HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY B73/2024

BETWEEN: **RALPH BABET**
First Plaintiff

NEIL FAVAGER
Second Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

PLAINTIFFS' SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. These submissions are suitable for publication on the internet.

PART II: ISSUES IN THE SPECIAL CASE

2. This proceeding concerns the validity of s 135(3) of the *Commonwealth Electoral Act 1918* (Cth) (**the Act**) which purports to prevent the **U**nited **A**ustralia **P**arty from being registered under Pt XI of the Act "until after the general election next following the deregistration".

3. More particularly, the issues raised in the Special Case are whether s 135(3) is invalid in its application to the UAP because:

   a. it is contrary to the requirement in ss 7 and 24 of the *Constitution* that Senators and Members of the House of Representatives be "directly chosen by the people" (Question 1);

   b. it impermissibly discriminates against candidates for election to Parliament who are endorsed by a political party that has voluntarily deregistered, and/or a Parliamentary party that has voluntarily deregistered (Question 2); or

   c. it unjustifiably burdens the implied freedom of political communication guaranteed by the *Constitution* (Question 3): **S**pecial **C**ase [61] in **S**pecial **C**ase **B**ook p 39.

PART III: SECTION 78B NOTICE

4. Notices under s 78B of the *Judiciary Act 1903* (Cth) have been served.

PART IV: MATERIAL FACTS

The parties

5. The first plaintiff (**Senator Babet**) was elected to the Senate at the federal election held on 21 May 2022. Senator Babet was endorsed as a candidate by the UAP, was identified as a UAP candidate during the election campaign that preceded polling day, and was identified on the Senate ballot paper for Victoria as a UAP candidate with the use of the UAP name, and the registered UAP logo: SC [9], [10] SCB p 42.

6. In Senator Babet's maiden speech he referred to himself as a member of the UAP and explained part of the UAP policy platform: SC [16] SCB p 50. He is referred to in Hansard and on televised broadcasts of parliamentary debates as being a member of the UAP: SC [18] SCB pp 61, 62. Since the commencement of his term as a senator on 1 July 2022 Senator Babet has been the Parliamentary leader of the UAP, and since 26 July 2022 has been the UAP Whip: SC [15], [20] SCB pp 46, 83. Senator Babet's term in the Senate will (absent a double dissolution election under s 57 of the *Constitution*) expire on 30 June 2028: SC [13].

7. Senator Babet operates a website, and social media accounts, that identify him as a member of the UAP, and an advocate for its policies: SC [17]. In the forthcoming federal election Senator Babet intends to campaign in support of the election of candidates endorsed by the UAP, and to use the name of the UAP, the UAP abbreviation, and logos of the UAP: SC [21].

8. The second plaintiff is the National Director of the UAP and is the "secretary" of the UAP within the meaning of s 123(1) of the Act by reason of his responsibility for carrying out the administration, and the correspondence of, the UAP: SC [23], [24].

United Australia Party

9. UAP is established on the basis of a written constitution which sets out the party's political principles. UAP's stated objects include "to secure the election of candidates selected by the Party to the Australian Parliament, the State Parliament and to such Local Authorities as the Party shall from time to time determine": SC [24], SCB p 91.

10. UAP candidates contested all 151 divisions in the House of Representatives in the 2019 and 2022 general elections (SC [51]) and the UAP endorsed candidates for election to the Senate in each of the States and Territories: SC [52]. In each case the names of the

candidates appeared on the ballot paper alongside the party name "United Australia Party": SC [51], [52]. At the most recent general election in 2022, 604,536 electors cast a first preference vote for a UAP candidate in the House of Representatives (SC [32], SCB p 165), and 520,520 electors case a first preference vote for the UAP or a UAP candidate in the Senate: SC [33], SCB p 166.

11. It is the UAP's intention to run candidates for all seats in the House of Representatives and the Senate at the federal election to be held in 2025: SC [35].

12. On 12 December 2018 the UAP was registered under Pt XI of the Act: SC [37]. It may be inferred that prior to 12 December 2018 the Australian Electoral Commission (**AEC**) undertook the procedure for dealing with the UAP's application for registration provided for by Pt XI of the Act, determined that the UAP satisfied the requirements for registration, and determined that it should be registered under the name "United Australia Party" (the name was changed on 31 January 2020, but since 11 August 2021 has reverted to "United Australia Party": SC [37]).

13. UAP was voluntarily deregistered under s 135 of the Act on 8 September 2022: SC [36].

14. UAP has at all times since Senator Babet's election been a "Parliamentary party" (by reason of Senator Babet's membership of UAP). Because it is both a Parliamentary party and is established on the basis of a written constitution that sets out the aims of the party, the UAP is also an "eligible political party" for the purposes of Pt XI of the Act: s 123.

