

No. 16-806

---

In the  
**Supreme Court of the United States**

---

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

v.

COREY STAPLETON, in his 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

---

**REPLY BRIEF FOR PETITIONERS**

---

MATTHEW G. MONFORTON  
*Counsel of Record*  
MONFORTON LAW OFFICES, PLLC  
32 Kelly Court  
Bozeman, Montana 59718  
(406) 570-2949  
matthewmonforton@yahoo.com

*Attorney for Petitioners*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
REPLY OF THE PETITIONERS .....	1
I. The State’s Vehicle Claims Lack Merit .....	2
A. The Committees Have Standing to Assert <i>Their</i> Associational Rights .....	2
B. This Case Is An Excellent Vehicle to Resolve The Sharp Circuit Split Over The Appealability of Voluntary Dismissals in Non-Class Action Cases .....	5
C. Open Primaries Interfere With Party Membership .....	8
D. The District Court’s Judgment Was “Obviously Controlled” By <i>Nago</i> .....	9
II. The State Fails to Distinguish <i>La Follette</i> .....	10
III. The State Fails to Harmonize the Circuit Split Regarding Open Primaries .....	13
CONCLUSION .....	13

## TABLE OF AUTHORITIES

### Cases:

<i>Ali v. Federal Ins. Co.</i> , 719 F.3d 83 (2d Cir. 2013).....	5
<i>BIW Deceived v. Local S6 Ind. Union</i> , 132 F.3d 824 (1st Cir 1997).....	6, 7
<i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000) .....	1, 3, 11, 12
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010) .....	10
<i>Clingman v. Beaver</i> , 544 U.S. 581 (2005) .....	9
<i>Concha v. London</i> , 62 F.3d 1493 (9th Cir. 1995) .....	6
<i>Democratic Party of Hawaii v Nago</i> , 833 F.3d 1119 (9th Cir. 2016) .....	1, 9
<i>Democratic Party of the United States v. Wisconsin ex rel. La Follette</i> , 450 U.S. 107 (1981) .....	<i>passim</i>
<i>Democratic Party of Washington v. Reed</i> , 343 F.3d 1198 (9th Cir. 2003) .....	12
<i>Distaff, Inc. v. Springfield Contractor Corp.</i> , 984 F.2d 108 (4th Cir. 1993) .....	5

<i>Eu v. San Francisco Cty Democratic Cent. Comm.,</i> 489 U.S. 214 (1989) .....	2
<i>Izumi Seimitsu Kogyo Kaisha v. U.S. Philips Corp.,</i> 510 U.S. 27 (1993) .....	4
<i>LeFande v. District of Columbia,</i> 841 F.3d 485 (D.C. Cir. 2016) .....	6, 8
<i>Lujan v. Defenders of Wildlife,</i> 504 U.S. 555 (1992) .....	2
<i>Martin v. Franklin Capital Corporation,</i> 251 F.3d 1284 (10th Cir. 2001) .....	6
<i>Martin Marietta Materials, Inc. v. KDOT,</i> 810 F.3d 1161 (10th Cir. 2016) .....	6
<i>Miller v. Brown,</i> 462 F.3d 312 (4th Cir. 2006) .....	3
<i>Miller v. Brown,</i> 503 F.3d 360 (4th Cir. 2007) .....	12
<i>OFS Fitel, LLC v. Epstein, Becker, &amp; Green,</i> 549 F.3d 1344 (11th Cir. 2008) .....	6, 8
<i>Raceway Properties, Inc. v. Emprise Corp.,</i> 613 F.2d 656 (6th Cir. 1980) .....	5
<i>Robb Evans &amp; Assoc., LLC, v. United States,</i> 850 F.3d 24 (1st Cir. 2017).....	6
<i>Timmons v. Twin Cities Area New Party,</i> 520 U.S. 351 (1997) .....	7

<i>United States v. Hays</i> , 515 U.S. 737 (1995) .....	4
<i>United States v. Procter &amp; Gamble Co.</i> , 356 U.S. 677 (1958).....	5, 6
<i>United States v. Williams</i> , 504 U.S. 36 (1992).....	10
<i>Washington State Grange v. Washington State Republican Party</i> , 552 U.S. 442 (2008).....	11
<i>Williams v. Employers Mut. Casualty Co.</i> , 845 F.3d 891 (8th Cir. 2017) .....	5-6
<i>Youngblood v. West Virginia</i> , 547 U.S. 867 (2006).....	2

