
RECORD NO. 13-2170

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

GREENVILLE COUNTY REPUBLICAN PARTY
EXECUTIVE COMMITTEE, et al.,

Appellants,

v.

BILLY WAY, JR., in his official capacity as the Chairman
of the South Carolina State Election Commission, et al.

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RESPONSE BRIEF OF APPELLEES

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TABLE OF CONTENTS

Table of Authorities	iii
Jurisdictional Statement	1
Statement of the Case	2
Statement of the Facts	5
Summary of Arguments	9
Arguments	12
I. Standard of Review	12
II. The District Court correctly ruled that the Appellants lacked standing following the withdrawal of the South Carolina Republican Party as a party-plaintiff.	12
A. The associational rights are those of the South Carolina Republican Party and not the Appellants.	14
B. The dispute raised by the Greenville County Republican Party Executive Committee is with the State Republican Party and not the State of South Carolina.	23
C. The Appellants' equal protection claim challenging the three-fourths vote requirement to "opt-out" of a primary is non-justiciable.	25
D. The district court correctly found no standing for the Greenville County Republican Party's claim that its rights were violated when the party conducted and paid for the 2011 City of Greenville municipal primary.	26

E.	The district court did not find that the Appellant Mitchell lacked standing to assert his equal protection claim that was adjudicated on the merits in the March 30, 2011 order.	27
III.	This Court has held that an open primary is constitutional on its face where a state provides an alternative method to nominate candidates.	28
IV.	The Greenville County Republican Party's rights are not violated by any requirement that it conduct and pay for a municipal primary.....	34
V.	South Carolina Code Section 7-11-30, and specifically the three-fourths vote requirement to nominate by convention, does not violate the Appellants' First Amendment right to freedom of association.	37
VI.	South Carolina Code Section 7-11-30, and specifically the three-fourths vote requirement to nominate by convention, does not violate the Appellants' equal protections rights.	42
VII.	The Appellant Mitchell's equal protection rights are not violated by the fact that a municipal primary is conducted by a political party while a county primary is conducted by the County Election Commission.	44
	Conclusion	47
	Certificate of Service	
	Certificate of Compliance	

TABLE OF AUTHORITIES

Cases

<i>Beck v. Ysursa</i> , 2007 WL 4224051 (D. Idaho 2007).	23
<i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000).	24, 31, 32
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).	43
<i>Clingman v. Beaver</i> , 544 U.S. 582 (2005).	24, 32
<i>Democratic Party v. Nago</i> , 2013 WL 6038018 (D. Hawaii 2013).	14, 32, 33
<i>Idaho Republican Party v. Ysursa</i> , 660 F. Supp. 2d 1195 (D. Idaho 2009).	31
<i>Idaho Republican Party v. Ysursa</i> , 765 F. Supp. 2d 1266 (D. Idaho 2011).	13, 19, 31
<i>Marshall v. Meadows</i> , 921 F. Supp. 1490 (E.D. 1996).	22
<i>Marshall v. Meadows</i> , 105 F.3d 904 (4th Cir. 1997).	9, 15, 16, 22
<i>Miller v. Brown</i> , 462 F.3d 312 (4th Cir. 2006).	passim
<i>Miller v. Brown</i> , 503 F.3d 360 (4th Cir. 2007).	passim

<i>Miller v. Cunningham</i> , 512 F.3d 98 (4th Cir. 2007).	30
<i>Morse v. Republican Party of Virginia</i> , 517 U.S. 186 (1996).	21
<i>New York State Club Association, Inc. v. City of New York</i> , 487 U.S. 1 (1988).	39
<i>Storer v. Brown</i> , 415 U.S. 724 (1974).	41
<i>Sylvia Development Corp. v. Calvert County, Md.</i> , 48 F.3d 810 (4th Cir 1995).	43
<i>Tashjian v. Republican Party of Conn.</i> , 479 U.S. 208 (1986).	24
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997).	41
<i>United States v. Hernandez-Fundora</i> , 58 F.3d 802 (2d Cir. 1995).	18
<i>United States v. Rivers</i> , 595 F.3d 558 (4th Cir. 2010).	15
<i>Wash. State Grange v. Washington State Republican Party</i> , 552 U.S. 442 (2008).	33
<i>Winter v. Natural Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).	33
<i>Woollard v. Gallagher</i> , 712 F.3d 865 (4th Cir. 2013).	12

Statutes and Rules

28 U.S.C. § 1291.	1
S.C. Code Ann. § 5-15-60.	26, 27
S.C. Code Ann. § 5-15-110.	35
S.C. Code Ann. § 7-9-10.	5
S.C. Code Ann. § 7-9-20.	6
S.C. Code Ann. § 7-11-10.	6
S.C. Code Ann. § 7-11-20.	20
S.C. Code Ann. § 7-11-30.	passim
S.C. Code Ann. § 7-13-15(A)(1)	36, 44
S.C. Code Ann. § 7-13-1010.	6
Va. Code Ann. § 24.2-1015.	20
Va. Code Ann. § 24.2-530.	29

JURISDICTIONAL STATEMENT

The Appellees do not dispute the Appellants' statement that this is a timely appeal from a final order, and that this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This case involves a challenge to multiple state election laws brought by the Appellants Greenville County Republican Party Executive Committee and William Mitchell against Billy Way, Jr., in his official capacity as the Chairman of the South Carolina State Election Commission.¹ The Appellants generally allege that the open primary system in South Carolina is in violation of their rights to freedom of association and equal protection as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This action was commenced on June 1, 2010. (J.A. 28-49). The case was originally assigned to then District Judge Henry F. Floyd, but on August 24, 2010, the case was reassigned to District Judge J. Michelle Childs. (J.A. 10). By text order filed March 4, 2011, Judge Childs granted a motion to intervene filed by the Appellee-Intervenors including thirteen members of the Black Legislative Caucus of the South Carolina House of Representatives, minor political parties in South Carolina, and others. (J.A. 12).

After the original parties to this litigation filed cross motions for summary judgment, Judge Childs issued a decision rejecting the Appellants' facial challenge

¹ The Chairperson of the Greenville County Republican Party was also a party-plaintiff from the commencement of this action. However, that individual has not joined in the appeal. (J.A. 739-740).

to the open primary system and the other state election laws being challenged. (J.A. 239-263). After a motion to alter or amend was filed, Judge Childs issued an additional order filed July 18, 2011, denying summary judgment on the as-applied challenge to allow for further factual development. (J.A. 308-315).

Thereafter, with leave of court, the Appellants filed an amended complaint which added the Greenville County Election Commission, the Greenville County Board of Registration, and the City of Greenville Municipal Election Commission as new party-defendants.² The amended complaint included a prayer for monetary relief against the Defendants Greenville County Election Commission and Greenville County Board of Registration (hereafter referred to as "Greenville County Defendants") for violations of their First and Fourteenth Amendment rights.

On July 5, 2012, the case was reassigned to District Judge Mary G. Lewis. (J.A. 17).

On June 7, 2013, the South Carolina Republican Party, which was an original party-plaintiff to the action, filed a stipulation dismissing its claims without prejudice. (J.A. 379-380).

After the completion of further discovery, the Appellees filed motions to dismiss and motions for summary judgment raising numerous jurisdictional and

² The City of Greenville Municipal Election Commission has since been dismissed by a consent order issued on August 22, 2012. (J.A. 367-372).

legal defenses, including a defense based on the lack of standing. Judge Lewis set the case for a bench trial to begin on August 21, 2013, and further advised that all outstanding motions would be heard on that date as well. (J.A. 25).