15. On or about 29 November 2024 the UAP lodged an application for registration under s 126 of the Act: SC [38] SCB p 177-251.

16. On 6 December 2024 the AEC acknowledged receipt of, and stated an indicative timeline for processing, the application: SC [39] SCB p 252. On 20 December 2024, the AEC determined that the UAP was ineligible for registration until after the next election by reason of s 135(3) of the Act: SC [40] SCB p 254.

17. Apart from s 135(3) of the Act (assuming it is valid in its application to the UAP) the UAP is otherwise *prima facie* eligible for registration under Pt XI of the Act as a Parliamentary party: ss 123, 124 of the Act.

Identification of a party on a ballot paper

18. Since at least 1996 (and following the 1983 amendments that enabled party names to appear on the ballot, discussed further below) there has been a marked decrease in the

use by electors of How-to-Vote cards for the House of Representatives: SC [49], SCB p275.

19. As at the 2021 Census, 3.4% of the population spoke English either "not well" or "not at all"; and the most recent OECD Survey of Adult Skills indicated that 12.6% of Australian adults could not "read brief texts on familiar topics and locate a single piece of specific information identical in form to information in the question or directive": SC [41], [42].

20. At the same time there has also been a marked decrease in the proportion of Australian voters who vote for the same party from election to election: from 72% in 1967; to 39% in 2019; to 37% in 2022: SC [43], and a substantial proportion of voters report making up their minds as to who to vote for on the day of the election being 20% in 2019, and 17% in 2022: SC [44].

21. The vast majority of voters at federal elections give their first preference in the House of Representatives to a candidate who has a party affiliation on the ballot paper; and the vast majority of voters in the Senate elections cast their vote "above the line": SC [45], [46].

22. The ability of logos to assist in recognition of party affiliation was recognised by the **J**oint **S**tanding **C**ommittee on **E**lectoral **M**atters following the 2013 election,[1] and confirmed in JSCEM's advisory report on the Bill that introduced the logo printing provisions (discussed below) in the Act in 2016.[2] It is also clear that some registered parties use their logos to communicate their affinity to particular issues or policy commitments: SC [50] SCB pp 416, 418.

23. Those facts taken together, make it highly likely that at the forthcoming election a substantial proportion of voters will be looking to identify candidates of different parties *on the ballot paper*; and that registered parties will communicate their affiliation with endorsed candidates to voters by requesting the inclusion of the party name or abbreviation, and the party logo, on the ballot paper.

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[1] Joint Standing Committee on Electoral Matters, *The 2013 federal election: report on the conduct of the 2013 election and matters related thereto,* April 2015, [4.88]-[4.91].
[2] Joint Standing Committee on Electoral Matters, *Advisory report on the Commonwealth Electoral Amendment Bill 2016*, 2 March 2016, [3.45]; [4.19]-[4.20].

PART V: ARGUMENT

STATUTORY FRAMEWORK

Registration and deregistration of political parties

24. The present scheme for the voluntary registration of political parties in what is now Part XI of the Act[3] was introduced by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) which commenced in 1984. It was part of a package of reforms enacted in implementation of many of the recommendations made in the First Report of the Joint Select Committee on Electoral Reform. Those reforms included the printing of the names of political parties on ballot papers as well as the introduction of "above the line" and "below the line" voting in Senate elections.[4]

25. As well as setting out the requirements for the registration of political parties, Part XI also provides for their deregistration. In order to explain the drafting history of s 135(3) it is sufficient to note that deregistration can occur voluntarily upon written application by a political party to the AEC (s 135), and mandatorily where the party (other than a Parliamentary party) has not endorsed a candidate for a period of 4 years (s 136).

26. When the *Commonwealth Electoral Legislation Amendment Bill 1983* was first introduced into Parliament, it did not contain what is now s 135(3). The Bill was amended to include s 135(3) in order to address a concern that a registered party that was imminently to be subject to mandatory de-registration under s 136 (for failing to endorse a candidate over the preceding 4 years) could voluntarily de-register and then immediately apply to be re-registered under the same name, thus frustrating the operation of s 136.[5] At the same time, the Bill was further amended to introduce s 136(3) (which provides that a Parliamentary party shall not be deregistered under s 136) to address a concern that a sitting Senator who had registered a political party might be liable to compulsory deregistration during the course of his or her term.[6]

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[3] The provisions introduced by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) were subsequently renumbered by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth). For convenience, these submissions refer to relevant provisions as renumbered.
[4] ***Ruddick*** *v Commonwealth* (2022) 275 CLR 333 at 352 [34] (Gageler J), 378 [112] (Gordon, Edelman and Gleeson JJ); ***Mulholland*** *v Australian Electoral Commission* (2004) 220 CLR 181 at 213 [78] (McHugh J).
[5] Commonwealth, *Parliamentary Debates*, Senate, 1 December 1983, 3146 (Senator Macklin).
[6] Commonwealth, *Parliamentary Debates*, Senate, 1 December 1983, 3146 (Senator Harradine); Commonwealth, *Parliamentary Debates*, Senate, 2 December 1983, 3224-3225 (Senator Evans, Attorney-General).

