

No. 13-17545

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Democratic Party of Hawaii,  
Plaintiff-Appellant,

v.

Scott T. Nago, in his official  
capacity as Chief Election Officer  
of the State of Hawaii,  
Defendant-Appellee.

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On Appeal from the United States District Court  
for the District of Hawaii

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**BRIEF OF APPELLANT DEMOCRATIC PARTY OF HAWAII**

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**CORPORATE DISCLOSURE STATEMENT**

Democratic Party of Hawaii is a Hawaii Nonprofit Corporation; it is a membership organization. No entity owns more than 10% of its stock.

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## **JURISDICTIONAL STATEMENT**

This is an appeal from the final judgment of the United States District Court for the district of Hawaii. This Court has jurisdiction pursuant to 28 U. S.C. § 1291.

The district court had jurisdiction under 28 U. S.C. § 1331 (federal question) because the Democratic Party of Hawaii brought claims under federal law. The final order disposing of all claims in this case was entered on November 14, 2013. I ER 0005.

The Democratic Party of Hawaii filed its notice of appeal on December 12, 2013, I ER 0001, making the appeal timely under 28 U. S.C. § 2107(a), and Rule 4 of the Federal Rules of Appellate Procedure.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. The District Court concluded that Hawaii's open primary law was not open to facial challenge, because it is reasonably likely that at least one political party would not object to the open primary. Must facial challenges fail, whenever one may infer the existence of a non-objector to the challenged law?

2. Hawaii's open primary imposes a nomination electorate on DPH, that violates DPH's chosen range of political association. Does proof of the severity of this burden depend on empirical demonstration of consequences of the burden?

3. Do Hawaii Revised Statutes § 12-31, and related statutes, implemented pursuant to Hawaii Constitution Article 2, Section 4, providing for an "open primary," on their face, violate the Democratic Party of Hawaii's associational rights under the First Amendment of the U.S. Constitution?



## **ADDENDUM**

### **Hawaii Constitution**

#### **Hawaii Constitution Article II, Section 4**

The legislature shall provide for the registration of voters and for absentee voting and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved; provided that no person shall be required to declare a party preference or nonpartisanship as a condition of voting in any primary or special primary election. Secrecy of voting and choice of political party affiliation or nonpartisanship shall be preserved. [Am Const Con 1978 and election Nov 7, 1978]

### **Hawaii Revised Statutes**

#### **HRS §12-1 Application of chapter.**

All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise. [L 1970, c 26, pt of §2]

#### **HRS §12-2 Primary held when; candidates only those nominated.**

The primary shall be held on the second Saturday of August in every even numbered year.

No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(a); am L 1975, c 36, §2(1); am L 1976, c 106, §2(1); am L 1979, c 122, §2; gen ch 1985; am L 2010, c 126, §2]

**HRS §12-31 Selection of party ballot; voting.**

No person eligible to vote in any primary or special primary election shall be required to state a party preference or nonpartisanship as a condition of voting. Each voter shall be issued the primary or special primary ballot for each party and the nonpartisan primary or special primary ballot. A voter shall be entitled to vote only for candidates of one party or only for nonpartisan candidates. If the primary or special primary ballot is marked contrary to this paragraph, the ballot shall not be counted.

In any primary or special primary election in the year 1979 and thereafter, a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(i); am L 1974, c 34, §2(c); am L 1979, c 139, §9; gen ch 1985]

**HRS §14-21 Nomination of presidential electors and alternates; certification; notification of nominees.**

In each year when electors of president and vice president of the United States are to be chosen, each of the political parties or parties or groups qualified under section 11-113 shall hold a state party or group convention pursuant to the constitution, bylaws, and rules of the party or group; and nominate as candidates for its party or group as many electors, and a first and second alternate for each elector, of president and vice president of the United States as the State is then entitled. The electors and alternates shall be registered voters of the State. The names and addresses of

the nominees shall be certified by the chairperson and secretary of the convention of the respective parties or groups and submitted to the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election of the same year. The chief election officer upon receipt thereof, shall immediately notify each of the nominees for elector and alternate elector of the nomination. [L 1970, c 26, pt of §2; am L 1973, c 217, §4(b); am L 1981, c 100, §2(1); gen ch 1993]

### **Democratic Party of Hawaii Constitution**

#### **Article I, Section 1**

General.

The Democratic Party of Hawai`i shall be open to all persons who desire to support the Party, who wish to be known as Democrats, and who live in Hawai`i.

The Democratic Party of Hawai`i believes that its primary election, a state-imposed mandatory nomination procedure, ought to be open to participation of only such persons as are willing to declare their affiliation with and support for the Party, either through public registration to vote, or through maintenance of membership in the Party. The Party further believes that the current Constitution and laws of the State of Hawai`i, by maintaining secrecy of affiliation, and by compelling the Party to admit to its nomination procedures those who may have no interest in, or actually oppose the interests, values, and platform of the Party, do violence to the Party's associational freedoms and the individual freedoms of its membership to define their own political views, guaranteed under the Constitution of the United States. The State Central Committee and Party Chairperson shall take appropriate action to correct this injustice.

II ER 0104: 0105-0106.

### **STATEMENT OF THE CASE**

In 1978, the voters of Hawaii adopted a constitutional amendment. It was followed by implementing statutes enacted by the legislature. The result was Hawaii's "open" primary.

The open primary system is the only nomination system by which any political party in Hawaii can nominate a candidate for any office, state or federal, other than for U.S. President. There is no alternative for any party that disagrees with the system. If a candidate is not nominated through the open primary system, he or she is not a candidate in the general election.

Under Hawaii's open primary, any registered voter, in the primary election, can secretly choose the ballot of any single political party (though not more than one party). On that party ballot, the voter may choose preferred candidate(s) in his or her private discretion. There is no requirement that the voter be a member of the party, or believe in its principles. The names of voters who select a party's ballot cannot be recorded, by law. Therefore, a party can never know who has participated in its nomination.

Accordingly, every voter, even those who are indifferent to, or oppose a

party, or who have not been accepted by a party, have nomination rights in a party, equal to those of the most ardent or long-term members of that party.

The Democratic Party of Hawaii (“DPH”) adopted an amendment to its party Constitution, opposing Hawaii’s open primary, and defining its desired nomination electorate as those who are members or publicly support the party.

The present case was filed in the U.S. District Court for the District of Hawaii. DPH brought suit against Hawaii’s chief election officer, who administers primary elections statewide, in his official capacity.

This case contended that Hawaii’s open primary law was facially unconstitutional because it constituted a severe burden on associational rights, and Hawaii had no compelling interest that could survive strict scrutiny.

No objection has been made to DPH’s standing, to venue, or to the jurisdiction of the court. The Hawaii Attorney General’s office has appeared for Defendant Nago.

The matter was resolved at the trial court on cross-motions for summary judgment. The District Court and the parties understood that a grant of summary judgment would dispose of DPH's facial claim one way or the other, without precluding DPH's option to subsequently bring an "as-applied" case if it so desired.

The District Court granted Defendant Nago's motion for summary judgment, and denied DPH's motion for summary judgment, disposing of all issues and parties.

This appeal was thereafter timely taken.

### **STATEMENT OF FACTS**

The DPH Constitution is DPH's supreme governing document. II ER 104: 0105.

The Democratic Party of Hawaii's Constitution, Article I, Section 1, as duly certified by DPH convention in 2012, sets forth DPH's opposition to Hawaii's open primary and its preferred nomination electorate. It reads as set forth in the Addendum. I ER 0005: 0012; II ER 104: 0105-0106.

The membership of the DPH numbered about 20,000 for many years until 2008, at which time it rose to about 65,000. I ER 0005: 0013, 0038; II ER 100: 0101-102.

The number of voters participating in the Democratic primary election in recent years has typically been around a quarter of a million, roughly four times the formal party membership. II ER 0041: 0068-69.

## **SUMMARY OF ARGUMENT**

I.

The District Court erred in concluding that DPH's challenge to Hawaii's open primary law failed under both the Salerno "no set of circumstances" test and the "plainly legitimate sweep" test. I ER 0005: 0014. The District Court reached this conclusion because it supposed that, under either test, there will be at least one political party that does not object to the open primary. I ER 0005: 0024-25, 0029, 0031-32, 0034. Whether or not the District Court's theoretical non-objector really exists, the District Court's conclusion is flawed.

If the District Court's rule — that facial challenges must fail where non-objectors can plausibly be anticipated — were the law, facial challenges could not have been sustained in numerous cases where facial challenges have in fact been sustained. It follows logically that the District Court's rule is not the law, or at least is subject to many exceptions.

The assessment of whether a statute is subject to facial analysis should not involve locating consenters, hypothetical or actual. The correct



procedure should be to determine whether the statute can be constitutionally applied to any objectors with proper standing to complain.

## II.

The District Court erred in concluding that, despite the plain collision of Hawaii's law requiring open primaries, and DPH's desired nomination electorate, the DPH would need to prove a "severe" burden on DPH's associational rights through empirical evidence.

The DPH membership is joined, in the DPH nomination process, by anonymous and untraceable participants of no determinable political orientation. The DPH prefers not to associate with such persons.

The District Court opinion suggests that DPH must engage in a social-science proof of what persons the DPH primary electorate is composed, what they believe, and what they think they are doing, in order to prove, for example, that DPH is suffering an alteration of its ideology, or other potential harm. I ER 0005: 0032, 0035, 0038. Presumably the District Court would then decide whether the ideological harm it perceives, if any, is

severe enough to justify strict scrutiny of the Hawaii law.

There are at least three objections to this. First: the District Court is requiring an expensive and time-consuming proof, likely involving debates between experts over complex statistics, all to vindicate a basic constitutional right at the core of American political theory; i.e., free association for a political purpose. Second: what the biennially-variable cadre of anonymous uninvited voters think they are doing in the DPH nomination, is interesting, but ultimately not germane to the DPH's right to choose whether to associate with any of them. Third: the District Court risks substituting its own judgment about the prudence of DPH's chosen political associations, for the DPH's own judgment.

### III.

A political party's right of association has been largely elucidated by cases. While penumbral cases may require proof of severity of burden, as where administrative judgments involve interpretations of a law, it should not be necessary to make complex empirical proofs about collisions of

values at the bright core of the First Amendment. This case is at the core.

Because the Hawaii open primary is functionally identical to the “blanket” primary struck down in Jones, Hawaii’s open primary constitutes a severe burden on the DPH’s associational rights, subjecting the law to strict scrutiny, which it cannot withstand. The proffered state interests have all been rejected in prior decisional law, in cases which, on fair reading, are applicable here.

## **ARGUMENT**

### **Standard of Review.**

The following standard applies to all issues in this appeal. The Ninth Circuit reviews *de novo* a district court's ruling on cross motions for summary judgment. Travelers Prop. Cas. Co. of Am. v. Conocophillips Co., 546 F. 3d 1142, 1145 (9th Cir. 2008); Arakaki v. Hawaii, 314 F. 3d 1091, 1094 (9th Cir. 2002). “[C]onstitutional questions of fact, such as whether certain restrictions create a ‘severe burden’ on an individual's First Amendment rights, are reviewed de novo.” Prete v. Bradbury, 438 F. 3d 949, 960–61 (9th Cir. 2006). In the event that neither side contends that there are any genuine issues of material fact, the Court’s task is to determine whether the district court correctly applied the relevant substantive law. Arakaki v. Hawaii, 314 F. 3d at 1094.

**I. The District Court erred in deciding that a facial challenge to Hawaii’s open primary law must fail if it is possible to hypothesize a party that does not object to the open primary law.**

**A. Facial and As-applied Challenges have been explained in Hoye v. City of Oakland.**

The Ninth Circuit in Hoye v. City of Oakland, 653 F.3d 835, 857, (9th Cir. 2011) has explained the difference between a “facial” challenge and an “as-applied” challenge. A facial challenge attacks a whole rule, and an as-applied challenge attacks a sub-rule; that is, the rule as applied to a particular circumstance, but not all circumstances.

As a general matter, a facial challenge is a challenge to an entire legislative enactment or provision. See Foti, 146 F. 3d at 635 (explaining that a statute is facially unconstitutional if “it is unconstitutional in every conceivable application, or it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad”) (internal quotation marks omitted). If it does not charge statutory overbreadth, “a facial challenge must fail where the statute has a plainly legitimate sweep. ” Wash. State Grange v. Wash. State Republican Party, 552 U. S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (quotation omitted). A paradigmatic as-applied attack, by contrast, challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance, under the assumption that a court can “separate valid from invalid subrules or applications. ” Richard H. Fallon, Jr., As– Applied and Facial Challenges and Third–Party Standing, 113 Harv. L.Rev. 1321, 1334 (2000) ; see Legal Aid Serv. of Oregon v. Legal Services Corp., 608 F. 3d 1084, 1096 (9th Cir. 2010) (“Facial and as-

applied challenges differ in the extent to which the invalidity of a statute need be demonstrated. ” (quotation omitted) (emphasis in original)). Because the difference between an as-applied and a facial challenge lies only in whether all or only some of the statute's subrules (or fact-specific applications) are being challenged, the substantive legal tests used in the two challenges are “invariant. ” *Id.* (quotation omitted).

Hoye v. City of Oakland, 653 F.3d at 857. Note that the same substantive legal tests apply to both facial and as-applied challenges. This matters to DPH because the District Court and the parties understand that bringing an as-applied challenge is an option for DPH if it does not succeed in this case. I ER 0005; 0016, fn. 7.

**B. Applying Hoye terminology in this case, it is appropriate to challenge the whole Hawaii open primary law as a single rule, rather than as several subrules, which makes it appropriate for a facial challenge. The District Court, however, hypothesized a political party that would not object to the open primary (a “non-objector”), and used that as a rationale to deny facial analysis.**

DPH did not allege overbreadth, a doctrine associated with free speech cases. Therefore, under Hoye, DPH must show that Hawaii’s primary election law is unconstitutional in every conceivable application, or that it

doesn't have a "plainly legitimate sweep".

In this case, the open primary law is composed of a few interrelated principles. These are:

- The open primary is the sole and exclusive method by which any Hawaii political party can nominate any candidate (except President) See, HRS §§12-1, 14-21
- Any candidate nominated by any method other than the open primary cannot appear on the general election ballot. See, HRS §12-2
- All registered voters can participate anonymously in the party nomination of their choice, without regard to whether the party chooses to affiliate with them or not, without regard to their political beliefs. See, HRS §12-31
- A political party can never know who has participated in its nomination procedure. See, Hawaii Constitution Art. II, § 4, HRS §12-31
- In consequence, no party can exercise any choice about its political associations in the nomination process. A party may embrace the "open" concept or reject it, but, under Hawaii law, it has no choice in defining a nomination electorate.

These principles reinforce each other to achieve a single result, the open primary. It would be hard for a party to achieve freedom of choice of

nomination electorate by attacking fewer than all of them. Accordingly, the several principles can be regarded as a single “rule” within the meaning of Hoye. See Hoye at 857.

Furthermore, the Hawaii open primary law is not subject to any variation in administrative interpretation which could result in materially different outcomes. Nago has not proposed any possible variation, and neither has the District Court. I ER 0005: 0007-0013.

Therefore, the Hawaii open primary is a single Hoye rule, admitting of no variations in legal or administrative interpretation, with no sub-rules that can easily be separated out. The open primary is thus potentially susceptible to facial challenge. This is not to pre-decide the merits of such a challenge, but merely to say that the open primary, as a single Hoye rule, is in the form that permits a facial challenge.

However, the District Court decided that facial analysis had to fail, because it is plausible to assume that some political party might embrace the restrictions imposed by the open primary. That hypothetical political party might think that the open primary’s restrictions, though irksome,



didn't matter much. Or, the party might think its political purposes were best served by the open primary, and that, if allowed a free choice, it would prefer to admit all voters to participate anonymously in its nomination process. Although such a political party would have some trouble as a plaintiff, on standing or case-and-controversy grounds, the existence of such a party was significant to the District Court. I ER 0005: 0026; II ER 0041: 0060, 0097. For sake of this briefing, we call this hypothetical political party a "non-objector."

We will concede for purposes of argument that it is reasonable to assume such a non-objector exists.

The question then becomes, if a non-objector exists, does that mean facial analysis must fail? Phrased another way, if a non-objector exists, does that mean that a court can never strike down a law (or, Hoye rule), but is perpetually doomed to confronting it piecemeal, in as-applied challenges?

We answer these questions in the next two sections.

**C. Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir. 2013) (en banc) demonstrates that the existence of a non-objector does not preclude a facial challenge.**

Patel is a search and seizure case in which a Los Angeles municipal code authorized warrantless onsite inspections of hotel records, on demand of a police officer. In Patel, at 1061, hoteliers objected to the warrantless searches of their records, and the Court noted the basis of their right to exclude intruders:

Record inspections under § 41.49 involve both a physical intrusion upon a hotel's papers and an invasion of the hotel's protected privacy interest in those papers, for essentially the same reasons. 'One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.'"

(internal citation omitted). DPH and Patel plaintiffs are in similar positions. Both argue that a right to exclude persons (from a political association, or from physical premises and records) has been violated by an unconstitutional law that purports to justify intrusion.

In Patel, at 1066-67, a dissent cited a case in which a hotel had, apparently voluntarily, not made an issue of its right to exclude, and had

disclosed its records to the police. That hotel can be seen as a non-objector, one who would have acceded to the warrantless search law much as, in this case, the District Court's hypothetical non-objecting political party would accede to the open primary law.

The majority opinion, Watford, J., at 1062, addressed the point as follows:

It may be the case, as the dissent speculates, that the hotel in *Cormier* voluntarily consented to an inspection of its guest records. See Clifton dissent at 1072-73. But that does not support the dissent's contention that hotels generally lack an expectation of privacy in such records. Otherwise, the fact that a defendant in one of our published decisions voluntarily consented to the search of his home would establish that the rest of us lack an expectation of privacy in our own homes.

In other words, the existence of a non-objector to warrantless searches— even one proven to exist by another published decision — did not waive Patel's rights, or anybody else's rights. Once stated clearly, the point seems obvious. There could be no rights if a non-objector's mere existence waived them.

In the present open primary case, the District Court did not contend

that the existence of a non-objecting political party would deprive the DPH of its substantive rights. But the District Court did find that the presence of a non-objector would preclude facial analysis.

In Patel, the presence of a non-objector did not preclude facial analysis.

One Patel dissent argued that “the Patels’ decision to drop the as-applied challenge they raised in their complaint.. leaves us with insufficient facts regarding the unconstitutional conduct they allege has occurred.” Id. at 1066. Another dissent, citing Salerno and Grange, recited the usual formulae about how difficult facial challenges are, and argued that the standard had not been met. Id. at 1070 et seq. Both dissents’ arguments are reminiscent of the District Court’s conclusions here. Nonetheless, the Patel court struck down the statute pursuant to a facial challenge.

The key point here is that the Patel decision was rendered on a facial challenge, despite the clear existence of a non-objector. We submit that the District Court’s conclusion that a facial challenge cannot succeed, because of the existence of a non-objector to the open primary, is error.

We next consider whether other cases support our proposition that the

presence of a non-objector should not preclude facial challenge.

**D. If the existence of a non-objector precluded a facial challenge, facial challenges would rarely succeed, since one can plausibly imagine non-objectors to almost any restriction.**

Any law enacted through majority vote of the people should have large numbers of non-objectors. A law enacted by a legislature, rather than the people, should have at least some constituency. Consider a law establishing a state religion; despite the presumed unconstitutionality of such a law, non-objectors can likely be found among the adherents of that religion. The District Court's rule would refuse facial challenge even in such a case. Even where the class of affected persons is a minority, there may at least some non-objectors. On a common-sense basis, the law would have to be profoundly abhorrent, to make us suspect that all affected persons would object.

Professor Fallon, whose work was cited in Hoye, 635 F.3d at 857, has, in a 2011 article, provided an updated analysis of facial challenges. Richard H. Fallon, Jr., Fact and Fiction about Facial Challenges, 99 Cal. L. Rev. 915

(August 2011). Under the heading “A. Facial Challenges Hiding in Plain Sight”, 99 Cal. L. Rev. at 935, Professor Fallon says,

Powerful evidence that the Supreme Court routinely entertains, and not infrequently upholds, facial challenges emerges from examination of the leading cases under a broad range of constitutional provisions, as reflected in a single Constitutional Law [FN112] and a single Federal Courts casebook. [FN113] A survey of leading cases unmistakably demonstrates that the Court has held statutes wholly invalid under nearly every provision of the Constitution under which it has adjudicated challenges to statutes.

The article’s footnotes list dozens of facial analysis cases decided by the U.S. Supreme Court during several terms.