On August 21, 2013, Judge Lewis heard arguments on the Appellees' motion and issued an order from the bench dismissing the action for lack of standing. (J.A. 26). Judge Lewis thereafter issued a written opinion which was filed on August 30, 2013. (J.A. 716-737). Judgment was entered in favor of the Appellees on September 6, 2013. (J.A. 738). The Appellants filed a timely Notice of Appeal on September 18, 2013. (J.A. 739-740).

STATEMENT OF FACTS

1. The Appellant Greenville County Republican Party Executive Committee is not itself a certified political party within the meaning of S.C. Code Ann. § 7-9-10.

2. The Appellant William "Billy" Mitchell is a registered voter and citizen of the City of Greenville, South Carolina. When Mitchell votes for county offices, he votes in a county-wide primary conducted by the Greenville County Election Commission, and when he votes for municipal offices, Mitchell votes in a municipal primary conducted by the County Republican Party.

3. The South Carolina Republican Party, which is a certified political party within the meaning of S.C. Code Ann. § 7-9-10, was originally a party-plaintiff in this action but was voluntarily dismissed with the consent of all parties by Stipulation of Dismissal filed June 7, 2013. (J.A. 379-380).

4. The Appellee Billy Way, Jr. is the Chairman of the South Carolina State Election Commission and is sued in his official capacity only.

5. The Appellees Greenville County Election Commission and the Greenville County Board of Voter Registration are local governmental entities located in Greenville County, South Carolina.

6. South Carolina election law currently provides for an open primary

election system as one method of nominating political party candidates for inclusion on the general election ballot. Under the law, any qualified voter is allowed to vote in the party primary of his or her choice; provided, however, that the voter may vote in only one party primary during any single election cycle. *See*, S.C. Code Ann. §§ 7-11-10, 7-9-20, and 7-13-1010.

7. South Carolina does not maintain partisan registration. A voter affiliates with a party by choosing its ballot at a primary election.

8. Primaries in South Carolina are conducted as open primaries regardless of whether the primary is conducted by the State Election Commission, County Election Commissions, or the political parties.

9. Political parties may elect not to participate in the primary process and instead nominate its candidates for the general election by convention. *See*, S.C. Code Ann. § 7-11-10. However, to nominate candidates by convention, three-fourths of the total membership of the party's state convention must vote to use the nomination method. *See*, S.C. Code Ann. § 7-11-30.³

10. Under South Carolina election law, candidates may also be placed on the general election ballot by petition. *See*, S.C. Code Ann. § 7-11-10. Although

³ On June 13, 2013, Act No. 61 entitled the "Equal Access to the Ballot Act" was signed by the Governor. Among several provisions, the Act amends Section 7-11-30 in several particulars. Section 7-11-30 will allow a party to nominate candidates for all offices by convention "if (1) there is a three-fourths vote of the total membership of the convention to use the convention nomination process, and (2) a majority of voters in the party's next primary election approve the use of the convention nomination process." 2013 Act No. 61.

the petition method of nomination is not typically used by organized political parties, South Carolina law does not expressly prohibit political parties from using petitions to place the candidate of the party's choice on the general election ballot.

* * * * *

In their statement of facts, the Appellants cite to the reports and "findings" by Dr. Nathan Drake, a mathematics professor. Dr. Drake compiled comparisons of voter data using only voter registration numbers. Dr. Drake, however, has offered no opinions or analysis based on the voter data. As the Appellants themselves have stated, the information prepared by Dr. Drake is merely "basic math calculations using an Excel software program that millions of people use every day." (Dkt. #151, p. 6 of 12). No opinions based upon the "basic math calculations" were ever offered by Dr. Drake.

The Appellants also have cited to the report of Dr. Reginald Ecarma who presented no studies, surveys, interviews, data, or analyses that he conducted that support his opinions. Instead, Dr. Ecarma relied exclusively on an article prepared in 1998 by Elisabeth Gerber based on data for congressional races from 1982 through 1990 and having no relevance to current electoral conditions in South Carolina.

The Appellees had filed *Daubert* motions with respect to the reports and "opinions" of Drs. Drake and Ecarma. Those motions were never adjudicated by

the district court because the "opinions" offered by Drs. Drake and Ecarma and the voter data compilations by Dr. Drake were not necessary for the adjudication of the defense based on lack of standing. The Appellees therefore object to any consideration of those reports or "opinions" on appeal.

Furthermore, the Appellants cite to documents included in the record that purport to identify Greenville County Democratic Party officers and officers of other parties who allegedly voted in the 2011 City of Greenville Municipal Republican Primary or potentially other Republican primaries. The Appellees object to this evidence. In support, the Appellants have cited to their own answers to interrogatories which are self-serving and not competent evidence of what is stated therein. (J.A. 590-606). Moreover, the records are not introduced by way of affidavit or any other means to authenticate the information contained therein or the inferences or conclusions drawn therefrom by the Appellants. (J.A. 618-652).

Finally, this information is not relevant or necessary for the adjudication of the standing issue on which the district court did rule and disposed of the remainder of the action. Upon finding that the Appellants lacked standing, Judge Lewis did not take testimony or rule on the as-applied challenge for which this evidence was presumably intended.

SUMMARY OF ARGUMENTS

In the order issued by District Judge J. Michelle Childs on March 30, 2011, the district court addressed a facial challenge to the constitutionality of the open primary in South Carolina and concluded that the open primary laws do not facially burden political parties' right to freedom of association. The district court also rejected an equal protection challenge to the open primary laws. Following the completion of additional discovery, the South Carolina Republican Party, which was an original party-plaintiff in the action, voluntarily withdrew from the action, in response to which the Appellees moved for dismissal for lack of standing. The district court thereafter in an order issued by District Judge Mary G. Lewis on August 30, 2013, dismissed the Appellants' remaining claims for lack of standing.

The district court was correct in finding no standing for the remaining party-plaintiffs. The district court followed this Court's decision in *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997). Just as was the case in *Marshall*, in the present case, the Appellants could not satisfy the causation or redressability prongs of the standing analysis because the South Carolina Republican Party Rules do not favor a closed primary system nor place restrictions on the eligibility of voters in Republican primaries. The associational rights belong to the State Republican

Party and not a single local party organization. Where the State Party was not joining in the attempt to overturn the open primary, the Greenville County Republican Party had no standing.

Furthermore, the district court correctly upheld the open primary system on the Appellants' facial challenge based on this Court's reasoning in *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) (*Miller II*). Because South Carolina law allows for alternative methods of nomination, namely by convention or by petition, an open primary is facially constitutional.

The Greenville County Republican Party argues that the requirement that it conduct and pay for a partisan municipal primary in the City of Greenville is also unconstitutional. That claim fails on the same premise – the Greenville County Republican Party was not required to hold a primary but rather had the option of using alternative methods of nomination.

The district court was also correct in rejecting the Appellants' facial challenge to Section 7-11-30 and specifically the three-fourths vote requirement to nominate by convention. The Appellants failed to show that any attempt has been made by the Greenville County Republican Party to choose to nominate candidates for county offices by the convention method. Thus, there was no showing that the three-fourths vote is unattainable. The district court also concluded that the

burden, if any, would be "slight" and that there were important state interests that supported the three-fourths vote requirement.

The district court also correctly rejected the equal protection challenge to the three-fourths vote requirement because the Appellants failed to show that political parties and other organizations are similarly situated and cannot be treated differently under the law.

ARGUMENTS

I. Standard of Review

This Court reviews a district court's dismissal for lack of standing *de novo*. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). Likewise, a district court's ruling granting summary judgment is also to be reviewed *de novo*. *Woollard v. Gallagher*, 712 F.3d 865, 873 (4th Cir. 2013).