#### **Statutory Provisions:**

Mont. Code Ann. § 13-10-327(1)(c) .....	3
---	---

#### **Other Authorities:**

J. Berger, “Trump doing better in ‘open’ primaries,” <i>Fox News</i> , March 7, 2016, <a href="http://goo.gl/Bfmz4r">goo.gl/Bfmz4r</a> .....	4
M. Fahey, “Why Trump wins: Open primaries, maybe?” <i>CNBC</i> , Mar. 16, 2016, <a href="http://goo.gl/Yva7Xn">goo.gl/Yva7Xn</a> ....	4
T. Zywicki, “So Far, Trump Wins Open Primaries and Cruz Wins Closed,” <i>Washington Post</i> , Mar. 2, 2016, <a href="http://goo.gl/5G5TQu">goo.gl/5G5TQu</a> .....	4

## REPLY OF THE PETITIONERS

None of Montana's arguments for denying certiorari have merit. In fact, the County Republican Committees' voluntary dismissal with prejudice in the District Court constitutes another reason for *granting* certiorari. The Court in *Microsoft Corp. v. Baker*, No. 15-457, is deciding whether a voluntary dismissal resulting from an order denying class certification is appealable. Such orders *do not affect the merits* of a plaintiff's case. *Microsoft* will likely leave unresolved the appealability of voluntary dismissals resulting from orders that *do affect the merits*, such as the one issued in this case. The circuits are sharply divided on this issue.

The State fails to persuasively address the merits and, in particular, fails to distinguish *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), which held that open primaries are a "substantial intrusion" upon parties' associational rights as a matter of law. *Id.* at 126. The Committees relied heavily on *La Follette* in the courts below. See Pet.App.25-27; CA9 Dkt. 8, 13-1, 19. Astonishingly, the Ninth Circuit did not mention *La Follette* at all, either in *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (9th Cir. 2016), or in this matter. Instead, it relied upon *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which analyzed *blanket* primaries rather than *open* primaries. Pet.App.6-12.

The briefs filed in this Court by the *Nago* litigants do not mention *La Follette*, either. Hawaii Democrats instead argue that *Jones* renders open primaries unconstitutional. NagoPetn. 2, 6. The

State of Hawaii disagrees and argues that *Jones* precludes relief. NagoBIO 11-12, 17.

The County Republican Committees submit that *La Follette*, an *open-primary* decision, provides essential guidance for resolving the pending *open-primary* challenges arising out of Montana and Hawaii. In light of Montana’s failure to distinguish *La Follette*, and the failure of the Ninth Circuit and the *Nago* litigants to even mention *La Follette*, the Committees respectfully ask that the Court grant certiorari in both *Nago* and this matter and (1) calendar the cases to be heard in tandem or (2) issue a GVR that would provide “the benefit of the [Ninth Circuit’s] views on the [*La Follette*] issue” (and, potentially, the *Microsoft* issue) should this case return to the Court. *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

## **I. The State’s Vehicle Claims Lack Merit**

### **A. The Committees Have Standing to Assert *Their* Associational Rights**

The State of Montana argues against certiorari because the lower courts did not address standing. BIO8-12. Its argument presupposes a colorable claim that standing is lacking. The State offers none.

Standing requires (1) “an invasion of a legally protected interest” that is (2) “fairly traceable” to the defendant, and (3) redressable. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) -- a case the State fails to cite -- this Court held that county party organizations “enjoy

freedom of association,” which includes “select[ing] a standard bearer who best represents the party’s ideologies and preferences.” *Id.* at 224. Though *Eu* involved county party endorsements, its reasoning applies with equal (or greater) force to nominations because “the ability of the party leadership to endorse a candidate is simply no substitute for the party members’ ability to choose their own nominee.” *Jones*, 530 U.S. at 580; see also *Miller v. Brown*, 462 F.3d 312, 317-18 (4th Cir. 2006) (local party had standing to challenge state’s open primary as applied to local nominee).

Absent judicial relief, Montana’s open primary in June 2018 will allow nonmembers to participate in selecting Committee nominees for county offices such as county sheriff. The open primary system causes this injury, and enjoining it will provide redress. The Committees therefore have standing.

The State contends the Committees cannot “represent the interests of the State Republican Party and they play no role in selecting the Party’s candidates.” BIO9. The Committees do not contend otherwise, nor does the Montana Republican Party in its amicus brief. Rather, the Committees are asserting *their* associational right to select *their* nominees for county offices. Indeed, the State recognizes the obvious fact that nominees for county office are county party nominees. For example, it assigns to county parties, not state parties, the task of selecting replacements when nominees for county offices elected in primaries die or withdraw. Mont. Code Ann. §13-10-327(1)(c).

