No. 16-806

In the Supreme Court of the United States

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

v.

COREY STAPLETON, MONTANA SECRETARY OF STATE, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the district court err in requiring Petitioners to submit evidence to support their allegation that Montana's open primary severely burdens their rights to freely associate because of substantial cross-over voting by nonmembers?

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INTRODUCTION

The Petitioners, several Republican County Committees, claim that Montana's century-old open primary severely burdens their rights to free association. They allege that "20-30 percent" of non-Republicans, who they claim are "openly antagonistic" to Republican Party ideals, vote in Republican primaries. They argue that the Ninth Circuit erred in requiring evidence to support that claim, and they ask this Court to grant their petition to determine whether open primaries constitute a *per se* severe burden on their associational rights.

The Court should deny the petition. There is no split among the circuits on the question that the County Committees present. And that should not be surprising. It is axiomatic that when plaintiffs allege that they are severely burdened because a significant number of non-Republicans are raiding Republican primaries, they ought to have some evidence that their allegations are actually true.

But even if the Court believes that the issue needs resolution, this case's unresolved jurisdictional questions and its haphazard procedural history make it an exceptionally poor vehicle to do so. Montana has twice questioned the County Committees' standing to challenge the open primary because the County Committees play no role in selecting Republican candidates and have no authority to represent the Republican Party's interests. Yet the County Committees have twice avoided judicial review of that issue. This Court should not be the first court to determine whether the County Committees have

standing, especially when they failed to raise it as a question presented.

That is not the only open jurisdictional question. The County Committees appealed after they *voluntarily dismissed* their case with prejudice following the district court's denial of cross-motions for summary judgment. This Court is currently reviewing, in a different context, whether the Ninth Circuit's unique rule allowing appeal of a voluntary dismissal with prejudice renders a case non-justiciable under Article III. *See Microsoft Corporation v. Baker*, No. 15-547. Other circuits have held, for good reason, that a plaintiff moots his case by voluntarily dismissing it. Thus, mootness is yet another jurisdictional question that this Court will be forced to address should it grant the petition for certiorari.

Finally, even if the County Committees could overcome these jurisdictional hurdles, their question presented does not allow resolution of the case. The County Committees ask 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." (emphasis added). But the Montana Republican Party does not have formal membership. The Party's executive director acknowledged that "there is no exact way to become a member" of the Montana Republican Party. So even if the Court were to answer the question presented in the affirmative, it would not provide relief to the County Committees. It cannot be assumed that "nonmembers" select the nominees for the Republican Party when the Party does not have members in the

first place. The County Committees would therefore still be required to present evidence at trial, as the district court held.

The Court should deny the petition for certiorari.

STATEMENT OF THE CASE

1. The people of Montana adopted the open primary system, via initiative, in 1912. Pet. App. 19. "This system has governed Montana's primary elections, with only slight modifications, for the last century." *Id.*

Under Montana law, all major party candidates for elective office, except for the Presidency, must be nominated in a primary election. Mont. Code Ann. §§ 13-10-407; -601. Voters in Montana receive a complete set of party ballots during primary elections. Pet. App. 59. Though they have the right to choose which party's ballot they vote, voters may cast votes on only one party's ballot, and must dispose of the other ballot. *Id.* Voters are thereby "limited to voting for candidates of that party." *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000)

Montana voters are not, however, required to register their political party affiliation in order to vote in a primary or general election. Pet. App. 59. Indeed, the Montana Republican Party does not even have formal membership. CA9 Dkt. 15 at ER 206-10. Montana also does not record which primary ballot a particular elector chooses. *Id.* While voters do have to register to vote, they can register the day of the primary or general election. *Id.*

2. In September 2014, the County Committees filed suit challenging Montana's open primary.[1] The County Committees are the local arm of the statewide party. They "make rules for the government of the political party in each county" and "fill all vacancies" in the county. Mont. Code Ann. § 13-38-203. But they play no direct role in selecting the Party's candidates.

The County Committees challenged the open primary in two ways. First, they challenged open primaries as applied to the election of County Committee precinct persons, who serve as the internal leadership of the County Committee. Second, the County Committees challenged the open primaries as applied to all candidates for public office of the Montana Republican Party.