II. The District Court correctly ruled that the Appellants lacked standing following the withdrawal of the South Carolina Republican Party as a party-plaintiff.

In its August 30, 2013 order, the district court granted the Appellees' dispositive motions and dismissed this action for lack of standing. (J.A. 737). The Appellants contend on appeal that both Greenville County Republican Party Executive Committee and William Mitchell had standing despite the withdrawal of the South Carolina Republican Party as a party-plaintiff on June 7, 2013. (J.A. 379-380).

The Appellants' approach to the issue of standing obscures the basic principles on which the district court rested its decision dismissing the action after

the withdrawal of the State Republican Party as a party-plaintiff. These principles include the following:

- The associational rights in question are those of the State Republican Party, a certified party under South Carolina law. The Greenville County Republican Party Executive Committee, its officers and adherents are merely a subdivision or part of the State Republican Party.
- The withdrawal of the State Republican Party from the litigation deprived the Appellants of standing.
- The State Republican Party has not taken a position on the conduct of its primary and has, in fact, failed to adopt a rule or plan to conduct a closed primary.⁴
- The dispute, properly understood, is between the State Republican Party and the Greenville organization, which takes issue with the failure of the State Republican Party to close its primary and attempts to act for the State Republican Party in continuing the lawsuit.
- Even were the Court to express an opinion that the open primary violated the associational rights of the Republican Party, such an opinion could not redress the complaint of the Greenville organization unless and until

⁴ This is unlike the Virginia State Republican Party subsequent to *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997); and prior to *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) (*Miller I*) or in Idaho prior to its successful challenge to the open primary in that State. See, *Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266, 1270 (D. Idaho 2011).

the State Republican Party accepted the opinion and changed its rules regarding the conduct of its primary.

- The equal protection issues raised by Appellants have meaning only in relation to the existence of the open primary.

These fundamentals will be addressed below.

A. The associational rights are those of the South Carolina Republican Party and not the Appellants.

The State of South Carolina has 46 counties. In one of them, Greenville County, the Republican Party organization seeks to challenge the State's open primary system as violating the associational rights of Republicans in South Carolina. If they are permitted to do so, then what of the rights of association of Republicans and their organizations in the other counties who have accepted the open primary, as has the State Party? Both the State Party and the other counties have seen fit to express their associational rights by allowing all of the State's voters to participate in Republican primary elections, and are satisfied that the act of choosing a Republican ballot on election day is a sufficient step to affiliate with the Republican Party in a state that does not have prior party registration. *See, e.g. Democratic Party v. Nago*, 2013 WL 6038018 (D. Hawaii 2013). If the Greenville organization believes that allowing all voters in South Carolina to associate with the Republican Party in this manner, rather than, for example, having to enroll

prior to the primary election, than its remedy is to seek to change the position of the State Party or withdraw and form their own party, not to attempt to have the Federal Courts impose their views on the State Party and other county organizations.

Read together, the cases of *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997) and *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) (*Miller I*), stand for the proposition that a local organization can have standing to challenge a State's open primary if, and only if, the State Party has adopted a rule or "Plan of Organization" for the conduct of a closed primary. In such a case, the local organization would be taking legal action to enforce the terms of association set by the State Party. They are not barred by the fact that the State Party has, for whatever reason, elected not to sue. This is quite a different question from the case at bar, in which the Greenville organization attempts to assert terms of association different from those adopted by the State Party. A close look at these two cases bears this out.

The Appellants rest their claim to standing on *Miller I*, which they contend supersedes *Marshall*,⁵ and on which the district court relied along with other

⁵ The Appellants argue that "[t]he *Miller I* decision was decided after the *Marshall* decision and the *Miller I* decision takes precedence." See, Appellants' Opening Brief, p. 57. That is incorrect. This Court has repeatedly stated that "a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting en banc can do that." *United States v. Rivers*, 595 F.3d 558, 564, n.3 (4th Cir. 2010).

authority. Both cases involved claims that the State of Virginia's open primary violated the Republican Party's right of freedom of association. The State Republican Party was not a party-plaintiff in either case.

The *Miller I* case, however, is distinguishable from the case at bar, the critical distinction being that the South Carolina Republican Party like the Virginia Republican Party at the time of *Marshall* has taken no steps to effect the closing of its primary. By the time *Miller I* was decided, however, the Virginia State Party had adopted a "Plan of Organization" to bar non-Republicans from voting in its primary. That allowed a local organization of Republicans to challenge the State's refusal to defer to the express plan of the State Party in the conduct of Republican primaries. Indeed in *Miller I*, this Court noted that the local organization informed the State Board of Elections of its intention to follow the State Party's "Plan of Organization." The State directed them to do otherwise -- to act in accordance with Virginia's open primary law. *See, Miller I*, 462 F.3d at 315. It was that express conflict between the Virginia Republican Party's plan and the refusal of the State Board of Elections to acquiesce that gave rise to the litigation and conferred standing on the local organization, even though the State Republican Party had not joined the lawsuit.

The Appellants' effort to demonstrate that the actions of the South Carolina Republican Party were similar to those of the Virginia Republican Party is

unavailing. The Appellants write that the "*Miller I* decision does not rest on the State political party passing a certain policy position." *See*, Appellants' Opening Brief, pp. 57-58. That is inaccurate. *See, Miller I*, 462 F.3d at 314-315, 318. The Appellants also suggest that the issue of standing had already been decided by the district court in the March 30, 2011 order. That is not the case. Indeed, the issue of standing was not raised, nor could it be, until the State Republican Party withdrew as a plaintiff, thereby depriving the remaining plaintiffs of standing. The withdrawal opened a gap between the position of the State Party and that of the local Greenville organization and its adherents. By the time of the decision and order appealed from, the gap between the State and the local Greenville organization had widened due to the overwhelming Republican support in the legislature for changes in the opt-out provision that made it more difficult to nominate other than by the open primary. What is now clear is that not only did the State Republican Party withdraw from this lawsuit, it took other steps to distance itself from the position of the Appellants. It was after the legislation passed both houses of the legislature that the State Party withdrew from the lawsuit.⁶

⁶ In a series of votes in June 2013, the overwhelming majority of Republicans in the South Carolina General Assembly voted to strengthen the open primary by making it harder to opt-out of primary elections altogether. The vote on Act 61 was 40 to 0 in the South Carolina Senate and 105 to 5 in the House of Representatives. In other words, all of the Republicans in the Senate and all but five out of 76 Republicans in the House supported this effort. Three of the five Republican nays came from the Greenville area. The Senate vote took place on June 5,

As a result, the remaining plaintiffs (several Greenville County Republicans and their county organization), Appellants herein, now find themselves in direct opposition to the State Party, which has established, through the actions described above, that not only does it support the open primary but it supports strengthening it. On what basis can the Appellants contend that their associational rights as Republicans have been violated, when their own Party has given contrary expression to its associational rights through these actions? For this Court to impose the Greenville viewpoint on the Party would arguably violate the Party's associational rights.

The Appellants further argue that South Carolina differs from Virginia in that the Virginia Republican Party was not prohibited from adopting rules that were inconsistent with state law. *See*, Appellants' Opening Brief, pp. 58-61. This is wrong on two counts. First, as was noted above, this Court in *Miller I* recited that the Virginia State Board of Elections advised the State Party that its Plan of Organization violated state law. Second, the Appellants attempt to buttress their shaky position by asking rhetorically whether the Appellees expect the State Party

2012, and the House vote on June 6, 2013. (See below web references). The Court can take judicial notice of these legislative facts. *United States v. Hernandez-Fundora*, 58 F.3d 802, 811-12 (2d Cir. 1995). The State Republican Party filed its stipulation of dismissal the day after the House vote. (J.A. 379).