Open primaries transfer a political party’s nominating rights to the entire electorate. Thus, the



State is correct in noting that the Committees “play no role” in selecting nominees. BIO9. State parties play no role, either. This is exactly why open primaries violate the associational rights of both state and county parties and why both have standing to challenge them.

The State’s claim that the Committees violated Rule 14.1 by not including standing as a question presented is puzzling. BIO12. The Ninth Circuit denied the State’s standing motion. Pet.App.53. The State fails to explain why petitioners should burden the Court with additional questions presented concerning *favorable* jurisdictional rulings. Moreover, Rule 14.1 does not apply to jurisdictional issues, *Izumi Seimitsu Kogyo Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (citations omitted), and “standing is perhaps the most important of the jurisdictional doctrines.” *United States v. Hays*, 515 U.S. 737, 742 (1995).

The Montana Republican Party’s leadership flinched in April 2016 and declined to litigate further after reports surfaced showing Donald Trump benefitted from open primaries.<sup>1</sup> The County Republican Committees pressed forward, however, steadfast in the belief that theirs is still the Party of Lincoln. They have standing to challenge a primary system that opens their nomination process to nonmembers who disagree.

---

<sup>1</sup> See, e.g., T. Zywicki, “So Far, Trump Wins Open Primaries and Cruz Wins Closed,” *Washington Post*, Mar. 2, 2016, [goo.gl/5G5TQu](http://goo.gl/5G5TQu); M. Fahey, “Why Trump wins: Open primaries, maybe?” *CNBC*, Mar. 16, 2016, [goo.gl/Yva7Xn](http://goo.gl/Yva7Xn); J. Berger, “Trump doing better in ‘open’ primaries,” *Fox News*, Mar. 7, 2016), [goo.gl/Bfmz4r](http://goo.gl/Bfmz4r).

**B. This Case Is An Excellent Vehicle to  
Resolve the Sharp Circuit Split Over  
The Appealability of Voluntary  
Dismissals in Non-Class Action Cases**

The District Court granted the Committees' motion to voluntarily dismiss with prejudice while reserving their appellate rights. Pet.App.13-17. The State claims this dismissal raises a jurisdictional issue the Court is already addressing in *Microsoft*. BIO13-14. The question presented in that case, however, is whether a voluntary dismissal with prejudice in response to an order denying class certification – an order that does not affect the merits – is appealable. Orders that do affect the merits, such as the one in this case, present a different question upon which the circuits are sharply split.

For voluntary dismissals in non-class action cases, the Second, Fourth, Sixth, Eighth, Eleventh, and District of Columbia Circuits follow *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), and allow appeals only when the dismissals are with prejudice and involve case-dispositive orders. See *Ali v. Federal Ins. Co.*, 719 F.3d 83, 88-89 (2d Cir. 2013) (interlocutory order constituted an “effective dismissal”); *Distaff, Inc. v. Springfield Contractor Corp.*, 984 F.2d 108, 110-11 (4th Cir. 1993) (expert report’s exclusion gave plaintiff “no hope of succeeding”); *Raceway Properties, Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980) (order redefining market in antitrust case “foreclosed any possibility of [plaintiffs] continuing with the proceedings”); *Williams v. Employers Mut. Casualty Co.*, 845 F.3d 891, 897 (8th Cir. 2017) (appeal

permitted because of “a ruling that was, as a practical matter, case-dispositive”); *OFS Fitel, LLC v. Epstein, Becker, & Green, P.C.*, 549 F.3d 1344, 1358 (11th Cir. 2008) (order excluding plaintiff’s expert was “case-dispositive”); *LeFande v. District of Columbia*, 841 F.3d 485, 493 (D.C. Cir. 2016) (plaintiff’s “voluntary dismissal with prejudice followed a case-dispositive interlocutory ruling”).

