

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JO RAE PERKINS,

Plaintiff,

vs.

**BEVERLY CLARNO, in her official
capacity as Secretary of State for the
State of Oregon, and Gary Dye,**

Defendants,

and

**LIBERTARIAN PARTY OF
OREGON,**

Intervenor,

Case No. 20CV31103

**INTERVENOR-DEFENDANT
LIBERTARIAN PARTY OF
OREGON'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER**

UTCRC 5.050

Intervenor-Defendant Libertarian Party of Oregon ("LPO") requests oral argument, estimates that 60 minutes will be sufficient for such argument, and requests official court reporting services.

OPPOSITION TO TEMPORARY RESTRAINING ORDER

LPO opposes Plaintiff's Motion for Temporary Restraining Order, filed on September 10, 2020. For the reasons that follow, the Court should deny Plaintiff's motion.

This submission is supported by the Declaration of Timothy Perkins in Support of LPO's Opposition to Plaintiff's Temporary Restraining Order ("T. Perkins Decl."), the Declaration of Kyle Markley In Support of LPO's Opposition to Plaintiff's Temporary

1 Restraining Order (“Markely Decl.”), and the Declaration of C. Robert Steringer in
2 Support of LPO’s Opposition to Plaintiff’s Temporary Restraining Order (“Steringer
3 Decl.”), the court’s file, and the following points and authorities.

4 POINTS AND AUTHORITIES

5 I. INTRODUCTION

6 This is the latest attempt by Richard Burke to seize control of the LPO for the
7 benefit of the Oregon Republican Party. He made these arguments to the Oregon
8 Secretary of State in 2011, and lost. He made these arguments to the Clackamas County
9 Circuit Court and the Oregon Court of Appeals, and lost. He made these arguments to
10 the Oregon Secretary of State in 2017, and lost. Now, he seeks to disqualify all of the
11 LPO’s 27 candidates for state offices in favor of the 4 candidates his dissenting group
12 “nominated” (2 of whom also received the legitimate nomination of the LPO). And he is
13 doing it under the auspices of a complaint filed on behalf of the GOP candidate for U.S.
14 Senate, who claims it would be politically advantageous not to have an LPO challenger
15 and who wants this court to clear the way for her. In fact, as the record makes amply
16 clear, Plaintiff Jo Rae Perkins (“Perkins”) is nothing more than a nominal party put
17 forward by Burke in an attempt to avoid the application of claim and issue preclusion to
18 him and his associates.

19 This court should deny plaintiff’s motion for a temporary restraining order for the
20 following reasons:

- 21 1. Plaintiff cannot prevail on the merits because:
 - 22 a. The Secretary of State resolved the dispute between the LPO and
23 the Burke/Reeves group in 2011, rejecting the Burke/Reeves
24 group’s attempt to take over the LPO in an order that is now final
25 and no longer subject to judicial review. *Reeves v. Wagner*, 295
26 Or App 295, 434 P3d 429 (2018),

- 1 b. Under Oregon law and under the First Amendment to the United
2 States Constitution, neither the Secretary of State nor this court can
3 adjudicate the LPO’s intraparty dispute.
4 c. The LPO properly amended its bylaws in 2011.
5 d. Plaintiff did not join all necessary parties to this action, most
6 importantly, the other 27 LPO candidates she wishes to remove
7 from the ballot.
- 8 2. A temporary restraining order removing the LPO’s candidates from the
9 ballot would provide no benefit to plaintiff, but would irreparably harm
10 the LPO, its candidates, and Oregon voters.
- 11 3. A temporary restraining order would be in derogation of the public
12 interest.

13 **II. FACTS**

14 The underlying facts giving rise to this dispute are set out in a decision by the
15 Oregon Court of Appeals in *Reeves v. Wagner*, 295 Or App 295, 297, 434 P3d 429
16 (2018), which are presented here for this Court’s convenience:

17 “At the March 2010 annual LPO convention, defendant
18 Wagner was elected LPO vice-chairperson. On March 12,
19 2011, the LPO met for its 2011 annual convention, with 20
20 party members in attendance. The convention fell short of a
21 quorum as defined by the then-existing, 2009 LPO bylaws.
22 On Wagner’s motion, the convention was adjourned and
23 continued to May 21, 2011. Shortly after the March 2011
24 meeting, then LPO state chairperson Weston resigned.
25 Under the 2009 bylaws, upon the resignation of a state
26 chairperson, the vice-chairperson “shall serve as State
 Chairperson until the close of the next annual convention.”
 Thus, Wagner, as vice-chairperson, assumed the office of
 state chairperson. Wagner then called a meeting of the
 “State Committee” (a committee established by the LPO
 constitution) for March 31, 2011. A majority of those
 attending the March 31, 2011, meeting adopted a new
 constitution and bylaws, with new quorum and membership
 requirements [the “2011 Bylaws”]. At the same meeting,
 the State Committee appointed a board of directors, which
 subsequently appointed defendants as officers, with

1 Wagner as state chairperson. At a meeting of April 19,
2 2011, the newly created board of directors met and changed
3 the rescheduled May 21, 2011, annual convention into a
4 social event at a different location. The newly adopted
5 bylaws were subsequently ratified by the membership by
6 ballot and filed with the Secretary of State.