27. In its operation with respect to a Parliamentary party, therefore, s 135(3) cannot serve the purpose for which it was enacted because the provision it was enacted to prevent frustration of (s 136) has no application to a Parliamentary party.

28. Section 137 of the Act sets out a number of further bases on which a party is to be mandatorily deregistered by the AEC. Briefly stated, these are where: (a) a party has ceased to exist; (b) a party (other than a Parliamentary party) does not have the requisite 1,500 members; (c) the party was registered by fraud or misrepresentation; (d) a party's name is too similar to the name of an earlier-registered party; (e) a party has not complied with a notice requesting information relevant to its eligibility to remain register; or (f) a registered officer or deputy registered officer of a party is also filling such an office in another party.

29. Unlike ss 135 and 136, there is nothing in the Act that precludes the re-registration "until after the general election next following the deregistration" of a party that is deregistered under s 137.

Benefits of registration

30. The Act confers a number of benefits on registered political parties. Some of these are administrative: the nomination process is streamlined by permitting the registered officer of a political party to sign nominations, rather than requiring 100 electors (s 166(1)(b)(ii)); and the nomination of candidates can be submitted in bulk: s 167(3).

31. Of central importance to the present case is the ability of the registered officer of a registered political party to request, and the obligation on the AEC to ensure, that the name or abbreviation of the registered political party, and the logo of the party, be printed on the ballot paper adjacent to the name of a candidate who has been endorsed by that party and, where two or more candidates have been endorsed by a registered political party for election to the Senate, the name or abbreviation of the registered political party, and the logo of the party, are to be printed adjacent to the square printed "above the line" on the Senate ballot paper: ss 214, 214A.

QUESTION 1: DIRECT CHOICE

Applicable principles

32. It is well-established that the requirement in ss 7 and 24 of the *Constitution* that Senators and Members be "directly chosen by the people" guarantees a system of representative

government.[7] It is also well-established that these words contain implied restraints on legislative power. The constraint implied by the reference to "the people" limits the extent to which Parliament can burden or reduce the universal adult franchise.[8] The constraint implied by the reference to being "chosen" is that Parliament may not constrain the ability to make an informed choice,[9] by limiting the ability to "convey and receive opinions, arguments and information concerning matter intended or likely to affect voting."[10]

33. In the present case the constraint implied by the requirement of being "chosen" gives rise to two questions:[11]

a. does the impugned provision constrain the ability of electors to make an informed choice; and if so,

b. is that constraint justified because it is imposed for a reason which is "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government."[12]

Section 135(3) constrains "direct choice"

34. As Gleeson CJ[13] explained in *Mulholland* at 196 [29], in a system of compulsory voting, party affiliation is of particular importance in providing guidance as to how to vote, with many electors regarding themselves as voting "for" or "against" a party leader, or for or against the policies of a party, rather than choosing between the particular candidates on the ballot paper. That choice is likely to be exercised by the elector obtaining and memorising the names of the relevant candidates prior to entering the ballot box, being provided with that information prior to entering the ballot box by means of a "how to vote" card, or by receiving that information on the ballot paper itself.

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[7] *Ruddick* (2022) 275 CLR 333 at 347-348 [17]-[19] (Kiefel CJ and Keane J), 350 (Gageler J), 388 [146] – [148] (Gordon, Edelman and Gleeson JJ).
[8] *Ruddick* (2022) 275 CLR 333 at 388 [148] (Gordon, Edelman and Gleeson JJ), referring to: ***Roach*** *v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; and *Murphy v Electoral Commissioner* (2016) 261 CLR 28.
[9] *Ruddick* (2022) 275 CLR 333 at 390 [151] (Gordon, Edelman and Gleeson JJ)
[10] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 232 (McHugh J) (***ACTV***).
[11] *Ruddick* (2022) 275 CLR 333 at 388 [148], 390 [151], 395 [166] (Gordon, Edelman and Gleeson JJ), see also 348 [19] (Kiefel CJ and Keane J) and 351 [28]-[29], 365 [70] (Gageler J).
[12] *Roach* (2007) 233 CLR 162 at 199 [85] (Gummow, Kirby and Crennan JJ).
[13] While Gleeson CJ was in dissent in the result, the observations made are, with respect, nonetheless valid.

35. In its application to the UAP in the present circumstances, s 135(3) constrains the ability of electors to make an informed choice. The prohibition on re-registration prevents information about the affiliation of the UAP's endorsed candidates from appearing on the ballot papers. It diminishes the utility of the UAP's use of its name and logos in political advertising both before and during the election campaign. It also limits the ability of the UAP and its endorsed candidates to leverage off favourable views of Senator Babet's public statements and affiliation.

