

Case 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

Civil No. 13-00301 JMS-KSC (Hon. J. Michael Seabright)

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Whether Facial Analysis Is Defeated By The Purported Salerno Instance, Consisting Of An Imagined Political Party That Embraces Hawaii's Open Primary Law.

The Salerno and “plainly legitimate sweep” tests defeat a facial attack on the constitutionality of a law, when one can identify a realistic instance in which the law can be applied constitutionally. As a shortcut, we will call such an instance a “Salerno instance.”

The question in the facial analysis portion of this case, is whether the District Court did, or did not, correctly identify a Salerno instance.

Defendant says the District Court did; DPH says the District Court did not.

DPH understands that a Salerno instance can be found where the government has not yet acted, and could interpret the law one way or another, and one way would be constitutional, even if another is not. Perhaps, it could, in the future, design a ballot one way, or another. In such a case, where latitude in ballot design exists, it makes sense to see what the government does before deciding the constitutionality of it. Compare,

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 702 (2008).

Also, it makes sense that, if the government has room to vary its application of a law, and applies it unconstitutionally to one person, but constitutionally to another, there is a Salerno instance, and the law should not be struck down on its face. But those two examples deal with objective actions of the government, in selecting one of several solutions permitted by the law. Please note that in this case, Hawaii's primary election law is subject to only one possible solution, that solution is mandatory and applicable to everybody, and the purported basis of the Salerno instance is not something objective that the government chose or might choose to do, but resides in the subjective preference of the political party.

The purported Salerno instance is: it is realistic to imagine a political party that would affirmatively embrace, or, at least, not object to, Hawaii's open primary law. We will refer to the imagined political party as a "non-objector." DPH agrees that it is realistic to imagine a non-objector to Hawaii's law. But does a non-objector really constitute a Salerno instance?

Defendant identifies the non-objector political party as a Salerno instance, dooming facial analysis, because Defendant believes that “[in] associational rights cases, a political party’s preferences about the primary election are uniquely significant. These preferences define the party’s associational interests.” (emphasis added) Defendant’s Answering Brief at 24 of 55.

We understand Defendant to be asserting that a political party’s preferences control whether Hawaii’s primary election law can be constitutionally applied to it. That must be the purport of Defendant’s assertion, because Defendant is trying to identify a Salerno instance. That is the axle upon which the District Court’s finding of a Salerno instance rides.

DPH rejects that assertion, because normally, one’s preferences should not define one’s rights. Defendant’s argument conflates preferences and rights, whereas they are commonly understood to be distinct. Also, there is nothing obviously unique about associational rights cases.

We will try to illustrate this with simple examples.

The First Amendment operates by restraining the government. The First Amendment begins, “Congress shall make no law....” It restrains the government from making any law “respecting an establishment of religion.” It then restrains the government from making any law “abridging” the freedom of speech, press, assembly, or petitioning the government for redress of grievances. In sum, the First Amendment restrains the government from enacting laws on certain topics.

Suppose Hawaii enacts a law establishing the Anglican church as the official church of the State. Perhaps it would do this because of Hawaiian monarchs’ traditional respect for England, in the days before annexation; it doesn’t matter, the example is fanciful, and the reasons are not germane to the example. Suppose then someone brings suit under the establishment clause, contending that the establishment of the Anglican church violates the First Amendment. And suppose the suit is constructed as a facial attack. If Defendant State were to point to non-objecting Anglicans -- we stipulate some could be found -- we rather doubt that a District Court would consider that a Salerno instance. Why? Because a person’s

preference that the Anglican church be established, does not make the establishment of the Anglican church constitutional, even for an Anglican who desires it. Phrased another way, an Anglican does not have the constitutional right to the establishment of the Anglican church, not least because the government can't establish any church. It's not a matter of preference, it's just beyond the power of government to do that. The purported Salerno instance is not convincing, because the Anglican's policy preference has nothing to do with anybody's constitutional rights. We expect the court to strike down the establishment of the church on facial challenge.