7 Plaintiffs are registered Libertarian electors. Only one
8 plaintiff, Terry, was present at the March 31, 2011, meeting
9 called by Wagner, and he objected to the proceedings.
10 Plaintiffs instead attended the rescheduled May 21, 2011,
11 annual convention, which defendants did not attend and
12 which, like the March 12, 2011, convention, failed to
13 achieve a quorum. The rescheduled annual convention was
14 adjourned sine die.

15 Under the 2009 bylaws, officers' terms begin immediately
16 upon the close of an annual convention. But, because of the
17 lack of a quorum, no officers were elected at the May 21,
18 2011, annual convention. The 2009 bylaws provide that the
19 State Committee can meet for the purpose of filling vacant
20 officer positions. Immediately after the convention,
21 plaintiffs, as the putative remaining State Committee
22 members, held a State Committee meeting, where the
23 members present elected plaintiffs as officers, with Reeves
24 as state chairperson. In late May 2011, the Secretary of
25 State rejected plaintiffs' attempt to register their elected
26 officers, because the Secretary had previously recognized
Wagner as LPO chairperson.

Since May 2011, the Wagner group and the Reeves group
have vied for leadership and control of the LPO. The
question underlying their dispute is whether the 2009
bylaws or the bylaws adopted at the March 31, 2011,
meeting govern the activities of the LPO.”

295 Or App at 297-299.

In September 2011 the Burke/Reeves group sought recognition by the Oregon
Secretary of State. Elections Director Trout issued a letter to Reeves and Wagner that
stated the Secretary of State’s decision:

“We currently recognize, and will continue to recognize
Wes Wagner as the Chair of the Libertarian Party of
Oregon.”

Stringer Decl. Ex. 1 (2011 Secretary of State Order). The Burke/Reeves group did not
seek judicial review of the Secretary of State’s order. *Reeves*, 295 Or App at 301.

1 In the spring of 2012, the LPO Board of Directors referred the 2011 Bylaws to
2 every Libertarian elector in Oregon for ratification or veto, as part of the mail balloting
3 for the 2012 primary. Steringer Decl. Ex. 4 at 4-5, 8-11. At the close of voting, over 96%
4 of Libertarian electors returning ballots ratified the 2011 Bylaws, with 725 in favor and
5 26 opposed. *Id.* at 8.

6 **A. Clackamas County Litigation**

7 As suggested by the Court of Appeals' recital of facts, the Burke/Reeves group
8 commenced litigation against the LPO in Clackamas County Circuit Court. Among other
9 things, the Burke/Reeves group sought declaratory relief because, according to them, the
10 LPO was operating under void bylaws. Steringer Decl. Ex. 2.

11 The Clackamas County Circuit Court granted summary judgment in favor of the
12 LPO, concluding that the judicial branch could not and should not insert itself in the
13 political party's dispute or dictate the result. Steringer Decl. Ex. 3.

14 The Burke/Reeves group appealed, and the Court of Appeals held that their
15 "exclusive remedy was to seek judicial review * * * under the APA." *Reeves*, 295 Or
16 App at 305. The Court of Appeals found that the Burke/Reeves group had not sought
17 judicial review under the APA, "and the time period to do that has expired." *Id.* at 306.
18 The Burke/Reeves group argued that they were not challenging the Secretary's
19 determination of who are LPO officers. *Id.* at 308. The court disagreed:

20 "[I]n practical effect, the Secretary's determination is being
21 challenged. In presenting conflicting lists of officers to the
22 Secretary, the same parties involved in this declaratory
23 judgment action placed before the Secretary their dispute
24 concerning the leadership of the LPO. * * * [T]he Secretary
25 in fact resolved the parties' dispute through a letter directed
26 to the parties receiving the Wagner group's list and
rejecting the Reeves group's list."

Id. at 308.

1 **B. Secretary of State Dennis Richardson’s Order**

2 While the Burke/Reeves group’s appeal was pending, the Burke/Reeves group
3 again challenged the LPO’s leadership in a complaint to Secretary of State Dennis
4 Richardson. Markley Decl. Ex. 1. Secretary of State Dennis Richardson, after making “a
5 careful review of the records presented by both groups, and after considerable
6 deliberations” recognized LPO leadership. Steringer Decl. Ex. 6. Secretary Richardson’s
7 2017 order stated that “[n]either group followed the 2009 LPO bylaws that both groups
8 agree were in force in March 2011.” The order explained:

9 “It is significant to note that the current bylaws of the group
10 this office recognizes as the Libertarian Party of Oregon
11 allow for full participation by members of the other group.
12 If they have disagreements with the recognized leaders of
13 the party, they are welcome to vote for other candidates or
14 even run for office themselves.”