In cases involving challenges to Congress's authority to enact legislation under Article I, the Court has held statutes wholly invalid under the Qualifications Clause, [FN114] the Presentment Clause, [FN115] and the Suspension \*936 Clause. [FN116] Within the past two decades, it has twice ruled that statutes exceeded Congress's power under the Commerce Clause. [FN117] Indeed, a subsequent decision, in *Gonzales v. Raich*, [FN118] can be read as rejecting the possibility of successful as-applied challenges to assertions of legislative power under the Commerce Clause and thus as establishing that all attacks must be facial if they are to have any chance at success. [FN119] The Court has struck down state legislation under the Contracts Clause [FN120]

and the Import-Export Clause. [FN121] It frequently invalidates state statutes under the dormant Commerce Clause. [FN122]

In other decisions enforcing the Constitution's structural provisions, the Court has ruled statutory provisions invalid, apparently in all applications, because they trench on powers reserved to the President by Article II [FN123] or conflicted with Article III. [FN124] *Printz v. United States* [FN125] found that a statutory provision requiring state and local law enforcement officials to enforce federal law violated assumptions of dual sovereignty implicit in the Constitution's structure. The Court has repeatedly held statutes that discriminate against out-of-staters unconstitutional under the Privileges and Immunities Clause of Article IV. [FN126] It often finds state statutes and regulations to be preempted by federal law and thus wholly unenforceable under the Supremacy Clause of Article VI. [FN127]

Myriad Supreme Court decisions have pronounced statutes invalid under the Free Speech Clause of the First Amendment. [FN128] Many of these rulings have \*937 laid down or reaffirmed tests of constitutional validity that can be, and often have been, employed to hold other statutes invalid in toto. These include tests that inquire whether statutes regulating speech or expression are substantially overbroad, [FN129] whether they are narrowly tailored to further compelling governmental interests, [FN130] and whether restrictions on commercial speech directly advance substantial government interests

and are no more extensive than necessary. [FN131]

A formidably large number of decisions have found statutes unconstitutional under the religion clauses of the First Amendment. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Court held a statute facially invalid under the Free Exercise Clause. [FN132] More frequently, the Court has declared statutes invalid under the Establishment Clause, [FN133] often because of their failure to satisfy one or another prong of the much criticized but frequently applied threepart test of *Lemon v. Kurtzman*. [FN134] Pursuant to the Lemon test, laws and regulations will fall to constitutional challenge if they lack a secular purpose, have the principal or primary effect of advancing or inhibiting religion, or promote an excessive government entanglement with religion. [FN135]

Fallon 2011 goes on in this vein for five or six more paragraphs, covering different sections of the U.S. Constitution. A footnote may contain several cases. The usefulness of Fallon's list here is that it assembles a representative sampling of facial analysis cases in a single convenient location. On this list, it is not hard to find cases that are consistent with the proposition that facial challenges succeed, even where it is easy to imagine non-objectors. Here are two.

**U. S. Term Limits, Inc. v. Thornton, 514 U. S. 779, 828-36 (1995).** In



this case, the Supreme Court struck down an amendment to the Arkansas Constitution which precluded persons who had served a certain number of terms in the U.S. Congress from having their names placed on the ballot for election to Congress. In view of the political popularity of the term limits idea — it had been enacted by general vote of the Arkansas electorate — it would have been reasonable to suppose that a non-objector could have been found. For example, there may have been an affected congressperson who agreed with term limits, and would have acceded to the law. Had the District Court's rule been the law, the the majority should not have struck down the law. The majority nonetheless struck down the amendment applicable to congressional candidates in its entirety.

**Santa Fe Indep. Sch. Dist. v. Doe, 530 U. S. 290 (2000).** In this Establishment Clause case, the Supreme Court sustained a facial challenge to a Texas school district's policy permitting student-led religious invocations before football games, even though no such invocation had yet occurred. That there would have been non-objectors among the affected students, was certainly a reasonable inference, on the grounds that the

school district policy probably represented dominant public opinion. The dissent raised an argument based on Salerno. Id. at 318. Yet the challenge was sustained anyway, with the Court noting that “fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” Id. at 305. Santa Fe has additional significance because overbreadth analysis is not available in Establishment Clause cases. See, id. at 318. Here DPH also has a case which an overbreadth challenge does not exist, so in Hoye terms, *supra*, Santa Fe plaintiffs faced a similar standard of proof. In sum, this is a roughly parallel case in which a non-objector clearly existed, and yet a facial challenge was sustained.

Rather than exhaust available space, here is a chart showing how non-objectors might have been identified, in a few cases from Fallon’s list where rules were in fact held facially unconstitutional.

Citation	Fallon footnote	Kind of case	Potential non-objector to rule
U.S. v. Stevens, 559 U.S. 460 (2010)	128	free speech; overbreadth; prohibition of depictions of cruelty to animals	animal rights advocates

Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)	128	free speech; overbreadth; Child Pornography Protection Act	computer imaging artists, not desiring to create virtual imagery of children
Watchtower Bible & Tract Soc'y v. Stratton, 536 U.S. 150 (2005)	128	free speech; ordinance requires permit prior to door-to-door advocacy	any advocacy group not choosing door-to-door contact as a tactic
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)	128	free speech and supremacy clause; state restrictions on tobacco advertising	any retailer, selling tobacco, offended by advertising near schools
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)	128	free speech; statutory prohibition against anonymous campaign literature	citizens prepared to identify themselves to the public while leafletting
Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)	132	practice of religion; ordinance prohibiting animal sacrifice	religious citizen not inclined to animal sacrifice
Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994)	133	establishment of religion; special school district drawn to include only strict Jewish sect	member of sect residing in school district
Edwards v. Aguillard, 482 U.S. 578 (1987)	133	statute forbids teaching of evolution unless accompanied by "creation science"	creationist teacher
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	137	travel and association; statute denying full use of passport to Communists	alleged Communist willing to disavow Communism
Saenz v. Roe, 526 U.S. 489 (1999)	138	travel; year of residency required as precondition to full aid for children	in-migrants satisfied with aid temporarily pegged to their previous state's levels

Lawrence v. Texas, 539 U. S. 558 (2003)	143	sodomy law; homosexual conduct in private home	persons contending that sexual acts not aimed a procreation should be prohibited
Hooper v. Bernallilo Cnty. Assessor, 472 U. S. 612 (1985)	144	tax exemption for Vietnam veterans resident in state before 1976	veteran of another era or another war, wanting to help Vietnam vets returning to state

In sum, the District Court's reasoning, that facial analysis must fail if a non-objector exists, is illogical. There would have been few, if any, facial challenges sustained, if the District Court's reasoning were correct, but the truth is otherwise. The District Court's reasoning is therefore error.

**II. The District Court erred in holding that the Democratic Party of Hawaii must prove, through empirical evidence about voter behavior, that its First Amendment associational rights are severely burdened by the open primary law.**

**A. Such a proof is probably expensive, which works inequitably, to the disadvantage of political parties without money, and makes vindication of constitutional rights difficult.**

The District Court held that DPH must demonstrate through empirical data that the open primary's burden on its First Amendment associational rights is heavy. I ER 005: 0032-0039. As a model for the proof it requires, the District Court points to other cases that involved days of federal trial to

establish the burden imposed by a primary election system on a political party's associational rights. See I ER 005: 0032-0039

In this case, the expense of many days of federal trial would be only the tip of the iceberg. The cost of generating data on voter behavior, over historic periods, is likely to be substantial.

Hawaii maintains aggregate turnout data, curated by Defendant Nago's office, which may easily be found on its official public website, See [hawaii.gov/elections](http://hawaii.gov/elections). By exploring the URL [hawaii.gov/elections/results](http://hawaii.gov/elections/results), anyone may determine aggregate turnout in Hawaii primary, general, and special elections back to 1992, and, for example, determine that the number of votes cast statewide, in the 2012 primary, for all Democratic candidates for the office of U.S. Senator, totaled 233,639. Any other electoral contest can be similarly inspected.

However, Hawaii's official count does not show how many of those 233,639 voters, in 2012, were members of, or in sympathy with, a particular political party, or any political party. Hawaii has, for a generation, because of the open primary law itself, scrupulously not maintained data on voters'

party affiliation. See, Hawaii Constitution Art. II, Section 4; and HRS § 12-31. Perforce, Hawaii doesn't maintain any data that could show year-by-year fluctuations in voter behavior.

There is a big difference between trying to prove burden with officially-collected State party affiliation data, and trying to prove burden, as here, with no such data at all. The most recent such data would be around 35 years old. If the District Court expects a political party to analyze historical patterns in primary races to show the severity of burden, e.g., whether a given election contains contested or "attractive" races that invite crossover, and how that incidence of crossovers compares to other years with "less attractive" races, a political party would have to somehow infer party membership and party sympathy rates, and their respective turnout rates, not only as a present snapshot, but across many election cycles, back into history, based on no official numbers. The task is complicated by the need to isolate blocs of voters in spite of population migration, Hawaii's decadal reapportionments, required by the Hawaii Constitution Article IV, Section 1 (Reapportionment Years), and

administrative redrawing of precincts.

Such a study is not impossible, but it is not trivial, and it is likely not cheap. A political party must be prepared to advance money on experts and the discovery process, but importantly, on fairly significant research studies. Indeed, under the District Court's theory, it would appear that each political party, even the smallest ones, would have to make its own showing of burden individually. Because the reported cases do not appear to set mathematical standards whereby, for example, a certain percentage of crossover voters is deemed to constitute a "severe" burden, even a concrete proof still must confront a fairly subjective standard of decision.

In the absence of publicly-collected data, the kinds of proof the District Court contemplates, require creation of data from scratch. The costs may be disproportionate for parties without cash on hand. The broader question is whether courts should require this kind of expensive and perhaps speculative proof, to vindicate constitutional rights.

**B. Focusing on voter behavior as the measure of burden on DPH's associational rights, causes DPH's associational rights to depend on the fluctuating and irrelevant behavior of others.**

According to the District Court, the assessment of the severity of the burden the open primary places on DPH's associational rights is central to the outcome of the case. If the burden is "severe", the State of Hawaii's justifications for the open primary are subject to strict scrutiny, and probably cannot withstand that scrutiny. If the burden is lesser, then lesser scrutiny is applied, and the State's proffered reasons probably can withstand it. II ER 0041: 0076.

Unfortunately, measuring the burden on DPH's associational rights by determining how voters at large behave, places DPH's associational rights at the mercy of persons with whom DPH has no association, and has sought no association; they may not even be persons with whom DPH would associate, if they weren't utterly anonymous.

We will consider the problem of cross-over voting. We do not assume that cross-over voting is the only behavior that burdens DPH's associational rights; it's merely a vivid and easily-understood example.



Cross-over voting can occur when DPH has a contested primary (more than one member of DPH seeks nomination as DPH's candidate in the general) and voters who are not part of DPH's preferred nomination electorate leave their normal confines and "cross over" into the DPH ballot to cast a vote. Some cross-over voting may be motivated by the desire to select the weaker member of DPH; from the point of view of a competing party that weaker candidate be the easier one to beat. Or the cross-over voting maybe motivated by a desire to select for a particular ideology; e.g., the more "moderate" candidate, or the candidate with a particular view on a hot-button issue, regardless of general ideology. Cross-over voting may be motivated by boredom, as when members of one party perceive no interesting contests on their own ballot. And sometimes cross-over voting may occur because a particularly charismatic candidate emerges in another party. There may be other motivations.

Cross-over voting can also occur in an open primary when the DPH does not have a contested primary. It might be that members of other parties find their own choices unsatisfactory and want to protest. It might

be that the vote is cast for a DPH candidate because the voter crossed over to affect another race, and while on the ballot, thought it appropriate to just fill in the rest of the blanks. Voters may cross over party lines at rates varying from election to election. Some years there may be attractive contests with a high rate of cross over, and some years there may not be.

Sorting out all these motivations and their impacts across historical data is not a simple statistical task, especially where official data do not exist, as discussed above. But note here that, in each situation, the burden on DPH's associational rights is being measured by the fluctuating behavior of others, which may be ideological, tactical, idiosyncratic, or conditioned by unique and momentary causes, election by election. The DPH's associational rights are being measured by a yardstick that fluctuates in length, and the yardstick's length is dictated by the behavior of and desires of persons with whom the DPH has not chosen to associate.

**C. Evaluating burden by counting how non-DPH voters behave, is dangerously close to allowing a court to substitute its judgment on the wisdom of DPH's chosen associations for DPH's own judgment, and its judgment on DPH's proper ideology for DPH's own judgment.**

The difference between the DPH's preferred nomination electorate, and the nomination electorate DPH is forced to accept by Hawaii's open primary law, is demonstrated in the first instance by the collision between the text of DPH's Constitution and the text of Hawaii's Constitution and statutes. Although we can imagine a situation in which a party's preference and the mandate of the law were not materially different, we submit that in this case there is an obvious and material difference. Here, the DPH wants to select its nominees using its members and such persons as are willing to publicly state support of the DPH. DPH would require, not only that DPH nominators be supporters, but that they be known to DPH to be supporters. Hawaii law mandates that DPH shall have only the one prescribed nomination electorate: all electors, they need not be supporters of DPH, none of them can be known to DPH, and no variation is permitted. We contend that this plain collision allows a direct inference that the burden on DPH's rights is severe. The District Court did not agree, and therefore proposed to weigh voter behavior.

In weighing voter behavior as a measure of burden, a court is very close to weighing whether DPH's preferred political associations are acceptable, in the view of the court, or DPH's preferred ideology is acceptable, in the view of the court. To use the example of ideology, if the point of the weighing of evidence is to measure how much the open primary has affected DPH's ideology, to decide whether that effect is severe or not, then the court is deciding, albeit in other terms, that alterations to a party's ideology do or don't matter. This puts a court in the position of dictating to a political party what its ideology can be, based on popular voting behavior, or a court's own preferences. This is a dangerous slope for a court to be on, given that matters of right, and particularly matters of preferred political organization, should not be subject to legislative or judicial dictate. Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 224, 107 S.Ct. 544 (1986) (party's determination of the boundaries of its own association is protected by Constitution; state or courts may not interfere on grounds they view a particular expression unwise or irrational).

To use the example of preferred political association, if the point of the weighing of evidence of voting behavior is to determine whether compelled political association, as Hawaii would require, against DPH's preference, works a material alteration in DPH's ideology, we are back in the prior example.

### **III. Hawaii's open primary law violates DPH's associational rights.**

#### **A. Distinctions between a "blanket" primary and Hawaii's open primary are distinctions without material difference.**

A fundamental dispute between the District Court and DPH is the question of whether Hawaii's open primary fits within the previously-decided rules, for example, those pertinent to "blanket" primaries as in Jones, or represents something importantly different. The District Court believes that Hawaii's open primary is importantly different from primaries described in earlier cases. On the other hand, DPH believes there is no important difference between Hawaii's open primary and laws that have previously been struck down. Therefore, DPH contends that the

decisional rationales of cases like Jones apply with equal force to Hawaii's open primary.

In both the blanket primary described in Jones, and Hawaii's open primary:

1. The result of the primary is deemed the actual nomination of the political party.

2. There is no escape from the primary system; political parties do not have any option to nominate by other means.

3. The nomination electorate for all political parties is all registered voters.

4. Political parties have no alternative to the prescribed nomination electorate.

5. No voter is subject to any requirement to be a member of a political party, in order to participate in its nomination.

6. No party may learn which voters have chosen to participate in either its nomination, or the nomination of any other party.

7. No voter's membership in any political party disqualifies him or her from voting in another political party's nomination.

8. Leaving aside formal membership, no voter is subject to any requirement to even state support for the party in which he or she proposes to nominate.

9. No voter's support of another party, even if he is not a member of that party, disqualifies him from voting in a party's nomination.

10. No political party can block desertion, or discipline its own members for desertion, since no political party can learn if its own members have voted in another nomination.

11. No political party can block even its most virulent opponents from sharing in its nomination on an equal basis with its most loyal members.

12. There is no requirement that a voter's choice of party nominations be consistent over time between elections; furthermore, there is no means of registration or declaration of support, that could support any such requirement.

13. A voter's decision about which nomination to participate in, may be delayed until the actual moment of voting, and be subject to the most transient whim, in the privacy of the voting booth.

14. A voter's decision about which nomination to participate in, is not reciprocated by any action of the political party to admit that voter to its nomination. All discretion is consigned to the voter, and none to the political party. There is nothing mutual about any purported "association".

15. Because no list is maintained, the political party cannot identify sympathetic voters, who are supportive but not formal members, in order to offer them membership and recruit them to the common cause.

As far as we can determine, the only difference between a "blanket" primary and Hawaii's open primary, is that:

1. In Hawaii, voters secretly select one party's primary ballot, and perforce restrict their choices to that one political party for the handful of available offices, whereas in a "blanket" primary, the voter is given a single



ballot with all parties' choices available, and may secretly select parties on an office-by-office basis.

It is upon that single slim thread that the whole purported distinction between "blanket" and open primaries depends. Against the argument that some Hawaii open primary voters may be deterred from, for example, "crossing over" into the DPH primary if they spot interesting contests in several parties, and therefore pause to ponder which ballot to use, is the argument that when voters do cross over, they will plunder DPH wholesale, to a greater extent than they would have in a "blanket" primary, since only DPH candidates are available to them once they select the DPH ballot. The Hawaii open primary arguably creates a greater impact across the whole DPH ticket than a "blanket" primary would, because all DPH contests necessarily become the subject of crossovers, even those contests that would not attract crossovers in a "blanket" primary.

Courts do not wish to decide cases beyond their facts, but also, courts must decide when cases are similar enough to justify their treatment under rules established in previous cases. Courts must also distinguish

between purely verbal distinctions, and distinctions of importance. No doubt, although the elucidation of the types state-by-state is beyond the scope of this brief, there are many varieties of “open” primaries, such as ones that provide alternatives for parties that don’t want to use the state system. Hawaii’s “open” primary is the most rigid and exclusive type imaginable, and differs barely from “blanket” primaries, if it is not actually more constraining of party rights.

Here, there is no important distinction that would prevent the application of “blanket” primary cases to Hawaii’s open primary.

Returning to Patel, the court, over the objection of dissents making similar arguments to the Defendants here, found that the constitutional background was clear because, although ordinarily the court “would balance ‘the need to search against the invasion which the search entails....

Here, however, that balance has already been struck.’” 738 F.3d at 1063.

We urge a similar approach here.

**B. Ample justification exists for applying “blanket” primary precedent, and precedent from other situations, to Hawaii’s open primary, and finding Hawaii’s open primary unconstitutional.**

The District Court correctly identified the constitutional underpinnings of this case.

In this regard, “the First Amendment, among other things, protects the right of citizens ‘to band together in promoting among the electorate candidates who espouse their political views.’” *Clingman*, 544 U.S. at 586 (quoting *Jones*, 530 U.S. at 574). This freedom “necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.” *Jones*, 530 U.S. at 574 (quoting *Democratic Party of the U.S. v. La Follette*, 450 U.S. 107, 122 (1981)). “That is to say, a corollary of the right to associate is the right not to associate.” *Id.* “Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association’s being.” *Id.* (quoting *La Follette*, 450 U.S. at 122 n.22).

I ER 0005: 0020. DPH has identified the people it wishes to constitute its association, and wishes to limit control over its decisions -- in this case its nomination decision, which Jones, 530 U.S. at 574, regards as its most important -- to those who share the interests and persuasions that underlie DPH’s being. Beyond any doubt, Hawaii’s open primary law, intentionally

prohibits DPH from doing this, rendering freedom of association an empty guarantee. If this were a “blanket” primary case, the District Court should have concluded that the “blanket” primary’s burdens on a political party’s associational freedoms have already been tested, and have been found to be severe. We submit that there is no principled reason for a different result in this case, because, Hawaii’s law, though it bears a different adjective, is no different in impact on DPH’s rights than a “blanket” primary would be.

Below, we have made the affirmative argument for unconstitutionality in greater detail. We have also shown below that every purported compelling state interest adduced in support of Hawaii’s open primary, has already been dealt with, and denied, in Jones. If this Court accepts our argument that there is no material difference in impact on DPH between a “blanket” primary and Hawaii’s open primary, the way is clear to see that Hawaii’s justification for the open primary cannot withstand strict scrutiny.

## CONCLUSION

The District Court concluded that the statute could withstand facial challenge because it was easy to imagine a political party that would not object to the open primary.

The District Court also would require proof of impacts and consequences before finding a severe burden.

DPH has shown above that a statute cannot fail a facial challenge just because it is possible to imagine non-objectors. Non-objectors can be found to nearly any conceivable law. Were the District Court's test actually the law, few, if any, of the decisions striking down statutes on a facial basis would exist. Moreover, it is clear that, as to the class of parties who do not prefer the open primary, it is impossible for the statute to be applied consistently with their preferences of nomination electorate.

DPH has also shown that the Hawaii open primary law is not materially different than, and imposes the same severe burden on DPH's First Amendment associational rights, as the "blanket" primary struck down in Jones.

DPH seeks reversal of the judgment of the District Court on the grounds that the District Court did not correctly apply either the “plainly legitimate sweep” test or the “no set of circumstances” test, because the hypothetical existence of a non-objecting political party is not probative of constitutionality.

DPH further seeks reversal of the judgment of the District Court on the grounds that the direct and uncontested conflict between the DPH’s desire to nominate its candidates with its members and those other persons who are willing to publicly state support for DPH, and Hawaii’s open primary statute, constitutes a severe burden on DPH’s associational freedom, a burden that is shown on the record without need of further empirical proof. Once it is established that the burden of Hawaii’s open primary is functionally identical to that of the “blanket” primary, Hawaii’s adduced interests in the open primary law cannot withstand strict scrutiny.

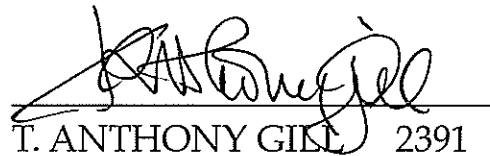
Accordingly, DPH seeks reversal and remand with instructions to enter judgment for DPH. Failing that, DPH seeks reversal and remand with instructions for further proceedings in the District Court consistent

with: a finding of severe burden on associational rights; and no finding that the open primary statute is not subject to facial challenge.

DPH seeks relief only in election years after 2014; as a practical matter, any decision by this Court will not come in time for reconfiguration of this August's primary.

Respectfully submitted,

Date: March 24, 2014

A handwritten signature in black ink, appearing to read "T. Anthony Gill", is written over a horizontal line.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitations of Fed. R. App. P.

32(a)(7)(B) because this brief contains 8,718 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P.

32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using fourteen-point Palatino.



**STATEMENT OF RELATED CASES**

Plaintiff Democratic Party of Hawaii, and its counsel, know of  
no related cases.

Respectfully submitted,

Date: March 24, 2014

  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. **PLAINTIFF-APPELLANT'S BRIEF**
  2. **PLAINTIFF-APPELLANT'S EXCERPTS OF RECORD**
- VOLUMES 1-2**

was served on all interested parties electronically through CM/ECF.

Date: March 24, 2014

  
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No. 13-17545

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

Democratic Party of Hawaii,  
Plaintiff-Appellant,

v.