36. The practical impediment to voters receiving information about candidate affiliation is amplified in circumstances where there is declining use of "how to vote" cards, and an increasing trend in those not voting for the same party from election to election. The ability to identify the candidates affiliated with the UAP is just as important for those wishing to vote *against* a UAP candidate as it is for those wanting to vote *for* a UAP candidate.

37. While "an overly broad approach constraining Parliament's leeway of choice should not be taken in determining the threshold issue"[14] the Court would readily conclude that the quality of electoral choice is constrained by the application of s 135(3) in the present circumstances.

The constraint on electoral choice imposed by s 135(3) is not justified

38. The constraint that s 135(3) of the Act imposes on the electoral choice contemplated by ss 7 and 24 of the *Constitution* is not justified because it is not imposed for a reason which is reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.

39. As noted above the clearly stated purpose of s 135(3) at the time of enactment was to ensure that the stricture imposed by the mandatory deregistration of inactive parties under s 136 of the Act could not be evaded by a party "restarting the clock" by voluntarily deregistering itself and then immediately applying for a fresh registration.

40. It may be accepted that to the extent s 135(3) prevents the frustration of the objects of s 136, it serves the purpose of promoting the integrity of the party registration system more broadly. However, s 135(3) cannot in its application to the UAP (or any other

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[14] *Ruddick* (2022) 275 CLR 333 at 389 [150] (Gordon, Edelman and Gleeson JJ)

Parliamentary party) further the legitimate end to which it is directed because Parliamentary parties are not subject to mandatory deregistration under s 136.

QUESTION 2: IMPERMISSIBLE DISCRIMINATION

41. The constitutional guarantee in ss 7 and 24 of the *Constitution* of a system of representative government necessarily recognises a system of government in which there are participants who "directly choose", and participants who are "directly chosen". In the same way that the constitutionally guaranteed system of representative government limits the extent to which Parliament can burden or reduce participation as an elector, this Court should recognise that it also limits the extent to which Parliament can burden or reduce participation as a representative. In the same way that the constitutionally guaranteed system of representative government constrains the ability of Parliament to discriminate against (in the sense of treat differently to their detriment) or privilege (in the sense of treat differently to their benefit) particular categories of electors, this Court should recognise that it also constrains the ability of Parliament to discriminate against, or privilege, particular categories of candidates for election as representatives of the people.

42. Various judgments of this Court have recognised a general constitutional value of political equality derived from the system of representative government guaranteed by ss 7 and 24 of the *Constitution*. In *ACTV* Mason CJ spoke of the need for a "level playing field"[15] between candidates as a requirement of the implied freedom of political communication. In the same case McHugh J observed that Parliament could not legislate so as to "prevent members of lawful political parties from being elected to Parliament" because that would amount to a "blatant" infringement of ss7 and 24 of the *Constitution*.[16] In *Mulholland* McHugh J contemplated at [86] that "a point could be reached where the electoral system is so discriminatory that the requirements of ss 7 and 24 are contravened". In the same case at [332] Callinan J similarly appeared to accept "unreasonable" discrimination would be inconsistent with ss 7 and 24 of the *Constitution*. The plurality in ***McCloy*** *v New South Wales* (2015) 257 CLR 178 at [45] recognised that "equality of opportunity to participate in the exercise of political sovereignty" was an aspect of the constitutionally guaranteed system of representative

[15] *ACTV* (1992) 117 CLR 106, 146 (Mason CJ).
[16] *ACTV* (1992) 117 CLR 106, 227-228 (McHugh J).

democracy. That passage has been cited with approval in a number of subsequent decisions of this Court.[17]

43. It must of course be accepted, consistently with those authorities, that *some* differential treatment is permissible. However, in harmony with the limits on the legislative power to burden or reduce participation as an elector, any burden or reduction in participation as a representative can only be constitutionally permissible if it is reasonably appropriate and adapted to serve an end which is consistent with or compatible with the maintenance of the constitutionally prescribed system of representative government. This limit on legislative power is a further reflection of the more general constitutional value of political equality that has been recognised in the various judgments set out above.

44. Section 135(3) of the Act impermissibly discriminates against candidates for election who are affiliated with and endorsed by a Parliamentary party that voluntarily deregisters and then seeks to re-register, when compared with the position of new parties seeking to register for the first time (such parties are likely to have less political history and capital than the UAP), or when compared with any political party deregistered mandatorily under s 137. There is no principled basis for preventing the UAP's candidates from identifying their affiliation with the UAP by means of the use of the party name or abbreviation, and the party logo on the ballot paper. Section 135(3) operates to the detriment of those UAP candidates and to the advantage of candidates affiliated with and endorsed by other registered political or Parliamentary parties, simply because the UAP has not maintained continuity in registration under Pt XI.