15 Steringer Decl. Ex. 6. The Burke/Reeves group did not seek judicial review of the 2017
16 Secretary of State order. Steringer Decl. at ¶5.

17 **C. LPO holds elections and submits its candidate filings to the Oregon
18 Secretary of State**

19 LPO elections are governed by the LPO’s Constitution and Bylaws. Markley
20 Decl. Ex. 2. Consistent with LPO’s Constitution and Bylaws, the LPO approved the
21 2020 Primary Election Rules. Markley Decl. Ex. 3.

22 Due to the coronavirus pandemic, the LPO Board of Directors voted to delay the
23 primary election at two Board of Directors meetings. *See* T Perkins Decl. ¶2; Markley
24 Decl. ¶4. The filing deadline for LPO’s primary election was May 8, 2020. Markley
25 Decl. ¶4. Of the 31 people who sought to run on the LPO’s primary election ballot, 17 of
26 the candidates were Republicans and 13 candidates were Libertarians. *Id.* Only three
Id. races were contested: U.S. Senator, U.S. Representative district 5, and Secretary of State.

1 The 2020 LPO primary election ballots were mailed to the over 19,000 Oregon
2 Libertarian registered voters on June 8, 2020. T Perkins Decl. ¶3. The ballot return date
3 was July 6, 2020. *Id.* The LPO received 609 timely, signed, and counted ballots. *Id.* at
4 ¶4. As a result, LPO nominated a total of 33 candidates for the 2020 election: 6
5 candidates are running for federal office; 23 candidates are running for state office; and 4
6 candidates are running for local office. *Id.* at ¶6.

7 **D. The Burke/Reeves group continues to challenge LPO’s leadership**

8 Notwithstanding the forgoing, the Burke/Reeves group have continued to
9 challenge the LPO’s right to operate under the 2011 Bylaws, insisting that the 2009
10 Bylaws remain in effect and, as a result, the Burke/Reeves group are the proper leaders of
11 LPO. *See* Declaration of Richard Burke (“Burk Decl.”) Ex. 1 (May 2019 letter to
12 Secretary Clarno); Ex. 2 (July 2020 letter to Secretary Clarno).¹ Purportedly operating
13 under the 2009 Bylaws, following an unknown method and involving an unknown
14 number of registered voters, Burke Decl. ¶15, the Burke/Reeves group claims it
15 nominated four candidates and submitted candidate filings to the Oregon Secretary of
16 State on August 24, 2020. Burke Decl. ¶18, Ex 3. The Burke/Reeves group “nominated”
17 Sandra Nelson as a candidate for State Representative, Ex. 3 at 1, Harmony Mulkey as a
18 candidate for Oregon State Senate, Ex. 3 at 3, Kim Thatcher as a candidate for Oregon
19 Secretary of State, Ex. 3 at 5, and Tim Reeves as a candidate for the Oregon House of
20 Representatives, Ex. 3 at 7.

21 Two of the Burke/Reeves group’s nominees, Sandra Nelson and Harmony
22 Mulkey, were nominated by the LPO. *See* Burke Decl. Ex. 5 at 7 (Nelson), 23 (Mulkey).
23 Kim Thatcher was a registered candidate in LPO’s primary but lost to Kyle Markley.

24
25
26 ¹ It is worth noting that Burke’s declaration is riddled with purported accounts of
LPO meeting minutes, but those meeting minutes are not attached as exhibits to Burke’s
declaration. *See* Burke Decl. ¶¶12-14. Because the best evidence of documents are the
documents themselves, this Court should not give weight to Burke’s statements.

1 T. Perkins Decl. ¶5. Tim Reeves was neither registered as a candidate nor written-in in
2 LPO’s primary. *Id.*

3 The Oregon Secretary of State rejected the Burke/Reeves’ group’s candidate
4 filings, because Tim Reeves is not listed as one of the officers of LPO. Burke Decl. Ex. 4
5 at 1.

6 **E. Republican U.S. Senate Candidate Perkins files her complaint**

7 On September 10, 2020, Perkins, the Republican nominee for U.S. Senator, filed
8 this action against Secretary Clarno and Dye, the LPO candidate running against her.
9 According to Perkins, “Dye’s presence in the race will tend to take votes I would
10 otherwise get.” Declaration of Jo Rae Perkins at ¶3. As a result, Perkins seeks “a ruling
11 from this Court that requires the Secretary of State to remove him.” *Id.* at 4.