Scott T. Nago, in his official  
capacity as Chief Election Officer  
of the State of Hawaii,  
Defendant-Appellee.

---

On Appeal from the United States District Court  
for the District of Hawaii

---

**APPELLANT'S EXCERPTS OF RECORD, VOLUME I OF II**

---

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Attorneys for Plaintiff  
Democratic Party of Hawai'i

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

ER 0001

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Democratic Party of Hawai`i in the above-named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order (1) Denying Plaintiff's Motion for Partial Summary Judgment; (2) Denying Plaintiff's Motion for Preliminary Injunction; and (3) Granting Defendant's Motion for Summary Judgment, entered in this action on the 14th day of November, 2013.

Respectfully submitted on this 12th day of December, 2013.

GILL, ZUKERAN & SGAN

/s/ David A. Sgan

Attorneys for Plaintiff  
Democratic Party of Hawai`i

No.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEMOCRATIC PARTY OF HAWAI`I,	)	
	)	
Plaintiff,	)	
	)	REPRESENTATION
	)	STATEMENT
vs.	)	
	)	
SCOTT T. NAGO, in his official	)	
capacity as Chief Election	)	
Officer of the State of Hawai`i,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

---

PLAINTIFF / APPELLANT

Democratic Party of Hawai`i

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Respectfully submitted on this 12th day of December, 2013.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

DEMOCRATIC PARTY OF HAWAII,	)	CIVIL NO. 13-00301 JMS-KSC
	)	
Plaintiff,	)	ORDER (1) DENYING PLAINTIFF’S
	)	MOTION FOR PARTIAL SUMMARY
vs.	)	JUDGMENT; (2) DENYING
	)	PLAINTIFF’S MOTION FOR
	)	PRELIMINARY INJUNCTION; AND
SCOTT T. NAGO, in his Official	)	(3) GRANTING DEFENDANT’S
Capacity as the Chief Election Officer	)	MOTION FOR SUMMARY
of the State of Hawaii,	)	JUDGMENT
	)	
Defendant.	)	
	)	

**ORDER (1) DENYING PLAINTIFF’S MOTION FOR PARTIAL  
SUMMARY JUDGMENT; (2) DENYING PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION; AND (3) GRANTING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

The court upholds Hawaii’s open primary election against this facial constitutional challenge.

The Democratic Party of Hawaii (“DPH”) challenges the constitutionality of Hawaii’s open primary election, contending that article II, § 4, of the Hawaii Constitution (and the Hawaii statutes that implement it) facially violates the First Amendment of the United States Constitution by allowing voters to select a political party’s general-election candidates (other than a Presidential

candidate) without *publicly* declaring their affiliation with that party. As explained to follow, a party's First Amendment right of free association includes the right to limit its association to people who share its views. Arguing that association is a "two way street," the DPH contends that this right is severely burdened if a party does not know who is associating with it, and thus has no opportunity to restrict persons from participating in the nomination of a party's candidates. Further arguing that Hawaii has no narrowly-tailored, compelling state interest justifying such a burden, the DPH seeks to prevent Defendant Scott T. Nago, in his official capacity as the Chief Election Officer of the State of Hawaii ("Nago" or the "State"), from administering this unconstitutional law any further.

Before the court are (1) Cross Motions for Summary Judgment; and (2) a Motion for Preliminary Injunction by the DPH seeking to enjoin Nago from enforcing or applying Hawaii's primary election laws in any way that violates the First Amendment. Based on the following, the DPH's Motion for Partial Summary Judgment and Motion for Preliminary Injunction are DENIED. The State's corresponding Motion for Summary Judgment is GRANTED. The DPH's facial challenge fails. Judgment shall issue in favor of the State.

## **II. BACKGROUND**

### **A. Factual Background**

Hawaii law requires candidates in any general election (except for a Presidential election) to be nominated in the preceding primary election. *See* Hawaii Revised Statutes (“HRS”) § 12-1 (“All candidates for elective office, except as provided in Section 14-21, shall be nominated in accordance with this chapter and not otherwise.”)<sup>1</sup> & § 12-2 (“No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary.”). And article II, § 4, of the Hawaii Constitution requires these primary elections to be “open.”<sup>2</sup> That is,

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<sup>1</sup> HRS § 14-21, regarding the nomination of presidential electors, requires political parties to select such electors by “state party or group convention pursuant to the constitution, bylaws, and rules of the party or group[.]” This action does not challenge § 14-21.

<sup>2</sup> Generally, an “open” primary allows a person to vote without being “required to declare publicly a party preference or to have that preference publicly recorded.” *Democratic Party of the U.S. v. La Follette*, 450 U.S. 107, 111 n.4 (1981). “The major characteristic of open primaries is that any registered voter can vote in the primary of [any] party.” *Id.* (quoting R. Blank, *Political Parties, An Introduction* 316 (1980)). A voter, however, “is limited to that party’s nominees *for all offices*. [A voter] may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 576 n.6 (2000).

Such an open primary differs from a “blanket” primary that allows a voter to choose “any candidate regardless of the candidate’s political affiliation.” *Id.* at 570. More specifically, a blanket primary is one “in which all candidates are combined on a single ballot and may be voted upon by voters affiliated with any party.” *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1178 (9th Cir. 2008). In contrast, in a “closed” primary, “only persons who are members of the political party . . . can vote on its nominee.” *Jones*, 530 U.S. at 570. And in a “semi-closed” primary, a party “may invite only its own registered members” as well as

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Hawaii’s Constitution provides that votes in a primary election must be cast *without* requiring voters to “declare a party preference.”

Specifically, as amended in 1978, the Hawaii Constitution provides:

The legislature shall provide for the registration of voters and for absentee voting and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved; *provided that no person shall be required to declare a party preference or nonpartisanship as a condition of voting in any primary or special primary election. Secrecy of voting and choice of political party affiliation or nonpartisanship shall be preserved.*

Haw. Const. art. II, § 4 (emphasis added). This provision was ratified by Hawaii’s voters in November 1978, after delegates debated different types of primary elections in the 1978 Constitutional Convention. *See* Doc. No. 16-1, Nago Decl. ¶¶ 4, 5; II Proceedings of the Constitutional Convention of Hawaii of 1978 (“1978 Proceedings”) 746-84 (1980).

Prior to 1978, section 4 simply stated: “The legislature shall provide for the registration of voters and for absentee voting; and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved.” Haw. Const. art. II, § 4 (1968). And in the decade before the 1978 amendment to the Hawaii Constitution, Hawaii utilized a “closed” primary based upon statute. As

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<sup>2</sup>(...continued)  
independent voters. *Clingman v. Beaver*, 544 U.S. 581, 584 (2005).

amended in 1970, HRS § 12-31 provided in pertinent part: “No person shall be entitled to vote at a primary or special primary election who shall refuse to state his party preference or nonpartisanship to the precinct officials, unless he wishes to vote only for the board of education.” Further, county clerks kept records of a voter’s party designation, and a voter was restricted from voting in a different party’s primary in the next election cycle, unless “he has registered with the county clerk to change his party to another party or to a nonpartisan designation” “not later than 4:30 p.m. on the ninetieth day preceding the primary or special primary election[.]” *Id.* County clerks also kept records of a new voter’s party selection. *See id.* (“In all primary or special primary elections the precinct officials shall note the voter’s party selection where the voter list indicates no previous party selection. This information shall be forwarded to the county clerk.”).

Many delegates at the 1978 Constitutional Convention voiced a clear desire to eliminate the former closed primary system, with a goal of protecting the privacy of a person’s vote, and encouraging voter participation. *See, e.g.*, II 1978 Proceedings 744 (“[A] large percentage of the electorate in Hawaii continues to stay away from the polls because of discontent over the closed primary system. Many people feel this is an invasion of their privacy, that it is repugnant to our democratic process[.]”) (statement of Delegate Campbell); *id.* at 766-67 (“An open

primary election operates to protect a person's voting and privacy rights . . . . [A]s the [closed-primary] system operates now, a voter must declare to a total stranger his party preference at the time of registration and at the primary voting.”) (statement of Delegate Odanaka); *id.* at 768 (“[I]n the earlier days in this State, . . . if you . . . went in and asked for the wrong ballot -- that would be a stigma attached to you in your daily lives.”) (statement of Delegate Blean).<sup>3</sup>

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<sup>3</sup> The 1978 Constitutional Convention's Committee of the Whole reported as follows in recommending adoption of the amendment:

. . . No longer will prospective voters have to register as a Democrat, Republican or nonpartisan. However, voters will still be required to vote only for candidates of one political persuasion. Therefore, any person who votes for candidates in both the Republican and Democratic primary shall not have his vote counted.

Your Committee believes that this change is warranted to encourage voters with minimal party affiliation or those without any party affiliation to participate in the electoral process.

Implementation is left to the appropriate body but your Committee wishes to make clear its intent that a person registering to vote need not state his political affiliation, be it a party preference or nonpartisan. Thus, the change from the current system is only in the fact that a voter's party preference or political affiliation need no longer be revealed.

I 1978 Proceedings 1025 (Comm. of the Whole Rep. No. 16); *see also id.* at 996 (“The people of Hawaii have indicated by polls that they favor a system that will not violate their privacy and not force them to reveal a political preference before being allowed to vote.”) (Minority Rep. No. 13).

Consistent with this view, in addressing the constitutionality of a Connecticut closed primary law, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), observed: “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.” *Id.* at 215. It then noted: “Indeed, acts of  
(continued...)

The Hawaii Legislature implemented the constitutional amendment in 1979 by amending HRS § 12-31, which now provides:

No person eligible to vote in any primary or special primary election shall be required to state a party preference or nonpartisanship as a condition of voting. Each voter shall be issued the primary or special primary ballot for each party and the nonpartisan primary or special primary ballot. A voter shall be entitled to vote only for candidates of one party or only for nonpartisan candidates. If the primary or special primary ballot is marked contrary to this paragraph, the ballot shall not be counted.

In any primary or special primary election in the year 1979 and thereafter, a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election.

*See* 1979 Haw. Sess. L. Act 139, § 9 at 317. “The first open primary [in Hawaii] was in 1980. Hawaii’s primary has been open ever since.” Doc. No. 16-1, Nago Decl. ¶ 6. “When the primary is conducted, voters must indicate on the primary ballot which party primary they are participating in. If they attempt to cast votes for any other party, those votes will not be counted.” *Id.* ¶ 19.

The DPH claims that these provisions requiring an open primary are facially unconstitutional because allowing voters to “associate” anonymously with

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<sup>3</sup>(...continued)  
public affiliation may subject the members of political organizations to public hostility or discrimination; under those circumstances an association has a constitutional right to protect the privacy of its membership rolls.” *Id.* at 215 n.5 (citations omitted).

a political party violates a party's First Amendment right of free association. The open primary conflicts with the DPH's formal policy that "prefers a nomination electorate composed of its members, and other voters, even if they are not members, who are supportive of the DPH and are willing to publicly declare their affiliation with it." Doc. No. 4-1 at 16, Pl.'s Mot. at 11. To this end, the DPH has certified and adopted the following provision in its constitution:<sup>4</sup>

The Democratic Party of Hawaii shall be open to all persons who desire to support the Party, who wish to be known as Democrats, and who live in Hawaii.

The Democratic Party of Hawaii believes that its primary election, a state-imposed mandatory nomination procedure, ought to be open to participation of only such persons as are willing to declare their affiliation with and support for the Party, either through public registration to vote, or through maintenance of membership in the Party. The Party further believes that the current Constitution and laws of the State of Hawaii, by maintaining secrecy of affiliation, and by compelling the Party to admit to its nomination procedures those who may have no interest in, or actually oppose the interests, values, and platform of the Party, do violence to the Party's associational freedoms and the individual freedoms of its membership to define their own political views, guaranteed under the Constitution of the United States. The State Central Committee and Party Chairperson shall take appropriate action to correct this injustice.

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<sup>4</sup> The provision was certified by the DPH "State Central Committee on July 28, 2012," although the second paragraph "was adopted by the Convention of the DPH on May 27, 2006." Doc. No. 4-2, Carpenter Decl. ¶ 4.



Doc. No. 4-2, Carpenter Decl. ¶ 4.

According to its Chairperson, DPH membership records in 2005 showed approximately 20,000 members. Doc. No. 13-1, Carpenter Suppl. Decl. ¶ 5. “DPH membership had been in the 15,000 to 20,000 range for at least a decade before 2005, and possibly two decades or more.” *Id.* ¶ 6. “In the period of the Obama-Clinton campaign for the 2008 election, DPH membership expanded dramatically.” *Id.* ¶ 10. “Many persons joined the DPH in order to cast votes for one or the other in DPH meetings [that is, caucuses], held in early 2008. DPH membership rose from approximately 20,000 to approximately 65,000.” *Id.* In July of 2013, DPH membership was 65,461. *Id.* ¶ 11. “Memberships are normally not terminated by DPH unless the member resigns, is known to have died, is expelled for cause, or for a few other reasons. Membership does not require the regular payment of dues, which are voluntary.” *Id.* ¶ 12.

## **B. Procedural Background**

DPH filed this action on June 17, 2013. Doc. No. 1. In conjunction with the Complaint, the DPH filed a combined Motion for Partial Summary Judgment and Motion for Preliminary Injunction.<sup>5</sup> Doc. No. 4. On September 16,

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<sup>5</sup> During the October 7, 2013 hearing, the DPH explained that its summary judgment is “partial” only to distinguish proceedings on liability (*i.e.*, the constitutionality of Hawaii’s open primary) from issues regarding a remedy, if the DPH succeeds in establishing that Hawaii law is  
(continued...)

2013, the State filed its Opposition, and a Counter Motion for Summary Judgment. Doc. No. 15. On September 23, the DPH filed a combined Reply as to its Motion, and Opposition to the State's Counter Motion, Doc. No. 19, and the State filed a Reply as to its Counter Motion on September 30, 2013. Doc. No. 21. The court heard oral argument on October 7, 2013.

### **III. STANDARD OF REVIEW**

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Rule 56(a) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir. 1999).

"A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th

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<sup>5</sup>(...continued)  
unconstitutional.

Cir. 2007) (citing *Celotex*, 477 U.S. at 323); *see also Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1079 (9th Cir. 2004). “When the moving party has carried its burden under Rule 56[(a)], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts [and] come forward with specific facts showing that there is a *genuine issue for trial*.” *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986) (citation and internal quotation signals omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (stating that a party cannot “rest upon the mere allegations or denials of his pleading” in opposing summary judgment).

“An issue is ‘genuine’ only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is ‘material’ only if it could affect the outcome of the suit under the governing law.” *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (citing *Anderson*, 477 U.S. at 248). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *see also Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008) (stating that “the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor.” (citations omitted)).

#### IV. DISCUSSION

The DPH's challenge is limited to a *facial* attack on Hawaii's open primary. Although its Complaint might be read more broadly, the DPH's memoranda in these Motions explicitly argue only that Hawaii's open primary provisions are facially unconstitutional, and the DPH made clear during oral argument that its action is only a facial -- not an "as applied" -- challenge.<sup>6</sup> See Oct. 7, 2013 Tr. at 6 ("And that's my story and I'm sticking to it."). The parties agree that there are no factual disputes on the record presented to the court, and that these Motions should resolve the constitutional issues before the court one way or the other -- if the court grants the State's Motion, then judgment should issue in its favor; and if the court grants the DPH's Motions, then only questions regarding an appropriate remedy would remain. *Id.* at 7. The court proceeds to address the facial challenge in this light.<sup>7</sup>

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<sup>6</sup> In contrast to a facial attack, a "'paradigmatic' . . . as-applied challenge is one that 'tests' a statute's constitutionality in one particular fact situation while refusing to adjudicate the constitutionality of the law in other fact situations." *Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011) (citation and internal quotation marks omitted). "An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).

<sup>7</sup> The State concedes that a ruling in its favor on the facial challenge in this case would not preclude an "as-applied" challenge in later proceedings with a fully-developed evidentiary record. Oct. 7, 2013 Tr. at 43-44. This recognition is consistent with Ninth Circuit caselaw distinguishing facial and as-applied challenges -- in upholding a facial challenge to Arizona's  
(continued...)

**A. Legal Standards for Assessing Whether a State Election Law Imposes a Facially Unconstitutional Burden**

**1. A Facial Challenge -- “Unconstitutional in All of its Applications?” Or “A Plainly Legitimate Sweep?”**

The parties offer differing standards for the court to apply. The State requests that the court apply the “*Salerno* standard.” 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.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (internal brackets omitted); *see also id.* at 457 (“[A] facial challenge fails where ‘at least some’ constitutional applications exist.”) (quoting *Schall v. Mering*, 467 U.S. 253, 264 (1984)). The DPH requests that the court apply a broader standard: “While some Members of the Court have criticized the *Salerno* formulation, all agree that

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<sup>7</sup>(...continued)

Legal Worker Act, *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), commented:

We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.

*Id.* at 861 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008)).

a facial challenge must fail where the [law] has a ‘plainly legitimate sweep.’” *Id.* at 449 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring)). When addressing facial invalidity, courts “must be careful not to go beyond the [law’s] facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Id.* (citations omitted).

Ultimately, the court’s conclusion is not impacted by the choice between these alternative formulations (“no set of circumstances” or “plainly legitimate sweep”). That is, the court’s ruling would be the same under either standard. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (“Which standard applies in a typical case is a matter of dispute that we need not and do not address [in this case.]”).

Courts disfavor facial challenges for several reasons. “Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of ‘premature interpretation of statutes on the basis of factually barebones records.’” *Wash. State Grange*, 552 U.S. at 450 (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

*Id.* (citations and internal quotation marks omitted). Further, “facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Id.* at 451 (citations and internal quotation marks omitted). That is, “[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” *Id.* (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)). A challenger seeking to invalidate a statute “in all its applications” bears a “heavy burden of persuasion.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008).

## **2. A “Severe Burden” on First Amendment Rights?**

“The Constitution grants States broad power to prescribe the ‘Times, Places and Manner of holding Elections for Senators and Representatives,’ Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.” *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (citations and some internal quotations omitted). Accordingly, “States have a major role to play in structuring and monitoring the election process, including primaries.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). For example, “a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion.” *Id.*

(citations omitted).

But this does not mean that States are free to regulate all aspects of a primary election -- “when States regulate [a political] parties’ internal processes they must act within limits imposed by the Constitution.” *Id.* at 573. In this regard, “the First Amendment, among other things, protects the right of citizens ‘to band together in promoting among the electorate candidates who espouse their political views.’” *Clingman*, 544 U.S. at 586 (quoting *Jones*, 530 U.S. at 574). This freedom “necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.” *Jones*, 530 U.S. at 574 (quoting *Democratic Party of the U.S. v. La Follette*, 450 U.S. 107, 122 (1981)). “That is to say, a corollary of the right to associate is the right not to associate.” *Id.* “Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association’s being.” *Id.* (quoting *La Follette*, 450 U.S. at 122 n.22).

And so, when considering a challenge to a state election law, the court must “weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for



the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citations and quotation marks omitted).

"Election regulations that impose a *severe burden* on associational rights are subject to strict scrutiny, and [courts] uphold them only if they are 'narrowly tailored to serve a compelling state interest.'" *Wash. State Grange*, 552 U.S. at 451 (quoting *Clingman*, 544 U.S. at 586) (emphasis added). "If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

In short, the court must assess whether Hawaii's open primary necessarily and facially "severely burdens" a political party's First Amendment right to free association. If so, then the court will uphold the open primary provisions only if they are narrowly tailored to meet compelling state interests. The analysis changes, however, if the burden is not "severe." Rather, "lesser burdens will be upheld as long as they are justified by a state's important regulatory interests." *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1177 (9th Cir. 2008) (citations and quotation marks omitted).

## **B. Application of Legal Standards**

### ***1. The DPH's Arguments***

The DPH, relying primarily on *Jones*, argues that Hawaii's open primary violates a party's -- *any* party's -- First Amendment associational rights because a party is, or can be, forced to "associate" with anonymous voters who do not share its views, and such voters should not have a say in a party's selection of its nominees. *See Jones*, 530 U.S. at 574 ("In no area is the political association's right to exclude more important than in the process of selecting its nominee."). *Jones* emphasizes that the associational right is particularly important in this context because the nomination process "often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* at 575 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (Stevens J., dissenting)). It is "the crucial juncture at which the appeal to common principles may be translated into concerted action[.]" *Id.* (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 216 (1986)). And thus Supreme Court "cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a

standard bearer who best represents the party's ideologies and preferences.” *Id.* (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

*Jones* struck as unconstitutional a California blanket primary system in which a primary ballot listed “every candidate regardless of party affiliation and allow[ed] the voter to choose freely among them.” *Id.* at 570. A California primary voter was not required to affiliate in any manner with a party before voting for that party's candidate. Such a blanket primary thus “force[d] political parties to associate with -- to have their nominees, and hence their positions, determined by - - those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.” *Id.* at 577. *Jones* characterized such a blanket primary as “qualitatively different from a closed primary [where] even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to ‘crossover,’ at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party.” *Id.*

*Jones* relied on evidence (for example, statistical surveys of past primary elections, and expert witness testimony) establishing a “clear and present danger” that a party's nominee could be “determined by adherents of an opposing party.” *Id.* at 578. Moreover, statistics demonstrated that “[t]he impact of voting

by non-party members is much greater upon minor parties.” *Id.* And the record supported that “these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful.” *Id.*

Further, the evidence indicated that “the deleterious effects” were “not limited to altering the identity of the nominee” -- the blanket primary actually forced nominees to change their message and views. *Id.* at 579. Indeed, it was “the whole *purpose* of [the blanket primary] . . . to favor nominees with ‘moderate’ positions. It encourages candidates -- and officeholders who hope to be renominated -- to curry favor with persons whose view are more ‘centrist’ that those of the party base.” *Id.* at 580. The blanket primary forced parties “to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party.” *Id.* at 581. It “ha[d] the likely outcome -- indeed . . . the *intended* outcome -- of changing the parties’ message.” *Id.* Such a severe burden was not justified by the interests proffered as “compelling” by California, *id.* at 582-85, and was not “narrowly tailored” to further them. *Id.* at 586.