45. As noted above, s 135(3) in its application to the UAP cannot be justified as preventing frustration of the purpose of s 136 as that provision does not operate with respect to Parliamentary parties. In its application to the UAP (and to Parliamentary parties generally) it cannot be said to be reasonably appropriate and adapted to serve an end which is consistent with or compatible with the maintenance of the constitutionally prescribed system of representative government.

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[17] ***Unions NSW (No 2)*** *v New South Wales* (2019) 264 CLR 595, [5] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171 at 198-199 [60] (Kiefel CJ, Bell and Keane JJ); *Gerner v Victoria* (2020) 270 CLR 412 at 426 [24] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ); *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 360 [43] (Kiefel CJ, Keane and Gleeson JJ)

QUESTION 3: IMPLIED FREEDOM OF POLITICAL COMMUNICATION

46. This Court recently explained in *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1:

> The constitutional basis for the implication in the *Constitution* of a freedom of communication on matters of politics and government is well settled. The freedom is recognised as necessarily implied because the great underlying principle of the *Constitution* is that citizens are to share equally in political power and because it is only by a freedom to communicate on these matters that citizens may exercise a free and informed choice as electors. It follows that a free flow of communication is necessary to the maintenance of the system of representative government for which the *Constitution* provides.[18]

47. Applying a structured proportionality analysis[19] to whether s 135(3) contravenes the implied freedom requires the Court to consider the following questions:

a. first, does the impugned law effectively burden the freedom in its terms, operation or effect;

b. second, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally guaranteed system of representative government; and

c. third, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (assessed by considering whether it is "suitable", "necessary" and "adequate in its balance").

Section 135(3) burdens the implied freedom

48. For the reasons given below the plaintiffs submit that the question of whether s 135(3) effectively burdens the freedom of candidates endorsed by the UAP to communicate their affiliation with the UAP to voters on the ballot paper in its terms, operation or effect is to be approached in the manner adopted by the minority in *Mulholland*[20] and by the minority in *Ruddick*.[21] Adopting that approach, the inability of candidates endorsed by the UAP to identify themselves on the ballot paper as UAP candidates imposes a practical burden upon their ability to communicate their affiliation with the UAP (including their

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[18] *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at 22 [44] (Kiefel CJ, Keane and Gleeson JJ).
[19] *McCloy* (2015) 257 CLR 178 at 193 [2] (French CJ, Kiefel, Bell and Keane JJ); ***Brown*** *v Tasmania* (2017) 261 CLR 328 at 363-4 [104] (Kiefel CJ, Bell and Keane JJ).
[20] *Mulholland* (2004) 220 CLR 181 at 195-6 [28]-[30] (Gleeson CJ), 275-276 [274]-[280] (Kirby J).
[21] *Ruddick* (2022) 275 CLR 333 at 348-349 [20]-[21] (Keifel CJ and Keane J); 352 [31]-[32], 367-8 [78] (Gageler J).

affiliation with the policies and parliamentary or public statements of Senator Babet). It also imposes a practical burden upon the ability of electors who wish to disavow any endorsement of the UAP or the policies and public statements of Senator Babet from ensuring that UAP candidates are not preferenced.

49. To the extent that *Mulholland* might be regarded as standing in the way of this approach, the reasons in *Mulholland* must be carefully considered in light of the manner in which the arguments were developed in that case[22] and in light of distinct but related issues in the developments of this Court's implied freedom jurisprudence.[23] As was observed by the minority in *Ruddick*, it is not entirely clear that the judges who made the "no burden" finding in *Mulholland* had spoken with one voice on the precise issue that arose in that case.

50. The majority reasons of Gordon, Edelman and Gleeson JJ (with whom Steward J agreed) in *Ruddick* observed that the majority in *Mulholland* expressly approved the reasoning of McHugh J in ***Levy*** *v Victoria,*[24] and that for there to be a burden on the freedom of political communication requires "proof that the challenged law burdens a freedom that exists independently of that law".[25] However, it is submitted that the various reasons in *Mulholland* are more nuanced, and there is no single strand of reasoning that stands in the way of the plaintiffs establishing that there is a relevant burden in this particular case.