12 **III. ARGUMENT**

13 A court may issue a temporary restraining order “[w]hen it appears that a party is
14 entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of
15 restraining the commission or continuance of some act, the commission or continuance of
16 which during the litigation would produce injury to the party seeking the relief.” ORCP
17 79 A(1)(a). When determining whether to issue a temporary restraining order, courts
18 consider, among other things:

- 19 (1) The likelihood that the party requesting the injunction
20 will ultimately prevail on the merits of its claim;
- 21 (2) Whether the party will be irreparably harmed during the
22 litigation if the injunction is not issued;
- 23 (3) The harm to the movant against the harm to the
24 opposing party; and
- 25 (4) The public interest if the injunction is issued.

26 *Elkhorn Baptist Church v. Brown*, 366 Or 506, 518-19, 466 P3d 30 (2020).

1 For the following reasons, Perkins has not established the requisite requirements
2 for this Court to grant motion for a temporary restraining order.

3 **A. Perkins cannot prevail on the merits.**

4 **1. Perkins' complaint is untimely and is barred by claim and**
5 **issue preclusion.**

6 Perkins' objections to Secretary Clarno's actions and alleged inactions in 2020 are
7 all based on the LPO's reorganization in 2011. For Perkins to prevail, this court would
8 have to re-adjudicate the 2011 dispute between the LPO and the Burke/Reeves group and
9 reach a different conclusion than the Secretary of State, the Clackamas County Circuit
10 Court, and the Oregon Court of Appeals reached. This court cannot do that. The 2011
11 dispute was resolved by the Secretary of State in an order that is final and no longer
12 subject to judicial review. *Reeves*, 295 Or App at 308-09. Perkins' complaint is
13 untimely and barred by claim preclusion and issue preclusion.

14 **B. Perkins' complaint is untimely.**

15 Although Perkins claims to be challenging Secretary Clarno's actions in 2020, she
16 actually is challenging Secretary of State Kate Brown's decision in 2011 to recognize the
17 LPO in its current form. If the 2011 Secretary of State Order is valid, Perkins is
18 foreclosed from arguing that the Burke/Reeves group are the true leaders of the
19 Libertarian Party of Oregon.

20 Under Oregon law, an agency order in other than a contested case must be
21 challenged by a petition for judicial review within 60 days. ORS 183.484(2). Obviously,
22 the deadline for challenging the 2011 Secretary of State Order is long past. In fact, it had
23 passed by the time the Reeves/Burke group asked the Clackamas County Circuit Court to
24 give them control of the LPO. When the Oregon Court of Appeals affirmed the circuit
25 court's judgment rejecting the Burke/Reeves group's lawsuit, it forever ended the dispute
26 that Reeves and Burke are trying to relitigate here through Perkins.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

C. Perkins’ complaint is barred by issue preclusion.

The doctrine of issue preclusion prevents Perkins from relitigating whether the LPO is the legitimate party recognized by the Oregon Secretary of State. Any resolution of Perkins’ complaint would require this Court to travel back in time and re-adjudicate whether the LPO bylaws were properly amended and, consequently, who constitutes the proper leadership of LPO.

Where one tribunal has decided an issue, the decision on that issue may preclude re-litigation of the issue in another proceeding if:

- (1) The issue in the two proceedings is identical;
- (2) The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding;
- (3) The party sought to be precluded has had a full and fair opportunity to be heard on that issue;
- (4) The party sought to be precluded was a party or was in privity with a party to the prior proceeding;
- (5) The prior proceeding was the type of the proceeding to which the court will give preclusive effect.

Nelson v. Emerald People’s Utility Dist., 318 Or 99, 104, 862 P2d 1293 (1993). The purpose of the “party or in privity with a party” requirement is to ensure that the party being estopped was “adequately protected in the first trial and therefore received due process.” *Gaul v. Tourtellotte*, 260 Or 14, 20, 488 P2d 416 (1971). Nonparties to prior adjudications whose rights can realistically be said to have been protected in those proceedings tend to fall into one of three categories: (1) those who control an action though not a party to it; (2) those whose interests are represented by a party to the action; and (3) successors in interest to those having derivative claims. *Stevens v. Horton*, 161 Or App 454, 461–62, 984 P2d 868 (1999), *rev den*, 331 Or 692 (2001).