The DPH likens Hawaii’s open primary to the blanket primary that *Jones* struck down. Because a party has no other option but to nominate candidates by primary, *see* HRS § 12-1, the DPH contends that a party is powerless

to exclude, for example, (1) those who are indifferent to its beliefs; (2) those whose interest in the party is “fleeting or transient, or a matter of momentary convenience or accident;” (3) “adherents of opposing parties;” or (4) those “who have worked to undermine and oppose” the party. Doc. No. 4-1, Pl.’s Mot. at 15. It argues that “Hawaii voters can nominate the candidates of [] political organization[s] they would, as matter of conscience, refuse to join, and by which, in a reciprocal exercise of conscience, they would be rejected.” *Id.* at 16. The DPH thus concludes that (1) the open primary imposes a severe burden, and is facially unconstitutional as a matter of law; and (2) the DPH suffers irreparable harm, and the public interest therefore favors the entry of a preliminary injunction preventing Nago from enforcing and applying Hawaii’s open primary provisions. *Id.* at 29-30.<sup>8</sup>

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<sup>8</sup> The DPH also relies on *La Follette*, which struck a Wisconsin open primary provision as inconsistent with a Democratic National Party rule providing that “only those who are willing to affiliate publicly with the Democratic Party may participate in the process of selecting delegates to the Party’s National Convention” for selection of a Presidential candidate. 450 U.S. at 109. *La Follette*, however, did not decide that Wisconsin’s open primary itself was facially unconstitutional, and did not address its application outside of a Presidential nomination process. Indeed, it suggested that an “open” feature might itself be permissible:

The Wisconsin Supreme Court considered the question before it to be the constitutionality of the ‘open’ feature of the state primary election law, as such. Concluding that the open primary serves [a] compelling state interest by encouraging voter participation, the court held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct.

(continued...)

The DPH's challenge fails for two reasons. First, even if *Jones* applies to this open primary challenge, there are realistic factual situations that would not "severely" burden *other* parties' associational rights -- and thus, given legitimate and important state interests, the open primary is not "unconstitutional in all of its applications." *Wash. State Grange*, 552 U.S. at 449. Second, the DPH has failed to *prove* a severe burden -- "*Jones* treated the risk that nonparty members will skew either primary results or candidates' positions as a *factual* issue, with the plaintiffs having the burden of establishing that risk." *Ariz. Libertarian Party v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003) (emphasis added). Proving a severe burden must be done "as-applied," with an evidentiary record, and the current record is simply insufficient. *Wash. State Grange*, 552 U.S. at 457-58. The court explains these two reasons more fully below.

## **2. A Purely Facial Challenge Fails**

The DPH's facial challenge is premised on the open primary being a severe burden *per se*. And in doing so, the DPH emphasizes its own party "preference" (adopted into the DPH Constitution) to have voters who are willing to declare their affiliation with the DPH publicly. Its formal policy is that it should

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<sup>8</sup>(...continued)  
*Id.* at 120-21.

not be compelled to affiliate, in the nomination process, with persons “who may have no interest in, or actually oppose the interests, values, and platform” of the DPH. Doc. No. 4-2, Carpenter Decl. ¶ 4. The DPH thus argues that, under *Jones*, it is “severely” burdened by being forced to associate with those who do not share its values (or by being forced to associate with those whose values it does not know).<sup>9</sup>

Initially, it is far from clear the extent to which *Jones*’ holding (arising from a blanket primary) applies to an open primary. Indeed, *Jones* stated that California’s prior blanket primary was “qualitatively different” from a closed primary system where it may be “made quite easy for a voter to change his party

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<sup>9</sup> The DPH makes much of the mandatory nature of Hawaii’s open primary. That is, unlike in some other states with open primaries, Hawaii law does not allow a party to “opt out” and nominate a general election candidate by other means. See HRS §§ 12-1, 12-2. Other courts have relied on such an “opt out” possibility to uphold (facially) an open primary against a forced association constitutional challenge under *Jones*. See *Miller v. Brown*, 503 F.3d 360, 367 (4th Cir. 2007) (“[W]e need not decide whether Virginia’s open primary statute, viewed in isolation, impermissibly burdens a political party’s right to associate with those who share its beliefs. . . . Virginia allows political parties to nominate candidates not only by state-run primary but also by other methods controlled and funded by the party. And, by merely choosing any of these other options, a party is free to limit its candidate selection process to voters who share its political views. Thus the ‘forced association’ that the Supreme Court has condemned [in *Jones*] simply is not present here.”); *Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 655, 664 (D.S.C. 2011) (“[C]ourts have repeatedly rejected attempts to facially attack state election statutes on the basis of forced association where state law provides legitimate alternatives that do not restrict freedom of association.”).

Nevertheless, it is “too plain for argument” that “a State may *require* parties to use the primary format for selecting their nominees[.]” *Jones*, 530 U.S. at 572 (emphasis added). And the lack of an alternative does not necessarily mean the open primary requirement is facially unconstitutional under *Jones*.

affiliation the day of the primary, and thus, in some sense, to ‘cross over’[.]” 530 U.S. at 577. In such a system, “at least [the voter] must formally *become a member of the party*; and once [the voter] does so, he is limited to voting for candidates of that party.” *Id.* And, in this particular sense, such a closed primary may be virtually indistinguishable from Hawaii’s open primary where voters can “affiliate” with a party on the day of the primary. In fact, *Jones* distinguished an open primary system from California’s blanket primary system:

In this sense, the blanket primary also may be constitutionally distinct from the open primary . . . in which the voter is limited to one party’s ballot. *See La Follette*, [450 U.S.] at 130, n.2 (Powell, J., dissenting) (“[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. . . . The situation might be different in those States with ‘blanket’ primaries -- i.e., those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office”). This case does not require us to determine the constitutionality of open primaries.

*Id.* at 577 n.8.

Even applying *Jones*’ reasoning here, however, the DPH’s facial challenge necessarily raises other parties’ perspectives, an issue not squarely



addressed in *Jones*.<sup>10</sup> At its core, *Jones* found the blanket primary process unconstitutional because it “adulterated” the process by opening the primary “to persons wholly unaffiliated with the party.” *Id.* at 581. But another party (particularly a smaller and less recognized party) might well have a preference different from the DPH’s. Another party might happily embrace any voter willing to affiliate with it in any manner -- even voters affiliating anonymously in the privacy of the ballot booth. Another party might adopt a formal policy to welcome voters with diverse views -- even those that might differ from a party’s public campaign positions. A party with such policies would not be forced to change its message at all, as was central to the reasoning in *Jones*. 530 U.S. at 579-80. These possibilities are far from hypothetical or speculative.

In *Clingman*, for example, the Libertarian Party of Oklahoma (“LPO”) *wanted* to open its primary to all registered voters regardless of party affiliation, whether Republican, Democratic, Reform, or independent. 544 U.S. at 581. “[T]he LPO [was] happy to have their votes, if not their membership on the party rolls.” *Id.* at 589.<sup>11</sup> And in *Tashjian*, the Republican Party of Connecticut

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<sup>10</sup> *Jones* was brought by a coalition of parties across the political spectrum (the California Democratic, Republican, and Libertarian Parties, and the Peace and Freedom Party). 530 U.S. at 571.

<sup>11</sup> *Clingman* ultimately upheld Oklahoma’s semiclosed primary, under which a political  
(continued...)

adopted a rule *permitting* independent voters to vote in Republican primaries for federal and state offices, 479 U.S. at 210, “[m]otivated in part by the demographic importance of independent voters in Connecticut politics.” *Id.* at 212.

*Tashjian* found unconstitutional a Connecticut closed primary that required voters in any primary to be registered as party members, contrary to the Republican Party of Connecticut’s rule inviting independents to vote in its primaries. The Supreme Court reasoned that the closed primary “impermissibly burdens the right of [the party’s] members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success.” *Id.* at 214. “The Party’s attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association.” *Id.* Although *Tashjian* addressed a closed primary, it demonstrated that the constitutional analysis in a primary election law challenge -- whether a state’s primary system “severely burdens” a party’s associational rights -- depends fundamentally on the party’s *own* views as to who it wants to associate with because it is “the right of [a party’s] members to determine

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<sup>11</sup>(...continued)  
party could invite only its own registered members and registered independents to vote in its primary. 544 U.S. at 590. Such a system did not severely burden either a voter’s or the LPO’s associational rights because voters (even those already registered with another party) could have affiliated with the LPO “with only nominal effort” and were “not ‘locked in’ to an unwanted party affiliation.” *Id.* at 590-91.

for themselves with whom they will associate.” *Id.*

The DPH disagrees that the burden turns on a party’s policy or desires, contending that an unconstitutional law is still unconstitutional even if one embraces it. The DPH argues that “[a] political party that prefers the ‘open’ primary suffers a lack of liberty by having no other choice.” Doc. No. 19, Pl.’s Reply at 10. “[A] citizen may not want to stand in a public forum and make political speeches, but being prohibited from doing so is still a loss of liberty.” *Id.* But the DPH’s logic assumes too much. The right at issue is the right to associate, which includes the corollary right *not* to associate. And although the DPH may not want to associate with non-members, other parties may embrace association with anyone -- party members or not -- willing to vote in that party’s primary. Another party, as in *Tashjian*, may want to “broaden the base of public participation” in its primary,” 479 U.S. at 214, and thus it would have no “asserted injury” under the First Amendment. *Burdick*, 504 U.S. at 434. Put differently, a party (particularly small parties) welcoming all voters would not face any burden on its associational rights, and the open primary would be fully consistent with *its* right to associate.

Consequently -- regardless of which test for facial invalidity (“no set of circumstances” or “plainly legitimate sweep”) is proper here -- there are realistic (perhaps even likely) factual situations where a party’s associational rights would

not be “severely” burdened by Hawaii’s open primary. Given a lesser burden, the open primary is clearly supported by important and legitimate State rights such as protecting the privacy of a person’s vote, and encouraging voter participation by removing barriers to vote. *See, e.g., Clingman*, 544 U.S. at 593 (“When a state electoral provision places no heavy burden on associational rights, a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”) (citations and internal quotation marks omitted). In short, the open primary has a “plainly legitimate sweep.” *Wash. State Grange*, 552 U.S. at 449. There are “at least some” constitutional applications of Hawaii’s open primary. *Id.* at 457. And it is not “unconstitutional in all of its applications.” *Id.* at 449. Therefore, the DPH’s purely facial challenge to Hawaii’s open primary fails.

### **3. *An Evidentiary Record Is Necessary***

The DPH’s challenge fails for a second, independent reason -- the court cannot measure whether the burden is severe (or not) without proof -- and proof requires an evidentiary record.

The DPH argues that this court can address its facial First Amendment challenge after ensuring “that there are no troublesome facts hidden beneath the surface, so that the claim really can be decided on the record” and after making

certain that “there truly is but one avenue for its application.” Doc. No. 19, Pl.’s Reply at 8. It asserts that the open primary is unconstitutional by emphasizing the primary’s impact on its own policies (although not explicitly challenging the primary “as applied” only to the DPH). But even given the DPH’s interpretation of a “facial challenge,” and even if the court could address the DPH’s challenge without looking to the possible impact on other parties, the court cannot -- on the present record -- assess whether the DPH’s associational rights have been burdened without considering evidence as to the extent, if any, of that burden.

*Jones* determined that California’s blanket primary constituted a “clear and present danger” that a party’s nominee would be “determined by adherents of an opposing party,” but it did so based on *evidence*. 530 U.S. at 578. For example, the court had data quantifying the percentage and characteristics of likely “cross over” voters, and considered testimony measuring the likely impact of unaffiliated voters. *Id.* at 578-79. Expert opinions, surveys, and statistical data of prior elections indicated that the blanket primary had the intended effect of “changing the parties’ message.” *Id.* at 580-82. And historical evidence revealed that the blanket primary was adopted by voter initiative, “[p]romoted [by California] largely as a measure that would ‘weaken’ party ‘hard-liners’ and ease the way for ‘modern problem-solvers.’” *Id.* at 570.

Recognizing that *Jones* relied on evidence to establish the burden on those political parties, *Bayless* subsequently held that a challenge to a primary election (and in particular, the severity of the burden on a party's associational rights) raised a factual issue that must be proven. 351 F.3d at 1282. In reviewing a facial challenge to the constitutionality of an Arizona primary election system, *Bayless* reasoned:<sup>12</sup>

The district court . . . erred in failing to consider separately whether the participation of nonmembers in the selection of candidates is constitutional under [*Jones*]. Although forcing the Libertarians to open their primary to nonmembers for the selection of party candidates raises serious constitutional concerns, *we conclude that the resolution of the constitutional issue turns on factual questions* not decided by the district court. We therefore remand so that the district court may consider the severity of the burden this aspect of the primary system imposes on the Libertarian Party's associational rights, [and] whether the state has sufficiently justified that burden[.]

*Id.* (emphasis added). It explained that

*Jones* treated the risk that nonparty members will skew either primary results or candidates' positions *as a factual issue*, with the plaintiffs having the burden of establishing that risk. On remand, the district court should separately consider the constitutionality of

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<sup>12</sup> See *Ariz. Libertarian Party, Inc. v. Bd. of Supervisors of Pima Cnty.*, 216 F. Supp. 2d 1007, 1009 (D. Ariz. 2002) ("Plaintiffs raise a facial challenge to the open primary election law in Arizona and are not challenging how that law is applied specifically to the Libertarian Party in Pima County.") (district court decision reversed by *Bayless*).

nonparty members voting for Libertarian party candidates for public office, including the primary system's potential to change the party's nominee or the candidates' positions.

*Id.* (emphasis added).

And in a subsequent election law challenge (after *Washington State Grange*), *Crawford* reemphasized the inherently factual nature of the relevant inquiry. Referring to the “heavy burden” necessary to invalidate an election law “in all its applications,” *Crawford* reiterated that a court errs by “fail[ing] to give appropriate weight to the magnitude of that burden when [analyzing] a preelection facial attack on . . . primary election procedures.” 553 U.S. at 200 (citing *Wash. State Grange*, 552 U.S. at 442). *Crawford* upheld an Illinois voter registration law, reasoning in part that the evidentiary record was insufficient: “[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on [an identified] narrow class of voters or the portion of the burden imposed on them that is fully justified.” *Id.* Given an insufficient record in that facial challenge, *Crawford* could “not conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.” *Id.* at 202.

Under this precedent, this court cannot consider the DPH's challenge without analyzing proof of a burden. *See also Alaskan Independence Party*, 545 F.3d at 1180-81 (rejecting a facial challenge to an Alaska primary election law

because the record did not demonstrate that the law conflicted with a party's specific bylaws); *Idaho Republican Party v. Ysura*, 660 F. Supp. 2d 1195, 1201 (D. Idaho 2009) (requiring "an evidentiary hearing or trial" to determine whether Idaho's open primary violated the Idaho Republican Party's associational rights, given a lack of evidence as to "whether and to what extent 'crossover voting' exists in Idaho, and whether and to what extent the threat of such 'crossover' voting affects the message of [that party] and its candidates").<sup>13</sup> *Cf. Greenville Cnty. Republican Party v. South Carolina*, 824 F. Supp. 2d 655, 665 (D.S.C. 2011) ("[Jones] is additionally distinguishable in that the lower court and the appellate courts reviewing California's blanket primary law evaluated the law after benefit of a trial which focused, substantially, on testimony regarding the effects of cross-over voting. There is no similar empirical evidence before the court today[.]").

The DPH simply asserts that it will be, or can be, forced to "associate" with voters who are "adherents of opposing parties," and "who have worked to

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<sup>13</sup> *Idaho Republican Party v. Ysura*, 765 F. Supp.2d 1266 (D. Idaho 2011), later determined that Idaho's open primary was unconstitutional, but did so on an as-applied basis after a bench trial. *See id.* at 1277 (finding the Idaho open primary statute "is unconstitutional *as applied* to the Idaho Republican Party") (emphasis added). On appeal, the Ninth Circuit vacated the district court's judgment with instructions to dismiss the case as moot, after Idaho's legislature changed its primary system. *See Idaho Republican Party v. Ysura*, No. 11-35251 (9th Cir. Sept. 19, 2011) (Order granting Appellees' Motion to Dismiss Appeal).



undermine and oppose” the DPH. Doc. No. 4-1, Pl.’s Mot. at 15. The court, however, cannot assume (1) that such “non-adherents” have burdened the DPH by voting in a Democratic primary in the past, (2) that DPH candidates have in fact been forced to change their message to cater to these non-DPH voters, much less (3) that the DPH has been “severely” burdened over the past thirty-three years that Hawaii has had an open primary.

Of course, it is *possible* (even likely) that some “crossover” voters (*i.e.*, members of, or sympathizers with, a rival party) have temporarily affiliated with the DPH by voting Democrat in a Hawaii primary election. But it is also *possible* (even likely) that -- given Hawaii’s demographics<sup>14</sup> -- a large percentage of primary voters who were not formally registered with the DPH, 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 DPH. And if Hawaii primary election voters choosing a Democratic ballot have views

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<sup>14</sup> Both the DPH and the State agree as a matter of common knowledge that Hawaii is a heavily Democratic State. *See, e.g.*, Doc. No. 15-1, Def.’s Counter-Mot. at 8; Doc. No. 19, Pl.’s Reply at 4. This fact is supported by publicly-available polls -- according to an August 3, 2012 Gallup poll, “[a]long with the District of Columbia, Rhode Island and Hawaii rank as the most Democratic states in the country[.]” L. Saad, *Heavily Democratic States Are Concentrated in the East* (Aug. 3, 2012), available at <http://www.gallup.com/poll/156437/heavily-democratic-states-concentrated-east.aspx> (last visited Nov. 14, 2013). As an example, Hawaii’s current State Senate consists of twenty four Democrats and one Republican, and its House consists of forty four Democrats and seven Republicans. *See* <http://www.capitol.hawaii.gov/members/legislators.aspx?chamber=S> (last visited Nov. 14, 2013).

that *completely agree* with the DPH's platform, then the DPH is not being forced to associate with those who are antithetical to its views. The DPH would likely not be "severely" burdened by not being able to reject persons who fully embrace its values. The possibility of crossover voters might make no difference.<sup>15</sup>

Even if anonymity creates *some* burden to the DPH, the court cannot *assume* -- without a developed evidentiary record -- that the DPH is *severely* burdened (as opposed to being merely inconvenienced) by such a system, especially a system adopted specifically to protect privacy of the vote and to encourage voter participation. And the current record in this case establishes no more than that the DPH has a formal preference to associate with those who are willing to publicly declare their support for the DPH, and that approximately 65,000 people have formally registered with the DPH in a heavily Democratic state with a population of over one million people.

In short, the DPH's arguments rest on assumptions about voter behavior that cannot be judged without evidence. The DPH's challenge thus fails for this second reason. *See Wash. State Grange*, 552 U.S. at 457 ("Each of [the

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<sup>15</sup> "It may be the case, of course, that the public avowal of party affiliation . . . provides no more assurance of party loyalty than does [a] requirement that a person vote in no more than one party's primary. But the stringency, and wisdom, of membership requirements is for the association and its members to decide -- not the court -- so long as those requirements are otherwise constitutionally permissible." *La Follette*, 450 U.S. at 123 n.25.

challenger's] arguments rests on factual assumptions about voter confusion, and each fails for the same reason: In the absence of evidence, [a court] cannot assume that . . . voters will be misled."). Just as in *Washington State Grange*, such a factual determination "must await an as-applied challenge." *Id.* at 458.<sup>16</sup> Having failed to succeed on the merits, it follows that the DPH's request for a preliminary injunction also fails. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

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<sup>16</sup> The DPH relies on *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), which, in addressing a facial challenge to Washington's former blanket primary, characterized *Jones* as determining that California's blanket primary statutes "on their face" restricted free association and only looked "at the evidence to determine whether the state satisfied its burden of showing narrow tailoring toward a compelling state interest." *See id.* at 1203 ("[*Jones*] does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones* infers the burden from the face of the blanket primary statutes."). Regardless of how *Reed* may characterize it, *Jones* reviewed a district court's findings of fact and conclusions of law after four days of testimony, *see Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1292-93 (E.D. Cal. 1997), *aff'd* 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000), and relied on this well-developed factual record at all stages of the strict scrutiny analysis. In any event, the court is persuaded by *Bayless*, which the Ninth Circuit decided several months after *Reed*, and is completely consistent with later-decided Supreme Court precedent, *Washington State Grange* and *Crawford*, as detailed above.

## **V. CONCLUSION**

For the foregoing reasons, the court upholds Hawaii's open primary against the Democratic Party of Hawaii's facial constitutional challenge. The DPH has failed to prove that the open primary is facially unconstitutional. Accordingly, the court DENIES the DPH's Motion for Partial Summary Judgment and Motion for Preliminary Injunction, Doc. No. 4, and GRANTS the State's Counter Motion for Summary Judgment. Doc. No. 15. Judgment shall enter in favor of the State, and the Clerk of Court shall close the case file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 14, 2013.



/s/ J. Michael Seabright  
J. Michael Seabright  
United States District Judge

*Democratic Party of Haw. v. Nago*, Civ. No. 13-00301 JMS-KSC, Order (1) Denying Plaintiff's Motion for Summary Judgment; (2) Denying Plaintiff's Motion for Preliminary Injunction; and (3) Granting Defendant's Motion for Summary Judgment

**CERTIFICATE OF SERVICE**

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. **PLAINTIFF-APPELLANT'S BRIEF**
  2. **PLAINTIFF-APPELLANT'S EXCERPTS OF RECORD**
- VOLUMES 1-2**

was served on all interested parties electronically through CM/ECF.

Date: March 24, 2014

  
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No. 13-17545

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Democratic Party of Hawaii,  
Plaintiff-Appellant,

v.