(http://www.scstatehouse.gov/sess120_2013-2014/sj13/20130605.htm#p66)

(http://www.scstatehouse.gov/sess120_2013-2014/hj13/20130606.htm#p61)

to disregard the March 30, 2011 district court order and to violate state criminal law. These points are likewise without merit. The very language quoted on page 58 of Appellants' Opening Brief simply recites what was true in Virginia: that any party rule closing the Republican primary would violate the State of South Carolina's open primary system. This, of course, is the case, as it was in Virginia at the time of *Miller I* and in Idaho at the time of *Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266 (D. Idaho 2011). It is this adoption of a rule or organization plan contrary to state law that is the predicate for the actual case or controversy necessary to confer standing.⁷ Without that, the wrong the local plaintiffs seek to redress is the position of the State Party, not the action of the State.

As for the alleged criminal violation, as alluded to on page 59 of the Appellants Opening Brief, it rests uncomfortably on the catch-all provision of the South Carolina Code providing that a person who violates any provision of the State's election laws is guilty of a crime. Virginia has a similar statute:

⁷ Indeed, the South Carolina Republican Party Rules contemplate conflict between its provisions and the State election laws when matters of constitutional importance arise. Rule 2(b) states: "Should any conflict exist or develop between any of these Rules and the South Carolina election law, the latter shall govern except as to those laws which have been judicially held to be constitutionally unenforceable or which are patently unconstitutional." (J.A. 386).

§ 24.2-1015. Conspiracy against rights of citizens under this title.

If two or more persons conspire to injure, oppress, threaten, intimidate, prevent, or hinder any citizen of this Commonwealth in the free exercise or enjoyment of any right or privilege secured to him by the provisions of this title, or because of his having so exercised such right, they shall be guilty of a Class 5 felony.

Va. Code Ann. § 24.2-1015. In fact, the Virginia statute is more susceptible of a construction that would make its Plan of Organization a felony, as it speaks of two or more persons (for example, a party committee) conspiring to "hinder" citizens from exercising rights accorded them by the state election law. Read literally, it could even be construed to have prohibited the local Virginia organization from commencing the *Miller I* lawsuit. Of course, neither that statute nor the more narrowly drawn South Carolina statute is intended to make it illegal to adopt a rule or bring a lawsuit. That would violate the First, Fifth, and Fourteenth Amendments to the United States Constitution. The statutes in question are designed to prevent conduct that actually prevents a person from voting (such as an inspector telling someone they are not registered when, in fact, they are). In this regard, Section 7-11-20 of the South Carolina Code says just that: it speaks to how an election "must be conducted."

Next, the Appellants point to actions taken by the State Party that they claim are equivalent to those taken by the Virginia Republican Party at the time of *Miller*

I. *See*, Appellants' Opening Brief, pp. 60-61. This is not the case. The Plan of Organization of the Virginia Republican Party placed it in direct opposition to that state's election laws. The South Carolina Party's rule that "prohibits cross-over voting" does nothing of the sort. It simply echoes existing state law prohibiting a voter from voting in more than one primary in the same election for the same office.⁸

The Appellants also point to a provision of the 2012 platform of the State Republican Party, which expresses "support" for a closed primary. Far from taking any steps to give organizational expression to that support, the State Party has acted contrary to it by withdrawing from this lawsuit and by acting through its legislators to make it more difficult to opt-out of the open primary. Moreover, a party platform has neither the force of law nor the force of the Party's rules. *See e.g., Morse v. Republican Party of Virginia*, 517 U.S. 186, 227 (1996) (holding that changes in a party platform were not subject to pre-clearance under Section 5 of

⁸ The South Carolina Republican Party Rules include the following: "No person that has voted in a primary or run-off election of another political party, including a presidential preference primary, shall be allowed to cast a ballot in a Republican Primary or run-off *for the same office in the same election cycle*." *See*, South Carolina Republican Party Rule 11(c). (J.A. 411). (Emphasis added). This is the only provision that addresses potential "crossover voting" and is entirely consistent with the use of an open primary system under South Carolina law. The highlighted language – "for the same office in the same election cycle" – is critical. That language shows that the only prohibition in these rules prevents someone who voted in a non-Republican primary or run-off election from voting in a Republican primary or run-off for that same office in that same election. That provision is consistent with an open primary system, and in fact, a closed primary system would be at odds with that language.

the Voting Rights Act). Indeed, the South Carolina Republican Party Rules contain no provision giving legal or organizational force to a plank in the platform.

The case of *Marshall v. Meadows*, 921 F.Supp. 1490 (E.D. 1996), is directly on point. In that case, the district court held as follows:

On the separate question of capacity to sue as a representative of the Party, as in *Connell* plaintiffs have raised a separate and more troubling issue. The plaintiffs have not clearly demonstrated that they are the proper party to invoke judicial review. The Party itself has not joined this suit and in fact refused to initiate it. The proffered reasons for this refusal – cost, shortness of time, political appearances or support for the statute – are ultimately irrelevant. The Party's actions must speak louder than the conflicting motivations attributed to it by opposing litigants, and those actions are clear: the Party chose an open primary and chose not to challenge the primary law or even add protesting language to its Party Plan. That two of the most prominent members of the Party, a United States Senator and its Chairman, disagree in this litigation is the final proof that plaintiffs cannot demonstrate a proper representative capacity. Plaintiffs have demonstrated no standing as a proper party and therefore no jurisdiction exists.

921 F.Supp. at 1493. This district court decision was later affirmed by this Court in *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997).

The Appellants' attempts to distinguish the *Marshall* case are unavailing. They argue that in *Marshall*, the plaintiffs were individuals not, as here and in *Miller I*, a local organization. This, however, misses the point. The critical distinction is that at the time of *Marshall*, the Virginia Republican Party had not

taken definitive steps to limit the terms of association with it. Had it done so, the individual plaintiffs might have had standing. In *Miller I*, the plaintiff was a local organization, *but by that time* the State Party had acted. In the case at bar, one of the conditions – the critical one (the establishment by the party of more limited terms of association) – has not been satisfied.

B. The dispute raised by the Greenville County Republican Party Executive Committee is with the State Republican Party and not the State of South Carolina.

The withdrawal of the South Carolina Republican Party from the litigation can only be understood as taking a position contrary to that of the Greenville organization. This would not be the case if the State Party had, as in Virginia, adopted a rule or "Plan of Organization" to conduct a closed primary. This is the cause of the injury to the Greenville organization. They are harmed by the action of the State Party withdrawing from the litigation and by its failure to adopt such a "Plan of Organization." Indeed, there is authority for the proposition that even the State Party would lack standing without taking this crucial step. *Beck v. Ysursa*, 2007 WL 4224051 (D. Idaho 2007).

This, of course, also goes to the issue of redressability. Even were this Court to make a declaration that it agreed with the Appellants as to the proper terms of association with the Republican Party, that view could not take precedence over

the position of the State Party itself. This, after all, is what the Supreme Court has ruled in *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) and *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In *Tashjian*, the Supreme Court found that, state law notwithstanding, the Republican Party had the right to allow non-aligned voters to vote in its primary. Likewise, in *Jones*, the Supreme Court held that the right of association rested with the party and it, not the State (and presumably not the court), determines the terms of association with it. The case at bar is unlike *Clingman v. Beaver*, 544 U.S. 581 (2005), where Oklahoma's Libertarian Party was found to have no right to allow those who had already registered into another party to vote in their primary. Here, South Carolina law does not provide for partisan registration. Therefore, the South Carolina Republican Party has the right to allow any voter to take its ballot on primary day and affiliate in that manner. The rights of no other party are violated as they were in *Clingman*. Any other outcome would be absurd as it would require this Court to deny the right of the State Republican Party to determine the terms of association with it in favor of the position taken by one county in the state seeking to assert a right to association that does not even attach to it.