At bottom, Perkins’ complaint seeks a ruling that the LPO is not governed by its current organizational documents or its current leaders, and that the Burke/Reeves group is the legitimate leadership that the Secretary of State must recognize. This issue has

1 been litigated time and time again, with each tribunal affirming the legitimacy of the
2 current LPO against the challenges of the Burke/Reeves group. In 2011, Director of
3 Elections Steven Trout issued an order on behalf of the Secretary of State, declaring the
4 LPO as the official Libertarian Party of Oregon, and directing the LPO to submit its
5 nominees to the Secretary of State. Steringer Decl. Ex. 1. In that order, “the Secretary
6 in fact resolved the parties’ dispute through a letter directed to the parties receiving
7 [LPO’s] group’s list and rejecting the Reeves group’s list.” *Reeves*, 295 Or App at 308.
8 The Reeves group did not seek judicial review of the 2011 order, so it became final.
9 *Reeves*, 295 Or App at 306.

10 Obviously, the purpose of having Perkins bring this lawsuit (as opposed to the
11 Burke/Reeves group) was an attempt to avoid application of issue preclusion. Perkins
12 inevitably will argue that she was not a party to the previous proceedings, and that she is
13 not in privity with the Reeves group. The fallacy of that argument is demonstrated not
14 only by Burke’s declaration, demonstrating that the Burke/Reeves group are the impetus
15 behind this litigation, but by the relief Perkins seeks – nullifying LPO’s leadership and
16 organizational documents and instating the Burke/Reeves group as the purportedly
17 rightful Libertarian Party of Oregon officers.

18 Perkins cannot reasonably argue that her interests were not adequately protected
19 in the previous proceedings brought by the Burke/Reeves group. Her complaint seeks to
20 remove LPO candidates from the ballot and require Secretary Clarno to instate the
21 Burke/Reeves group as the leadership of LPO. The Burke/Reeves group has fought that
22 same battle since 2011, repeatedly urging the Secretary of State and the courts to
23 recognize themselves as the rightful leaders and disavow the LPO as illegitimate. Perkins
24 is undoubtably in privity with the Burke/Reeves group. As a result, she is precluded from
25 raising the same issues which have been adjudicated and decided on the merits.

26

1 **D. Perkins’ complaint is barred by claim preclusion.**

2 The doctrine of claim preclusion prevents Perkins from initiating another lawsuit
3 arising from the same set of facts, which have already been adjudicated. Claim
4 preclusion prevents Perkins from bringing the same claims brought by the Burke/Reeves
5 group. “The doctrine of claim preclusion * * * generally prohibits a party from
6 relitigating the same claim or splitting a claim into multiple actions against the same
7 opponent.” *Bloomfield v. Weakland*, 339 Or 504, 510-11, 123 P3d275 (2005). A person
8 who was not a party to an earlier action but who is in “privity” with a party also can be
9 barred on claim preclusion grounds from bringing a second action. *Id.* at 511.

10 In 2011, the Burke/Reeves group brought an action in Clackamas County Circuit
11 Court, arguing that LPO’s action to amend its bylaws was improper. The Clackamas
12 County Circuit Court concluded that it could not adjudicate intraparty disputes among
13 political parties, and the Court of Appeals affirmed the circuit court’s judgment on the
14 ground that the Burke/Reeves group’s exclusive remedy was under the APA. “The
15 question underlying their dispute is whether the 2009 bylaws or the bylaws adopted at the
16 March 31, 2011, meeting govern the activities of the LPO.” *Reeves*, 295 Or App at 299.
17 Despite multiple years of adjudication concerning the LPO bylaws, the Burke/Reeves
18 group continues to allege that the LPO acts *ultra vires* in 2020 by operating under the
19 2011 Bylaws. Perkins’ Complaint at ¶12(a). And despite nine years of the Secretary of
20 State’s recognition of the LPO, the Burke/Reeves group submitted their own candidate
21 filings to the Secretary of State in August 2020, and continue to question Secretary
22 Clarno’s rejection of their candidate filings in favor of the LPO’s candidate filings.
23 Perkins’ Complaint at ¶12(b), (c). These claims are ultimately based on the same facts,
24 dating back to the 2011 amendment of the LPO bylaws.

25 As noted above, the only difference between this case and the prior Reeves/LPO
26 proceedings is that it is now purportedly being brought by Perkins. But the Burke/Reeves
group represented Perkins’ purported interest in the previous proceedings. Any interest

1 Perkins has in running against a challenger who was nominated under different bylaws (if
2 that can even reasonably be an interest) was protected and adjudicated by the
3 Burke/Reeves group, who have repeatedly and exhaustively sought rulings on that exact
4 claim to protect their same interest, without success.

5 It cannot reasonably be disputed that, behind Perkins, the Burke/Reeves group is
6 seeking a ruling from this court that prior Secretaries of State and courts have refused to
7 provide them. The issues and claims are precluded.