By contrast, the First, Ninth and Tenth Circuits do not apply *Procter & Gamble* and allow appeals from voluntary dismissals without requiring case-dispositive orders. See *BIW Deceived v. Local S6 Ind. Union*, 132 F.3d 824, 828 (1st Cir. 1997) (circuit’s “latitudinarian approach” permitted appeal of order denying remand to state court); *Robb Evans & Assoc., LLC, v. United States*, 850 F.3d 24, 29 (1st Cir. 2017) (following *BIW Deceived* and noting that “all that is needed to pave the way for appellate jurisdiction...is the clear reservation of a right to appeal”); *Concha v. London*, 62 F.3d 1493, 1507-1508 (9th Cir. 1995) (appeal of order denying remand to state court after voluntary dismissal); *Martin v. Franklin Capital Corporation*, 251 F.3d 1284, 1288-89 (10th Cir. 2001) (following *Concha*); *Martin Marietta, Inc. v. KDOT*, 810 F.3d 1161, 1170 & n.11 (10th Cir. 2016) (after dismissal of state entity, plaintiff voluntarily dismissed claims against remaining defendants, then appealed).

In this case, although the District Court issued a consolidated order denying the parties’ cross-motions for summary judgment, Pet.App.51, that order was effectively case dispositive. The court criticized the Committees’ experts for opining that crossover voting occurs at an overall rate of 10% in open primary

states because the experts failed to offer a Montana-specific rate, something that would cause the Committees to “struggle to succeed on the merits....” Pet.App.30, 50.

More ominously, the court ruled that “Plaintiffs have failed to develop an evidentiary record that establishes that Montana’s open primary law imposes a severe burden on their associational rights,” and therefore the State “must show only an important regulatory interest.” Pet.App.47. The State likely would have met this standard. See, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 n.10 (1997) (regulatory interest not included in briefs but mentioned during oral argument satisfied state’s burden).

The District Court also ruled that the Committees had “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.” Pet.App.49. This ruling rendered crossover voting data irrelevant, because if every primary voter qualified as a Republican simply by selecting a Republican ballot, the crossover rate would be zero.

The *coup de grace* came when the Committees moved to reopen discovery to satisfy the District Court’s eleventh-hour requirement for state-specific data. The court denied the motion. Resp.App.1-5.

This case is thus an ideal vehicle to resolve the circuit split regarding the appealability of voluntary dismissals with prejudice in non-class action cases. The Court can embrace the Ninth Circuit’s relaxed rule that the District Court applied to this case

Pet.App.15, as well as the similar “latitudinarian approach” to appellate jurisdiction taken by the First Circuit. *BIW Deceived*, 132 F.3d at 828. Or, instead, it can condition such appeals upon the issuance of case-dispositive orders by district courts.

This issue is important because voluntary dismissals with prejudice promote judicial economy by eliminating *pro forma* trials and summary judgment motions. *LeFande*, 841 F.3d at 493 (when “the plaintiff voluntarily dismisses the case with prejudice, he wagers his entire case on prevailing on appeal – thereby creating a disincentive against” piecemeal appeals); *OFS Fitel*, 549 F.3d at 1360 (allowing such appeals “avoids the waste of a party going through a dismissal or summary judgment procedure that it already knows it will lose simply to get a final judgment.”). Resolving this issue is another reason for granting certiorari.

### **C. Open Primaries Interfere With Party Membership**

The State objects to certiorari because it alleges, incorrectly, that the Montana Republican Party has no membership. BIO15. Like most parties around the nation, membership in the Party, and the right to select nominees, is open to anyone who registers with the Party. CA9 Dkt. 9-2, ER 72. This membership requirement is constitutionally protected. *La Follette*, 450 U.S. at 123 n.25 (upholding party’s public affiliation requirement because “the stringency, and wisdom, of membership requirements is for the association and its members to decide – not the courts – so long as those requirements are otherwise constitutionally permissible”).

This “vehicle” issue is, in reality, a merits issue because open primaries undermine party membership by allowing voters to anonymously select a party’s nominees, thereby circumventing its registration requirement. This severely burdens a party’s associational right to identify persons who select its standard bearers. As this Court has held, “[i]t is undisputed that the voter registration lists, *with voter affiliation information*, provide *essential information* to the party state committees.” *Clingman v. Beaver*, 544 U.S. 581, 595 (2005) (emphasis added).

Montana does not register party affiliation or record the party ballots electors choose, Pet.App.19, thereby denying parties information essential to their functions. As a result, “there is no magic or proverbial list of Republican voters, and that makes our job as the Republican Party to identify and help turn out our voters a lot tougher.” CA9 Dkt.9-2, ER at 59-60. The State’s “vehicle” objection concerning membership is, in fact, another reason to grant certiorari.

#### **D. The District Court’s Judgment Was “Obviously Controlled” By *Nago***

The State claims the Ninth Circuit “never considered the merits of the County Committees’ claims.” BIO16. The Ninth Circuit did, however, and summarily affirmed because the Committees’ appeal “was obviously controlled” by *Nago*. Pet.App.53. The State agreed at the time. CA9 Dkt.14 at 6 (“the ‘identical’ issue was already decided by” the Ninth Circuit).