Scott T. Nago, in his official  
capacity as Chief Election Officer  
of the State of Hawaii,  
Defendant-Appellee.

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On Appeal from the United States District Court  
for the District of Hawaii

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**APPELLANT'S EXCERPTS OF RECORD, VOLUME II OF II**

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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF HAWAII

3 DEMOCRATIC PARTY OF HAWAII, ) CIVIL NO. 13-00301JMS-KSC  
4 )  
5 Plaintiff, ) Honolulu, Hawaii  
6 vs. ) October 7, 2013  
7 ) 9:01 a.m.  
8 )  
9 SCOTT T. NAGO, in his ) PLAINTIFF'S MOTION FOR PARTIAL  
10 official capacity as Chief ) SUMMARY JUDGMENT AND  
11 Election Officer of the ) PRELIMINARY INJUNCTION [4]  
12 State of Hawaii, ) DEFENDANT SCOTT T. NAGO'S  
13 ) COUNTER MOTION FOR SUMMARY  
14 Defendant. ) JUDGMENT FOR DEFENDANT NAGO  
15 ) AND OPPOSITION TO  
16 ) PLAINTIFF'S MOTIONS FOR  
17 ) PRELIMINARY INJUNCTION AND  
18 ) PARTIAL SUMMARY JUDGMENT [15]  
19 \_\_\_\_\_

12 TRANSCRIPT OF PROCEEDINGS  
13 BEFORE THE HONORABLE J. MICHAEL SEABRIGHT,  
14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

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2 Official Court  
Reporter:Cynthia Fazio, CSR, RMR, CRR  
United States District Court  
P.O. Box 50131  
Honolulu, Hawaii 96850

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20 Proceedings recorded by machine shorthand, transcript produced  
21 with computer-aided transcription (CAT).

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1 MONDAY, OCTOBER 7, 2013 9:01 A.M.

2 THE CLERK: Civil Number 13-00301JMS-KSC, Democratic  
3 Party of Hawaii versus Scott T. Nago, in his official capacity  
4 as Chief Election Officer of the State of Hawaii.

5 This case has been called for hearing on Plaintiff's  
6 Motion for Partial Summary Judgment and Preliminary Injunction,  
7 and Defendant's Countermotion for Summary Judgment and  
8 Opposition to Plaintiff's Motion.

9 Counsel, please make your appearances for the record.

10 MR. GILL: Good morning, Your Honor. Tony Gill. With  
11 me is Dave Sgan from my firm. We represent the Democratic  
12 Party of Hawaii.

13 THE COURT: Yes, good morning to both of you.

14 MS. MARIE-IHA: Good morning, Your Honor. Deputy  
15 Attorneys General Deirdre Marie-Iha and Marissa Luning for  
16 defendant Scott Nago, the Chief Election Officer.

17 THE COURT: All right. Yes, good morning to both of  
18 you as well. You may be seated.

19 MS. MARIE-IHA: Thank you.

20 THE COURT: Well, I suspect you all know where I want  
21 to start, which is with procedure, because of all the back and  
22 forth about the facial, as-applied and where things stand with  
23 that. And so I thought it would be useful to have a bit of a  
24 back and forth to start before we get to the substance and  
25 really dissect some of these cases and have a discussion to try

1 to make sure we're all on the same page. Because obviously I  
2 need to put out an order and I need to know exactly what I'm  
3 facing here.

4 And so to put this in context, the motion that was  
5 filed by the Democratic Party is titled Partial Motion for  
6 Summary Judgment. And I tabbed as I read through it over the  
7 weekend a number of times it says, "facial challenge" and there  
8 are several stickers on my copy of the motion because it says  
9 "facial" many times, more than you've cited I think in your  
10 briefing actually, in the motion itself and then in the  
11 memorandum throughout it talks about the facial challenge.

12 So I first want to have a discussion as to how the  
13 party, and I want to start with you, Mr. Gill, on the process  
14 only where you see this as far as why it is a Partial Motion  
15 for Summary Judgment. If it is partial, what is the other part  
16 that remains. And to have you affirm if in fact this is just a  
17 facial challenge, which I'm pretty sure that's what your claim  
18 is right now. That's it.

19 So I'm trying to figure out if the -- in other words,  
20 it's partial because it's only facial, but your view is you've  
21 made an as-applied claim in the complaint and that's still --  
22 it's being unaddressed through these proceedings today. That's  
23 sort of what I'm trying to figure out.

24 So let me -- let's start with you, Mr. Gill, if you  
25 will.

1 MR. GILL: Shall I come up, Your Honor?

2 THE COURT: It's up to you. It's up to you. As long  
3 as I can hear you I'm okay from there. You're going to have to  
4 get that mike up a little higher. You seem like a pretty tall  
5 guy. So we need to have that mike pick you up.

6 MR. GILL: Well, let me come up just to be safe.

7 THE COURT: Okay. All right. Sure.

8 MR. GILL: Normally being heard is not my problem.

9 THE COURT: Okay. These courtrooms have beautiful koa  
10 wood, but there is a price for it, which is there is a lot of  
11 echo in here, so I have to make sure I can hear you okay.

12 MR. GILL: Well, Your Honor raises an interesting  
13 point. And I don't intend that any of the legal challenges  
14 that we've been brought are left hanging. In this motion we  
15 feel very strongly that under the Jones case and Reed, which  
16 we've subsequently cited --

17 THE COURT: Okay. You're going somewhere I don't want  
18 you to go, which is I really don't want you to tie this into  
19 the substance yet. You'll have plenty of time to do that.

20 MR. GILL: Sure.

21 THE COURT: I kind of want like baby step, real clear  
22 answers as to how you're seeing this motion. You brought it as  
23 a partial motion.

24 MR. GILL: Yes. The only reason we brought it as a  
25 partial is we thought that perhaps there may be some questions

1 of remedy or implementation that might be gone into downstream.  
2 That's the only thing that we intended to reserve. We're going  
3 directly after the law as it stands and we think we can take it  
4 out on a facial challenge.

5 THE COURT: Okay. All right. So, to be clear then,  
6 because I'm going to put this in the order as far as where  
7 things stand based on concession, from your standpoint it's a  
8 facial challenge only and it is on the merits, if you will, a  
9 Motion for Summary Judgment, not partial. The partial is  
10 there's back and forth on remedy, there may be further hearings  
11 before me on that. If I rule in your favor, got to sort out  
12 sort of how to unwind this if in fact that's required.

13 MR. GILL: And that's my story and I'm sticking to it.

14 THE COURT: All right. And I appreciate that. I  
15 appreciate the straight answer.

16 And then I suppose the next question is, I'm going to  
17 have for both of you is, is it your view then based on the  
18 position you're taking that I would grant summary judgment for  
19 you or I would grant summary judgment for the State, for Nago.

20 MR. GILL: Yes.

21 THE COURT: In other words, somebody is going to  
22 prevail here today is your view based on what you're saying,  
23 based on this record.

24 MR. GILL: On the facial challenge, yes. That's it.

25 THE COURT: Right.

1 MR. GILL: Up or down.

2 THE COURT: Up or down. In other words, I have the  
3 whole record before me is what you're saying to rule on the  
4 facial challenge in your view.

5 MR. GILL: Yes.

6 THE COURT: And so I either rule for you or I rule for  
7 the State.

8 MR. GILL: Yes.

9 THE COURT: There's no trial that you would see would  
10 come out of this.

11 MR. GILL: No, I think that, if I can speak for  
12 myself, but I think the AG has also tried to streamline this  
13 and get the essential case before Your Honor.

14 THE COURT: Well, and they've said in their, I think  
15 it's a reply of some sort that I think they have the same view,  
16 which is, if you don't prevail, they do prevail. I mean that's  
17 sort of their view on this as far as how the case plays out and  
18 you seem to be agreeing with that.

19 MR. GILL: I do.

20 THE COURT: Okay. All right. Let me turn to the  
21 State then. Does that clarify everything for you as far as  
22 where we stand and do you -- you can stay there if you wish  
23 because we'll get to substance in just a moment.

24 MS. MARIE-IHA: Of course. It does, Your Honor. The  
25 summary that you gave, as I understand it, is a facial

1 challenge only. Plaintiff's motion as a partial motion was  
2 because of perhaps issues about remedy. We have addressed that  
3 most thoroughly, I believe, in our filings.

4 We believe that --

5 THE COURT: And let me say, I have not even focused on  
6 remedy. If I grant the motion I'm likely to bring everybody  
7 back together and have further discussions on that. So just to  
8 be clear, you can make your arguments today about remedy, but I  
9 really have not focused on that because there's enough meat  
10 here on the substance without me worrying yet about whether I  
11 would tell the State what to do or whether I'd give the State  
12 time, or whatever the case may be. That seems to me something  
13 I would sort of look at, as Mr. Gill sort of, I think, maybe  
14 was thinking ahead if I were to rule in favor of the Democratic  
15 Party. That's going to be something I would have to divorce  
16 from the instant issue as to whether I grant or deny the  
17 motion. If I grant it, then I will focus on that.

18 MS. MARIE-IHA: Okay. So in that case, Your Honor,  
19 the discussion you've had now with Mr. Gill does clarify for us  
20 the nature of the challenge. And since it's not for us to  
21 specify what plaintiff's challenge is, I would then read this  
22 case as a facial challenge only.

23 THE COURT: Okay. And you agree that one party walks  
24 away a winner from this. In other words, there's no in between  
25 here, there's no denying both motions and a trial to follow.

1 MS. MARIE-IHA: I believe given the way that we both  
2 placed our arguments that there is no genuine issue of material  
3 fact, I agree it's one or the other.

4 THE COURT: Okay. All right. That's very helpful to  
5 me. I appreciate that.

6 Mr. Gill, we can turn to substance now.

7 MR. GILL: Good morning again, Your Honor. Our  
8 intention here today is to go through four major parts. First  
9 I want to make absolutely clear what the Democratic Party  
10 constitution requires. I will then talk about the things that  
11 we agree on. Simply list them out. And we'll talk a little  
12 bit about why the two or three significantly contested points  
13 ought to turn our way and I will go through a few cases of  
14 interest.

15 THE COURT: Okay.

16 MR. GILL: Now, first of all, the Democratic Party of  
17 Hawaii has in its constitution the requirement for membership  
18 and another paragraph which states its requirements for the  
19 nomination electorate that it would use if permitted by law.

20 The membership provision states that: "The Democratic  
21 Party of Hawaii will be open to all persons who desire to  
22 support the party, who wish to be known as Democrats and who  
23 live in Hawaii." So there's the residence requirement, the  
24 support requirement and the willingness to be known. That is  
25 for membership.



1           Paralleling this, in the next paragraph, the party  
2     constitution states that its primary election is a state  
3     imposed mandatory nomination procedure, et cetera. "It ought  
4     to be open to the participation of only such persons who are  
5     willing to declare their affiliation with and support for the  
6     party, either through public registration to vote or through  
7     maintenance of membership in the party."

8           Now, you'll notice that these two requirements  
9     dovetail pretty well. They constitute a requirement that the  
10    nomination electorate be composed of people who are willing to  
11    publicly support the party. And there are means that a person  
12    might do that.

13          Now, this requirement of public support for the party  
14    is not anything unusual to the Judiciary. It is almost  
15    identical to the requirement that the National Democratic Party  
16    imposed in the La Follette case, that is the Wisconsin open  
17    primary case which struck down the open primary's application  
18    to the selection of presidential electors. So, you will find  
19    in the La Follette case a formulation by the national party  
20    which is virtually identical to this one.

21          So, the turning point here is the Democratic Party of  
22    Hawaii will happily admit to its nomination procedure anybody  
23    who is willing to publicly support the party. I think that  
24    much is clear, but it needs emphasizing. The rest of the  
25    paragraph goes on --

1           THE COURT: So public support, just so I understand,  
2 public support means what? If you were to have a system where  
3 you have -- I was trying to think back when I voted years ago,  
4 and I know now you go into the ballot with several different --  
5 into the booth with several different ballots, a Democrat,  
6 Republican, Libertarian, whatever you might have and you pick  
7 one. You have to pick one. If you do more than one, the  
8 machine will spit it out and say you're an idiot and go back  
9 and vote again, you didn't understand the instruction. Used to  
10 be, as I recall, when you went up to the desk they asked you  
11 what ballot you wanted.

12           MR. GILL: Through 1960 -- the period '68 to '78, that  
13 situation did obtain in Hawaii in that period. I mean, without  
14 going into a great deal of history about this, from the time of  
15 the territorial days through the early '60s, there was a  
16 situation in place which was somewhat similar to the one we  
17 have now.

18           THE COURT: Okay.

19           MR. GILL: Democratic Party in the 1960s under Burns  
20 and when it got control of the two Houses enacted prospectively  
21 a semiclosed primary system, which then did obtain from 1968  
22 through 1978. And in 1978 the constitutional convention and  
23 the subsequent vote of the people reversed that situation to  
24 create what we have now.

25           So there was definitely a historical time when persons

1 in this state voted and said at the teller, I am a Democrat, I  
2 am a Republican, and they would say, You are correctly  
3 registered, sir. Here's your ballot. And so during that  
4 period the state did keep track of who was registered where, as  
5 many states do. It was not unusual here, it was emulating --

6 THE COURT: So was the '78, the constitutional  
7 convention that changed the State Constitution to require the  
8 system we now have.

9 MR. GILL: Yes. You can read the record and --

10 THE COURT: Yeah.

11 MR. GILL: -- counsel has submitted portions of it.  
12 The dominant rationale at that time or at least the facial  
13 rationale was privacy. Why should big brother state know what  
14 your party preference is. And that was the dominant rationale,  
15 and there were others.

16 THE COURT: So based on your constitution as it now  
17 exists, if when you went to vote -- you called the person the  
18 teller, is that the name of the person who --

19 MR. GILL: Well, we'll just use teller.

20 THE COURT: Let's use that term. Okay. If you go to  
21 the teller and say, I want -- if you don't register, but you,  
22 say I want a Democratic ballot or I want a Republican or Green  
23 Party, whatever it may be.

24 MR. GILL: You would have been recorded as such.

25 THE COURT: No, but I'm just saying if you're not

1 recorded as such that would not satisfy your requirements, is  
2 that how you view it at that point because you're not -- you're  
3 not publicly affiliating yourself?

4 MR. GILL: I am willing to allow as Hawaii did in 1968  
5 a transitional provision. But the long-term goal is, as you  
6 suspect, and as the Democratic Party requires, that there be a  
7 public declaration of some sort. In other words, what the  
8 Democratic Party does not want is anonymous persons deciding  
9 its candidates. So what -- in 1968 there was a transitional  
10 provision which said if you have not previously registered, we  
11 will take the ballot that you pull the first time, check your  
12 name off the list as a D, an R, a G, whatever, and subsequently  
13 you will be deemed to have registered in that party.

14 THE COURT: So it seems to me there's a lot of  
15 briefing about crossover voting and so forth, but in the core  
16 of your argument is this public affiliation, really, it seems  
17 to me. Is that accurate?

18 MR. GILL: We believe that we are entitled to public  
19 affiliation. That is correct. And that is why the secret,  
20 anonymous, unilateral supposed affiliation, which has been  
21 pointed out by some cases to not be the whole thing, that's a  
22 one-way street. We need to know who the people are and we need  
23 to know that they have publicly declared support for our party.

24 THE COURT: And what is the severe burden if you don't  
25 have that?

1 MR. GILL: The severe burden is defined in Jones and  
2 Reed in exactly those terms. And Jones says --

3 THE COURT: Okay. Let me follow you. I have all the  
4 cases up here. Where are you in Jones? If you have a page?

5 MR. GILL: I can get you the page.

6 THE COURT: Oh, you don't have it set out like that.  
7 Okay.

8 MR. GILL: I can get it off the other chart.

9 THE COURT: If you don't, that's okay, that's all  
10 right.

11 MR. GILL: What Jones says is that the -- let me do it  
12 this way, Your Honor -- I hope I haven't lost the citation  
13 here, but --

14 THE COURT: That's okay. Just tell me what you want,  
15 I can find it.

16 MR. GILL: Oh, here we go. 530 U.S. at 581 to 582.

17 THE COURT: Okay.

18 MR. GILL: What Jones resolved was that the  
19 Californian's open primary law, quote: Forces petitioners to  
20 adulterate their candidate selection process, the basic  
21 function of a political party, by opening it up to persons  
22 wholly unaffiliated with the party. Such forced association  
23 has a likely outcome of changing the party's message. We can  
24 think of no heavier burden.

25 Now, we think that this is a per se declaration of the

1 law. Forcing a party to open itself up to persons who have not  
2 met the standards for the nomination electorate is a direct  
3 violation of the associational rights that all these cases turn  
4 on.

5 THE COURT: So why is it -- and I'm just going to play  
6 devil's advocate on both sides now -- why is it you don't need  
7 evidence to show that in fact the people who vote in the  
8 primary for a democratic candidate, talking about evidence now,  
9 why is it you don't need evidence they are in fact  
10 unaffiliated?

11 MR. GILL: Why do I say it is a per se rule that this  
12 is unconstitutional? Because Jones says so, Reed says so, and  
13 La Follette says as much.

14 THE COURT: Well, but Jones then does talk about  
15 facts, right?

16 MR. GILL: It does.

17 THE COURT: And puts it in the context of facts.

18 MR. GILL: It does.

19 THE COURT: And the Ninth Circuit has been -- want to  
20 make sure I don't say anything too harsh towards the Ninth  
21 Circuit -- but not entirely consistent on its view as what  
22 Jones means. You provided a cite over the weekend, I think, I  
23 just saw it this morning.

24 MR. GILL: Yes, Your Honor.

25 THE COURT: That case, what was the name of that case,

1 Doug?

2 MR. GILL: It is Reed.

3 THE COURT: Reed. Oh, that's the Reed case. Okay.

4 But then I looked at the Arizona Libertarian Party versus  
5 Bayless case, which really is just fully inconsistent with Reed  
6 as far as I can tell. And the Reed case sort of filtered up  
7 that rule to the Grange which Supreme Court seemed to then  
8 reject, at least in part. So, this gets to the core of the  
9 issue, right? I mean really down to the very core of what  
10 we're discussing here, which is, Where is evidence needed and  
11 where isn't evidence needed.

12 MR. GILL: Well, we don't think that evidence is  
13 needed of this because we think that the language of the Jones  
14 case without any translation or adaptation exactly and directly  
15 applies to the circumstances here. Jones --

16 THE COURT: The language you just read to me?

17 MR. GILL: Yes, and other citations within Jones which  
18 I'd be pleased to recite, but Your Honor can read.

19 Secondly, we think that what's really going on in  
20 these cases is, there is a difference between a unilateral  
21 secret, momentary affiliation on the one hand and the party's  
22 right to truly associate with others.

23 THE COURT: So what if you had a system where you  
24 could -- the State had a law in other words -- that you could  
25 register with a party on the day of the election? In other

1 words, you could go into the ballot, the voting locale, go to  
2 the teller, and on that little sheet you signed, put a little X  
3 next to Democrat, Republican, Libertarian, Independent,  
4 whatever parties may be on the ballot.

5 MR. GILL: Right.

6 THE COURT: And then you're given that ballot for  
7 instance. How would you view that?

8 MR. GILL: I would view that as acceptable only as a  
9 transitional situation to deal with some problem of getting the  
10 system up and running.

11 THE COURT: Okay. But let's not talk about that.  
12 Let's not talk about transition. What I'm hearing you saying  
13 is you still think it's unconstitutional. May be an acceptable  
14 short term remedy.

15 MR. GILL: Because it is not political association.  
16 Now, let me use a sort of more commonplace analogy.

17 I wake up in the morning and I get a letter from the  
18 State of Hawaii that says, Guess what, Gill, you're married.  
19 And I say, Huh? And they say, Yup. And I say, To whom? And  
20 they say, Won't tell you. And furthermore you don't get to  
21 know. All right. Now, that is political party at its core.  
22 It's the most basic. There's at least two people. They have  
23 to choose each other, they have to decide to work for a common  
24 purpose. That is the right of association.

25 Now, affiliation is a one-way street. Anyone on the



1 street can say, Gosh, I want to be affiliated with the  
2 Democratic Party. But that is not the Democratic Party  
3 agreeing to affiliate with that person. And what Jones says  
4 absolutely specifically, very clearly is that the right to  
5 associate, the corollary of the right to associate is the right  
6 to reject.

7 THE COURT: Now, I understand that and I -- I think I  
8 understand that principle clearly. What I'm struggling with  
9 and trying to look at too is in Footnote 8 and the lead up to  
10 Footnote 8 where Justice Scalia at least suggests and the  
11 majority at least suggests that day of primary registration  
12 will be acceptable.

13 MR. GILL: Well, it's a burden we must bear, but  
14 that's not what we think the correct standard is. So from the  
15 point of view of the Democratic Party, you want to know what  
16 does the Democratic Party want. The Democratic Party wants  
17 public declaration of support. That's the sine qua non.

18 THE COURT: I understand. I understand that.

19 MR. GILL: And the reason that a day of instantaneous  
20 registration does not work is because there has been no mutual  
21 association and it offends our right to exclude. It is not  
22 materially different than imposing no qualifications whatsoever  
23 except insofar as that vote is recorded and subsequently  
24 becomes a public statement of affiliation.

25 THE COURT: So that takes us to Salerno then, let's

1 talk about that a little bit. I know I've taken you off  
2 script, Mr. Gill, and I'll let you finish. I have --

3 MR. GILL: Your Honor, it's your script.

4 THE COURT: Well, I have another hour. I kind of  
5 consider this your time, but it's very useful to have this back  
6 and forth for me in a conversational way on something as meaty  
7 as this is.

8 MR. GILL: Certainly.

9 THE COURT: And we all understand the complexity here.  
10 I mean, I was surprised I saw how few cases there are on the  
11 circuit level on these issues on this sort of primary. How  
12 many states have a system like we have? Does anyone know the  
13 answer to that?