8 **1. Neither the Secretary of State nor this court can adjudicate the**
9 **LPO’s intraparty dispute.**

10 As the Clackamas County Circuit Court concluded when it considered this issue
11 in 2012, the First and Fourteenth Amendments to the United States Constitution prohibit
12 states from deciding governance disputes with political parties. Steringer Decl. Ex. 3.
13 Freedom of association under the Constitution of the United States “encompasses a
14 political party’s decisions about the identity of, and the process for electing, its leaders.”
15 *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 US 214, 229, 109 S Ct 1013
16 (1989). When laws “burden the association rights of political parties and their members,
17 the question is whether they serve a compelling state interest.” *Id.* at 231. Thus, the
18 question in this case is whether application of state law to grant the relief requested by
19 plaintiffs would serve a compelling state interest.

20 As to whether resolving an intraparty leadership struggle furthers a compelling
21 state interest, the Court could not be clearer: “the State has no interest in ‘protect[ing] the
22 integrity of the Party against the Party itself.’” *Eu*, 489 US at 232 (quoting *Tashjian v.*
23 *Republican Party of Connecticut*, 479 US 208, 224, 107 S Ct 544 (1986)). Instead, “a
24 State has a legitimate interest ‘in orderly elections, not orderly parties.’” *Eu*, 489 US at
25 221-22 (quoting *San Francisco Cnty. Democratic Cent. Comm.*, 826 F2d 814 (9th Cir
26 1987)). Thus, the Court has ruled that intraparty disputes must be resolved, if at all, by
the party’s political processes, rather than in the courts. *See O’Brien v. Brown*, 409 US 1,

1 4-5, 92 S Ct 2718 (1972) (reasoning that the party’s “convention itself is the proper
2 forum for determining intra-party disputes,” and that “the political processes” should
3 “function free from judicial supervision”).

4 Thus, the question in this case is whether Perkins’ claims seek to resolve an
5 intraparty dispute, which may not be adjudicated in a state tribunal, or whether state
6 action was justified by a compelling state interest such as maintaining the integrity of
7 state elections. On this point, the record is clear. Perkins’ complaint turns entirely on her
8 argument that the 2011 Bylaws are null and void. Perkins’ Complaint ¶12. Burke’s
9 declaration repeatedly characterizes this action as an intraparty dispute – one between the
10 Reeves group and “a renegade group of libertarians.” Burke’s Decl. at ¶5. Perkins’
11 requested relief follow from those premises, seeking an injunction prohibiting Secretary
12 Clarno from recognizing the LPO and instating the Burke/Reeves group’s candidates.
13 That is, Perkins’ own pleading conclusively establishes that she is asking this court to
14 decide who are the leaders of a political party and what set of party bylaws governed their
15 activities. One cannot read the U.S. Supreme Court decisions in *Eu* and conclude that
16 court intervention in such matters is permissible. *Accord Pilloud v. King County Repub.*
17 *Central Comm.*, 189 Wash2d 599, 603-04, 404 P3d 500 (2017) (holding statute
18 unconstitutional where it specified the manner in which an internal office was filled,
19 interfering with political committee’s discretion in organizing itself and selecting its
20 leaders).

21 2. The LPO properly amended its bylaws in 2011

22 Oregon law authorized the LPO State Committee to adopt the 2011 Bylaws for
23 ratification or veto by Libertarian electors. ORS 248.072 provides that “[t]he state
24 central committee is the highest party authority in the state and may adopt rules or
25 resolutions for any matter of party government which is not controlled by the laws of this
26 state.”

1 The Burke/Reeves group previously has argued that only major political parties
2 have “state central committees” and, therefore, ORS 248.072 cannot apply to LPO, a
3 minor political party. That position finds no support in the text of ORS 248.072 or in the
4 views of the Oregon Secretary of State, the official charged with administering ORS
5 chapter 248. *See* Steringer Decl. Ex. 5 at 5 (Secretary of State letter referencing the LPO
6 state central committee). As such, ORS 248.072 empowered the LPO State Committee,
7 as that entity was constituted on March 21, 2011, to adopt new governing rules and to
8 submit them for ratification or veto by all Libertarian electors.

9 The Burke/Reeves group also previously argued that ORS 248.004 makes
10 political parties subject to all of ORS chapter 65, notwithstanding that the LPO is not
11 incorporated as a nonprofit corporation. Assuming *arguendo* that ORS chapter 65
12 applies to the LPO, that chapter authorized the LPO State Committee to revise the bylaws
13 in March 2011 and send them out for ratification or veto by Libertarian electors. ORS
14 65.464 provides:

15 “(1) A corporation’s board of directors may amend or
16 repeal the corporation’s bylaws unless:

17 “(a) The articles of incorporation or this chapter
18 reserve this power exclusively to the members, or to
19 a party authorized under ORS 65.467, or both, in
20 whole or in part; or

21 “(b) The Members entitled to vote on bylaws, in
22 amending or repealing a particular bylaw, provide
23 expressly that the board of directors may not amend
24 or repeal that bylaw.