If the State is arguing that the Ninth Circuit did not consider *La Follette*, it is probably correct. The Ninth Circuit made no mention of *La Follette*, this Court's only decision concerning open primaries, in either *Nago* or its summary affirmance of this case. This is a reason to *grant* certiorari, and perhaps a GVR.

The State also claims the Ninth Circuit never determined whether the Committees waived their argument that open primaries are unconstitutional as a matter of law. BIO17. The State, however, never made a waiver argument in the Ninth Circuit – and for good reason. An issue is preserved for review when it is “pressed or passed upon below.” *United States v. Williams*, 504 U.S. 36, 41 (1992). Citing *Miller*, the Committees pressed their entitlement to summary judgment because “forced association in a primary election between a political party and non-members unconstitutionally infringes upon First Amendment rights as a matter of law.” Doc. 93 at 19. The District Court passed upon this argument – quite thoroughly. Pet.App.37-44. This vehicle objection fails.

## **II. The State Fails To Distinguish *La Follette***

The Court in *La Follette* held Wisconsin could not bind presidential delegates to vote in accordance with the state's open primary system because open primaries are a “substantial intrusion” upon a party's associational rights. *La Follette*, 450 U.S. at 126. The State errs in arguing that *La Follette* is limited to presidential nominations. BIO24. Rather, “the state-imposed burden at issue in *La Follette* was

the intrusion by those with adverse political principles upon the selection of the party's nominee (*in that case its presidential nominee*).” *Jones*, 530 U.S. at 576 n.7, quoting *La Follette*, 450 U.S. at 122 (emphasis added). The State cannot explain why the First Amendment protects political parties from open primaries as a matter of law when nominating candidates for president, but requires state-specific crossover voting data if they want the same protection when nominating candidates for sheriff.

The State quotes dicta in *La Follette* stating that upholding open primaries “may well be correct.” BIO24, quoting *La Follette*, 450 U.S. at 121. This Court actually stated the following:

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

*Id.* (emphasis added). Thus, the Court simply stated that encouraging voter participation *might* be a compelling state interest. It has subsequently held otherwise. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 446 (2008), citing *Jones*, 530 U.S. at 585-86. Moreover, open primaries are not narrowly tailored because nonpartisan primaries advance that interest without burdening associational rights. *Id.*

Because *La Follette* applies, the State’s criticisms of the Committees’ crossover data “should be addressed to the [Committees]...and not to the



judiciary.” *La Follette*, 450 U.S. 124 n.27; *id.* (lack of evidence of “raiding” by crossover voters was “irrelevant” in challenge to open primary). The State responds by insisting that, in *Jones* (a case not involving an open primary), “the severity of the burden imposed by California’s blanket primary was demonstrated by factual evidence....” BIO21. The State’s attempt to cast *Jones* as a data-driven decision lacks merit. As shown previously by the Committees, the *Jones* Court *cited* crossover voting evidence but never *required* it from the plaintiffs. Pet.8-10. The Fourth Circuit cited *Jones* without requiring crossover data, *Miller v. Brown*, 503 F.3d 360, 366 (4th Cir. 2007), and so has a Ninth Circuit panel. *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003) (*Jones* “does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones* infers the burden from the face of the blanket primary statutes.”)

Finally, the State characterizes this case as much ado about nothing because open primaries are “functionally equivalent to a closed primary with same-day registration.” BIO25. But in closed primaries, “even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to ‘cross over,’ at least he must formally *become a member of the party....*” *Jones*, 530 U.S. at 577 (emphasis in original). When a voter formally becomes a member of a party, the party can exercise its right to identify that member, something that cannot happen in an open primary.

### **III. The State Fails to Harmonize the Circuit Split Regarding Open Primaries**

As explained in detail by the Montana Republican Party, the Committees would have prevailed under the analysis used by the Fourth Circuit in *Miller*. Amicus Brf. 7. Conversely, the local party that prevailed in *Miller* would have lost under the Ninth Circuit's rule in *Nago*. *Id.* This is clear evidence of a circuit split on an issue of national importance and another reason for granting certiorari.

### **CONCLUSION**

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

Respectfully submitted,

MATTHEW G. MONFORTON  
MONFORTON LAW OFFICES, PLLC  
32 Kelly Court  
Bozeman, Montana 59718

*Counsel for Petitioners*

April 24, 2017