It may be objected that the Anglican example doesn't involve sufficient restrictive compulsion. We offer a second example to cover this. Suppose Hawaii enacts a law prohibiting all public political speech; all of it. Again, suit is brought, on a facial basis. Again, Defendant State points to non-objectors as a Salerno instance, intending to defeat facial analysis. Defendant shows that it is foreseeable that numerous people accept complete bans on public political speech, and that numerous other people

actually prefer that condition, on the grounds of improved peace and quiet, reduction of junk mail, and fewer distracting lawn signs. Again, we are sure that such people can be found. Would a District Court consider those people a Salerno instance? We submit not, because the compulsion is unconstitutional, beyond what the State can legislate, even if some people prefer that policy. We submit that a total prohibition of all public political speech would be held facially unconstitutional, the purported non-objectors notwithstanding.

In both examples, we understand that the adduced Salerno instance is nonsense, because people's policy preferences, and their rights (the First Amendment limitations on government action), are distinct. Their policy preferences do not define their rights. Even a person preferring not to speak publicly, and wishing others would be quiet as well, has the right to speak publicly, because the government is without power to "abridge" that right.

Normally, because preferences are not rights, non-objectors are not Salerno instances. We made that point, perhaps excessively, in the opening

brief, by pointing out that in many of the facial analysis cases decided by the U.S. Supreme Court, it would have been easy to identify non-objectors. Few of those facial cases would be on the books, if facial attacks were defeated by Salerno instances of non-objectors. If one reasons from the actual behavior of the Supreme Court, the necessary conclusion is that non-objectors are not good Salerno instances. (It should not be necessary to add that the presence or absence of a non-objector does not confirm the constitutionality of a proposition; however, Defendant thinks we are asserting such a thing, and having set up the straw man, spends several pages attacking it.)

Returning to this case, we look again at Defendant's assertion that "[in] associational rights cases, a political party's preferences about the primary election are uniquely significant. These preferences define the party's associational interests." (emphasis added). Defendant's Answering Brief at 24 of 55. In other words, a non-objector constitutes a Salerno instance in an associational case, even if a non-objector has no significance in other contexts. Without this proposition, the District Court's rejection of

facial analysis is unsupported. But what is so unique about associational cases? Associational cases have evolved from First Amendment principles involving freedoms of speech and assembly; it would be more normal to assume that associational cases behave like their genetic ancestors, so to speak. Associational cases trace their doctrines to individual rights.¹ The government can't tell many people what to believe, or how to speak, or with whom to affiliate, just because they are many, rather than one.

Defendant Nago's recourse to Tashjian is unavailing. In Tashjian, the Republican Party of Connecticut challenged General Statute § 9-431 of the Connecticut closed primary system as an impermissible burden on its First Amendment right to associate with unaffiliated voters. § 9-431 required

1. The Second Circuit's painstakingly historical review of the derivation of the right of association, and its application of the right of association to a political party in Connecticut, is very useful for understanding the issues here. "Although the constitutional text does not mention freedom of association, the Supreme Court, in NAACP v. Alabama ex rel. Patterson, 357 U. S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958), recognized an independent right of association. Such a right, according to the Court, derives from the first amendment guarantees of speech, press, assembly and petition." Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 276 (1985).

voters in any political primary to be registered members of that party. The trial court granted the political party's motion for summary judgment and denied the State's motion to dismiss after conducting a balancing test between the associational rights of the party and the State's interests in encroachment of the party's rights by § 9-431. The Tashjian case turned upon the judicial recognition of the primacy of a political party's rights to define its own associational boundaries and to voluntarily associate with unaffiliated voters, regardless of the wisdom of such associations. See Republican Party of State of Conn. v. Tashjian, 599 F.Supp. 1128, 1238 (D. Conn. 1984) ("any effort by the state to substitute its judgment for that of the party on ... the question of who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process ... substantially impinges on First Amendment rights."). On appeal, the trial court's decision was affirmed by both the Second Circuit and the United States Supreme Court without any discussions about facial versus as-applied challenges, or any foreshadowing of Salerno's "no set of circumstances" test. See Tashjian, 770, F.2d 265, *aff'd* 479 U.S. 208 (1986).