The County Committees alleged that the open primary violated their associational rights because "many Democrats and independent voters cross-over [sic] to participate in and raid the Republican Party's primary elections in Ravalli County and throughout Montana." Compl. ¶ 27, Dist. Ct. Doc. 1. Specifically, the County Committees claimed that "[o]n average, 20 to 30 percent of voters participating in the Republican Party's primaries are Democrats or other non-Republican voters" that are "openly antagonistic to the ideology and principles of the Republican Party." *Id.* at ¶¶ 28-29. They argued that cross-over voting constituted a severe burden on their associational

[1] The Ravalli County Republican Central Committee initially filed this case as the only plaintiff. Additional county committees joined thereafter. This brief refers to County Committees in the plural to avoid confusion.

rights because it resulted in more moderate candidates being elected and caused the Party and its candidates to alter their message. *Id*. at ¶¶ 32, 38.

After filing the initial complaint, the County Committees immediately moved for summary judgment, "or alternatively for a preliminary injunction" as to the first claim regarding county committee leadership elections, *but not* for the second claim challenging the open primary as applied to all candidates. CA9 Dkt. 15 at ER 216-18. The County Committees moved for pre-discovery summary judgment only on the first claim because they recognized that "evidence" that non-Republicans voted in primary races "is required for challenges to laws regulating a party's candidates for *public office*. . . . not for challenges to laws regulating a party's *internal leadership*." CA9 Dkt. 15 at ER 214-15 (citing *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003)) (emphasis in original).

But shortly after the County Committees filed their motion on the first claim regarding the election of its internal leadership, the Montana Legislature mooted the issue by amending the law concerning the election of local precinct persons. That left only the second general claim against the open primary as applied to all Republican candidates. Because that claim was not specific to the County Committees, Montana filed a motion to dismiss arguing that the County Committees lacked standing to raise claims on behalf of the Montana Republican Party. CA9 Dkt. 15 at ER 142. The Montana Republican Party then joined the case and mooted the motion to dismiss.

As discovery progressed, the County Committees and their expert recognized the need for evidence to support their claim of cross-over voting and raiding. For example, the County Committees' expert acknowledged that a survey analyzing potential cross-over voting "is a *necessary tool* to measure [the electorate's] behavior." CA9 No. 15-35967, Dkt. 17 at ER 366 (emphasis added). The County Committees later acknowledged that survey data represents the "most accurate measure of crossover voting in Montana." Resp. App. 3.

After discovery concluded, the parties filed cross-motions for summary judgment. Despite their admissions that they needed evidence to support their claim that "20-30 percent" of voters in Republican elections are non-Republicans, the County Committees submitted no Montana-specific survey data to support the claim.[2] Thus, the district court found that it "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." Pet. App. 44. Because it found that this issue constituted a disputed issue of material fact, it denied both parties' motions for summary judgment. Pet. App. 46.

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[2] The County Committees' only "evidence" was a statement from the leader of a teacher's union encouraging voters in Republican counties to vote for the Republican that best represented their interests. Pet. 4. But this was not evidence of raiding or cross-over voting. The union had endorsed several Republican candidates and presumably has many Republican members. In any event, the district court recognized that this lone anecdote was unaccompanied by any actual evidence supporting the County Committees' claim that non-Republican voters were crossing over to vote in Republican primaries. Pet. App. 45.

3. The County Committees simultaneously sought a preliminary injunction, which the district court also denied. They moved the Ninth Circuit for a stay pending appeal, arguing, as they do here, that the open primary constitutes a severe burden on their associational rights, without the need for evidence. After the Ninth Circuit denied the motion, they petitioned Justice Kennedy for an injunction pending appeal, which Justice Kennedy referred to the full Court. This Court denied the motion. 577 U.S. __ (March 23, 2016) (No. 15A911).

The County Committees, acknowledging that they needed additional evidence to support their claims in the upcoming trial, asked the District Court to reopen discovery for an additional nine months so they could perform a voter survey during the 2016 primary. Resp. App. 2, 4. The court, noting the discovery deadline had passed five months earlier, denied the motion. Resp. App. 4-5. The County Committees then moved to dismiss their claim *with prejudice*, after the Montana Republican Party moved to dismiss its claim *without prejudice*. CA9 Dkt. 9-2 at ER 153. The District Court granted both motions. Pet. App. 17; CA9 Dkt. 9-2 at ER 153. Based on this voluntary dismissal, and the passage of the 2016 primary, the Ninth Circuit dismissed the preliminary injunction appeal as moot. CA9 No. 15-35967, Dkt. 43 (July 22, 2016).

4. Despite having voluntarily dismissed their case, the County Committees, *without* the Montana Republican Party, then appealed the denial of their summary judgment motion, CA9 Dkt. 1 (Oct. 27, 2016), under a unique Ninth Circuit procedural exception, *Concha v. London*, 62 F.3d 1493, 1508 (9th Cir. 1995).