51. The proposition that the challenged law must burden a freedom that exists under the general law (whether the common law or statute law) sufficiently explains the outcome in *Levy*. What is not apparent from *Levy*, and is not satisfactorily explained in *Mulholland*, is why the challenged provision must burden a freedom that exists independently of the Act which contains the challenged provision. This is understandable where the challenge is to the whole of a regime that both confers the right and contains the impugned provision.[26] It is also understandable where the impugned

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[22] So much was noted by members of this Court in *Ruddick* (2022) 275 CLR 333 at 349 [22] (Kiefel CJ and Keane J), 366-7 [75]-[76] (Gageler J).
[23] See the reasons of Gageler J in *Brown* (2017 261 CLR 328 at 383-386 [183]-[189]; see also Stellios, *Zines's The High Court and the Constitution* (7 ed, 2022) 640.
[24] *Levy v Victoria* (1996) 189 CLR 579 at 622.
[25] *Ruddick* (2022) 275 CLR 333 at 397 [172] (Gordon, Edelman and Gleeson JJ).
[26] This appears to be the basis for the decision of Gummow and Hayne JJ in *Mulholland* (2004) 220 CLR 181 at 247 [187].

provision is not severable from the regime that confers the right, as was the case in *Ruddick*.[27] .

52. In the present case, the effect of ss 214, and 214A of the Act is to confer an entitlement upon a registered political party to have the Electoral Commissioner print a ballot paper that includes communication to electors of the affiliation of UAP endorsed candidates by means of the party name and logo.

53. If the "freedom" to communicate must be one that "exists independently", that doctrinal development ought not be applied in respect of party affiliation in the strict sense to recognise only the types of rights, or liberties that can be stated in terms of bi-lateral legal relations. Limiting the inquiry in that way underplays the centrality of party affiliation in the political and constitutional system where communications are not bilateral or correlative. Alignment of candidates with political parties has been "a feature of the experience of representative government in Australia from the 1890s".[28] Moreover, since 1977 recognition "by a particular political party as being an endorsed candidate of that party", has been essential to the prescribed manner for the filling of casual Senate vacancies under s 15 of the Constitution. Senator Babet and the UAP both enjoy the benefit of being endorsed by and affiliated with each other.

54. But to the extent that an identifiable "freedom" or "right" independent of the Act is required, the UAP has been authorised to use the trademarks in the name, abbreviation, and the previously registered logo[29]: SC [30] SCB p 158-160, 164.

55. Even if it is the case that the effect of *Mulholland* is that there can be no burden with respect to the listing of party names on the ballot itself, s 135(3) imposes a practical burden or impediment on the entitlement of Senator Babet and the UAP to make effective use of the UAP name in the parliamentary process, broader political debate, and formal election campaigning. As Gageler J noted (in dissent) in *Ruddick*, "[i]f the name of the political party with which a candidate is affiliated cannot appear with the name of that candidate on a ballot paper, standard methods of communication with electors by

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[27] *Ruddick* (2022) 275 CLR 333 at 395 [165]-[166] (Gordon, Edelman and Gleeson JJ); see also their Honours' comments at 378 [111], 391-2 [155]-[156].
[28] *Unions NSW (No 2)* (2019) 264 CLR 595, [87] (Gageler J), see also Standing Order 24A and the identification of party whips as part of the parliamentary process: SCB p 82-83.
[29] The logo that is now sought to be registered is slightly different showing the words "Save Australia", but has been used previously by the UAP in political campaigns: SC [31],[54].

political advertising such as billboards, corflutes and how-to-vote cards linking the candidate with the political party will inevitably be less effective."[30]

Mulholland should be reopened to the extent necessary

56. Notwithstanding the above, to the extent that it might be necessary in order to advance the argument above, the plaintiffs seek leave to re-open *Mulholland*.

57. Each of the four factors set out in *John v Federal Commissioner of Taxation* support leave being granted:[31]

    a. The "no burden" finding in *Mulholland* did not rest upon a principle carefully worked out in a significant succession of cases. Rather, as the plurality judgment in *Ruddick* acknowledged,[32] it was an application of a general statement by McHugh J in *Levy* to the effect that the implied freedom did not grant a right *to* political communication and that only prior rights or privileges extant under the general law are protected by it.[33] As has been noted in commentary,[34] the application of that general statement to reach the "no burden" finding in *Mulholland* required some reconsideration of the explanation for the Court's decision in *ACTV* and what prior right was affected by the impugned legislation in that case.

    b. There were differences in the reasoning of the judges who made the "no burden" finding in *Mulholland*. Further to what is said above, Gummow and Hayne JJ[35] on the one hand, and McHugh J and Heydon JJ[36] on the other hand, were at odds over the correct explanation for the outcome in *ACTV*.

    c. There were also diverging views as to whether the ballot paper was a form of political communication by the party and its candidates. Gleeson CJ, McHugh J and Kirby J all separately held that it was a form of political communication.[37] Heydon J held that the ballot paper "is not part of the process of communicating information with a view to influencing electors to vote for one candidate or another", a holding that is at