Defendant Nago miscites the Tashjian case four times in its Answering Brief. On page 24 of 55, Defendant attempts to retrofit its novel interpretation of facial and as-applied challenges derived from the 1987 Salerno case to its ‘non-objector phenomenon’ argument while citing to the 1986 Tashjian decision. Nothing in the Tashjian case supports this argument.

On page 28 of 55, Defendant quotes Tashjian out of context for the proposition that, “[e]ach political party must “determine for themselves with whom they will associate[.]” Tashjian, 479 U.S. at 214.” However, the actual context of the quote is the Supreme Court’s summary of the plaintiff’s contentions in the Tashjian case. The Court writes:

The Party here contends that § 9–431 impermissibly burdens the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success. 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. As we have said, the freedom to join together in furtherance of common political beliefs “necessarily pre-supposes the freedom to identify the people who constitute the association. Democratic Party of United States v. Wisconsin ex

rel. LaFollette, 450 U.S. 107, 122, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981).

Tashjian, 479 U.S. at 214.

On page 44 of 55, Defendant cites and quotes Tashjian out of context for the stand-alone proposition that, “The open primary “prevent[s] the disruption of the political parties from without” by supporting a multi-party system. Tashjian, 479 U.S. at 224.” However, the actual context is the Court’s discussion of the Storer v. Brown decision that upheld a statute barring unsuccessful putative party nominees from launching independent candidacies following defeat in party primaries. The Court wrote,

We have previously recognized the danger that “splintered parties and unrestrained factionalism may do significant damage to the fabric of government.” *Storer v. Brown*, 415 U.S., at 736, 94 S.Ct., at 1282. We upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election. We said:

[T]he one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have

in making a late rather than an early decision to seek independent ballot status.” *Ibid.*

The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened by raiding in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Tashjian, 479 U.S. at 223-24.

Lastly, on page 50 of 55 of the Answering Brief, Defendant Nago quotes Tashjian’s admonition that, “the Constitution grants to the States a broad power to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives,” [U.S. Const.] Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices,” without including the critical points that follow. The Court continued,

But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, see *Wesberry v. Sanders*, 376 U.S. 1, 6–7, 84 S.Ct. 526, 529–530, 11 L.Ed.2d 481 (1964), or, as here, the freedom of political association. We turn then to an examination of the interests which appellant asserts to justify the burden cast by the statute upon the associational rights of the Party and its members.

Tashjian, 479 U.S. at 217.

To conflate rights and preferences, and then claim that associational cases are unique, is sleight-of-hand.

In sum, DPH asserts that the District Court and Defendants' purported Salerno instance is not correct, and does not defeat facial analysis in this case. Facial analysis is appropriate.

II. There Is No Significant Difference Between The Open Primary And The Blanket Primary, Because Both Totally Eliminate All Political Parties' Freedom of Association.

Defendant's Answering Brief at 32 of 55, cites footnote eight in Jones for the dicta that a blanket primary "may be constitutionally distinct from

the open primary, in which the voter is limited to one party's ballot." (emphasis added). At 32 of 55, Defendant further cites the O'Connor concurrence in Clingman for the dicta that "The act of casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering." (emphasis added). At 33 of 55, n. 15, Defendant also cites La Follette for the dicta that the Wisconsin Supreme Court "may well be correct" that the open primary serves a compelling state interest. These "three may"s identify issues, but don't decide them. Searching for shades of meaning in dicta is fruitless, especially when Jones has been clear about the right that's decisive here.