Montana moved to dismiss the appeal for lack of standing because the County Committees, alone, were not the real party in interest and could claim no particularized, personal injury. CA9 Dkt. 5 (Oct. 27, 2016). Montana also argued that the County Committees waived their rights of appeal by voluntarily dismissing the case. *Id.* After the Ninth Circuit issued *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (9th Cir. 2016), Pet. App. 1-12, the County Committees moved for an initial hearing *en banc*, which the Ninth Circuit denied. CA9 Dkt. 22 (Oct. 27, 2016).

The County Committees then moved the Ninth Circuit to summarily affirm the district court's denial of summary judgment. *Id.*, Dkt. 23. The Ninth Circuit summarily affirmed, without addressing the standing question. *Id.*, Dkt. 24. Notwithstanding that the County Committees voluntarily dismissed their case, and then sought summary affirmance of the order denying them summary judgment, the County Committees then filed a petition for certiorari.

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle To Decide the Question Presented.

A. No Court Has Yet Resolved the State's Contention That the Committees Lack Standing.

Montana has twice challenged the County Committees' standing to bring claims that are specific to the State Republican Party, but the County Committees have twice avoided judicial review of the issue. This Court "is a court of final review and not

first review." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (per curium) (internal quotation marks omitted). Thus, the Court "ordinarily 'do[es] not decide in the first instance issues not decided below.'" *Id.* at 109 (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1999)). The unresolved, threshold question concerning the County Committees' standing makes this case an exceptionally poor vehicle to decide the constitutional issue presented.

Montana first challenged the County Committees' standing by filing a motion to dismiss the open primary claim shortly after the County Committees filed their case. Montana pointed out that the Committees' complaint alleged wrongs to the Republican Party as a whole, not the individual county committees. The County Committees' complaint alleged that Montana's open primary forced the Party to have its candidates nominated by the open primary and forced "alteration of the Party's message." Compl., ¶¶ 32, 37, Dist. Ct. Doc. 1. The complaint also alleged that the Party amended its bylaws to state its preference for closed primaries (*id.* ¶¶ 24-25), and that the open primary injured the Republican Party (*id.*, Section IV "Effects of Montana's Open Primary upon the Republican Party").

The County Committees, however, are not authorized to represent the interests of the State Republican Party and they play no role in selecting the Party's candidates. Their purpose is simply to make rules for each county's political party and to fill vacancies. Mont. Code Ann. § 13-38-203. As a local arm of the Party that has no direct role in selecting the Party's candidates, a county committee lacks the requisite "personal stake" in the outcome of a challenge

to Montana's open primary law. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44 (1986). The County Committees' status as a local component of the Montana Republican Party does not permit them to "step into the shoes" of the Party and take legal action that "the body itself has declined to take." *Id.* at 544; *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) ("a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties") (citation omitted). Thus, the County Committees have not shown "'an invasion of a legally protected interest' that is 'concrete and particularized' and actual or imminent." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1990)).

But after Montana filed its motion to dismiss the County Committees' claims for lack of standing, the Montana Republican Party joined the lawsuit as a plaintiff. The Montana Republican Party undoubtedly had standing to challenge the open primary, so the district court denied the motion to dismiss as moot, without deciding whether the County Committees had standing to make the claims without the Party's participation. D. Ct. Doc. 45.

Montana again challenged the County Committees' standing when the County Committees appealed to the Ninth Circuit without the Montana Republican Party, since "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English*, 520 U.S. at 64. The County Committees' "ability to ride 'piggyback' on the

[Party's] undoubted standing exists only if the [Party] is in fact an appellant before the Court." *Diamond v. Charles*, 476 U.S. 54, 64 (1986). Once the Republican Party dropped out of the case, the County Committees' right to appeal was extinguished.

The County Committees once again avoided judicial review of the issue. Before the Ninth Circuit ruled on the motion to dismiss, another Ninth Circuit panel decided the related case, *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (9th Cir. 2016).[3] The County Committees argued that *Nago* controlled their case and was contrary to their position, so they moved for summary affirmance of the district court's decision against them. The Ninth Circuit granted the Committees' motion, without ruling on Montana's motion to dismiss the appeal for lack of standing. Pet. App. 52-53. The County Committees then petitioned for certiorari, without a court having ever decided whether they have standing to pursue their claims independent of the Montana Republican Party.