25 “(2) A corporation’s members entitled to vote on bylaws,
26 subject to ORS 65.67, may amend or repeal the
corporation’s bylaws even though the bylaws may also be
amended or repealed by its board of directors.”

 The LPO State Committee would be the “board” or “board of directors” for
purposes of ORS 65.464, because those terms are defined in relevant part as “the
individual or individuals vested with overall management of the affairs of the domestic or

1 foreign corporation, irrespective of the name by which the individual or individuals are
2 designated * * *.” ORS 65.001(4). Under the 2007 LPO Constitution, the LPO State
3 Committee is vested with the overall management of the affairs of the organization.

4 *Reeves*, 295 Or App at 299 n 1.

5 Under ORS 65.464(1), the LPO State Committee could amend or repeal the
6 bylaws unless the organization’s articles of incorporation or another provision of ORS
7 Chapter 65 reserved that right to the membership, or unless the membership expressly
8 provided that the LPO State Committee could not amend or repeal a particular bylaw. No
9 articles of incorporation or provision in ORS Chapter 65 reserved the power to amend or
10 repeal bylaws to the organization’s members, and the LPO membership did not expressly
11 provide that the LPO State Committee could not amend or repeal any particular bylaws.
12 Therefore, the LPO State Committee’s adoption of the 2011 Bylaws was a valid act under
13 ORS 65.464(1).

14 Additionally, with one limitation not applicable here, ORS 65.464(2) empowers
15 the LPO membership at large to amend or repeal the bylaws even if the LPO State
16 Committee also may amend or repeal the bylaws. More than 96% of LPO electors who
17 cast votes ratified the 2011 Bylaws that were approved by the LPO State Committee.
18 Thus, notwithstanding any inconsistent provision in the 2009 Bylaws, ORS 65.464
19 authorized the actions of the LPO State Committee and the LPO membership to adopt the
20 2011 Bylaws.

21 Grasping at straws, the Burke/Reeves group – through Perkins—latches on to a
22 footnote in the Court of Appeals’ opinion indicating that neither the 2007 Constitution
23 nor the 2009 Bylaws allowed the State Committee to amend or replace the bylaws. The
24 Court of Appeals made no decision based on that observation, however, and did not
25 address the LPO’s arguments on why the 2011 Bylaws were properly adopted
26 notwithstanding the quoted terms of the 2009 Bylaws. In fact, the court said that the

1 opinion “does not purport to interpret the 2009 bylaws.” *Reeves v. Wagner*, 295 Or App
2 at 299 n 1. The Court of Appeals’ comment was *dictum*, a judicial comment that is
3 unnecessary to the decision in the case and therefore is not precedential. *Engweiler v.*
4 *Persson*, 354 Or 549, 558, 316 P3d 264 (2013).

5 **3. Perkins has not joined all necessary parties.**

6 Perkins seeks relief which would implicate the rights of 26 LPO candidates.² Yet
7 Perkins has not joined those 26 individuals in an action which would remove their names
8 from the 2020 election ballot. Because the LPO-nominated candidates are necessary
9 parties, Perkins must join them to this action and notify them of this proceeding before
10 any relief can be entered that impairs their rights.

11 ORCP 29 A provides, in pertinent part:

12 “A person who is subject to service of process shall be
13 joined as a party in the action if (1) in that person’s absence
14 complete relief cannot be accorded among those already
15 parties, or (2) that person claims an interest relating to the
subject of the action and is so situated that the disposition
in that party’s absence may (a) as a practical matter impair
or impede the person’s ability to protect that interest.”

16 Whether a person is indispensable and whether a particular lawsuit must be dismissed in
17 the absence of that person can only be determined in the context of particular litigation.
18 *Steers v. Rescue 3, Inc.*, 146 Or App 746, 749, 934 P2d 532 (1997). That is, “in each
19 case the court must consider the particular circumstances and determine whether, as a
20 practical matter, the proceedings can properly continue without the absent person.” *Id.* at
21 750. Under the rule, the court must first consider whether the parties in the case can
22 receive complete justice while not prejudicing the absent party. *Id.* at 751.

23 Here, it cannot reasonably be disputed that a court order requiring Secretary
24 Clarno to remove the names of the 26 LPO-nominated candidates from the 2020 election

25 _____
26 ² Sandra Nelson and Harmony Mulkey are also the Burke/Reeves group’s candidate
nominees and Defendant Dye is a party to this action. Thus, of the 29 candidates
nominated by LPO, 26 of them will be prejudiced by their absence from this litigation.

1 ballot will prejudice those individuals. The LPO candidates have an interest in sustaining
2 Secretary Clarno’s acceptance of their candidate filings, which will allow voters to elect
3 them into office. Those individuals will be immediately and irreparably harmed if this
4 court were to grant the relief Perkins seeks, all without notice and the ability to be heard.