C. The Appellants' equal protection claim challenging the three-fourths vote requirement to "opt-out" of a primary is non-justiciable.

The Appellants suggest that they still have standing to litigate the equal protection claims. That is not the case. These claims, at least with regard to the three-fourths vote requirement to "opt-out" of a primary, are derivative of the First Amendment claims. The challenge is to South Carolina's open primary system, not a portion of it. The opt-out provisions become relevant only because they represent an alternative to the open primary. If lack of standing prevents a challenge to the latter, then there can be no challenge to the former. The Appellants contend that the three-fourths vote requirement burdens their ability to choose a non-primary option and, therefore, makes it more difficult for them to control access to Republican primary elections. However, the right to control such access, if there is one, rests on the First Amendment's protection of freedom of association. As discussed above, freedom of association in this regard attaches to the State Party, not the local organization. Likewise, standing to challenge a burden on this freedom belongs to the State Party. After all, if the open primary withstands challenge, then whether or not the three-fourths vote requirement violates the equal protection clause (and the Appellees have demonstrated below that it does not) is irrelevant, moot, and non-justiciable.

D. The district court correctly found no standing for the Greenville County Republican Party's claim that its rights were violated when the party conducted and paid for the 2011 City of Greenville municipal primary.

In her August 30, 2013 order, Judge Lewis found that the Appellants also lack standing to assert their claims premised on the 2011 City of Greenville municipal primary which the Greenville County Republican Party paid for and conducted. The merits of the First Amendment claim are addressed below,⁹ but Judge Lewis did not reach the merits. Instead, she dismissed the claims for lack of standing. Specifically, Judge Lewis concluded that the City of Greenville's choice to hold partisan municipal elections (as opposed to non-partisan elections) as permitted by Section 5-15-60 was at the heart of the controversy and that the Appellants' claims could not be redressed without the City's presence in the action. Judge Lewis wrote: "But the municipality's absence from this lawsuit directly impacts Plaintiffs' ability to satisfy both the causation and redressability prongs of the analysis. The municipality is one such absent intermediary that stands between Plaintiffs and the challenged conduct 'in a way that breaks the causal chain' and deprives Plaintiffs of standing." (J.A. 733).

⁹ Notably, the Appellants have appealed only the merits of the First Amendment freedom of association claim and not the equal protection claim. As Judge Lewis described it, the equal protection claim alleged that the Greenville County Republican Party "is treated differently from other county-wide republican party executive committees due to varying decisions of municipalities as to their preferred methods of nominating candidates for municipal offices." (J.A. 733).

On appeal, the Appellants do not challenge Judge Lewis' analysis on the causation and redressability prongs. Instead, they complain that Judge Lewis earlier had dismissed the City of Greenville Municipal Election Commission as a party-defendant.¹⁰ Importantly, that dismissal was with the consent of the Appellants. The order was a "consent order," and quite frankly, Judge Lewis' standing analysis is not at odds with the rulings in that August 22, 2012 consent order.

E. The district court did not find that the Appellant Mitchell lacked standing to assert his equal protection claim that was adjudicated on the merits in the March 30, 2011 order.

Finally, the Appellant William Mitchell claims that he has standing to assert his equal protection claim and that the district court erred in dismissing his equal protection claim for lack of standing. Mitchell, however, is confused. Mitchell initially brought an equal protection claim whereby he argued that voters in different parts of Greenville County vote in different types of primaries depending on where they live and that somehow violates his equal protection rights. That equal protection claim was adjudicated by Judge Childs in her order filed March 30, 2011, granting summary judgment to the Appellees on that issue. (J.A. 259-

¹⁰ The City of Greenville was never a party-defendant in this action. The decision to adopt partisan rather than non-partisan municipal elections was a decision made by the Greenville City Council per Section 5-15-60, not any decision by the Municipal Election Commission.

260). That equal protection claim was not revisited by Judge Lewis, and her order filed August 30, 2013, did not adjudicate that claim or dismiss *that claim* for lack of standing. As discussed below, Mitchell's equal protection claim based on his status as a voter within the city limits of the City of Greenville was not dismissed for lack of standing and was adjudicated correctly by Judge Childs.¹¹

III. This Court has held that an open primary is constitutional on its face where a state provides an alternative method to nominate candidates.

In Issue I (H) of their brief, the Appellants appear to argue that an open primary is facially unconstitutional. In taking this position, they rely heavily on *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) (*Miller II*). However, this decision actually supports the Appellees' position and is of no benefit to the Appellants.

In *Miller II*, this Court held unequivocally that an open primary system is not facially unconstitutional so long as the State provides an alternative means for a party to choose its nominees. At the time of this Court's ruling, Virginia allowed a party to nominate by convention, caucus, or a "firehouse" primary. 503 F.3d at 362. South Carolina, likewise, provides alternative methods of nomination, namely by convention or petition. The Appellants' claim that the convention alternative is circumscribed by limitations they argue are unconstitutional. This

¹¹ The merits of this equal protection claim are addressed in Section VII of this brief.

argument was rejected by the district court in its March 30, 2011 order and, as will be demonstrated in Sections V and VI below, should be rejected here.

In *Miller II*, this Court went on to consider the validity of the open primary when the party has no alternative. The State Board of Elections took the position that the district court ruled properly when it held that in the absence of an "opt out," the open primary was unconstitutional. 503 F.3d at 368. Nonetheless, this Court specifically declined to rule on the issue:

Here, we need not decide whether Virginia's open primary statute, viewed in isolation, impermissibly burdens a political party's right to associate with those who share its beliefs. That is because it is clear that § 24.2-530 – when properly viewed in the context of other methods of nomination permitted by Virginia law – does not facially burden political parties' associational rights.

503 F.3d at 367.

This Court in *Miller II* did, however, touch on a point that is significant for the instant appeal when it noted that the State had failed to support its claim that the open primary was necessary to further the goals of the federal Voting Rights Act. 503 F.3d at 370-71. The Appellee-Intervenors in the instant case (thirteen of whom are members of the Black Legislative Caucus of the South Carolina House of Representatives), through the expert opinion of Professor Paul Finkelman, provided support for the contention that the open primary was necessary to prevent a return to the racial polarization and suppression of minority voting rights that

characterized South Carolina politics during the "Jim Crow" period. (J.A. 523-573).

In its March 30, 2011 order, the distinct court articulated additional and persuasive grounds for preserving the open primary:

In enacting elections laws, States must engage in a tough balancing act that culminates in a procedure that protects the rights of political organizations, the rights of candidates, and the rights of voters. It is a complicated task that may not provide everyone with the options they would like, but one that must result in providing all with the rights to which they are entitled. South Carolina's election statutes provide multiple methods for political parties to nominate candidates to the general election ballot. Defendants argue that the State prefers to have candidates nominated to the general election ballot by open primary because it is, in the State's view, the most administratively convenient manner to provide political parties with broad forums in which to reach voters who share their ideology while preserving the integrity of the overall electoral process and encouraging voter participation. Defendants also contend that the same reasons motivate the State's requirement that political parties attain three-fourths vote by convention to choose the convention nomination method. Defendants' arguments are persuasive. Accordingly, the court finds the challenged statutes are adequately justified by legitimate state interests.