If this Court were to grant certiorari, it would have to address the County Committees' standing before addressing the merits. *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). But the Court would be forced to do so in the first instance "without the benefit of thorough lower court opinions to guide" its analysis. *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). And if the Court finds that the County Committees do not have

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[3] The plaintiff in that case has filed a petition for certiorari. *See Democratic Party of Hawaii v. Nago*, Pet. for Certiorari, No. 16-652 (Nov. 14, 2016). The County Committees' question presented is identical to the question presented in *Nago*.

standing, it will have to dismiss the writ of certiorari for want of jurisdiction, without ever reaching the merits. These unresolved uncertainties counsel against granting the petition.

The Court should also reject the petition and decline to address the County Committees' standing because they failed to include standing as a question presented in their petition. Rule 14.1(a) provides that "[t]he statement of any question presented [in a petition for certiorari] will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." Standing is not a subsidiary question because it is a "threshold inquiry that in no way depends on the merits of the case." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993) (noting that denial of a motion to intervene was a threshold issue "akin to a question regarding a party's standing"). Because the County Committees did not include standing as a question presented, the Court should decline to hear the case on that basis alone. *Id.* at 34 (dismissing writ of certiorari as improvidently granted because the petitioner failed to include a threshold issue in the questions presented).

In sum, the open question concerning the County Committees' standing makes this case a particularly poor vehicle to decide the question presented.

B. No Court Has Yet Resolved Whether the County Committees Mooted Their Case By Voluntarily Dismissing It With Prejudice.

This Court has long held that a plaintiff "who has voluntarily dismissed his complaint" may not appeal from that dismissal. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958). Article III's case or controversy requirement is no longer met because a plaintiff loses a personal stake in the litigation, and the issues becomes moot. Thus, even if the County Committees at one point had a personal stake in this case, they relinquished it when the voluntarily dismissed their complaint after the district court denied the cross-motions for summary judgment.

In contrast to this Court's reasoning, the Ninth Circuit allows appeal from a voluntary dismissal with prejudice if there is an underlying ruling that the "plaintiff believes to be determinative of his claim." *Concha*, 62 F.3d at 1507. This Court is currently reviewing the Ninth Circuit's precedent allowing appeals from voluntary dismissals with prejudice in the context of class certification. *Microsoft Corporation v. Baker*, No. 15-457. That issue is equally relevant here, and casts further doubt on the case's justiciability.

Here, the district court denied cross-motions for summary judgment, noting that the conflict over the County Committees' and the Montana Republican Party's allegation of cross-over voting in Montana constituted a genuine issue of material fact. Pet. App. 46. The plaintiffs then asked the district court to re-open discovery so that they could conduct a survey to try to gather Montana-specific evidence. Resp. App. 2,

4. Only after the district court denied that motion did the County Committees voluntarily dismiss their case with prejudice so that they could appeal. But their co-plaintiff, the Montana Republican Party, dismissed its complaint without prejudice.

Thus, the parties essentially hedged their bets. The County Committees voluntarily dismissed with prejudice so they could appeal under the Ninth Circuit's rule in *Concha*, while the Montana Republican Party voluntarily dismissed without prejudice so it could refile if it could accumulate evidence of cross-over voting.

Montana argued in its motion to dismiss at the Ninth Circuit that the appeal therefore lacked necessary adverseness and should be dismissed. CA9 Dkt. 5. But, like standing, the County Committees avoided judicial review of the issue by requesting summary affirmance. Thus, this is another jurisdictional issue that the Court would be required to address in the first instance, and is yet another example of this case's substantial vehicle problems that may prevent consideration of the merits.

C. The Question Presented Does Not Allow Resolution of this Case.

This Court only considers "questions set forth in the petition, or fairly included therein." Rule 14.1(a). The County Committees' question presented is "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." (emphasis added). That question

presented bears little resemblance to the issues actually presented in this case because the Montana Republican Party is not a party to this action and it has no membership in any event.

The County Committees ask this Court to simply assume that many people who vote the Republican ballot in Montana's open primary are "nonmembers." The County Committees cannot make this claim, however, because the Montana Republican Party does not have members, unlike the Democratic Party of Hawaii. Ninth Cir. CA9 Dkt. 15 at ER 206-10. As the Party's Rule 30(b)(6) witness conceded, "there is no exact way to become a member" of the Party. *Id.* at ER 206.[4]

In short, even assuming the Court answered the question presented in the affirmative, it would not change the outcome of this case. The County Committees have no basis to assume that "nonmembers" select the nominees for the Republican Party when the Party does not have members in the first place. The question presented by the County Committees would therefore not resolve this case and they would still be required to present evidence of who their members are.

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[4] This also undercuts the County Committees' argument regarding its right to "identify" its members. *See* Pet 11-12.