14 MR. GILL: There are some. I think the problem in  
15 giving a number, opposing counsel will probably agree with me,  
16 is that there are many subtle variations.

17 THE COURT: Like in Virginia you could nominate  
18 through some other process.

19 MR. GILL: For example.

20 THE COURT: Right, right.

21 MR. GILL: Or even, you mentioned Bayless, to compare  
22 Bayless to Clingman. The only difference there is whether the  
23 independents are crammed down or an option.

24 THE COURT: Right. Okay.

25 MR. GILL: But they both come under the rubric of

1 closed primary. So I don't know that it's a useful discussion.

2 THE COURT: Okay.

3 MR. GILL: I think we are agreed that here we have a  
4 mandatory exclusive cramdown. There is no alternative.

5 THE COURT: Okay.

6 MR. GILL: But you wanted to go into Salerno.

7 THE COURT: Into Salerno. And I understand that  
8 there's a little back and forth as to how Salerno actually  
9 applies and whether I should apply it literally or not, and  
10 there has been a certain level of criticism in Salerno. I  
11 understand all that. But if you're making a facial challenge,  
12 wouldn't I have to know that the Republican Party, the  
13 Libertarian Party, the Green Party, I just had a case about the  
14 Justice Party recently, I mean whatever parties there are that  
15 are recognized here. I'm not sure the Justice Party is. But  
16 whatever parties have the modicum of support such that they  
17 will get their candidates on the ballot. Wouldn't it have to  
18 be unconstitutional as to them as well? In your view it is, I  
19 guess.

20 MR. GILL: Yes, our view is that it's unconstitutional  
21 as to all parties.

22 THE COURT: But what if their constitution says, We  
23 want openness, we love openness, we want anyone to vote for --

24 MR. GILL: Then it's their prerogative.

25 THE COURT: But then why would it be facially

1 unconstitutional as to them?

2 MR. GILL: For the same reason that it's  
3 unconstitutional to restrict speech on the street whether  
4 anyone chooses to make a speech or not. This is a First  
5 Amendment principle at root.

6 THE COURT: But I guess what's unique here, I think  
7 there are a couple things that are unique about the test.  
8 First, there's only strict scrutiny and sort of rational basis,  
9 if you will. There's no in between. You either have to make a  
10 determination of something severe or not or lesser. And that's  
11 kind of in the eye of the beholder to a certain degree,  
12 obviously.

13 But that aside, if you have to sort of judge whether  
14 there's a severe burden or not, then you have to know the  
15 interest at stake, right?

16 MR. GILL: Well, here's the way I deal with Salerno:  
17 I look at Salerno through the eyes of the Citizens United  
18 court. And I'm going to translate it into as simple English as  
19 I can make so I can understand what I'm saying.

20 The substance of the case --

21 THE COURT: That's a very nice way of putting it.

22 MR. GILL: The substance of the case, the dog is the  
23 material constitutional question. Whether it is a facial  
24 challenge or an as-applied challenge, that goes mainly to  
25 remedy, says the Citizens United court.

1           And the question -- I mean the Salerno business and  
2   the facial challenge analysis rapidly become metaphysical,  
3   which is why this is so difficult in the cases and  
4   commentaries. As I understand the Citizens United take on  
5   facial challenge it is that all cases start as applied. That's  
6   the root. You show up, you say, I'm a Democratic Party, this  
7   is unconstitutional.

8           And we are asking that the remedy be broad or that the  
9   remedy be only as to us. But at root all challenges have to  
10   start with somebody showing up and complaining. Then you  
11   decide according to facial analysis whether the remedy is broad  
12   or not.

13           But if you look at Salerno, the real problem with  
14   understanding it is, What realm of speculation are you supposed  
15   to go through?

16           In our case there is no way that this law can be  
17   applied constitutionally to the Democratic Party. I think  
18   we're pretty much agreed that there is no alternative to the  
19   law.

20           THE COURT: Right.

21           MR. GILL: There is no --

22           THE COURT: Meaning no alternative to the nomination  
23   process.

24           MR. GILL: Yes. There's no alternative to the  
25   nomination process.

1 THE COURT: Other than a primary.

2 MR. GILL: Other than a primary. In the primary  
3 everyone will be able to vote and no one must declare and the  
4 State may not maintain any records of any party affiliation  
5 ever. And so therefore those two things directly and  
6 immediately collide with the Democratic Party constitution.  
7 You cannot get across that gap.

8 So there is no way that that law can be applied  
9 constitutionally to the Democratic Party, we assert. There's  
10 simply no -- there's no room for administrative wiggle room.  
11 If there had been we would have seen some affidavit indicating  
12 that there's some blurriness in application. But there's no  
13 such declaration.

14 THE COURT: I think the law is pretty clear. Yeah.  
15 The underlying process.

16 MR. GILL: That is a direct collision, it is as clear  
17 a collision as you can get because unlike those East Coast  
18 cases there's no alternative.

19 So, when I -- I don't rely only on Jones, though, Your  
20 Honor. I take a look at the La Follette case, which has some  
21 very good quotes in it directly about the open primary. And if  
22 you remember the La Follette case, Wisconsin is a big fan of  
23 the open primary and they try to apply it to everything. And  
24 the National Democratic Party came into Wisconsin aggrieved  
25 because Wisconsin was attempting to use the results of an open

1 primary to dictate how presidential electors would vote.

2 THE COURT: Right.

3 MR. GILL: And the Democratic Party came in, laid down  
4 its requirements for participation, which are not any different  
5 than the ones DPH is bringing here, and you get quotes out of  
6 La Follette which -- and I'm looking, 530 U.S. 576, I think  
7 that's a Jones quote of it, but it's the same text. "Wisconsin  
8 law required these delegates to vote in accord with the primary  
9 results, thus allowing nonparty members to participate in the  
10 selection of the party nominee conflicted with the Democratic  
11 Party's rules." All right. "Allowing nonparty members to  
12 participate in the selection of the party's nominee conflicted  
13 with the Democratic Party rules." That's La Follette. That's  
14 the same case we have here.

15 We held that whatever the strength of the State  
16 interests supporting the open primary itself, they could not  
17 justify the substantial intrusion into the associational  
18 freedom of the members of the national party, unquote. That's  
19 the Supreme Court in La Follette.

20 THE COURT: But that's where the party members, the  
21 national delegates had to vote in a way that made them very  
22 inconsistent with their own standards, right, or their own  
23 conscience. I mean they had to vote according to the  
24 results --

25 MR. GILL: Wisconsin was using an open --

1 THE COURT: It's a very strange factual scenario.

2 MR. GILL: It's only strange because of the electoral  
3 college system.

4 THE COURT: Right. And the court goes out of its way  
5 to say the Wisconsin State Supreme Court sort of ruled on this  
6 open primary. We're not going there and we don't need to go  
7 there and we don't know if that's good or bad. That's  
8 irrelevant.

9 MR. GILL: That is correct. And the oddity in that  
10 case was that the Wisconsin Democratic Party, bless its heart,  
11 which would have had standing to deal with that, is the  
12 national party doesn't claim to have standing as to state  
13 elections. Wisconsin Democratic Party didn't bring that  
14 challenge. Maybe they're happy with the open primary for  
15 whatever reason.

16 But the rationale of the court directly addressed this  
17 point. Whatever the strength of the state interests supporting  
18 the open primary itself, they cannot justify the substantial  
19 intrusion into the associational freedom of the members of the  
20 national party. And that is, as of that slice of Wisconsin law  
21 that was attacked by the national party. Now, to me that is  
22 dead on.

23 THE COURT: Well, factually it's distinct though. I  
24 mean it's very distinct.

25 MR. GILL: What is the magical difference between a



1 national party and a state party?

2 THE COURT: Because you're forcing the national party  
3 to do something. You're forcing them to vote during that  
4 convention in a particular way. Right? In the system that  
5 existed then.

6 Here you don't have any evidence that there's  
7 crossover voting. There's a total lack of an evidentiary  
8 record. I mean I really have no evidentiary record before me,  
9 and that's why this is a facial challenge. There's no  
10 evidentiary record before me to show that you're harmed through  
11 crossover voting. That somebody gets on the democratic ballot.  
12 You can't control who goes on the ballot, am I correct on that,  
13 you as the party?

14 MR. GILL: We have --

15 THE COURT: Is that not right?

16 MR. GILL: That's not exactly right, but thereby hangs  
17 a long and sordid tale that you probably don't want to go into.  
18 Whether we can or cannot --

19 THE COURT: Yeah, I sort of remember a lot of press  
20 about this.

21 MR. GILL: -- directly controls someone who defies the  
22 party rules is a matter on which the shoe has not dropped.

23 THE COURT: Okay. All right.

24 MR. GILL: But there are nominal restrictions which  
25 have to be enforced anytime they weigh in circuit court.

1 THE COURT: You come forward with no evidence that  
2 there's, you know, two democratic candidates, one is very weak  
3 for whatever reason or one you don't really support, the party  
4 doesn't support, the other you do, and a bunch of Republicans  
5 are coming in and grabbing that democratic ballot to get the  
6 weak person on the general election ballot. I have no evidence  
7 of that.

8 MR. GILL: Well, that is correct. We've put no  
9 evidence of it on the record in that form. I have a couple  
10 layers of answer to this, so if you'll bear with me.

11 THE COURT: All right.

12 MR. GILL: One is we don't think we need it because we  
13 think that the Jones and La Follette analysis create a per se  
14 problem.

15 Second, we aren't arguing crossovers per se because we  
16 think that this potential is built into the per se rule.

17 Thirdly, we have on the record the fact that the  
18 Democratic Party membership, those people who have publicly  
19 declared their affiliation and support with the party has been  
20 in the range of 20,000 to 60,000 in the germane time.

21 If Your Honor wished to take evidence on that, I would  
22 simply, you know, in the hypothetical case that I was required  
23 to do that, I would simply ask Defendant Nago how many people  
24 voted in the democratic primary last time, and he would then  
25 tell you faithfully, as his own statistics are publicly

1 available show that over a quarter of a million people did.

2 THE COURT: Well, but, Mr. Gill, I mean let's be real  
3 here. Okay. We don't need a record to know this is a heavily  
4 democratic state.

5 MR. GILL: We don't need that.

6 THE COURT: We don't need that. We know that, right?

7 MR. GILL: We don't need that.

8 THE COURT: Everyone can agree with that. And we know  
9 that just looking at registration numbers, for whatever reason,  
10 maybe because you have an open primary.

11 MR. GILL: Voter records. There's no way to know  
12 behind the number of people who voted, but I can tell you that  
13 four times as many people voted as were publicly declared  
14 supporters.

15 THE COURT: I understand that. But what I'm saying  
16 is, it doesn't mean those people aren't affiliated with the  
17 Democratic Party and the Democratic Party principles. I cannot  
18 draw that conclusion based on this record, is what I'm saying.

19 MR. GILL: Nor could anyone because the Hawaii open  
20 primary hides that ball. The purpose of it is to hide that  
21 ball.

22 THE COURT: Well --

23 MR. GILL: Now, we can argue about studies and --

24 THE COURT: Surveys and so forth, correct.

25 MR. GILL: Surveys. But the studies and surveys that

1 we might adduce would not be materially different than the ones  
2 already adduced and recognized in Jones and others.

3 THE COURT: Well, I can't just draw of what -- and  
4 Judge Winmill refused to do that in the case in Idaho, as I'm  
5 sure you are aware, and I think correctly so.

6 MR. GILL: Well, we say that we're not concerned as  
7 much with the crossovers here. We are here to defend the  
8 constitution, and that is we want publicly declared supporters.  
9 By the constitution, I mean, of the Democratic Party.

10 THE COURT: Let me ask you this to try to pull these  
11 threads.

12 MR. GILL: Sure.

13 THE COURT: If you don't have evidence of crossover,  
14 of sort of a harm in the voting booth, if there's no  
15 evidentiary record, let me put it that way, as opposed to  
16 asking me to speculate somewhat, or to hypothesize or to draw  
17 off of Jones. There's no evidentiary record on that. Then  
18 that leaves you, it seems to me, really with you have a right,  
19 an associational right to make those who want to vote to have  
20 to register publicly with you.

21 MR. GILL: Or perhaps some other method, but we'll use  
22 that example as a proxy for other possible methods, which goes  
23 to remedy and we don't want to get into that.

24 But yes, that's what we are saying. We're saying that  
25 the associational right, and association is a two-way street,

1 association is the right not only of the voter to come in and  
2 try to affiliate with the party, it's the right of the members,  
3 the co-equal right of the members of the party to decide  
4 whether they accept this person or not. And that's the point  
5 that keeps getting missed in the affiliation discussion.  
6 Association is a two-way street. If you cannot reject a person  
7 for not meeting your qualification, that in itself is the  
8 violation of the associational right and that's -- that's what  
9 we think the real meaning of Jones is and similarly the whole  
10 line of cases, including Eu and Tashjian and La Follette, all  
11 of which have been gone into.

12 THE COURT: So to rule on this, though, whether for or  
13 against you, I mean there are no cases that directly address  
14 that issue as you have framed it before me, that I've seen at  
15 least. So I just want to make sure there's nothing out there  
16 that you're aware of that I'm not aware of.

17 MR. GILL: I think that the -- that that's  
18 substantially true and what I'm inviting the Court to do is to  
19 take one very small logical step forward.

20 THE COURT: Okay. I understand the argument. I  
21 haven't -- I have to say you're really refining this in a way  
22 that's very helpful for me ultimately to reach a decision.

23 MR. GILL: Okay. And I would add to that, that if you  
24 go down step by step through the Jones analysis and look at  
25 what it says and you look at what La Follette says and then you

1     apply it to the extremely simple uncontroverted facts of this  
2     case, you must come to the conclusion that the State of Hawaii  
3     is compelling the Democratic Party of Hawaii to associate with  
4     persons who do not publicly declare their support of the party.  
5     You can slice it any way you want, but you're going to come out  
6     there.

7             Now, there is a distinction between a blanket primary  
8     and an open primary, and the distinction is very simple. The  
9     voter has more options in a blanket primary. Looked at from  
10    the point of view of the voter, a blanket primary is different  
11    than an open primary. But looked at from the point of view of  
12    the party, there is no material difference.

13            THE COURT: So you're being forced to associate in a  
14    way you don't want to associate, correct?

15            MR. GILL: Correct, sir.

16            THE COURT: And with whom are you associating you  
17    don't want to associate with?

18            MR. GILL: We can't tell.

19            THE COURT: But you're talking about people in the  
20    voting --

21            MR. GILL: We can't tell.

22            THE COURT: No, no, but you're talking about people in  
23    the voting booth, correct?

24            MR. GILL: Yes. So we cannot tell --

25            THE COURT: See, and that's what I'm trying to figure

1 out, the requirement of evidence, I'm trying to get back to, if  
2 that's what you're talking about why is it you don't need  
3 evidence to show that?

4 MR. GILL: Because we know the number of people we  
5 have in our party. We know that we want our party to nominate  
6 its candidates through people who have publicly declared  
7 affiliation with us. We know our membership rolls and the  
8 State says all on sundry, for whatever reason, you're in. And  
9 we say, No, we don't want you in. We want to see the public  
10 declaration of support. Now, that could be achieved by a  
11 number of means. It could be achieved by an appropriate  
12 registration, it could be achieved in a convention system, it  
13 could be achieved by joining a party. There are probably lots  
14 of different ways this thing could be sliced. Or the State  
15 could say, Forget the whole primary thing, we'll do something  
16 else.

17 You know, there are possible ways to resolve this  
18 problem, but the central and sole problem here is that the  
19 Democratic Party constitution wants a public declaration of  
20 support and the law on its face will not permit that. They  
21 will cramdown any number of people who take absolutely no  
22 public step to affiliate or grant us the right to associate  
23 with them.

24 THE COURT: So, one option could be -- I don't  
25 understand the name of this party, the Washington State Grange

1 Party. I'm not sure what that means, but --

2 MR. GILL: Farmers.

3 THE COURT: Farmers. Thank you.

4 MR. GILL: They hate the effete Democratic/Republican  
5 access that was imported from the East Coast.

6 THE COURT: Okay. All right.

7 MR. GILL: It's all about threshers and stuff.

8 THE COURT: I got you. All right.

9 MR. GILL: That's why Colorado wants to have counties.

10 THE COURT: I saw that in the paper, yes.

11 A result might be by the legislature -- I know we're  
12 not far off -- we're far from remedy -- to apply the Grange  
13 system. Is that really what you want ultimately? Doesn't that  
14 put you in a worse position?

15 MR. GILL: Not necessarily.

16 THE COURT: Really?

17 MR. GILL: Not necessarily.

18 THE COURT: It seems to me you lose a lot of --

19 MR. GILL: Well, I can only work with the constitution  
20 and the cases that we have.

21 THE COURT: Yeah, and I know this is beyond my  
22 purview. I mean just it's interesting because if I agree with  
23 you ultimately --

24 MR. GILL: Well, I think that the people --

25 THE COURT: -- you may end up in a worse position than



1 you are now.

2 MR. GILL: Well, constitutionally, no. Right now  
3 we're in a constitutionally untenable position. If the top two  
4 primary is constitutional, then that is an option for the  
5 State. However, I don't think that the State would want to do  
6 that and I also think that the part that's missing about the  
7 top two is how scrupulously the drafters of the top two stayed  
8 away from two items. One, affecting party nominations because  
9 they don't even touch it. Parties under that system can  
10 nominate however they want. And two -- which goes a long way  
11 toward curing a constitutional problem that we're talking  
12 about. And two, it doesn't -- they don't interfere because  
13 they've also read La Follette with any of the national.

14 THE COURT: All right. It's a little bit beyond our  
15 sort of kuleana right now.

16 MR. GILL: Granted.

17 THE COURT: Mr. Gill, let me do this. I want to turn  
18 to Ms. Marie-Iha. I'll give you a few minutes to wrap up if  
19 there's something you really wanted to cover that I didn't give  
20 you an opportunity to.

21 MR. GILL: I'd like to say one other thing which  
22 didn't come out too clearly in the briefing.

23 We think that the correct test to apply here is if  
24 there's a severe burden. Of course we contend there's a severe  
25 burden. Then you have to have compelling interests that are

1 narrowly tailored.

2           There is nothing narrowly tailored about an open  
3 primary. It is the second broadest brush that you can sweep  
4 with. Only the blanket primary could possibly be worse.  
5 There's no -- it is a blunt instrument and there's been no  
6 argument --

7           THE COURT: How can you tailor it more narrowly then,  
8 give me some examples.

9           MR. GILL: Well, you can narrow primary structures in  
10 a way that don't totally cause an influx or cramdown of unknown  
11 people. So, for example, you can say you can cure the  
12 crossover portion of the problem by establishing a semiclosed  
13 primary in which only party members or independents who have  
14 never declared a party affiliation can vote in a primary, as  
15 some states try to do. Or you can narrow that further to a  
16 closed primary in which there has to be some mutually agreeable  
17 association.

18           Okay. So I'm saying that there's a continuum and  
19 probably smart minds can devise ways along that continuum that  
20 have less of a constitutional problem. But in the current  
21 context, the open primary is a blunt instrument and they have  
22 not argued that it's narrowly tailored at all.

23           THE COURT: All right.

24           MR. GILL: So, you know, if we were going to be hyper  
25 technical we could say that it doesn't matter what interests

1 they adduce because they haven't shown that these interests,  
2 and that is clearly their burden, they haven't shown that these  
3 interests are narrowly tailored.

4 Now, the final point on this is that if you look at  
5 the -- the compelling interest they have adduced, one is  
6 privacy, that's been dealt with in Jones sufficiently. We  
7 would apply the same argument here. But also we would say that  
8 the State privacy -- constitutional provisions for privacy just  
9 simply don't deal with this kind of thing. They deal with  
10 medical or personal or educational matters, they don't deal  
11 with an intrinsically public behavior.

12 THE COURT: I mean I have to say my view right now  
13 looking at this is like so many other constitutional cases,  
14 which is the decision rises or falls with the burden that  
15 applies. I mean that's sort of the way I'm looking at it right  
16 now, I'll tell both of you, which is, if it's a severe burden  
17 you're likely to prevail, Mr. Gill. If it's not, you're likely  
18 not to prevail. I mean that's right now how I'm looking at  
19 this.

20 MR. GILL: All right. Well, to finish this thought  
21 off and then get out of the way, the Clingman case, which  
22 supports Oklahoma's closed primary system, adduces a list of  
23 compelling state interests that justify a closed system. Those  
24 interests sound a lot like the State's third interest here,  
25 which is the vibrant democracy. It's very -- it's ironic to me

1 that the interests that support a closed primary for the  
2 reasons that it's closed can be adduced in this case as a  
3 reason to support the open primary. We just think that  
4 Clingman goes off in the opposite direction there.

5 THE COURT: We do the lowest voter turnout in the  
6 country, right? In recent elections? I mean isn't there a  
7 concern that if you prevail there will be even lesser turnout,  
8 at least in the primaries, I mean I don't know about the  
9 general obviously.

10 MR. GILL: This reminds me of Mayor Fasi's old joke.  
11 I'm here to protect you from rogue tortoises. And everybody  
12 said, I don't see any rogue tortoises coming. And he said,  
13 Elect me.

14 Now, what this is about, if you look nationally, if  
15 you want to go in, and you can do this with publicly available  
16 records, and also go back and look at the constitutional  
17 convention, the whole idea of this system that we have now is  
18 privacy followed by throwing the doors open for greater voter  
19 participation, which was then followed by a continued  
20 precipitous decline in voter participation. Now, that's just  
21 the record. You can look at it, it's online.

22 THE COURT: I don't -- yeah, I mean I think that's  
23 pretty clear, but your --

24 MR. GILL: What I'm saying is --

25 THE COURT: -- corollary is that voter participation

1 will increase if you prevail here?

2 MR. GILL: No, I'm saying that the right of the  
3 Democratic Party to decide who it will associate with is  
4 independent of these concerns.