(J.A. 262).¹²

¹² This Court is also referred to the well-reasoned analysis of Judge Wilkinson in his dissent from the denial of a petition for rehearing *en banc* filed in *Miller*. See, *Miller v. Cunningham*, 512 F.3d 98 (4th Cir. 2007). Judge Wilkinson did not take issue in that dissent with the panel's decision; rather, he dissented because the panel narrowly addressed the question before it and did not decide the larger issue, that is, whether an open primary is constitutional.

Since *Miller II*, two other district courts have considered the constitutionality of open primary systems similar to that in South Carolina, except that neither allowed an "opt-out." In *Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266 (D. Idaho 2011), the district court saw no reason to distinguish Idaho's open primary from the blanket primary invalidated by the Supreme Court in *Jones* and, only *after trial*, found Idaho's primary system unconstitutional on an as-applied challenge.¹³ In *Democratic Party v. Nago*, 2013 WL 6038018 (D. Hawaii 2013), the district court upheld the open primary and dismissed a facial challenge. The *Nago* court distinguished *Jones*:

Initially, it is far from clear the extent to which *Jones*' holding (arising from a blanket primary) applies to an open primary. Indeed, *Jones* stated that California's prior blanket primary was "qualitatively different" from a closed primary system where it may be "made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'cross over'[" 530 U.S. at 577. In such a system, "at least [the voter] must formally *become a member of the party*; and once [the voter] does so, he is limited to voting for candidates of that party." *Id.* And, in this particular sense, such a

Judge Wilkinson dissented because he found the issue of sufficient public importance to warrant an *en banc* rehearing so that the Court could address the issue avoided by the panel. Following a detailed constitutional analysis, Judge Wilkinson concluded that the use of an open primary for the nomination of candidates is not only permissible but "should indeed be a constitutional choice for states to make." 512 F.3d at 106. Ultimately, Judge Wilkinson concluded that "an open primary imposes no unconstitutionally severe burden on parties' associational rights." *Miller*, 512 F.3d at 108.

¹³ The Idaho district court had previously rejected a facial challenge. *See, Idaho Republican Party v. Ysursa*, 660 F. Supp. 2d 1195 (D. Idaho 2009).

closed primary may be virtually indistinguishable from Hawaii's open primary where voters can "affiliate" with a party on the day of the primary. In fact, *Jones* distinguished an open primary system from California's blanket primary system:

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

2013 WL 6038018, *9.

In South Carolina, as in Hawaii, there is no party registration, and the voter chooses to affiliate with the party when he or she chooses a party ballot on election day. The Hawaii Court, citing *Clingman v. Beaver*, 544 U.S. 582 (2005), noted as well that minor parties might welcome an open primary, as it would bring more voters to their ballot line. *Nago*, 2013 WL 6038018, *10. Finally, the district court stressed the need for an evidentiary record and said it could not assume that the open primary imposed a severe burden on the State's Democratic Party:

Even if anonymity creates *some* burden to the DPH, the court cannot *assume* — without a developed evidentiary

record — that the DPH is *severely* burdened (as opposed to being merely inconvenienced) by such a system, especially a system adopted specifically to protect privacy of the vote and to encourage voter participation. And the current record in this case establishes no more than that the DPH has a formal preference to associate with those who are willing to publicly declare their support for the DPH, and that approximately 65,000 people have formally registered with the DPH in a heavily Democratic state with a population of over one million people.

In short, the DPH's arguments rest on assumptions about voter behavior that cannot be judged without evidence. The DPH's challenge thus fails for this second reason. *See Wash. State Grange*, 552 U.S. at 457, 128 S.Ct. 1184 ("Each of [the challenger's] arguments rests on factual assumptions about voter confusion, and each fails for the same reason: In the absence of evidence, [a court] cannot assume that . . . voters will be misled."). Just as in *Washington State Grange*, such a factual determination "must await an as-applied challenge." *Id.* at 458, 128 S.Ct. 1184. Having failed to succeed on the merits, it follows that the DPH's request for a preliminary injunction also fails. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

Nago, 2013 WL 6038018, *13. (Emphasis in original).

In sum, the Appellants have failed to present a convincing rationale to reverse the decisions of the district court below and declare South Carolina's open primary facially unconstitutional.

IV. The Greenville County Republican Party's rights are not violated by any requirement that it conduct and pay for a municipal primary.

The Greenville County Republican Party raises as its initial two issues on appeal that its First Amendment free association rights were violated when the party was compelled to conduct, pay for and certify the results of the 2011 City of Greenville municipal primary which was held as an open primary. The County Republican Party further claims that its rights will continue to be violated in the future when it is compelled to conduct, pay for, and certify the results of future partisan municipal primaries. The County Republican Party makes a facial challenge to laws requiring that any nomination by primary in a partisan municipal election must be by open primary, and like the same challenge made to non-municipal elections, the issue is controlled by this Court's decision in *Miller II*.

The County Republican Party appears to argue that the district court granted summary judgment on the merits of its First Amendment claim. That is not correct. As discussed above, the district court dismissed this First Amendment claim on the basis of lack of standing. (J.A. 732-733). The district court did not reach the merits of this claim.

Nonetheless, even if the district court had reached the merits, the arguments made on appeal by the Greenville County Republican Party are legally flawed. As the critical basis for its position, the County Republican Party argues that the use of

an open primary is mandatory under South Carolina law for the nomination of Republican candidates for municipal offices in a partisan election. The County Republican Party writes:

The municipal primary is a mandatory open primary. There is no S.C. Code section that allows the Greenville County Republican Party to nominate candidates for municipal office by a method other than the open primary method. There is no provision in the S.C. Code that allows the Greenville County Republican Party to nominate municipal candidates by the convention method."

See, Appellants' Opening Brief, p. 22. The County Republican Party is plainly wrong.

Section 5-15-60 allows a South Carolina municipality the option to adopt partisan or non-partisan elections. If a municipality adopts partisan elections, which the City of Greenville has, Section 5-15-60 provides as follows:

If nonpartisan elections are not provided for, the nomination of candidates for municipal offices may be by party primary, party convention or by petition in accordance with the provisions of this chapter, the applicable provisions of the state election laws and the rules of municipal party organizations not in conflict therewith.

S.C. Code Ann. § 5-15-60.¹⁴ Consequently, contrary to the Appellants' assertions, South Carolina statutory law does allow a candidate for a partisan municipal

¹⁴ *See also*, S.C. Code Ann. § 5-15-110 (referencing "[c]andidates for municipal offices in any partisan ... general election *nominated by petition*"). (Emphasis added). This

election to be nominated by a political party by primary, convention or petition. The use of an open primary is *not* mandatory.

This same conclusion was reached by the district court in the March 30, 2011 order, where Judge Childs wrote: "State law actually allows municipalities to select one of three nonpartisan methods of nomination *or allow partisan nominations by primary, convention, or petition in accordance with State law.*" (J.A. 260). (Emphasis added). Judge Childs further concluded that "[s]tate law does not 'compel the Greenville County Republican Party' to conduct and fund municipal primary elections in Greenville County. Code section 7-13-15(A)(1) only provides that neither the State Election Commission nor the county election commissions are required to conduct municipal elections." (J.A. 259-260). After noting that partisan nominations for municipal offices could be made by primary, convention or petition, Judge Childs explained: "If the Greenville County Republican Party feels compelled to run and pay for its party's municipal primary, it is because it chooses to do so or is required to do so by action of the City of Greenville, and not because there is a State election law mandating such action." (J.A. 260).¹⁵ Given her prior reliance on *Miller II*, Judge Childs then concluded

further reflects that state statutory law allows for the nomination by petition for party candidates in municipal elections.