D. The Ninth Circuit Never Considered the Merits of the County Committees' Case.

In addition to never addressing whether the County Committees have standing, the Ninth Circuit never considered the merits of the County Committees' claims. That is because the County Committees asked the Ninth Circuit to summarily affirm the district court's decision against them based on the court's decision in a different case, *Democratic Party of Hawaii v. Nago*. Pet. App. 52. This is yet another reason that this case is a poor vehicle. Like standing, this Court has no opinion from the Court of Appeals specifically analyzing the County Committees' claims.

That is particularly significant here because *Nago* involved different claims and different facts than this case. First, *Nago* is a *facial* challenge to Hawaii's open primary. 833 F.3d at 1122; *id.* at n.1 (noting that if the Democratic Party's facial challenge failed, "it may bring an as-applied challenge"). The County Committees' challenge to Montana's open primary, however, is *as applied*. Pet. App. 20, 40; Third Amended Compl., D. Ct. Doc. 43 ¶¶ 1, 70, 76. While a facial challenge considers all of a statute's possible applications, an as-applied challenge tests the application of the statute to a plaintiff's specific factual circumstances. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 444, 449 (2008).

Despite filing an as-applied complaint and engaging in discovery in an effort to support its claim, the County Committees now argue that the open primary poses a *per se* severe burden on their First Amendment rights, without the need to provide any Montana-specific data supporting that claim. And they are

making this argument even though the Montana Republican Party does not have formal membership, and does nothing to track membership. CA9 Dkt. 15 at ER 206-10. Because the County Committees asked the Ninth Circuit to summarily affirm the district court's decision, the panel never considered the significance of the Montana Republican Party's lack of membership in the context of the County Committees' as-applied challenge.

Nor did the Ninth Circuit have an opportunity to determine whether the County Committees waived their "matter of law" argument by admitting that they needed evidence to show a severe burden. The County Committees, early in the case, acknowledged that they needed to put on evidence to prove that Montana's open primary severely burdens their associational rights. CA9 Dkt. 15 at ER 214-15 (admitting "evidence . . . is required for challenges to laws regulating a party's candidates for *public office*") (emphasis in original). The County Committees' expert likewise recognized that a survey analyzing potential cross-over voting "is a *necessary tool* to measure [the electorate's] behavior." CA9 No. 15-35967 Dkt. 17 at ER 366 (emphasis added).

Nonetheless, the County Committees filed their case without having that survey information and without demonstrating how a political party that does not have formal membership or any way to track membership can — in any concrete way — be adversely affected by an open primary. The County Committees then shifted gears mid-case, and tried to salvage their claim by arguing that they do not need evidence because open primaries constitute a *per se* severe burden on their associational rights. But the

substantive decision from which the County Committees are petitioning for certiorari is the Hawaii Democratic Party's facial challenge, not even their own case. The Ninth Circuit never analyzed the County Committees' specific as-applied claims under this case's particular facts, including that—unlike Hawaii—the Montana Republican Party does not even have membership. Thus, this is yet another issue that the Court would have to address without the benefit of analysis by the Court of Appeals.

II. There Is No Conflict Among the Circuits.

Although the County Committees claim that the Ninth Circuit's decision in *Nago* "conflicts with several Fourth Circuit decisions," they reference only two decisions in the same case, *Miller I* and *Miller II*, neither of which conflicts with the Ninth Circuit. The question that the Ninth Circuit decided and that this case presents is what evidence is necessary to address whether an open primary severely burdens a political party's First Amendment rights. That was not even at issue in either *Miller* decision from the Fourth Circuit.

In *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) ("*Miller I*"), the only issue was whether the plaintiffs' challenge to Virginia's open primary law was justiciable. Virginia law allowed an incumbent to choose the method by which a candidate would be nominated, whether by a convention, a caucus, or a primary. *Id.* at 362. The incumbent chose a primary as the method of nomination, and Virginia law dictated that the primary be open. *Id.* at 315. But because the plaintiffs challenged the open primary two years before the primary was to take place, and before it was clear whether the incumbent would even have a primary

challenger, the district court ruled that the plaintiffs lacked standing and that the issue was not ripe. *Id.* at 316. The Fourth Circuit reversed, holding that the case was justiciable. *Id.* at 314.

The Fourth Circuit in *Miller I* had no occasion to address the merits, including the question that this case presents concerning whether a plaintiff needs to submit evidence that an open primary creates a severe burden. Nonetheless, the County Committees seize on the Court's recognition 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. That general observation was in the context of its discussion concerning ripeness. *Id.* at 318-320. The Court did not address, whatsoever, whether a plaintiff must present evidence to substantiate his claim that the open primary creates a severe burden. The County Committees' argument that *Miller I* conflicts with the Ninth Circuit's decision in *Nago* is wrong, given that the cases did not address the same question.