5 THE COURT: Well, it gets to the State's stated -- I  
6 mean this is -- gets to the point I'm making, I think, which  
7 is, ultimately it's a severe burden, I just don't see the State  
8 prevailing. If it's not a severe burden, I have a hard time  
9 seeing you prevailing. I mean that's really what I'm getting  
10 at.

11 MR. GILL: Well, thank you for laying that out, but we  
12 don't --

13 THE COURT: I'm not suggesting anything else.

14 MR. GILL: If it were so simple that the open primary  
15 and the closed primary and other varieties of primaries  
16 produced some measurable voter result in terms of turnout, the  
17 decline in voter participation would have been a solved  
18 problem, not only nationally but internationally. And it's  
19 true, we went from 80 and 90 percent turnout to whatever we've  
20 got now, which is well sub 50, and if you neglect the failure  
21 to register you're down to 25. The short answer is we think  
22 that better races would make more interest.

23 THE COURT: Thank you, Mr. Gill.

24 MR. GILL: All right.

25 MS. MARIE-IHA: Good morning. Deirdre Marie-Iha.

1 I'd like to start, Your Honor, with Washington State  
2 Grange. That is the United States Supreme Court's most recent  
3 primary case in which the Supreme Court identified and applied  
4 the test from Salerno. And --

5 THE COURT: Well, didn't it sort of say, Salerno, but  
6 there's a lot of criticism and even under other tests --

7 MS. MARIE-IHA: They sort of wandered into an  
8 overbreadth discussion actually, Your Honor, but they did  
9 identify Salerno and despite people who may criticize it, it is  
10 still good law, has not been overturned. So I think that is  
11 the starting point.

12 In terms of Mr. Gill's discussion about the  
13 possibility of using Citizens United to, I don't know, decide  
14 what relief you have afterwards, I don't think that that's a  
15 correct reading of the way that the facial and as-applied  
16 challenges were resolved in Citizens United. If you look at  
17 Citizens United itself it actually talks about when the facial  
18 challenge was brought up, when the as-applied challenge was  
19 brought up. It's a very odd sort of factual scenario behind  
20 those two challenges.

21 We would submit the better and clearer way to  
22 distinguish between the kind of -- how the relief ties to a  
23 facial challenge would be a look at the Ninth Circuit's Family  
24 Pack case where they say this is where the relief becomes  
25 relevant. The claim in the relief that would follow reach

1 beyond the particular circumstances of these plaintiffs. And,  
2 Your Honor, that's a quote from Doe versus Reed, which is a  
3 2010 Supreme Court case after Citizens United.

4           So I think that that is what you have to remember when  
5 you asked the questions about, Well, how would this apply to  
6 other parties, if the Court were to strike down the open  
7 primary facially, then the State would not apply the open  
8 primary to any of the parties. What would happen, what primary  
9 system would happen after that, we believe, would be resolved  
10 by the state legislature. If it had been brought as an  
11 as-applied challenge, then the open primary could not be  
12 applied to the Democratic Party, but it could still be applied  
13 to the other parties.

14           THE COURT: All right. But Mr. Gill seems to be  
15 saying, it sort of doesn't matter what a party wants. If it's  
16 facially unconstitutional. I mean he's drawn a line. And I  
17 give him credit in some ways for doing that at least and not  
18 being squooshy. You know, I mean he's drawn the line and said,  
19 Looking at this statutory framework, when you look at the  
20 Hawaii State Constitution and then statutory framework that  
21 follows, where there is no escape valve, if you will, that  
22 meaning the party can't directly nominate someone outside of  
23 the primary process. It has to be through this primary  
24 process. That regardless of what a party's desire may be, it's  
25 facially unconstitutional. That's the argument he's making.

1           So, I don't know that you two really had that much of  
2   a difference ultimately in your views on how I applied the  
3   facial challenge. It's really application of that to these  
4   facts.

5           MS. MARIE-IHA: True. The reason I was highlighting  
6   the language from Family Pack which comes from Doe versus Reed  
7   was because of Mr. Gill's statements about, indicating that  
8   somehow Citizens United had changed how one approaches facial  
9   and as-applied challenges. I believe that's completely  
10   incorrect.

11          THE COURT: All right. Let's move on past that.

12          MS. MARIE-IHA: Absolutely. Your Honor, I think the  
13   most important thing about the case law is the portions of the  
14   case law that Mr. Gill has skimmed over essentially.

15          The most important part we think of Jones is Footnote  
16   8 and the text immediately attached to it in which the Supreme  
17   Court distinguishes the open primary based on the fact that  
18   the -- participating in the Democratic Party is an act of --  
19   excuse me, the democratic primary is an act of affiliation with  
20   the Democratic Party. That's a quote from the majority opinion  
21   from the United States Supreme Court.

22          The La Follette case, the Supreme Court also set aside  
23   the decision about the open primary and in fact said, Well, the  
24   Wisconsin Supreme Court resolved this is the open primary,  
25   we're not going to talk about that, but they may very well be



1 correct.

2 So in our view, although it is dicta, we will admit  
3 it, what the Supreme Court has said about the open primary  
4 gives all the reasons why we should not import Jones wholesale  
5 into the application here. We shouldn't because the Supreme  
6 Court said they weren't deciding the constitutionality of the  
7 open primary. If the fact that it's exclusive decided it  
8 alone, then Washington State Grange would have gone the other  
9 way. If the fact that it's deciding --

10 THE COURT: Wait, say that again. You talk very --

11 MS. MARIE-IHA: I'm so sorry, You Honor.

12 THE COURT: Almost faster than I do.

13 MS. MARIE-IHA: Sorry. If the fact that the primary  
14 was exclusive was the determining factor.

15 THE COURT: In?

16 MS. MARIE-IHA: In Jones.

17 THE COURT: In Jones.

18 MS. MARIE-IHA: Then Washington State Grange would  
19 have gone the other way because Washington State Grange was  
20 exclusive.

21 If the fact that you are choosing the party's nominees  
22 was the determining factor, then Jones would not have  
23 distinguished the open primary the way that it does because the  
24 blanket primary was choosing the party's nominees.

25 THE COURT: So I want to understand your view. Is

1 your view that I should say as a matter of law, regardless of  
2 whatever evidence may come in, that an open primary is  
3 constitutional, or is it your view that in order to really make  
4 a challenge to an open primary you need to come in with  
5 evidence and show the burden?

6 MS. MARIE-IHA: Both yes -- sort of yes and no, Your  
7 Honor. I think the way that --

8 THE COURT: Yes to which one?

9 MS. MARIE-IHA: Right. I know. The way that Mr. Gill  
10 has framed the case, as I understand it, a facial challenge  
11 only, we believe the application of Salerno, the fact that the  
12 Supreme Court has very carefully not struck down the open  
13 primary, means that they cannot meet the Salerno standard and  
14 we win on a facial challenge. Would that preclude a later  
15 as-applied challenge with evidence? It would not. In my view.

16 And you can see the way the Washington State Grange  
17 happened in the litigation is that's exactly what happened.  
18 They resolved the facial challenge first at the Supreme Court,  
19 then they did a separate as-applied challenge which resulted in  
20 the Washington State Republican Party case.

21 THE COURT: Okay. So let me interrupt you. As far as  
22 preclusive principles, if I rule for you now the way you want,  
23 and I'm going to lay out the framework initially as to what was  
24 discussed in the beginning part of this hearing as far as where  
25 everyone agrees procedurally we are. If I were to rule for the

1 Democratic Party, it's pretty clear where we go. I mean we go  
2 to remedy. If I rule for you, that might have preclusive  
3 effect as to another facial challenge at some point, maybe not,  
4 but certainly not as to an as-applied challenge.

5 MS. MARIE-IHA: I believe that's consistent with the  
6 general principles of facial and as-applied challenges, Your  
7 Honor, and you can see the Washington State Grange decision on  
8 the facial grounds certainly did not preclude later proceedings  
9 on as-applied grounds. So that would be our view and it would  
10 be the same for any other party.

11 So if the Court was to uphold the facial  
12 constitutionality of the open primary, in 10 years from now  
13 somebody wants to sue on an as-applied challenge, they can.

14 THE COURT: All right. So Mr. Gill says, you know,  
15 Yes, we haven't come forward with evidence of crossover voting  
16 surveys, studies, expert witnesses, we haven't done that, but  
17 we want people to publicly affiliate, we want people to make it  
18 clear they share our values, and the State system doesn't  
19 permit that. And facially that's obvious, it doesn't, it  
20 doesn't permit that.

21 MS. MARIE-IHA: I think --

22 THE COURT: So how do you respond to his more refined  
23 argument than maybe I was getting out of the briefing  
24 initially, that this isn't necessarily just about crossover  
25 voting, people going in and being able to affiliate with us who

1 really don't share our values. It's about them, we have a  
2 right, that converse right to require them to affiliate with  
3 us.

4 MS. MARIE-IHA: I think the cases do not go that far.  
5 I think what he's asking the Court is to take a leap beyond  
6 what the cases actually hold. And since we're turning, like I  
7 said, to the Jones Footnote 8 and the careful distinguishing in  
8 La Follette, we think that those are the language, the closest  
9 that the United States Supreme Court has ever gotten to this  
10 question, that language is all in our favor. So, that's where  
11 we are hinging on it.

12 In terms of the party's right to do affiliation or  
13 association, that right is not entirely absolute. And I think  
14 that Mr. Gill is perhaps minimizing the role that the State  
15 government has in shaping or, you know, assisting the  
16 democratic process. And there is case law that holds that the  
17 right of affiliation -- when Mr. Gill was talking about a  
18 two-way street, I see no case law that actually says that  
19 affiliation can be only a two-way street. I see no case law  
20 that says that. What the case law does say is that your choice  
21 to participate in the democratic primary and that primary only  
22 is an act of affiliation. That's what Jones Footnote 8 says.

23 So to me those two principles are irreconcilable. One  
24 of them has no case law and the other one does. So that's  
25 where I see it.

1 THE COURT: Well, but the case law, as you point out,  
2 dicta and --

3 MS. MARIE-IHA: It is.

4 THE COURT: -- as grades of dicta go it's on the  
5 pretty weak side of dicta.

6 MS. MARIE-IHA: It is dicta. The Ninth Circuit has  
7 said that, We take dicta seriously. It's dicta from the United  
8 States Supreme Court. There is no controlling authority  
9 striking down the open primary. So I think that's where we  
10 are. It may be only, you know, winds are going in one  
11 direction, but that's what it says.

12 So, in any case, the --

13 THE COURT: I guess what I'm thinking through my mind  
14 right now and I'm trying to understand how this plays out is,  
15 now that I understand Mr. Gill's more refined argument, I'm not  
16 so sure it still doesn't require evidence. Because the outcome  
17 of the lack of ability to affiliate, the harm from it is in the  
18 polls, but we don't know what harm there is when people go to  
19 vote.

20 MS. MARIE-IHA: I think that's right, Your Honor.  
21 When you asked a question earlier, we all know that Hawaii is a  
22 heavily democratic state. So, the Office of Election keeps no  
23 records of what people's formal affiliation is or if you were  
24 to say to someone, Are you a Democrat and they said yes, we  
25 don't keep any of those kind of records. So who turns out at

1 the primary is just a number, it doesn't say who those people  
2 are.

3 So without those further studies, without the kind of  
4 evidence that you see discussed in the other cases, fleshed out  
5 here now in this state, we don't know any of those things. So,  
6 I think that's part of the problem.

7 When you -- when you highlighted that there was  
8 perhaps a lack of complete consistency from the Ninth Circuit  
9 about the factual issues, there's one thing I wanted to point  
10 out to you. From the Democratic Party of Washington versus  
11 Reed case, that's the case that Mr. Gill faxed yesterday, it  
12 says that the Jones court had, quote, inferred the burden. But  
13 I honestly think that's an improper characterization of Jones.

14 THE COURT: It is wrong. I mean I went back and read  
15 Jones after I read that and it's not right. And I don't think  
16 it withstands the Grange. I don't think it does, ultimately.

17 MS. MARIE-IHA: Well, they rejected the facial  
18 challenge in large part because it was based on speculation.

19 THE COURT: Right.

20 MS. MARIE-IHA: And I think when you get worried about  
21 the Salerno standard I think Washington State Grange can show  
22 the way because they say even under an overbreadth analysis  
23 that it has to be clear that this is a very, very serious thing  
24 that you do to strike down a statute in all its applications,  
25 to assume that it's unconstitutional in all its applications.

1 THE COURT: In Bayless.

2 MS. MARIE-IHA: Yes.

3 THE COURT: Decided about 2 months after Reed.

4 MS. MARIE-IHA: Yes.

5 THE COURT: The same circuit, the Ninth Circuit, says,  
6 "We observed that the court in Jones treated the risk that  
7 nonparty members will skew either primary results or  
8 candidate's positions as a factual issue with the plaintiffs  
9 having the burden establishing that risk."

10 MS. MARIE-IHA: Yes, it does say that, Your Honor.

11 THE COURT: That's what I'm saying, it seems  
12 inconsistent to me.

13 MS. MARIE-IHA: It does.

14 THE COURT: With Reed.

15 MS. MARIE-IHA: But I think what you've noticed about  
16 Reed, I think, is not an entirely correct characterization of  
17 Jones.

18 Your Honor, I was so curious about this I actually  
19 went down to look at the Jones district court decision because  
20 I thought, okay, if anybody was going to discuss the evidence  
21 it would have been the district court judge. The decision,  
22 this is at 948 Federal Supplement at 1292, quote: The Court  
23 heard testimony over 4 days and has received numerous exhibits,  
24 including the reports of various experts, unquote.

25 THE COURT: Okay. But Mr. Gill -- this is what I want

1 you to address now.

2 MS. MARIE-IHA: Yes.

3 THE COURT: Mr. Gill is saying, I don't need that  
4 evidence. I don't need it because the State system here  
5 doesn't allow me as -- or the Democratic Party, I should say,  
6 to associate -- we don't know who we're associating with. It's  
7 a two-way street and we have that right to know who we're  
8 associating with.

9 MS. MARIE-IHA: The case law doesn't go that far, Your  
10 Honor. The case law is talking about --

11 THE COURT: But he's asking me to extend it. So why  
12 shouldn't I? I mean, you know, I mean ultimately this case we  
13 all know could end up in the Supreme Court. I mean there's  
14 just not a huge amount of case law here and these are important  
15 issues, obviously.

16 MS. MARIE-IHA: Yes.

17 THE COURT: Extremely important issues in our system  
18 of government.

19 So, don't just tell me the cases don't support that  
20 because there are no cases that support it or don't support it.  
21 Tell me why I should rule inconsistent with the argument  
22 Mr. Gill --

23 MS. MARIE-IHA: Because the United States Supreme  
24 Court has said that voting in the exclusive where you -- excuse  
25 me -- where you choose to vote in one primary and one primary



1 only is an act of affiliation. That's what they said in Jones  
2 Footnote 8.

3 THE COURT: Well, do they go that far? I don't know  
4 if they go that far.

5 MS. MARIE-IHA: Quote, The act of voting in the  
6 Democratic Party fairly can be described as an act of  
7 affiliation with the Democratic Party. That's from Jones  
8 Footnote 8. And so we have asserted based on this footnote and  
9 also Justice O'Connor's concurrence from Clingman that this is  
10 an act of affiliation and it's not an empty one. It carries  
11 opportunity cost, you cannot vote in other races. And you pick  
12 that party and only that party when you vote in an open  
13 primary.

14 THE COURT: Okay.

15 MS. MARIE-IHA: Yeah. Just give me a moment, please.

16 (Pause in the proceedings.)

17 MS. MARIE-IHA: Your Honor, there's one important  
18 thing about the State's interests. Mr. Gill indicated that  
19 Jones doesn't entirely dispose of the interest of privacy. I  
20 believe that that's not correct. There were several interests  
21 that the Jones court disposed of only in the circumstances of  
22 this case with that phrase italicized by the Supreme Court  
23 itself.

24 Your Honor, we have not asserted privacy for its own  
25 sake. We have asserted privacy because it protects the

1 integrity of the democratic process.

2 THE COURT: Let me say what my inclination is.

3 MS. MARIE-IHA: Okay.

4 THE COURT: As I said, I've already sort of given how  
5 I view it in general, but I also want to be very honest. I  
6 haven't studied this part of it nearly as much because it's so  
7 meaty I was really trying to get to the burden and understand  
8 that.

9 MS. MARIE-IHA: Okay.

10 THE COURT: If I ultimately believe it's a severe  
11 burden I may call you folks back to have a further discussion  
12 because after reviewing the briefing more I might find it  
13 useful to do that. In other words, I openly admit I'm not as  
14 prepared to have a meaningful discussion on that front.

15 MS. MARIE-IHA: Very well, Your Honor.

16 THE COURT: As the other issue we've discussed.

17 MS. MARIE-IHA: Okay.

18 THE COURT: So I want to let both of you know that.  
19 If I go that route, if I ultimately determine that there is a  
20 severe burden that the Democratic Party has proven, I'll  
21 probably reach out one way or another to you folks at that  
22 point and either get back together or get supplemental  
23 briefing, whatever the case may be.

24 MS. MARIE-IHA: We would appreciate that opportunity,  
25 Your Honor.

1 THE COURT: Okay. All right.

2 MS. MARIE-IHA: In terms of further proceedings for  
3 whatever reason, should they be on that reason or remedy or  
4 whatever, as I'm sure you can guess, the State would be quite  
5 concerned should it go too far into the new year. We have a  
6 primary to run. There's an entire complicated system of  
7 deadlines that take many months to do.

8 THE COURT: Can you -- well, okay. Again, if I rule  
9 in favor of the Democratic Party, I will get everyone together  
10 ASAP. And part of what I'm going to require at that point in  
11 time, I would require at that point in time is a very clear  
12 understanding of the timeline. And, you know, Mr. Gill talked  
13 about transition, and I don't want to go there in too much  
14 detail right now because I really don't know where we're going  
15 to go. But that was an issue that was of great concern when I  
16 was on the three-judge --

17 MS. MARIE-IHA: Yes, Your Honor.

18 THE COURT: -- court and we started talking about  
19 timeline.

20 MS. MARIE-IHA: Yes.

21 THE COURT: And for instance, in relation to the TRO  
22 we had, it ended up the plaintiffs threw their hands up and  
23 said, Yeah, we agree as to Count 2 there's no way this could be  
24 implemented in time, and so they agreed it was all moot. So,  
25 you know, it may be it will be impossible to get anything in

1 time for November, maybe not, I don't know. But a timeline  
2 would have to be worked out for further discussions.

3 MS. MARIE-IHA: Right. You're absolutely correct,  
4 Your Honor. The reapportionment case and that court's decision  
5 and the briefing in that case highlights the exact same  
6 concerns that the State would have. We outlined --

7 THE COURT: I think, though, we'd find a very  
8 agreeable Democratic Party in working with the State in making  
9 sure we don't have disruption of process. I can't imagine the  
10 party would be unreasonable in wanting to work through in a  
11 meaningful way a remedy --

12 MS. MARIE-IHA: Well, I'm sure that's true, Your  
13 Honor, but --

14 THE COURT: -- that ultimately is constitutional but  
15 also would not be disruptive.

16 MS. MARIE-IHA: I'm sure that's true, Your Honor, and  
17 I hope all interested parties would be as cooperative as  
18 possible. However, our position is that the only thing that  
19 could -- if the Court was to rule that the open primary is  
20 unconstitutional, it's the state legislature that must act. By  
21 the State Constitution the state legislature has the authority  
22 to declare what the law is regarding our elections.

23 THE COURT: I would be very disinclined to create a  
24 rule for how the State runs its primaries. I mean I have to  
25 say, I'm an Article III judge, but I do understand my

1 limitations and what they should be. Whether that applies to  
2 sort of a transition period or not, I don't know. But I really  
3 don't want to go there yet because I really think I need to  
4 focus on these issues. As you can see, I'm taking this in bite  
5 sizes and trying to digest as much as I can one issue at a  
6 time. And I've really focused 80 percent of my time so far on  
7 the severe burden versus some other burden and when evidence is  
8 necessary, when it is not and so forth.

9 MS. MARIE-IHA: I understand that, Your Honor. It's  
10 apparent that the Court is aware of the kind of concerns --

11 THE COURT: Yes.

12 MS. MARIE-IHA: -- that would come up should they be  
13 necessary. So we, of course, would address those thoroughly at  
14 some later point in time if that is necessary.

15 Your Honor, it sounds like the things that you are  
16 interested in that we've already hit upon the high points that  
17 you're interested in. If you have any other questions I'm  
18 happy to answer them.

19 THE COURT: No. Thank you.

20 MS. MARIE-IHA: Thank you very much, Your Honor.

21 THE COURT: Mr. Gill, a very brief reply?

22 MR. GILL: Thank you, Your Honor. I think you  
23 understand where the argument is. Regarding this possible  
24 remedy, the remedy is -- it's possibly extremely simple for the  
25 legislature, make it non-mandatory, that's a clause, they're

1 done and they're out. Send us a letter saying who you  
2 nominated. Game over.

3 But the thing --

4 THE COURT: But the point is, that --

5 MR. GILL: That's down the road.

6 THE COURT: That's down the road and that would be for  
7 the legislature, not for me, is part of the difficulty.

8 MR. GILL: I'm just talking about the worry on the  
9 timeline.

10 There is a case following on the Grange matter. It's  
11 a Ninth Circuit Grange case. And it's a 2012 case. It's been  
12 cited in the materials where it's at 578 F.3d 784. I think  
13 that that case provides some support for this idea of a two-way  
14 street. In our briefing, it may have been too subtle, but  
15 we've tried to distinguish between an act of affiliation, which  
16 is a unilateral declaration. You know, I like the Packers. He  
17 likes the 49ers. You know, we feel affiliated. I like Apple.  
18 But am I a shareholder of Apple, have I bought in, do I have  
19 the responsibility is another question. Is there a two-way  
20 responsibility.