¹⁵ Following the issuance of the March 30, 2011 order, the Appellants amended their complaint to join the City of Greenville Municipal Election Commission as a party-defendant. The Appellants did not, however, cite any City Ordinance requiring that nomination be by

that "political parties are not required to nominate candidates by primary; that is true at the state, county, and municipal levels of government." (J.A. 260). Consequently, for the same reasons that the Appellants' facial challenge to the open primary was correctly rejected in non-municipal elections in accordance with the *Miller II* decision, the same result is required with respect to the nomination of candidates in partisan municipal elections.

V. South Carolina Code Section 7-11-30, and specifically the three-fourths vote requirement to nominate by convention, does not violate the Appellants' First Amendment right to freedom of association.

In its March 30, 2011 order, the district court addressed the Appellants' claim that Section 7-11-30, which allows for nomination by party convention, violated their First Amendment right to freedom of association due to the statute's requirement that three-fourths of the total membership of the convention affirmatively vote to utilize the nomination method. The district court, per Judge Childs, rejected the Appellants' argument that the statute impermissibly regulated parties' internal processes by dictating the vote needed for a party to select the convention nomination method. Judge Childs explained as follows:

primary or requiring the party to pay for any primary. Ultimately, the Appellants agreed to a consent order dismissing City of Greenville Municipal Election Commission from the action. (J.A. 367-372).

The voting requirement and the allocation of authority to the state committee over the nomination process of state legislative offices neither limit or abridge any party's ability to disseminate its views, nor does the statute affect how a party conducts its internal organizational affairs. Section 7-11-30 does not place any requirements on the party's candidate nomination process once the convention method is chosen. It only places limitations on how a party may first elect to participate in the convention method for nominating its candidate for the general election; the limitations merely affect the manner in which the State regulates candidate access to the general election ballot.

(J.A. 255). Judge Childs ultimately concluded that "the convention nomination statute does not have any direct affect on political parties' internal processes. It only indirectly impacts parties by placing requirements on the parties' efforts to utilize the convention method as an alternative to an open primary." (J.A. 255).

In their third issue on appeal, the Appellants challenges the district court's ruling that Section 7-11-30 is constitutional on its face.¹⁶ The Appellants argue in a conclusory fashion that the three-fourths vote requirement to nominate by convention "prevents the Greenville County Republican Party from opting out of the state-run open primary for county offices." *See*, Appellants' Opening Brief, p.

¹⁶ On June 13, 2013, Act No. 61 entitled the "Equal Access to the Ballot Act" was signed by the Governor. The Act amends S.C. Code Ann. § 7-11-30 in several particulars. Section 7-11-30 allows a party to nominate candidates for all offices by convention "if (1) there is a three-fourths vote of the total membership of the convention to use the convention nomination process, and (2) a majority of voters in the party's next primary election approve the use of the convention nomination process." S.C. Code Ann. § 7-11-30 (2013). The Act also repealed the requirement that the method of nomination for a party's candidates for state legislative offices be determined by the party's state committee. That requirement, however, has not been challenged by the Appellants on appeal.

41.

By way of historical perspective, Section 7-11-30 was first enacted in 1950 as Section 23-264 of the Code at that time. The Republican Party utilized the convention method to nominate candidates from at least 1962 to at least 1980. Indeed, the Republican Party Rules stated a *preference* for employing the convention method. (J.A. 96-113). For nearly twenty years, the Republican Party met the three-fourths membership requirement of Section 23-264 (now Section 7-11-30) to nominate its candidates. Only in 1982, did the Republican Party alter its stated preference for conventions to thereafter prefer primaries. (J.A. 115-116). Thus, the Appellants' argument that a three-fourths vote is unattainable because it is too high a percentage to meet and allows a minority of the delegates attending the convention to control the decision is simply inconsistent with the historical record.

As the district court found, with respect to a facial challenge, the Appellants "must show that there are no set of circumstances under which the law could be validly applied or, at least, that there is a realistic possibility that the law may inhibit the rights of third parties." (J.A. 259). See, *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) ("to prevail on a facial attack the plaintiff must demonstrate that the challenged law either could never be applied in a valid manner or that even though it may be validly applied to the

plaintiff and others, it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties"). The district court found that the Appellants "failed to make that showing" (J.A. 259), and the Appellants do not challenge that ruling. The Appellants have certainly not pointed to any evidence in the record that does make that showing. In fact, no evidence was presented to show that a Greenville County Republican Party convention has even taken a vote in the recent past to choose to nominate candidates for county offices by the convention method. Therefore, as Judge Childs noted, "the court has no basis upon which to determine that the vote requirement is impossible or impractical." (J.A. 259).

Giving the Appellants every benefit, the district court nonetheless concluded that "in the context of the extent of a possible infringement on Plaintiffs' constitutional rights, any burden that may be imposed on a party by the limitations contained in the convention nomination statute is only slight, at best." (J.A. 259). Yet, that "slight burden" is supported by a number of important state interests "including protecting and preserving the integrity of the nominating process, promoting fairness, increasing voter participation, and ensuring administrative efficiency." (J.A. 260-261). South Carolina, through its General Assembly, has historically recognized, and does today, a preference for the party primary. The State's decision to impose a three-fourths vote requirement to use a convention to

nominate in lieu of a primary simply demonstrates the State's desire to be assured that such decision is done with serious reflection and with a consensus of party members attending the convention. Thus, three-fourths vote requirement further promotes a stable political system and minimizes intra-party feuding or disputes.

The United States Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), is instructive in assessing the validity and sufficiency of the state interests asserted. The Supreme Court in *Timmons* held that "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Id.* "States also have a strong interest in the stability of their political systems, and may adopt measures that temper the destabilizing effects of party-splintering and excessive factionalism." *Timmons*, 520 U.S. at 366-67. *See also*, *Storer v. Brown*, 415 U.S. 724 (1974).

In sum, the Appellants have not shown the statutory requirement of a three-fourths vote to nominate by convention violated their First Amendment right to freedom of association.

VI. South Carolina Code Section 7-11-30, and specifically the three-fourths vote requirement to nominate by convention, does not violate the Appellants' equal protections rights.

The Appellants also argue that Section 7-11-30, which allows for nomination by party convention, violates equal protection. The Appellants contend that the requirement of a three-fourths vote to nominate by convention treats political parties differently from other organizations, both corporate and eleemosynary. The district court rejected this argument and ruled as follows:

Plaintiffs presuppose that political parties and private organizations share the same classification. However, the court has not found any constitutional requirement that States treat political organizations the same as other private organizations. The mere classification of a political party as such under South Carolina law entitles political parties to participation in and access to the election process in a way that is wholly denied to other private organizations. Political parties' involvement in the election process goes beyond mere public endorsement of a candidate, which implicates parties' free speech rights and extends to the State's actual inclusion of that endorsement on the general election ballot.

(J.A. 257).

The Equal Protection Clause "requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose. But this does not mean that persons in different circumstances cannot be treated differently under the law."

Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir 1995). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

In the case at bar, the Appellants have not shown that political parties and other organizations are similarly situated and cannot be treated differently under the law. As the district court concluded, "[u]ndoubtedly, South Carolina law treats political parties differently than other private entities, but this treatment is not the hallmark of the type of discrimination protected by the Equal Protection Clause." (J.A. 258). One political party is not treated differently from another. "To the extent that one party is required to meet the voting requirement in the convention nomination statute, all political parties are so required." (J.A. 258).