Similarly, *Miller II* did not address the question presented in this case. While the Fourth Circuit in *Miller II* did address the merits of the plaintiffs First Amendment claim, it did not address what evidence is necessary to show a severe burden. *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007). Under the facts of that case, Virginia *conceded* that the open primary severely burdened the plaintiffs' First Amendment rights, so there was no occasion to address whether evidence is required to prove that burden. *Id.* at 368. The court's acceptance of that concession suggests that it viewed the issue as a question of fact, since under Fourth

Circuit law, parties cannot concede questions of law. *See United States v. Rodriguez*, 433 F.3d 411, 414 n.6 (4th Cir. 2006). Further, the court was clear that it was deciding the issue based on "the narrow facts of this case" and it did not decide "whether [an] open primary statute, viewed in isolation, impermissibly burdens a political party's associational rights." *Id.* at 367.

In sum, the Fourth Circuit's decisions in *Miller I* and *Miller II* do not conflict with the Ninth Circuit's decision in *Nago* because the Fourth Circuit did not deal with the question presented here—whether evidence is required to sustain a plaintiff's claim that the open primary imposes a severe burden on associational rights. But the fact that the County Committees point to only one Circuit as being ostensibly in conflict is telling, given that thirty states have some form of open or semi-open primary.[5] Indeed, open primaries have been "a long-standing feature of the American electoral landscape." Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273, 307 (April 2011). They have been part of Montana's electoral landscape for more than a hundred years. Pet. App. 19. The fact that there are so few cases addressing open primaries suggests that the issue is not worthy of the Court's attention. Because a decision on the question has the potential to disrupt the longstanding electoral traditions of so many states,

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

the Court should wait for this issue to fully develop into an actual conflict before deciding the issue.

III. The Court of Appeals' Decision in *Democratic Party of Hawaii v. Nago* Is Correct.

Finally, this Court should deny the petition because the Ninth Circuit is correct. A party must demonstrate the extent to which its associational rights are burdened, and this is a factual question requiring evidentiary proof. Pet. App. 9.

A. This Court's Cases Require Evidence To Show the Extent of the Burden on Associational Rights.

The Ninth Circuit carefully followed this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), holding that whether First Amendment rights are severely burdened is a factual question. Pet. App. 6-9. At issue in *Jones* was the burden imposed by California's blanket primary. 530 U.S. at 569. In analyzing whether the burden imposed by the blanket primary was severe, *Jones* explicitly relied on "evidence . . . *demonstrat[ing]* that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party [was] a clear and present danger" *Jones*, 530 U.S. at 578-79 (emphasis added).

Thus, the severity of the burden imposed by California's blanket primary was demonstrated by factual evidence, not just the structure of the primary. The Court specifically relied on a "survey of California voters," noting that the figures in the California-

specific survey were "comparable to the results of studies in other States with blanket primaries." *Id.*

The Court also explained that an open primary system "in which the voter is limited to one party's ballot" may be "constitutionally distinct" from the unconstitutional blanket primary. *Id.* at 577 n.8. The Court was also careful to distinguish the open primary from the blanket primary. *Id.* at 577, n.6&8.

Indeed, this Court has long acknowledged that "challenges to specific provisions of a State's elections laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Id.* at 214 (quoting *Anderson*, 460 U.S. at 789). This analysis "derives much from the particular facts involved." *Id.* at 224 n.13.

Courts must inquire into what burden a law imposes because it dictates the appropriate level of scrutiny. A plaintiff must show the "character and magnitude of the asserted injury" because only "[r]egulations that impose severe burdens on associational rights" are subject to strict scrutiny. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Regulations that "impose lesser burdens," however, are generally justified by "a State's important regulatory interests[.]" *Id.* at 587. "[M]inor barriers

between voter and party do not compel strict scrutiny." *Id.* at 593. A contrary ruling "would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Id.*

Here, the County Committees made specific allegations that the open primary severely burdened their associational rights, alleging that "20-30 percent" of non-Republican voters crossed over to vote in Republican primaries.[6] First Amended Compl. ¶ 28, D.C. Doc. 1. They alleged that cross-over voting forced the Republican Party and its candidates to alter their messages. *Id.* at ¶¶ 32-38. The lower courts were correct in holding that a plaintiff must actually support such allegations, rather than merely relying on its assumption that they are true, as the County Committees did in this case.[7]

B. *La Follette* Is Not to the Contrary.

The County Committees nonetheless assert that they need not provide evidence of the character and magnitude of the burden imposed by Montana's open primary. They primarily rely on *Democratic Party of*

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[6] This Court has acknowledged that some of the asserted "evils" of cross-over voting, such as "raiding," Amicus Br. 19, have "never been conclusively proven by survey research." *Tashjian*, 479 U.S. at 219 (citing *La Follette*, 450 U.S. at 122-23 n. 23)).