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[30] *Ruddick* (2022) 275 CLR 333 at 367-8 [78].
[31] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417. See Herzfeld and Prince, *Interpretation* (3rd ed, 2024) [33.540].
[32] *Ruddick* (2022) 275 CLR 333 at 397 [172].
[33] *Levy* (1996) 189 CLR 579 at 622.
[34] Stellios, *Zines's The High Court and the Constitution* (7 ed, 2022) 615-616.
[35] *Mulholland* (2004) 220 CLR 181 at 248 [190].
[36] *Mulholland* (2004) 220 CLR 181 at 224 [111] (McHugh J), 306 [361] (Heydon J).
[37] *Mulholland* (2004) 220 CLR 181 at 196 [30] (Gleeson CJ), 219-221 [94]-[98] (McHugh J), 277 [282] (Kirby J).

odds with the purpose and effect of the inclusion on the ballot of party logos as a political communication by parties to candidates.[38] While the stated intent of that innovation was to reduce voter confusion,[39] the contents of the Register make clear that parties can and do use their logos to communicate their affinity to particular issues or even to express particular policy commitments: SC [50] SCB p 416, 418.

d. While it might not be said that the "no burden" finding in *Mulholland* has caused significant inconvenience, it has led to some conceptual difficulty by drawing a distinction between the direct choice and political communication dimensions of the implications to be drawn from ss 7 and 24 of the *Constitution*. As Gageler J suggested in *Ruddick*, albeit directed to a different issue, "coherence of constitutional principle and methodology" requires that the two dimensions of the implication operate in the same way.[40]

e. Finally, the "no burden" finding has not been independently acted on in a way which militates against reconsideration.

58. The Plaintiffs submit that the "no burden" finding in *Mulholland* depends upon too narrow a view of political communication. As Gleeson CJ explained in his dissent in *Mulholland*:

> Communication about elections takes place in a context which includes private or personal initiative, organised party activity, and public regulation. Candidates supply, and voters receive, information in a variety of ways right up to the time the ballot paper is marked. [41]

59. The plaintiffs respectfully adopt Gleeson CJ's insights that demonstrate the artificiality of the "no burden" approach constrained as it is by the identification of a pre-existing legal freedom on the part of the political speaker. The identification of the source or nature of the speaker's "right" or "freedom" is a distraction from what matters in real world political communication. As Gleeson CJ's reasons acknowledge, "public regulation" becomes an inseparable part of the context in which political communication occurs.

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[38] See s 214A of the Act, inserted by the *Commonwealth Electoral Amendment Act 2016* (Cth); Joint Standing Committee on Electoral Matters, *Advisory report on the Commonwealth Electoral Amendment Bill 2016*, 2 March 2016, [3.45]; [4.19]-[4.20].
[39] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2016, 1564 (Mr Morrison, for the Special Minister of State).
[40] *Ruddick* (2022) 275 CLR 333 at 351 [29] and 365 [70].
[41] *Mulholland* (2004) 220 CLR 181 at 195-196 [28] (Gleeson CJ).

60. In the same way that it limits Commonwealth legislative power to restrict free-standing communication, the implied freedom ought to constrain Commonwealth legislative power where the Parliament chooses to enter the field of communication (through regulating what appears on the ballot paper) by privileging certain speakers (here, registered political parties).

61. It would undermine the entire implied freedom were there not *some* limits on legislative power implied with respect to political neutrality and discrimination. The plaintiffs embrace an example similar to the one given by the Full Court of the Federal Court in *Mulholland*[42] in rejecting the submission that a law conferring a benefit by creating a means of communication could never be a burden. If for example a law required the printing of party names of any party to have held government in the last decade to be in size 24 font, but the names of any other party to be in fine print – then as the Full Court stated the "discriminatory privilege of one is the burden of another". [43]

62. The "no burden" (and the related "no communication") finding in *Mulholland* disables the implied freedom from having anything to say about such a circumstance and a law permitting the disparity in font size would simply entail the Commission carrying out a communication "required by the statute" to "discharge its function to administer the Australian ballot system".[44]

63. The effect on the minor party whose name appears in fine print is perhaps obvious. What matters just as much is the burden on the political listener's receipt of the communication. In the hypothetical, the ballot paper with differing font sizes creates practical impediments to the listener's (ie voter's) informed choice.

64. Accordingly, the plaintiffs submit that it is appropriate to assess the "burden" on political communication *either* on its effect on the political speaker's ability to communicate *or* on the political listener's (ie voter's) ability to make free and informed choice.

65. In its concrete application to the present case, the political listener (ie the voter) is entitled to make a fully informed decision about who to vote for, including through the communications received on the ballot paper about affiliation with the UAP. So much

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[42] *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, 531 [20] (the Court) (***Mulholland FCAFC***).
[43] *Mulholland FCAFC* (2003) 128 FCR 523, 531 [20] (the Court).
[44] *Mulholland* (2004) 220 CLR 181 at 247 [185] (Gummow and Hayne JJ).

was recognised by in similar circumstances by Gleeson CJ in *Mulholland* (cited above). So too by Kiefel CJ and Keane J in *Ruddick,* where their Honours recognised that preventing an elector from "identifying a candidate with all that is associated with the name of a political party" it is "apt to restrict or distort the choice presented".[45] It is also what Gageler J described as a "legal impediment to receipt by electors of information which bears on the making of an informed choice", and the indirect effect on reducing the efficacy of party-based campaigning.[46] Section 135(3) will deprive electors of information about party affiliation with the UAP. That is a stark burden to any voter seeking to vote for or against the UAP.

