amendment rights to freely associate” is a “purely legal question.” 462 F.3d at 319. But it made that statement in the context of a discussion of ripeness, not the merits. *See id.* at 318-321. And the

statement addresses only the overarching issue of whether the First Amendment was violated—not the subsidiary issue of whether the plaintiffs’ rights were severely burdened. See *Wash. State Grange*, 552 U.S. at 451 (explaining that even if an election law imposes a “severe burden on associational rights,” the First Amendment is violated only if the law is not “narrowly tailored to serve a compelling state interest” (internal quotation marks omitted)). Indeed, because the actual merits of the dispute were not before the court in *Miller I*, see 462 F.3d at 321, the court had no occasion to address the question presented here: whether that subsidiary issue—the “impact” of a State’s “open primary law” on a plaintiff—could be evaluated without “evidence,” Pet. i.

When the merits of the First Amendment challenge did come before the court in *Miller II*, the Fourth Circuit still had no occasion to address the question. The question did not arise in the context of the plaintiffs’ facial challenge, because under Virginia law, an open primary was only one method of choosing a nominee anyway. *Miller II*, 503 F.3d at 367 & n.6. And the question did not arise in the context of the plaintiffs’ as-applied challenge, because Virginia did not dispute that “forcing [a party] to conduct an open primary severely burdens its right of free association.” *Id.* at 367 n.6; see also *id.* at 368 (reciting Virginia’s concession). Thus, the Fourth Circuit did not decide “whether [an] open primary statute, viewed in isolation, impermissibly burdens a political party’s associational rights,” *id.* at 367 n.6—let alone whether that question can be answered without evidence. If anything, the Fourth Circuit’s willingness to accept Virginia’s concession of a severe burden suggests that the court regarded the question

as a *factual* one; after all, the Fourth Circuit is not bound by a party's concession on a *legal* issue. See *United States v. Rodriguez*, 433 F.3d 411, 414 n.6 (4th Cir. 2006).

In short, the Fourth Circuit has not squarely addressed the question presented. In the absence of a circuit split, there is no reason for this Court's review.

II. THIS CASE IS A POOR VEHICLE FOR DECIDING THE QUESTION PRESENTED

Review should also be denied because this case is a poor vehicle for addressing the question presented. That is so for three separate reasons.

First, the outcome below would be the same, even if “the impact of Hawaii’s open primary law on the [Party’s] associational rights [were] adjudged as a matter of law, in light of previously-decided cases.” Pet. i. The Party would still bear the burden of overcoming the presumption that the law is constitutional. See *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001). And to meet that burden, the Party would have to demonstrate that the “impact” of Hawaii’s law is analogous to that of laws struck down in “previously-decided cases.” Pet. i.

The problem is that the Party already tried making that analogy: In its briefing below, it argued that Hawaii’s open primary is “functionally identical to the ‘blanket’ primary struck down in *Jones*.” Party CA9 Br. 13; see also *id.* at 39 (framing the “fundamental dispute” as whether Hawaii’s open primary is akin to the “‘blanket’ primaries as in *Jones*, or represents something importantly different”); *id.* at 47 (arguing that Hawaii’s open primary law “is not materially different than * * * the ‘blanket’ primary

struck down in *Jones*”); Pet. 2. And the Court of Appeals rejected that argument, holding that “a *different* kind of primary system is at issue in this case.” Pet. App. 9a n.4 (emphasis added). As the court explained: “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 [like Hawaii] without partisan registration, choosing to vote in only one party’s primary may constitute a valid form of party affiliation.” *Id.* at 11a (emphasis added); *see also Wash. State Grange*, 552 U.S. at 445 n.1 (“The term ‘blanket primary’ refers to a system in which any person, regardless of party affiliation, may vote for a party’s nominee. A blanket primary is distinct from an ‘open primary,’ in which a person may vote for any party’s nominees, but must choose among that party’s nominees for all offices * * *.” (internal quotation marks and citation omitted)).

Thus, the Court of Appeals already considered—and rejected—the argument the Party thinks should be dispositive “as a matter of law.” Pet. i. The decision below makes clear that even if the “impact” on the Party’s “associational rights” were “adjudged” “in light of previously-decided cases” like *Jones*, *id.*, the Party’s facial challenge would still fail. This Court’s review of the question presented would not be outcome-determinative.

Second, the outcome would be the same, no matter the answer to the question presented, because there is an alternative and independent reason the Party’s facial challenge fails. As the District Court held, the Party’s facial challenge fails not only because the Party’s arguments “rest on assumptions about voter behavior that cannot be judged without evidence,”

Pet. App. 47a, but also because “there are realistic factual situations that would not ‘severely’ burden *other parties’* associational rights,” *id.* at 34a-35a. For examples of such other parties, one need look no further than this Court’s precedent. In *Clingman v. Beaver*, 544 U.S. 581 (2005), for instance, the Libertarian Party of Oklahoma (LPO) affirmatively “wanted to open its * * * primary to all registered Oklahoma voters, without regard to their party affiliation.” *Id.* at 585; *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 (1986) (“Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.”); Party CA9 Reply Br. 2 (“agree[ing] that it is realistic to imagine a non-objector to Hawaii’s law”).