On appeal, the Appellants have not demonstrated any error in the district court's analysis. The Appellants have not cited one case that would even question the district court's reasoning. More particularly, the Appellants cite no case holding that a State must treat political parties the same as other private organizations. Quite simply, the Appellants' equal protection argument is flawed. Summary judgment was correctly granted on this issue.

VII. The Appellant Mitchell's equal protection rights are not violated by the fact that a municipal primary is conducted by a political party while a county primary is conducted by the County Election Commission.

In the fifth issue on appeal, the Appellant William Mitchell argues that the district court erred in granting summary judgment on his equal protection claim. Mitchell claims that voters in different parts of Greenville County vote in different types of primaries depending on where they live, and that somehow his equal protection rights are violated. More specifically, Mitchell contends that Section 7-13-15(A)(1) is facially unconstitutional because it exempts municipal elections from those elections conducted by the State Election Commission or a county election commission. This claim is quite frankly frivolous.

Mitchell, who lives within the City of Greenville, votes for Republican candidates for municipal offices in a primary conducted and paid for by the County Republican Party. Mitchell, however, claims that a voter who lives in the unincorporated portion of Greenville County is entitled to vote in a primary conducted by the Greenville County Election Commission. The reality is there is no unequal or differing treatment. A voter in the unincorporated areas of the County cannot vote for municipal offices. However, because the City of Greenville is also located in Greenville County, all voters within the County limits (including City voters) may vote for County offices. For County offices, the primary is the same regardless of whether the voter lives inside the city limits or

outside the city limits. That primary is conducted by the Greenville County Election Commission. Mitchell can vote in that primary just as any other voter in the county. Therefore, there is no unequal treatment.

The district court correctly rejected this claim finding that Mitchell presented "a distinction without substance." (J.A. 259). Judge Childs further explained: "There is no distinction between electors based on where they live that is imposed upon the elector by the State and, even if a distinction did exist as Plaintiffs contend, it would not rise to the level of the invidious, arbitrary, or irrational conduct typically found to offend the Equal Protection Clause." (J.A. 260).

In sum, the Appellant Mitchell has quite simply not shown that similarly situated persons are treated differently. A voter for county offices can vote in a county primary, and a voter for municipal offices can vote in a municipal primary. When he votes for county offices, Mitchell votes in a county primary conducted by the Greenville County Election Commission, and when he votes for municipal offices, Mitchell votes in a municipal primary conducted by the County Republican Party. Mitchell has not alleged or shown any irregularities. His vote is counted the same regardless of whether he votes in a county primary or a municipal primary. He has not shown that he was denied an "equal vote." There

is no unequal treatment and no violation of Mitchell's equal protection rights. This claim was properly dismissed.

CONCLUSION

Based on the foregoing discussion, the Appellees respectfully request that this Court affirm the Order of District Court Judge Mary G. Lewis, filed August 30, 2013, dismissing Appellants' action for lack of standing with respect to the as-applied challenge to the open primary. In addition, to the extent that this Court finds that the Appellants have standing to sue, the Appellants request that this Court affirm the Orders of District Court Judge Michelle Childs, filed March 30, 2011 and July 18, 2011.

The Appellees respectfully request oral argument.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

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Board of Registration, and Billy Way, Jr.*

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-AND-

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*Counsel for Appellees Wayne Griffin,
Reginald Griffin, Brett Bursey, Alan Olson,
The South Carolina Independence Party,
South Carolina Constitution Party,
Committee for a Unified Independent Party,
Inc. (d/b/a IndependentVoting.org), Terry
Alexander, Karl B. Allen, Jerry N. Govan, Jr.,
Chris Hart, Leon Howard, Joseph Jefferson,
Jr., John Richard C. King, David J. Mack, III,
Harold Mitchell, Jr., Joseph Neal, Anne
Parks, Ronnie Sabb, Robert Williams and the
Progressive Network Education Fund,
Incorporated*

March 31, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Samuel Harms, Esquire

s/ Andrew F. Lindemann

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2170Caption: Greenville County Republican v. Way**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

- ☒ this brief contains 10,787 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
- ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 [*identify word processing program*] in 14 pt. Times New Roman [*identify font size and type style*]; **or**
- ☐ this brief has been prepared in a monospaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) Andrew F. Lindemann

Attorney for Appellees

Dated: 03/31/14

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2170 Caption: Greenville Co. RP Exec. et al v. Greenville Co. Election et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Committee for a Unified Independent Party, Inc. (d/b/a IndependentVoting.org
(name of party/amicus)

who is an appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Harry M. Kresky

Date: Sept. 26, 2013

Counsel for: Committee for a Unified...

CERTIFICATE OF SERVICE

I certify that on Sept. 26, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Harry M. Kresky
(signature)

9/26/13
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2170 Caption: Greenville County Republican v. Greenville County Election Com

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Progressive Network Education Fund, Inc.
(name of party/amicus)

who is an appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Harry M. Kresky

Date: Sept. 27, 2013

Counsel for: The Progressive Network Ed...

CERTIFICATE OF SERVICE

I certify that on Sept. 27, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

(signature)

(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2170 Caption: Greenville County Republican v. Greenville County Election Com

Pursuant to FRAP 26.1 and Local Rule 26.1,

Wayne Griffin, Reginald Griffin, Bretty A. Bursey, Alan Olson, South Carolona Independnece Party,
(name of party/amicus)

South Caroloina Constitution Party. Terry Alexander, Karl B. Allen, Jerry N. Govan (see rider for otehrs)

who is appelles, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Hary M. Kresky

Date: October 7, 2013

Counsel for: appelles-intervenors

CERTIFICATE OF SERVICE

I certify that on 10/7/13 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Harry M. Kresky
(signature)

10/7/13
(date)

RIDER TO CORPORATE DISCLOSURE)

(Additional parties to which disclosure applies)

Chris Hart, Leon Howard, Joseph Jefferson, Jr. , John Richard C. King , David J.Mack, III, Harold Mitchell, Jr. , Joseph Neal, Anne Parks, Ronnie Sabb, Robert Williams .

Note: all were defendants-intervenors below.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2170 Caption: Greenville Rep Party Exec Comm v. Greenville Cnty Election Comm

Pursuant to FRAP 26.1 and Local Rule 26.1,

Greenville County Board of Registration
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Andrew F. Lindemann

Date: 10-08-13

Counsel for: Appellee G'ville. Co. Bd. of Reg.

CERTIFICATE OF SERVICE

I certify that on 10-08-13 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Samuel D. III: samu

s/ Andrew F. Lindemann
(signature)

10-08-13
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2170 Caption: Greenville Rep Party Exec Comm v. Greenville Cnty Election Comm

Pursuant to FRAP 26.1 and Local Rule 26.1,

Greenville County Election Commission
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Andrew F. Lindemann

Date: 10-08-13

Counsel for: Appellee G'ville Co. Election Comm.

CERTIFICATE OF SERVICE

I certify that on 10-08-13 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Andrew F. Lindemann
(signature)

10-0813
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2170 Caption: Greenville Rep Party Exec Comm v. Greenville Cnty Election Comm

Pursuant to FRAP 26.1 and Local Rule 26.1,

Billy Way, Jr., in his official capacity as the Chairman of the South Carolina State Election Commission
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Andrew F. Lindemann

Date: 10-08-13

Counsel for: Appellee Billy Way, Jr.

CERTIFICATE OF SERVICE

I certify that on 10-08-13 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Andrew F. Lindemann
(signature)

10-08-13
(date)