Section 135(3) fails at the third stage of the proportionality analysis

66. The plaintiffs accept that s 135(3) pursues a legitimate purpose of preventing political parties (other than Parliamentary parties) from avoiding mandatory deregistration under s 136 of the Act. However, in its extension to *all* voluntarily deregistered political parties it plainly fails at both the suitability and the necessity stage of the analysis:

    a. Suitability: the provision does not exhibit "a rational connection to its purpose" because it is not capable of realising that purpose with respect to Parliamentary parties.[47] Because s 136 does not apply to Parliamentary parties, "the measure cannot contribute to the realisation of the statute's legitimate purpose".[48]

    b. Necessity: there is an obvious and compelling alternative means of achieving the anti-avoidance purpose of s 135(3) in an equally effective way that would impose less burden on the implied freedom.[49] That alternative means would be to bring s 135(3) into alignment with its corresponding provision in s 136(2), by providing that it likewise does not apply to Parliamentary parties.

67. On this understanding of the purpose of s 135(3) there would be no need to go on to consider its adequacy in its balance. Indeed it would be somewhat unnatural to speak as the Court did in *McCloy* of an "adequate congruence between the benefits gained by the law's policy and the harm it may cause" insofar as s 135(3) applies to Parliamentary

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[45] *Ruddick* (2022) 275 CLR 333 at 349 [21] (Kiefel CJ and Keane J).
[46] *Ruddick* (2022) 275 CLR 333 at 352 [31] (Gageler J)
[47] *Comcare v* ***Banerji*** (2019) 267 CLR 373 at 400 [33] (Kiefel CJ, Bell, Keane and Nettle JJ).
[48] *McCloy* (2015) 257 CLR 178 at 217 [80] (French CJ, Kiefel, Bell and Keane JJ).
[49] *Banerji* (2019) 267 CLR 373 at 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ); *McCloy* (2015) 257 CLR 178 at 217 [81] (French CJ, Kiefel, Bell and Keane JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

parties.[50] There is no connection between the two: the provision imposes a detriment on Parliamentary parties to deter them from a form of mischief that does not apply to Parliamentary parties. The unreality of the balancing task in such circumstances makes it plain that s 135(3) fails at an earlier stage in the established test for proportionality.

PART VI: ORDERS SOUGHT

68. For the reasons set out above, the plaintiffs contend that the Court should answer the questions stated in the Special Case at [61] in the affirmative, and the Commonwealth should pay costs. In the alternative to finding that the provision is wholly invalid the Court could read it down as not applying to a Parliamentary party or the UAP: Statement of Claim [32(b) or (c)] SCB pp18-19.

PART VII: ESTIMATE OF TIME

69. The plaintiffs seek approximately 2 hours to present their oral submissions, including reply.

Dated: 17 January 2025

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[50] Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 340, quoted in *McCloy* (2015) 257 CLR 178 at 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **RALPH BABET**
First Plaintiff

NEIL FAVAGER
Second Plaintiff
and
COMMONWEALTH OF AUSTRALIA
Defendant

ANNEXURE TO THE SUBMISSIONS OF FIRST AND SECOND PLAINTIFFS

Pursuant to cl 1 of *Practice Direction No 1 of 2024*, the plaintiffs set out below a list of the particular constitutional provisions and statutes referred to in their submissions.

No.	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply
1.	*Constitution*		ss 7,15, 24, 57	Act in force at time	
2.	*Commonwealth Electoral Act 1918* (Cth)	14 October 2024 – 6 January 2025 C2024C00457 (C77)	ss 123, 124, 126, 135, 136, 137, 166, 167, 169, 214, 214A	Act in force at time	
3.	*Commonwealth Electoral Legislation*	22 December 1983 to 20 February 1984	Section 42, repealing Part IX and inserting a new Part IXA	Act in force at time	

	Amendment Act 1983 (Cth).	Act No. 144, 1983 C2004A02861	containing ss 58A, 58N, 58P.		
4.	*Commonwealth Electoral Legislation Amendment Act 1984* (Cth)	21 February 1984 - 9 December 2015 Act No 45 of 1984 C2004A02909	Section 5 Re-numbering and re-lettering of the Commonwealth Electoral Act	Act in force at time	
5.	*Commonwealth Electoral Amendment Act 2016* (Cth)	21 March 2016 C2016A00025	Part 3 Division 1, s89 inserting s214A	Act in force at time	