21 And the Grange 2012 case, I think if you look at it  
22 closely, allows you to distinguish between this one-way  
23 affiliation and the concomitant equal right of the members of  
24 the party to similarly affiliate. You see, the party is not  
25 just an entity or a black box on the wall on a chart. These

1 are people who have the same right as the voters. If they want  
2 to affiliate with me, I have the equal and opposite right to  
3 reject affiliation with them. If the right to reject is not  
4 plain in Jones, I don't know what is. The right to reject an  
5 association is the corollary of the right to associate in the  
6 first place. It is meaningless if you do not have the right to  
7 reject.

8 And what we're saying is, look at the party  
9 constitution -- forgive me, Your Honor, my voice is going --  
10 look at the party constitution and see that the party and its  
11 members want to know who they're dealing with.

12 THE COURT: But when you start talking about the  
13 party, what it wants, doesn't that undermine your argument as  
14 to the facial challenge? Because the Republicans may feel  
15 different.

16 MR. GILL: They may feel differently, but they have a  
17 right to feel the same.

18 THE COURT: I'm not sure what that means. I mean sure  
19 they have the right to feel the same, they have a right to feel  
20 any way I suppose. And, you know, the Democratic Party  
21 tomorrow could have a different view, if they elect a new --  
22 I'm not sure what your governing body looks like, a board of  
23 directors or what it might be, but could change its  
24 constitution and say, We love the open primary. And that gets  
25 to your point where sort of your view is less important than

1 the constitutional principle in and of itself.

2 MR. GILL: The constitutional principle is that people  
3 have the right to not associate.

4 THE COURT: Right, I understand that.

5 MR. GILL: How is that different for anyone? They may  
6 choose to associate or choose to not.

7 THE COURT: I'm saying you can make that argument and  
8 I understand that argument. What I'm saying is it weakens it  
9 when you start talking about preferences then because somebody  
10 may have a different preference. I'm not sure the importance  
11 of the Democratic Party's preference. When you make a facial  
12 challenge you've got to stand or fall with that facial  
13 challenge. And so, one particular party's views seems almost  
14 irrelevant to that facial challenge. This isn't an as-applied  
15 challenge. Because I don't know the views of the Republicans  
16 or the Libertarians or the Green Party or any other party.

17 MR. GILL: That's an argument that's more about  
18 standing or case in controversy I think.

19 THE COURT: I think so too. That may be right.

20 MR. GILL: Your point really goes to can you bring  
21 this case. No one has disputed that there's a case in  
22 controversy or that we have standing.

23 THE COURT: I understand. I understand that.

24 MR. GILL: So that's the point. And we thank you very  
25 much for your attention and hope that the government remains



1 open.

2 THE COURT: I will put out a written order. I can't  
3 promise that I won't ask for some supplemental briefing if I  
4 look at this and decide I want to get a little more input from  
5 you. Because I think we started on some kind of broad briefing  
6 and we really sort of funneled down to a relatively narrow  
7 position here. And I want to make sure I fully appreciate both  
8 sides' arguments and the law. If I think I need any more help  
9 I'll let you know.

10 MR. GILL: I'm sure both of us feel anytime, anywhere,  
11 we're ready.

12 THE COURT: Okay. And like I say, I'm going to do  
13 this in baby steps. If I don't find a severe burden, I may  
14 have enough to rule at that point in time. If I do, I may want  
15 to get back together. And then if I ultimately strike down the  
16 system in place, obviously we'll get back together on remedy.  
17 Okay?

18 MR. GILL: Thank you.

19 THE COURT: All right. Thank you.

20 (The proceedings concluded at 10:16 a.m.,  
21 October 7, 2013.)

22

23

24

25

1 COURT REPORTER'S CERTIFICATE

2

3 I, CYNTHIA FAZIO, Official Court Reporter, United  
4 States District Court, District of Hawaii, Honolulu, Hawaii, do  
5 hereby certify that the foregoing pages numbered 1 through 58  
6 is a true, complete and correct transcript of the proceedings  
7 had in connection with the above-entitled matter.

8

DATED at Honolulu, Hawaii, October 13, 2013.

9

10

11 /s/ Cynthia Fazio  
12 CYNTHIA FAZIO, CSR, RMR, CRR

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Attorneys for Plaintiff  
Democratic Party of Hawai'i

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

DEMOCRATIC PARTY OF HAWAII,	)	CIVIL NO. <u>13-00301 JMS KSC</u>
	)	
Plaintiff,	)	SUPPLEMENTAL
	)	DECLARATION OF DANTE K.
	)	CARPENTER
	)	
vs.	)	
	)	
SCOTT T. NAGO, in his official	)	
capacity as Chief Election	)	
Officer of the State of Hawai'i,	)	
	)	
Defendant.	)	
	)	<b>Hearing:</b>
	)	Date: <u>October 7, 2013</u>
	)	Time: <u>9:00 AM</u>
	)	Judge: <u>J. Michael Seabright</u>

---

SUPPLEMENTAL DECLARATION OF DANTE K. CARPENTER

DANTE K. CARPENTER, being first duly sworn on oath, deposes  
and says:

1. I am the Chairperson of the Democratic Party of Hawaii.
2. As Chairperson, I have oversight over persons who maintain the DPH membership records.
3. The following information is based on my personal knowledge of the membership records, facts conveyed to me in the course of business, and discussions with persons who maintain the records, or have done so in the past.
4. Before 2005, DPH membership records were maintained solely in paper form.
5. In 2005, DPH membership records showed approximately 20,000 members.
6. I believe that DPH membership had been in the 15,000 to 20,000 range for at least a decade before 2005, and possibly two decades or more.

7. It is difficult to retroactively establish membership totals at any given historical point before 2005.

8. In 2005, the DPH began transcribing the paper records to an electronic database system. Paper applications have been retained, and are still required.

9. It is possible to track membership totals in historical periods 2005 to date with reasonable accuracy.

10. In the period of the Obama-Clinton campaign for the 2008 election, DPH membership expanded dramatically. Many persons joined the DPH in order to cast votes for one or the other in DPH meetings, held in early 2008. DPH membership rose from approximately 20,000 to approximately 65,000.

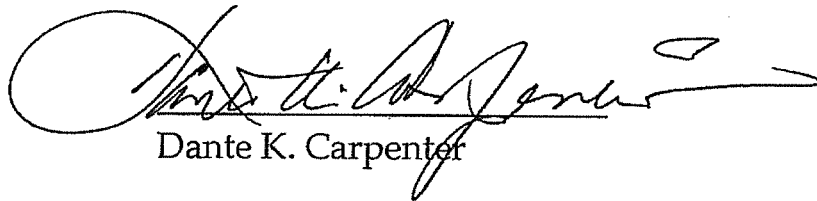
11. In July of 2013, when I checked the total statewide membership of the DPH for this Declaration, DPH membership was 65,461.

12. Memberships are normally not terminated by DPH unless the member resigns, is known to have died, is expelled for cause, or for a few

other reasons. Membership does not require the regular payment of dues, which are voluntary.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: Honolulu, Hawai'i, August 12, 2013

  
Dante K. Carpenter

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

DEMOCRATIC PARTY OF HAWAII, )  
 )  
 )  
 Plaintiff, )  
 )  
 )  
 vs. )  
 )  
 )  
 SCOTT T. NAGO, in his official )  
 capacity as Chief Election )  
 Officer of the State of Hawai'i, )  
 )  
 Defendant. )  
 )

CIVIL NO. \_\_\_\_\_  
  
DECLARATION OF DANTE  
K. CARPENTER

## DECLARATION OF DANTE K. CARPENTER

DANTE K. CARPENTER, being first duly sworn on oath, deposes and says:

1. I am the Chairperson of the Democratic Party of Hawai`i ("DPH"). DPH is qualified as a political party to participate in primary elections under Hawai`i law.
2. My office is the chief executive office of the DPH. My office







APPEAL,CLOSED

**U.S. District Court  
District of Hawaii (Hawaii)  
CIVIL DOCKET FOR CASE #: 1:13-cv-00301-JMS-KSC**

Democratic Party of Hawaii v. Nago  
Assigned to: JUDGE J. MICHAEL SEABRIGHT  
Referred to: JUDGE KEVIN S.C. CHANG  
Case in other court: 9CCA, 13-17545  
Cause: 42:1983 Civil Rights Act

Date Filed: 06/17/2013  
Date Terminated: 11/14/2013  
Jury Demand: None  
Nature of Suit: 441 Civil Rights: Voting  
Jurisdiction: Federal Question

**Plaintiff**

**Democratic Party of Hawaii**

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V.

**Defendant**

**Scott T. Nago**  
*in his official capacity as Chief Election  
 Officer of the State of Hawaii*

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Date Filed	#	Docket Text
06/17/2013	<a href="#"><u>1</u></a>	COMPLAINT; Summons (issued) against Scott T. Nago - filed by Democratic Party of Hawaii. (Attachments: # <a href="#"><u>1</u></a> Civil Cover Sheet)(emt, ) (Entered: 06/18/2013)
06/17/2013	<a href="#"><u>2</u></a>	Order Setting Rule 16 Scheduling Conference for 09:00AM on 9/16/2013 before JUDGE KEVIN S.C. CHANG - Signed by CHIEF JUDGE SUSAN OKI MOLLWAY on 6/17/13. (Attachments: # <a href="#"><u>1</u></a> Memo from Clerk Re: Corporate

		Disclosure Statements)(emt, ) (Entered: 06/18/2013)
06/17/2013	<a href="#">3</a>	Filing fee: \$ 400, receipt number HI008304 re <a href="#">1</a> Complaint. (emt, ) (Entered: 06/18/2013)
06/17/2013	<a href="#">4</a>	Plaintiff's MOTION for Partial Summary Judgment <u>AND</u> Preliminary Injunction - T. Anthony Gill, Wade C. Zukeran, David A. Sgan, Linda M. Aragon appearing for Plaintiff Democratic Party of Hawaii (Attachments: # <a href="#">1</a> Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment and Preliminary Injunction, # <a href="#">2</a> Declaration of Dante K. Carpenter, # <a href="#">3</a> Notice of Motion)(emt, ) (Entered: 06/18/2013)
06/17/2013	<a href="#">5</a>	Plaintiff's SEPARATE AND CONCISE STATEMENT of Facts re <a href="#">4</a> - filed by Democratic Party of Hawaii. (Attachments: # <a href="#">1</a> Exhibit 1)(emt, ) (Entered: 06/18/2013)
06/17/2013	<a href="#">6</a>	CERTIFICATE OF SERVICE (Re: <a href="#">4</a> Plaintiff's Motion for Partial Summary Judgment and Preliminary Injunction; Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment and Preliminary Injunction; Declaration of Dante K. Carpenter; Notice of Motion) - by Democratic Party of Hawaii. (emt, ) (Entered: 06/18/2013)
06/17/2013	<a href="#">7</a>	CERTIFICATE OF SERVICE (Re: <a href="#">5</a> Plaintiff's Separate and Concise Statement of Facts; Exhibit 1) - by Democratic Party of Hawaii. (emt, ) (Entered: 06/18/2013)
06/18/2013	<a href="#">8</a>	NOTICE of Hearing on Motion <a href="#">4</a> MOTION for Partial Summary Judgment MOTION for Preliminary Injunction. Motion Hearing set for 10/7/2013 09:00 AM before JUDGE J. MICHAEL SEABRIGHT. (apg, )  <hr/> CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry. (Entered: 06/18/2013)
07/02/2013	<a href="#">9</a>	SUMMONS Returned Executed Scott T. Nago served on 6/26/2013, answer due 7/17/2013. (gls, ) (Entered: 07/03/2013)
07/17/2013	<a href="#">10</a>	ANSWER to <a href="#">1</a> Complaint by Scott T. Nago.(gls, ) (Entered: 07/17/2013)
07/17/2013	<a href="#">11</a>	Errata re <a href="#">4</a> MOTION for Partial Summary Judgment MOTION for Preliminary Injunction . (Sgan, David) (Entered: 07/17/2013)
07/19/2013	<a href="#">12</a>	CERTIFICATE OF SERVICE by Democratic Party of Hawaii re <a href="#">11</a> Errata (Sgan, David) (Entered: 07/19/2013)
08/22/2013	<a href="#">13</a>	Declaration <i>Supplemental Declaration of Dante K. Carpenter</i> . (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Certificate of Service)(Marie-Iha, Deirdre) (Entered: 08/22/2013)
08/23/2013	<a href="#">14</a>	EO: By agreement, Rule 16 Scheduling Conference set 9/16/13 shall be continued to 09:00AM on 12/5/2013 before JUDGE KEVIN S.C. CHANG. Rule 16 Scheduling Conference Statement due: 11/29/13. Deirdre Marie-Iha to notify all parties. (JUDGE KEVIN S.C. CHANG)(sna, )No COS issued for this docket entry

		(Entered: 08/23/2013)
09/16/2013	<a href="#">15</a>	Counter MOTION Summary Judgment for Defendant Nago <i>and opposition to Plaintiffs Motions for Preliminary Injunction and Partial Summary Judgment</i> Deirdre Marie-Iha appearing for Defendant Scott T. Nago (Attachments: # <a href="#">1</a> Memorandum in OPPOSITION to Plaintiffs Motions for Preliminary Injunction and Partial Summary Judgment and IN SUPPORT of Nago's Counter Motion for Summary Judgment, # <a href="#">2</a> Certificate of Compliance, # <a href="#">3</a> Certificate of Service) (Marie-Iha, Deirdre) (Entered: 09/16/2013)
09/16/2013	<a href="#">16</a>	CONCISE STATEMENT in Support re <a href="#">15</a> Counter MOTION Summary Judgment for Defendant Nago <i>and opposition to Plaintiffs Motions for Preliminary Injunction and Partial Summary Judgment</i> filed by Scott T. Nago. (Attachments: # <a href="#">1</a> Declaration of Nago, # <a href="#">2</a> Declaration of Marie-Iha, # <a href="#">3</a> Exhibit A, # <a href="#">4</a> Exhibit B, # <a href="#">5</a> Exhibit C, # <a href="#">6</a> Exhibit D, # <a href="#">7</a> Certificate of Service)(Marie-Iha, Deirdre) (Entered: 09/16/2013)
09/16/2013	17	NOTICE of Hearing on Motion <a href="#">15</a> Counter MOTION Summary Judgment for Defendant Nago <i>and opposition to Plaintiffs Motions for Preliminary Injunction and Partial Summary Judgment</i> . Motion Hearing set for 10/7/2013 09:00 AM before JUDGE J. MICHAEL SEABRIGHT. (apg, ) <hr/> CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry. (Entered: 09/16/2013)
09/17/2013	<a href="#">18</a>	Errata re <a href="#">16</a> Concise Statement in Support of Motion, . (Marie-Iha, Deirdre) (Entered: 09/17/2013)
09/23/2013	<a href="#">19</a>	RESPONSE in Support re <a href="#">4</a> MOTION for Partial Summary Judgment MOTION for Preliminary Injunction <i>and OPPOSITION to Defendant's Counter-Motion for Summary Judgment</i> filed by Democratic Party of Hawaii. (Gill, T.) (Entered: 09/23/2013)
09/23/2013	<a href="#">20</a>	CERTIFICATE OF SERVICE by Democratic Party of Hawaii re <a href="#">19</a> Response in Support of Motion (Gill, T.) (Entered: 09/23/2013)
09/30/2013	<a href="#">21</a>	RESPONSE in Support of <i>Counter-Motion for Summary Judgment</i> filed by Scott T. Nago. (Attachments: # <a href="#">1</a> Certificate of Service)(Luning, Marissa) (Entered: 09/30/2013)
09/30/2013	<a href="#">22</a>	Letter addressed to Judge J. Michael Seabright from Deirdre Marie-Iha, Deputy Attorney General, dated September 27, 2013 -- re no live testimony at October 7, 2013 hearing. (emt, ) (Entered: 09/30/2013)
10/03/2013	<a href="#">23</a>	Letter from Plaintiff's Counsel (gls, ) (Entered: 10/03/2013)
10/07/2013	<a href="#">24</a>	EP: Hearing held on <a href="#">4</a> Plaintiff's Motion for Partial Summary Judgment and Preliminary Injunction; and [ <a href="#">15</a> ] Defendant Scott T. Nago's Counter Motion for Summary Judgment for Defendant Nago and Opposition to Plaintiff's Motions

		<p>for Preliminary Injunction and Partial Summary Judgment. Arguments heard. Motions taken under advisement. Court to issue written order. (Court Reporter Cynthia Fazio) (JUDGE J. MICHAEL SEABRIGHT)(tyk)</p> <hr/> <p>CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 10/07/2013)</p>
10/11/2013	<a href="#">25</a>	Letter from Plaintiff's counsel (gls, ) (Entered: 10/15/2013)
11/14/2013	26	EO: By agreement, Rule 16 Scheduling Conference set 12/5/13 shall be continued to 09:00AM on 1/6/2014 before JUDGE KEVIN S.C. CHANG. Rule 16 Scheduling Conference statements due: 12/30/13. Tammy with Deirdre Marie-Iha to notify all parties. (JUDGE KEVIN S.C. CHANG)(sna, )No COS issued for this docket entry (Entered: 11/14/2013)
11/14/2013	<a href="#">27</a>	<p>ORDER (1) DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT <a href="#">4</a> ; (2) DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION <a href="#">4</a> ; AND (3) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT <a href="#">15</a> . Signed by JUDGE J. MICHAEL SEABRIGHT on 11/14/2013. ~ Order follows hearing held October 7, 2013. Minutes of hearing: doc no. <a href="#">24</a> ~ (afc)</p> <hr/> <p>CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 11/14/2013)</p>
11/14/2013	<a href="#">28</a>	<p>CLERK'S JUDGMENT IN A CIVIL CASE ~ Judgment in favor of Defendant and against Plaintiff. <i>Reference: <a href="#">27</a> .</i> (afc)</p> <hr/> <p>CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). All participants are registered to receive electronic notifications. (Entered: 11/14/2013)</p>
12/12/2013	<a href="#">29</a>	NOTICE OF APPEAL as to <a href="#">27</a> Order on Motion for Partial Summary Judgment, Order on Motion for Preliminary Injunction, Order on Motion for Miscellaneous Relief, by Democratic Party of Hawaii. Filing fee \$ 455, receipt number 0975-1321935. (Attachments: # <a href="#">1</a> Exhibit Representation Statement) (Sgan, David) <i>Modified on 12/17/2013: 9CCA No. 13-17545</i> (afc) (Entered: 12/12/2013)
12/13/2013	<a href="#">30</a>	Filing fee: \$ 505.00, receipt number HI010299 re <a href="#">29</a> Notice of Appeal, (ecs, ) (Entered: 12/13/2013)
12/16/2013	<a href="#">32</a>	TRANSCRIPT Designation and Ordering Form by Democratic Party of Hawaii for proceedings held on 10/7/2013 before Judge Hon. J. Michael Seabright, (Sgan, David) (Entered: 12/16/2013)
12/17/2013	<a href="#">33</a>	USCA Case Number 13-17545 for <a href="#">29</a> Notice of Appeal, filed by Democratic Party of Hawaii. [USCA case number via letter dated 12/13/2013] (afc) (Entered: 12/17/2013)

		12/17/2013)
12/17/2013	<a href="#">34</a>	<p>USCA TIME SCHEDULE ORDER as to <a href="#">29</a> Notice of Appeal, filed by Democratic Party of Hawaii (9CCA No. 13-17545). [Time Schedule Order filed on 12/13/2013 in the USCA for the 9th Circuit] (afc)</p> <hr/> <p>CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 12/17/2013)</p>
12/17/2013	<a href="#">35</a>	<p>Attorney Appeal Packet re <a href="#">29</a> Notice of Appeal filed by Democratic Party of Hawaii. (9CCA No. 13-17545). (Attachments: # <a href="#">1</a> Notice of Appeal, # <a href="#">2</a> District Court Instructions/Form(s), # <a href="#">3</a> Docket Sheet) (afc)</p> <hr/> <p>CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). All participants are registered to receive electronic notifications. (Entered: 12/17/2013)</p>
12/31/2013	<a href="#">36</a>	<p>TRANSCRIPT of Proceedings (PLTFF'S M/PARTIAL SJ &amp; PREL INJUNC <a href="#">4</a> ; DEFT'S COUNTER M/SJ AND OPP. <a href="#">15</a> ) held on 10/7/13 - before Judge J. MICHAEL SEABRIGHT. Court Reporter Cynthia Fazio, Telephone number 808.541.2063. Transcript may be viewed at the court public terminal or ordered through the Court Reporter before the deadline for Release of Transcript. Remote availability of electronic transcripts is regulated by FRCP 5.2(a), FRCrP 49.1(a) and FRBP 9037(a) Redaction Request due 1/21/2014. Redacted Transcript Deadline set for 1/28/2014. Release of Transcript Restriction set for 3/28/2014. (58 pp.) (cf@hid.uscourts.gov) (Entered: 12/31/2013)</p>
02/25/2014	<a href="#">37</a>	<p>Certificate of Record re <a href="#">29</a> Notice of Appeal, USCA Number: 13-17545. (Img, )</p> <hr/> <p>CERTIFICATE OF SERVICE Participants registered to receive electronic notifications received this document electronically at the e-mail address listed on the Notice of Electronic Filing (NEF). Participants not registered to receive electronic notifications were served by first class mail on the date of this docket entry (Entered: 02/25/2014)</p>

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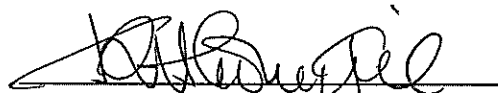
**CERTIFICATE OF SERVICE**

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. **PLAINTIFF-APPELLANT'S BRIEF**
  2. **PLAINTIFF-APPELLANT'S EXCERPTS OF RECORD**
- VOLUMES 1-2**

was served on all interested parties electronically through CM/ECF.

Date: March 24, 2014



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