[7] The Montana Republican Party had over a century to obtain "necessary" survey evidence. The Party is therefore disingenuous when it laments having to secure survey data in "at least one election cycle." Amicus Br. 20.

United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981), which they claim held "that open primaries are a 'substantial intrusion' upon a party's freedom of association." Pet. 6.

The Ninth Circuit had no reason to address *La Follette*, because the question in that case was "not whether Wisconsin may conduct an open primary election if it chooses to do so." *La Follette*, 450 U.S. at 120. Rather the question was whether Wisconsin could "bind the National Party" regarding the selection of the National Party's delegates "in a separate process," which is clearly not at issue here. *Id.* at 120, 125. Indeed, this Court acknowledged that the Wisconsin Supreme Court "may well be correct" that Wisconsin's open primary is constitutional. *Id.* at 121.

La Follette thus does not apply to the question here—whether the open primary imposes a severe burden to parties at the state level. As to that question, this Court's later precedents, described above, require that a plaintiff demonstrate the extent of the burden imposed by a particular state's election law.

C. The County Committees Present No Evidence of Forced Association.

The County Committees were unable to present evidence to the district court of forced association and its burden because they have no formal membership and no Montana-specific evidence of cross-over voting. CA9 Dkt. 15 at ER 206-10. Instead of presenting evidence of "forced association" and its burden, the County Committees ask this Court to simply assume that many who vote the Republican ballot in Montana's open primary are "nonmembers."

A voter in Montana affiliates with the Party when the voter casts a Republican ballot in the primary. *Jones*, 530 U.S. at 577 n.8 (noting that "[t]he act of voting in the Democratic primary [in an open primary system] can be described as an act of affiliation with the Democratic Party") (quoting *La Follette*, 450 U.S. at 130 n.2 (Powell, J., dissenting)). As this Court has recognized "anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time . . . ." *Clingman v. Beaver*, 544 U.S. 581 at 590-91 (2005) (quoting *Jones* at 598 (Stevens, J., dissenting); *id.* at 601 (O'Connor, J., concurring) ("The act of casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering.").

Montana's open primary is therefore functionally equivalent to a closed primary with same-day registration. *See* Pet. App. 59 (Montana allows same-day registration); CA9 Dkt. 15 at ER 212 (the County Committees' counsel admitting closed primary with same-day registration is the "functional equivalent" of an open primary). As such, the risk of forced association with nonmembers is no greater in Montana's open primary than a closed primary with same-day registration, and this Court has never questioned the constitutionality of a closed primary. *See, e.g., Jones*, 530 U.S. at 577 (contrasting blanket to closed, and open, primaries).

Although the County Committees made specific allegations of forced association, they presented no evidence to support the argument—just conclusory statements. And without formal membership, they are unable to show any cross-over voting whatsoever.

CONCLUSION

The Court should deny the County Committees' petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 14-58-H-BMM

[Filed March 11, 2016]

RAVALLI COUNTY REPUBLICAN CENTRAL COMITEE, GALLATIN COUNTY REPUBLICAN CENTRAL COMMITTEE, SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, DAWSON COUNTY REPUBLICAN CENTRAL COMMITTEE, STILLWATER COUNTY REPUBLICAN CENTRAL COMMITTEE, RICHLAND COUNTY REPUBLICAN CENTRAL COMMITTEE, CARBON COUNTY REPUBLICAN CENTRAL COMMITTEE, FLATHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE, MADISON COUNTY REPUBLICAN CENTRAL COMMITTEE, BIG HORN COUNTY REPUBLICAN DENTRAL COMMITTEE, MONTANA REPUBLICAN PARTY
Plaintiffs,

v.

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

ORDER

The Court denied Plaintiffs' Motion for Preliminary Injunction (Doc. 70) and Motion for Summary Judgment (Doc. 91) on December 14, 2015. The Court also denied Defendant's Motion for Summary Judgment (Doc. 88) on the same day. Plaintiffs filed a notice of appeal from the Court's order denying their Motion for Preliminary Injunction on December 16, 2015. (Doc. 115.) Plaintiffs did not appeal the Court's order denying their Motion for Summary Judgment.