5 **E. A temporary restraining order would spare Perkins no harm, but**
6 **would irreparably harm LPO.**

7 In deciding whether to grant a temporary restraining order, this court must
8 consider whether the moving party will be irreparably harmed during the litigation if the
9 injunction is not issued, and balance that against the harm it would cause to the opposing
10 party. Those considerations tilt entirely in favor of denying Perkins’ motion.

11 Perkins has failed to provide any evidence that the outcome of her race turns on
12 whether Gary Dye also is on the ballot. As the moving party, it was her burden to come
13 forward with that evidence. Thus, she has failed to prove irreparable harm.

14 The LPO, on the other hand, would be irreparably harmed by the temporary
15 restraining order Perkins seeks. She is asking this court to remove 27 LPO candidates
16 who were nominated through a statewide mail ballot sent to every LPO member in
17 Oregon, and replace them with four candidates “nominated” by the Burke/Reeves group
18 in a process that has not been described by her. Of the four candidates put forward by the
19 Burke/Reeves group, three of them are the Republican nominees for those offices and the
20 other one is Reeves himself. The result would be the disenfranchisement of the LPO
21 electors who cast primary votes and of every Oregon elector who wishes to vote for an
22 LPO candidate in the 2020 general election. Obviously, Perkins’ requested relief would
23 also irreparably harm the LPO candidates pulled off the ballot.

24 Perkins will not suffer irreparable harm, loss, or damage by Dye’s inclusion on
25 the ballot; she herself has admitted that she faces two other opponents, including her
26 “principal opponent,” incumbent Senator Jeff Merkley. Perkins Decl. at ¶2. The LPO,

1 its candidates, LPO electors, and all Oregon electors would be irreparably harmed by the
2 relief Perkins seeks. The balance of harms requires denial of Perkins' motion.

3 **F. The public interest requires denial of the motion.**

4 Restraining Secretary Clarno from issuing ballots with the LPO's nominated
5 candidates under bylaws which have been ratified by the LPO electors and accepted by
6 the Oregon Secretary of State since 2011 would deprive every Oregonian of the right to
7 vote for LPO's nominated candidates. The motion for temporary restraining order must
8 be denied.

9 **IV. CONCLUSION**

10 The LPO respectfully requests this court deny Perkins' motion for a temporary
11 restraining order. Perkins cannot prevail on the merits – her claims are barred by claim
12 and issue preclusion and the First Amendment prohibits a court's interference in a
13 political party's intraparty disputes. A restraining order would irreparably harm the 27
14 LPO-nominated candidates. Finally, the public interest requires denial of Perkins'
15 motion, which would deprive every Oregonian voter the right to vote for LPO's
16 nominated candidates.

17 DATED this 14th day of September, 2020.

18 HARRANG LONG GARY RUDNICK P.C.

19
20 By: s/ C. Robert Steringer

C. Robert Steringer, OSB #983514

bob.steringer@harrang.com

Erica Tatoian, OSB #164896

erica.tatoian@harrang.com

*Of Attorneys for Intervenor-Defendant
Libertarian Party of Oregon*

1 **CERTIFICATE OF SERVICE**

2 I certify that on September 14, 2020, I served or caused to be served a true and
3 complete copy of the foregoing **INTERVENOR-DEFENDANT LIBERTARIAN**
4 **PARTY OF OREGON’S OPPOSITION TO PLAINTIFF’S MOTION FOR**
5 **TEMPORARY RESTRAINING ORDER** on the party or parties listed below as
6 follows:

- 7 Via the Court’s Efiling System (to plaintiff and Defendant Clarno)
- 8 Via First-Class Mail, Postage Prepaid
- 9 Via Email (to all parties)

11 James L. Buchal, OSB #921618
12 MURPHY & BUCHAL LLP
13 3425 SW Yamhill Street, Suite 100
14 Portland, OR 97214
jbuchal@mblp.com
Of Attorneys for Plaintiff

Gary L. Dye
11942 SE Lexington Street
Portland, OR 97266
garyldye@gmail.com
Defendant

15 Sheila H. Potter, OSB #993485
16 Deanna J. Chang, OSB #192202
17 Oregon Department of Justice
18 100 SW Market Street
19 Portland, OR 97201
Sheila.potter@doj.state.or.us
Deanna.J.Chang@doj.state.or.us
Of Attorneys for Defendant Beverly Claro

HARRANG LONG GARY RUDNICK P.C.

23 By: s/ C. Robert Steringer
24 C. Robert Steringer, OSB #983514
25 bob.steringer@harrang.com
26 Erica Tatoian, OSB #164896
erica.tatoian@harrang.com
*Of Attorneys for Intervenor-Defendant
Libertarian Party of Oregon*