The point made clear by Jones is that a political party can decide with whom it will associate, for purposes of nominating its candidates. To say it again, the political party, not the non-member voter, has a right to define the bounds of its association; who is in, and who is out. We understand that rights are balanced against other considerations. However, a party cannot choose anything at all, if the law consigns to each and every general

election voter the right to intervene in a party's nomination, in that voter's sole and unilateral discretion. A party is thereby prohibited from establishing any associational criteria whatsoever. That the voter's intervention is anonymous, and need not be based on any deliberation beyond the whim of the moment, merely adds salt to the wound. This is not a nuanced situation. The total discretion allocated to a party, by Hawaii's primary election law, is, exactly, zero. A party is barred by law from exercising any choice, whatsoever. The blanket primary and the open primary are absolutely identical in that respect.

The O'Connor concurrence above, and Defendant's argument, suggest that what the court ought to measure is the intervening voters' subjective state(s) of mind. Does the intervening voter consider himself supportive and sympathetic, or a hostile raider? Can we infer voters' state of mind from counting general election votes and noting which party's candidates typically win? When a voter "relinquishes" his sole and unilateral anonymous right to participate in the nomination of one party, in favor of intervening in another party's nomination, does he do so with

reservations, or, with gusto, to throw his weight around up and down the target party's ticket? Does the fact that he has to choose a single party to plunder, as opposed to being able to shoplift from all parties at once, have constitutional significance? When an anonymous voter, in a primary election voting booth, "affiliates" with a party with the same frame of mind a consumer employs to select a can of soup, what does this evanescent commitment say about American citizenship? Such fascinating questions could occupy social scientists for decades, but they are all questions aimed at the wrong target. They are all questions about intervening voters' frame of mind, not about whether a political party has an appropriate degree of discretion in exercising its right of association.

The advance we suppose Jones to have made is that Jones collected various cases and, in the process of striking down a primary election system, clarified that a political party has an important right to choose with whom to associate, and with whom not to associate, particularly in making its nominations. Jones redirects our attention from the subjective and often imponderable state of mind of vast numbers of anonymous voters, and

places our attention on the rights of the party. After Jones, the appropriate question to ask, when evaluating a primary election system, is, “For purposes of its nominations, does a political party have an appropriate range of freedom to choose its nomination electorate, given the adduced interests of the State?” There might be different answers to this, under different states’ laws. But here, we present the purest possible case. In Hawaii, a political party has exactly no range of freedom, none at all. It has no discretion. It can draw no lines of inclusion, or exclusion, whatsoever. The purported basis of its judgment in drawing lines of inclusion, or exclusion, would be irrelevant, because it has no discretion at all. The nomination electorate is prescribed by the State to be the entire voting population, and no party has any choice about it. The nominators come and go anonymously, at their sole whim. All parties are in the same boat, always, subject to the same restrictions, whether they don’t like the system or whether they like it. Their preference is utterly irrelevant.

So, we must ask, considering the First Amendment right of association explained in Jones, is having absolutely no range of choice, an appropriate range of choice?

Defendant must concede that, in Hawaii, no party ever has any choice about its nomination electorate. Defendant's justification for this has to be something like, "well, you have no choice at all, but it doesn't hurt you that much to have no choice at all," or "it may hurt you a lot to have no choice at all, but you have to prove through all kinds of data that it hurts you a lot."

Our argument is basically, "If having no choice at all, ever, doesn't facially violate the right of association, then the right of association is essentially meaningless, which cannot be the intention of the Amendment." We are not talking about a situation in which choice is limited, within some range, and the argument is about whether the range is appropriate; we are talking about a situation in which choice is completely prohibited. Noting the absolute prohibition of any choice for any party under any circumstances, we reason that this is a case of violation of the right of

association as a matter of law, and one subject to facial analysis, because no party could be treated differently.

The District Court in Jones, an opinion adopted verbatim by the Ninth Circuit, made a useful observation.

This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity-the election process.