Hawaii’s open primary law would surely be constitutional as applied to a party like the LPO. Pet. App. 38a. The District Court was therefore correct to reject the Party’s facial challenge on that ground as well. *See Wash. State Grange*, 552 U.S. at 457 (rejecting a facial challenge to a state primary law because there were “implementations” of the law that “would be consistent with the First Amendment”).* Even if this Court were to decide the ques-

*The Party contends that *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), “arguably undercut” this ground, Pet. 4, by holding that the “proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant,” 135 S. Ct. at 2451 (internal quotation marks omitted). But the law at issue here makes an open primary the mandatory and exclusive method for nominat-

tion presented in the Party's favor, the Court of Appeals on remand could simply invoke that alternative ground and reach the same result.

Third, regardless of the outcome of these proceedings, the Party could still bring an *as-applied* challenge in a future case. Pet. App. 25a n.7; Party CA9 Br. 16. And in that future case, the Party could marshal whatever evidence it wished in support of its as-applied challenge. See Pet. 3 (“[A]n adverse decision on this matter would not preclude [the Party] from refiling a case in which evidence of impact would be presented.”). The Court of Appeals held only that the Party's *facial* challenge could not proceed, and that narrow decision does not merit this Court's attention.

In sum, this Court's resolution of the question presented would not affect the outcome of the Party's facial challenge, and the Party may bring an as-applied challenge in any event. That makes this case an especially poor candidate for certiorari, and this Court should deny review.

III. THE COURT OF APPEALS' DECISION IS CORRECT

Finally, this Court should deny review because the Court of Appeals is correct: Without evidence, the Party cannot demonstrate that its associational rights are severely burdened by Hawaii's open primary law. Pet. App. 9a-11a. Thus, the Party's facial challenge fails. *Id.* at 11a.

ing candidates in the State. See Haw. Rev. Stat. § 12-1. Thus, every primary held in the State—no matter the party's associational views—involves an “actual application[]” of the law. *Patel*, 135 S. Ct. at 2451.

1. The decision below follows directly from this Court's decision in *Washington State Grange*. At issue in that case were changes made to Washington's primary system by Initiative 872 (I-872). *Wash. State Grange*, 552 U.S. at 444. In brief, I-872 provided "that candidates for office shall be identified on the ballot by their self-designated 'party preference'; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election." *Id.* Respondents—various Washington political parties—brought a facial challenge to I-872, arguing that it "severely burden[ed] [their] associational rights." *Id.* at 452.

This Court rejected the respondents' facial challenge. *Id.* at 444. It explained that respondents' claim depended "on the possibility that voters will be confused as to the meaning of the party-preference designation." *Id.* at 454. "But," the Court held, "respondents' assertion that voters will misinterpret the party-preference designation is sheer speculation." *Id.* As the Court explained: "There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.* Thus, the Court concluded, "[e]ach of [respondents'] arguments rests on factual assumptions about voter confusion, and each fails for the same reason: In the absence of evidence, [the Court] cannot assume that Washington's voters will be misled. That factual determination must await an as-applied challenge." *Id.* at 457-458 (citation omitted); *see also id.* at 444 ("[R]espondents' arguments * * * rest on factual

assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge.”). “On its face,” the Court held, “I-872 does not impose any severe burden on respondents’ associational rights.” *Id.* at 458.

This case is no different. Just as in *Washington State Grange*, the Party’s arguments rest on factual assumptions about voter behavior—such as how many “adherents of opposing parties” cross over to vote in the Party’s primary. Pet. App. 11a. And just as in *Washington State Grange*, those arguments fail because, in the absence of evidence, a court cannot assume that “adherents of opposing parties determine the Democratic Party’s nominees,” or that “Hawaii’s open primary system causes Democratic candidates to moderate their policy stances.” *Id.* Hawaii, after all, “is a heavily Democratic State.” *Id.* at 46a n.14. And those “voting in Hawaii’s Democratic primaries who are not formal Party members may nevertheless personally identify as Democrats.” *Id.* at 10a. As in *Washington State Grange*, “[t]here is simply no basis to presume” otherwise. 552 U.S. at 454. On its face, therefore, Hawaii’s open primary law does not impose any severe burden on the Party’s associational rights. Pet. App. 11a.

2. Other decisions of this Court confirm that “the extent to which Hawaii’s open primary system burdens the Democratic Party’s associational rights is a factual question.” *Id.* at 12a. For example, in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the controlling opinion held that “the evidence in the record [wa]s not sufficient to support a facial attack” on a state law respecting the right to vote. *Id.* at 189 (plurality opinion). In *Clingman*, the Court declined to consider respondents’ challenge

to some of the State's election laws because "there [wa]s virtually no evidence in the record" regarding "whether [they] actually burden respondents' associational rights." 544 U.S. at 598. In *Jones*, the Court relied on "evidence" in the "record," 530 U.S. at 578-580—developed in the course of "a bench trial," *id.* at 599 (Stevens, J., dissenting)—to conclude that a State's blanket primary system severely burdened a party's associational freedom, *id.* at 581-582 (majority opinion). And in *Tashjian*, the Court admonished that "analysis of [state regulation of primary voting qualifications] derives much from the particular facts involved." 479 U.S. at 224 n.13.

As these precedents show, the evidentiary record is critical in a challenge to a law like the one here. Nevertheless, the Party made the "intentional[]" decision "not [to] introduce[] evidence of the impact of the open primary on [its] ideology or candidates." Pet. 3. The Party must now live with that decision. As the Court of Appeals properly held: "Absent evidence that Hawaii's system affects the Party's ability to select its nominees, the Party's facial challenge fails." Pet. App. 11a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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