IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

SOUTH CAROLINA REPUBLICAN PARTY, *et al.,* Plaintiffs, vs. STATE OF SOUTH CAROLINA, *et al.,* Defendants.	CA No. 6:10-1407-JMC

DEFENDANTS-INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants-Intervenors join in the arguments made by defendants on the pending summary judgment motions. The remainder of this memorandum of law will focus on (1) the failure of plaintiffs to provide any factual underpinning in support of their motion; and (2) the critical distinctions between an open primary system such as that utilized in the State of South Carolina, and the blanket primary invalidated by the United States Supreme Court in *California Democratic Party v. Jones***,** 530 U.S. 567 (2000).

ARGUMENT

There has never been a ruling that an open primary is unconstitutional *per se.* Both plaintiffs and defendants concede that the Fourth Circuit Court of Appeals specifically rejected a facial challenge of the State of Virginia's open primary system in *Miller v. Brown*, 503 F.3d 360, 367-68 (4ht Cir. 2007). Indeed, even in considering the validity of California's blanket primary system, the Supreme Court relied on statistical surveys of California voters and expert testimony on the extent and impact of "cross over" voting. 540 U.S. 577-580. In *The Idaho Republican*

Party v. Ysursa, 660 F. Supp. 2d 1195 (D. ID 2009), the District Court denied summary judgment to plaintiffs in an action brought by the Idaho Republican Party ("IRP") challenging that state's open primary. The Court stated:

> Therefore, based on the current record before this Court, genuine issues of material fact remain – mainly whether and to what extent "cross over" voting exists in Idaho, and whether and to what extent the threat of such "cross over" voting affects the message of IRP and its candidates. Therefore, the Court cannot determine whether Idaho's open primary subjects the Republican Party's candidate-selection process to persons wholly unaffiliated with the party. *Id*. at 581. Moreover, the Court cannot simply borrow the statistics, opinions and surveys from *Jones* because, as noted above, that case dealt with a blanket primary instead of an open primary, and it is clear that there is a distinction between the two. *Id*. at 576, n.6. These differences may result in different "cross-over" voter statistics.
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> Thus, the Court cannot determine what burdens or restrictions, if any, are placed on IRP by Idaho's open primary. In turn, the Court cannot weigh the character and magnitude of IRP's asserted injury against the interests of the State as justification for any such burden imposed by its statutes. *Burdick*, 504 U.S. at 434. These questions of fact prevent the Court from granting summary judgment for either party at this point. Instead, the Court intends to conduct an evidentiary hearing or trial in this matter to better develop the record in a manner similar to the record before the Court in *Jones*.

Id., at 1201-1202.

In the case at bar, plaintiffs have offered no evidence of cross over voting much less of its extent and impact in South Carolina. They rely completely on the assertion by plaintiff Patrick Haddon in his affidavit of February 2, 2011 (Dkt. Entry 28-2, para. 7) that the list of those eligible to vote in a Republican primary "can contain the names of electors who are not affiliated with the Republican Parties, or worse, are rivals to the Parties." How many of the persons on the list who are not Republicans actually crossed over and voted in Republican primaries, and what impact they had on the outcome and on candidate messaging, is completely unknown at this point in the litigation.

After a bench trial, the Idaho district court ruled in favor of plaintiffs, finding that there was sufficient evidence of cross over voting to hold that the associational rights of the IRP were subject to a "serve burden," and, therefore, the system could be not be upheld in the absence of a showing that it was "narrowly tailored to serve a compelling state interest." *The Idaho Republican Party v. Ysursa* , 1:08-cv-00165, March 3, 2011, Dkt. Entry 97, p. 18. The Idaho court reached its conclusion by applying the reasoning of the Supreme Court in *Jones*, stating that it could not find "any meaningful distinction" between a blanket primary and an open primary. *Id.* at p. 17.[1] This is the same approach taken by plaintiffs herein.

However, defendant-intervenors respectfully submit that there is a significant difference between the two systems, and that the difference requires upholding the open primary system that exists in South Carolina, Idaho and some 15 other states[2]. Indeed, in both *Jones, at 577, fn. 8,* and in *Democratic Party of the United States of America v. Wisconsin ex rel. La Follette*, 450 U.S. 107,126 (1981), the Supreme Court was careful to note that it was not ruling that open primary systems were unconstitutional.

What are the critical differences between open primaries and the blanket primary struck down in *Jones*? When the *Jones* case was decided, California had adopted a primary that allowed a voter, for example, to vote in the Republican primary for Governor and the Democratic primary for Attorney General. Under an open primary system, a voter can vote in only one primary and in so doing forgoes the right to participate in the primary of the other major party. Thus, in South Carolina, the decision to vote in the Republican Party primary is an act of affiliation. By voting in its primary, the voter affiliates with the Party. Second, California was and is a partisan registration state. There, you had the anomaly of a party primary in which a

[1] This differs from the District Court's statement in its earlier decision denying summary judgment (quoted on p. 2 above), that "it is clear there is a distinction between the two."
[2] http://archive.fairvote.org/?page=1801

person who had chosen to enroll in one party when he or she registered to vote, was allowed to vote in the primary of another. *Jones*, at 570. Such persons could not be said to be affiliating with a party by choosing to vote for a candidate in a particular primary election. In South Carolina you have a voter who is unaffiliated (as there is no partisan registration) associating with a party by voting in its primary election. As the Attorney General notes in his Memorandum in Oppositon at p. 1, South Carolina has had nonpartisan registration and open primaries for decades. Indeed, it is not even clear what cross over voting means in a state without partisan registration.

The measure of the burden, if any, on the South Carolina Republican Party is the difference between affiliation at the time of voting in the primary, and affiliation some time prior. This burden is not a severe one, and cannot overcome the interests of the State and the voters as set forth in the Attorney General's submission and below. It certainly does not justify overturning a decades old open primary system that maximizes voter participation.

Finally, defendants-itnervenors respectfully submit that no ruling that South Carolina's open primary is unconstitutional can be made without full exploration of two significant interests advanced by defendants-intervenors. The first is that a return to the closed primary system sought by plaintiffs would increase racial polarization in the State. Defendant-Intervenor Wayne Griffin, in his declaration and Rep. Joseph Neal on behalf of himself and twelve other African American legislators, express concern that should plaintiffs prevail, racial polarization in South Carolina would be furthered, as whites would likely flee the Democratic Party so they could vote in the Republican primary, leaving African Americans without significant impact in the selection of candidates with a chance of winning except in those districts that are a majority African American. In statewide elections, African Americans would have no say in the selection of the

Republican nominee, making it more likely that a candidate hostile to their interests would be nominated and, given the dominance of the Republican Party, elected to statewide office. (Dkt. Entry 21-1, paras. 15-18, and Ex. A)

This issue must be fully explored at trial, should defendants' motions to dismiss and for summary judgment be denied. In addition, the Court must weigh the dramatic impact of a closed primary on independent voters who would be barred from participating in the first round of voting altogether.

CONCLUSION

For all of the above reasons and those set forth in defendants' submission, plaintiffs' motion for summary judgment should be denied and defendants' granted.

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