Cal. Democratic Party v. Jones, 984 F.Supp. 1288, 1293 (E.D. Ca. 1997), *aff'd*, 169 F.3d 646, 651 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000). DPH's case is brought from the first perspective. Defendant apparently regards political parties from the second, more as a sort of regulated utility. Probably most observers would concede that both perspectives have some validity, and the issue is where to strike the balance between them. Unfortunately, Hawaii's law is extreme. It utterly dictates the nomination electorate, and

pegs the needle, so to speak, on the “highly-regulated governmental activity” end of the scale. After Jones, which clearly established the validity of the “autonomous organization” perspective through its discussion of a party’s associational rights, depriving a political party of all autonomy should be plain violation of the constitution.

The Ninth Circuit adopted the District Court’s decision verbatim. The Supreme Court didn’t so much reverse factual findings, as reverse the inferences drawn from them. Where the District Court and Ninth Circuit found a tolerable intrusion on party rights, the Supreme Court found an intolerable intrusion. An example of this, useful here, is the problem of “crossover voting.”

The District Court, and the Ninth Circuit by adoption, defined a crossover voter as one “who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party.” Cal.

Democratic Party v. Jones, 169 F. 3d at 656. See also, Jones, 530 U.S. at 579

fn. 9. Note that under this definition, all voters other than those registered

to a party are considered crossovers, if they vote in a party's primary. Studies suggested that the amount of crossover voting is greater in a blanket primary than an open primary, but not dramatically so; the crossover rates are roughly equivalent. Jones, 169 F.3d at 657. (It is not clear whether that study considered the deeper penetration of the crossover into other offices, once crossover occurs in an open primary; we suspect that once a non-aligned voter crosses over to get to one attractive race, and then carries on down the ballot, the crossover impact may be higher than in a blanket primary where the voter may intrude only for one race.) The evidence showed that "[t]he incentive to cross over will be particularly high if the winner of the other party's primary is almost certain to win at the general election." Jones, 169 F. 3d at 658. Defendant argues Democrats are likely to win in Hawaii, which would make this point applicable. The negative consequences of this crossover potential were analyzed by the District Court as follows:

Furthermore, the possibility of a decisive cross-over vote - whether or not that vote materializes-could well affect the conduct of elections and elected officials. **Under a blanket**

or open primary, the primary election becomes similar to the general election. Candidates will perceive a need or opportunity to attract support from the entire electorate, not simply from members of their respective parties. This will affect not only the cost of the primary-which is likely to increase, see R. T. at 270-but may affect the positions that candidates take on political issues as they seek to attract cross-over voters. Moreover, once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the wrath of the party organization or party regulars for acts of apostasy. A **blanket or open primary** weakens the “disciplining effect” of the primary challenge in requiring “the officeholder [to] carry out the party philosophy and support the majority position of the party caucus.” R. T. at 214. The corollary to this loss of discipline is a loss of power to party activists such that the ardor of party volunteers and activists may be dampened in a system that permits nonparty members to exert influence over the party's selection of a candidate. This has been the experience in Washington and is likely to occur in California. See R. T. at 558; R. T. at 18; R. T. at 989-99.

Jones, 169 F.3d at 658. (emphasis added) Note that the negative effects discussed are pertinent both to a blanket and an open primary.

The Supreme Court pointed out that “[t]he impact of voting by nonparty members is much greater upon minor parties, such as the Libertarian Party and the Peace and Freedom Party.” Jones, 530 U.S. at 578.

Using that reasoning in this case, the impact of crossover voting by nonparty members should be even greater on the parties other than the DPH.

The Supreme Court also found that “[t]he record also supports the obvious proposition 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.” Jones, 530 U.S. at 578. If this is an obvious proposition according to the Supreme Court, we need not re-litigate it, but should accept that non-party voters often have policy views that diverge from those of the party faithful.