The Court ordered the parties to submit a joint statement regarding the current status of the matter. (Doc. 120.) The parties submitted a status report. (Doc. 123.) Plaintiffs have moved to reopen discovery. (Doc. 124.) Plaintiffs have requested time to conduct a survey during the primary election. *Id*. at 2. Plaintiffs have proposed a deadline of September 1, 2016, to exchange expert reports and November 1, 2016, to conduct supplemental discovery related to those expert reports. *Id.* at 2-3. The State opposes the motion.

District court judges possess broad authority to regulate the conduct of discovery. The Ninth Circuit upheld a district court's denial of motion to extend discovery in *Century 21 Real Est. Corp. v. Sadlin*, 846 F.2d 1175, 1181 (9th Cir. 1988). The court directed the defendant in *Century 21* to submit a memorandum in opposition to summary judgment along with a plan outlining a discovery schedule. *Id*. The defendant filed his memorandum late and provided no discovery schedule. *Id*. Eleven days later, and three days before the summary judgment hearing, the defendant moved for an extension of discovery time to conduct a survey. *Id*. The Ninth Circuit determined that the Court

possessed discretion to deny the request for a discovery extension. *Id*.

A request to reopen discovery differs from a request to extend discovery. A request for an extension "acknowledges the importance of a deadline," while a request to reopen discovery "suggests that the party paid no attention at all to the deadline." *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1524 (9th Cir. 1990). District courts properly have declined to reopen discovery when the movant "had ample opportunity to conduct discovery" but failed to do so. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006) (citing *Panatronic USA v. AT & T Corp.*, 287 F.3d 840, 846 (9th Cir. 2002)); *See Hauser v. Farrel*, 14 F.3d 1338, 1340-1341 (9th Cir. 1994).

Plaintiffs assert that survey data represents the "most accurate measure of crossover voting in Montana." (Doc. 124 at 2.) Plaintiffs note that the Court addressed the lack of Montana specific survey data in its December 14, 2015, Order. The Court recognizes that success on the merits proves more difficult for Plaintiffs without having obtained Montana-specific survey data Plaintiffs chose, however, to initiate this litigation in September 2014. Plaintiffs presumably thought that they possessed sufficient facts and evidence to challenge Montana's open primary law when they raised the challenge back in 2014. Plaintiffs knew, or should have known, that the State would test the factual sufficiency of Plaintiffs' claims. *Ef. Cornwell*, 439 F.3d at 1027.

Plaintiffs simply have not requested more time to access an existing piece of evidence. Similar to the defendant in *Century 21*, plaintiffs instead now seek to

create evidence to help prove the merits of their case with a survey. Plaintiffs have requested nine months to conduct the survey, exchange expert reports, and conduct supplemental discovery related to the expert reports. Plaintiffs could have conducted these surveys before having brought this action or could have moved to extend discovery before the August 14, 2015, deadline. Either of these actions would have come before the Plaintiffs had filed their motion for summary judgment and their motion for preliminary injunction. The Court conducted a lengthy hearing on these motions on November 19, 2015. The Court resolved these motions with an order dated December 14, 2015. Plaintiffs have appealed the Court's denial of their motion for preliminary injunction.

Plaintiffs filed their original Complaint on September 8, 2014, without apparently having obtained this Montana-specific survey data. (Doc. 1.) Plaintiffs amended their Complaint on four separate occasions. Each amendment occasioned a delay in the case. The Court originally set the discovery deadline for July 17, 2015. (Doc. 35.) The Court extended the discovery deadline to August 14, 2015. (Doc. 51.) Plaintiffs' current request to conduct extended discovery comes five months after the August 14, 2015, discovery deadline has passed and nearly 18 months after Plaintiffs initiated litigation in 2014.

To allow Plaintiffs to reopen discovery to collect survey data at this stage in litigation would cause significant delay in the proceedings and prejudice the State. New survey data would create additional opinions from Plaintiffs' experts. The State would be forced, in turn, to produce new rebuttal expert reports.

The parties may then need to conduct more depositions and file another round of motions. A decision to reopen discovery potentially could undermine the State's efforts these past 18 months to defend the case as presented by Plaintiffs. Courts commonly use orders to establish a firm discovery cutoff date. *Cornwell*, 439 F.3d at 1027. These orders generally prove helpful to "the orderly progress of litigation, so that enforcement of such an order should come as a surprise to no one." *Id*. The Court declines to disrupt further the progress of this litigation.

Accordingly, **IT IS ORDERED** that Plaintiffs' Motion to Reopen Discovery (Doc. 124) is **DENIED.**

DATED this 11th day of March, 2016.

/s/_____
Brian Morris
United States District Court Judge