The District Court and the Ninth Circuit considered these negative effects of crossovers to not be very significant. The Supreme Court disagreed strenuously. “The evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote - indeed, it is a clear and present danger.” Jones, 530 U.S. at 578. Although the District Court and the Ninth Circuit thought that the crossover vote

would be determinative only in a small number of cases and thus its impact on rights of association would not be severe, the Supreme Court disagreed, stating "But a single election in which the party nominee is selected by nonparty members could be enough to destroy the party."

Jones, 530 U.S. at 579.

Therefore the Supreme Court concluded,

In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process - the "basic function of a political party," *ibid.* - by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome - indeed, in this case the intended outcome - of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

Upon what crossover statistics did the Supreme Court rely? Citing California Secretary of State voting results posted on the internet, the Supreme Court, resorting to italics, stated:

In the first primaries these parties conducted following California's implementation of Proposition 198, the total votes cast for party candidates in some races was more than *double* the total number of *registered party members*.

(emphasis in original) Jones, 530 U.S. at 578. The Supreme Court was impressed by the excess of the gross number of primary voters, compared to party members, in the California example.

In this case, the DPH membership has been established to be, most recently, around 60,000 persons, although for many years in the recent past it was around 20,000 persons. Resorting to publicly-available data curated by Defendant Nago, one may conveniently establish typical DPH primary turnout rates of a little less than a quarter of a million voters. One may therefore confidently conclude that, using the same methodology, and the same italics, that in Hawaii, the total votes cast for DPH party members in some races, depending on the year you select for reference, was between *four and ten times* the total number of *registered party members*.

DPH does not think that it should have to quantify the abridgment of its right of association, because its right of association has been totally

abridged. The State of Hawaii has deprived DPH of all discretion in setting the boundaries of its nomination electorate. This total abridgment is as clear here as it was in Jones. It is possible to confuse oneself greatly by focusing on the states of mind of hypothetical non-member voters, but there is no confusion possible when one views the case from the perspective of a political party. A range of discretion equal to zero is a total abridgment of a right that permits discretion.

However, if one considers the studies reported by the District Court in Jones, in an opinion adopted verbatim by the Ninth Circuit, and used by the Supreme Court in its reasoning, one finds that the studies are specifically applicable to open primary cases. The inferred consequences of crossover voting in Jones are the same in open primary as in blanket primary cases. The impacts of crossover voting have been analyzed based on the “obvious proposition” that non-members vote differently than party members. The proportion of crossover voters in DPH’s situation is dramatically worse than in Jones. A fortiori, the consequences to DPH are

more serious than in Jones. The impact in Jones was declared “severe”; the consequences here are even more severe.

CONCLUSION

A political party’s policy preference cannot make it a Salerno instance. This is because preferences and rights are distinguishable, and should not be conflated. The District Court’s opinion, and Defendant’s justification of it, relies on conflating preferences and rights. The District Court erred by refusing facial analysis on an inappropriate basis.

Hawaii’s open primary law dictates the primary election electorate for all political parties. All political parties are subject to the same total restriction on their right to define the bounds of their association. Since no political party is permitted any discretion, the abridgment of the right of association is total, and the law should be struck down on a facial basis. In any event, the abridgment of the right is identical to that in Jones.

Furthermore, crossover studies cited by the District Court in Jones were explicitly applicable to both open primaries and blanket primaries. The Supreme Court relied on them and on the District Court’s reasoning

from them. Each and every fact and inference is applicable here. The DPH is even more impacted by crossovers than the parties in Jones. The impact of Hawaii's open primary on all political parties is at least as severe as that in Jones.

Accordingly, here, the District Court's conclusion that DPH had not established severity of impact is error.

Respectfully submitted,

Dated: July 3, 2014

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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 5,775 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.

CERTIFICATE OF SERVICE

I certify that on July 3, 2014, I electronically filed the Appellant's Reply Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Date: July 3, 2014

Gill, Zukeran & Sgan

/s/ David A. Sgan

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