
In the Supreme Court of the United States

RAVALLI COUNTY REPUBLICAN CENTRAL COMMITTEE, GALLATIN COUNTY REPUBLICAN CENTRAL COMMITTEE, SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, DAWSON COUNTY REPUBLICAN CENTRAL COMMITTEE, RICHLAND COUNTY REPUBLICAN CENTRAL COMMITTEE, CARBON COUNTY REPUBLICAN CENTRAL COMMITTEE, FLATHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE, MADISON COUNTY REPUBLICAN CENTRAL COMMITTEE, and MONTANA REPUBLICAN PARTY,
Applicants,

v.

LINDA MCCULLOCH, Secretary of State of Montana, REGINA PLETTENBERG, Ravalli County Election Administrator, CHARLOTTE MILLS, Gallatin County Election Administrator, BOBBI CHRISTENSEN, Sanders County Election Administrator, SHIRLEY KREIMAN, Dawson County Election Administrator, PAULINE MISHLER, Stillwater County Election Administrator, STEPHANIE VERHASSELT, Richland County Election Administrator, JUDY CHRISTENSEN, Carbon County Election Administrator; PAULA ROBINSON, Flathead County Election Administrator, PEGGY STEMLER, Madison County Election Administrator; KIMBERLY YARLOTT, Big Horn County Election Administrator,
Respondents.

APPLICANTS' REPLY BRIEF

**Directed to the Honorable Anthony Kennedy,
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit**

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Dated: March 22, 2016

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. This Court’s Decisions in *La Follette* and *Jones* Are Fatal to the
State’s Arguments 1

II. There is More Than Adequate Time to Cure the Defects in
Montana’s June 2016 Primary 2

III. The Party Has Diligently Sought Relief..... 5

CONCLUSION..... 7

INTRODUCTION

The Montana Republican Party respectfully submits the following short reply to the State's response brief.

ARGUMENT

I. This Court's Decisions in *La Follette* and *Jones* Are Fatal to the State's Arguments

The State argues that it may require the determination of Party nominees by state-run primaries. State's Resp., p. 21. While Montana may "require parties to use the primary format for selecting their nominee," however, it "must act within limits imposed by the Constitution." *California Democratic Party v. Jones*, 530 U.S. 567, 572, 573 (2000). This includes the First Amendment's right of association, a right that "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Id.* at 574, quoting *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

This Court held that forcing a party to select its presidential nominee in an open primary constituted a "substantial intrusion" into its associational rights – and the Court did so without requiring empirical evidence. *La Follette*, 450 U.S. at 124 n.27; *id.* at 126. The State fails to offer any substantive explanation as to how the burden Montana's open primary imposes on the Montana Republican Party's associational right to select its congressional and state nominees is any less than the burden Wisconsin's open primary imposed on the National Democratic Party.

In both types of cases, forced association in open primaries substantially burdens a party's First Amendment associational rights as a matter of law.

The State contends that voters affiliate with the Republican Party when they choose the Party's ballot in an open primary. State's Resp., p. 17. It relies on a portion of Justice Powell's dissent in *La Follette*: "the act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party." *Jones*, 530 U.S. at 577, n.8, quoting *La Follette*, 460 U.S. at 130 (Powell, J., dissenting).

As Justice Powell noted in the following sentence of his dissent, however, "[t]he real issue in this case is whether the Party has the right to decide that only *publicly* affiliated voters may participate." *La Follette*, 460 U.S. at 130 n.2 (emphasis in original). The *La Follette* majority held that a party has that right as part of its right to identify its members. *La Follette*, 460 U.S. at 123–24. The State's contention that voters become "Republicans" when they anonymously cast Republican ballots begs the question of how the Party can exercise its constitutional right to identify those persons. When votes are cast by secret ballot, as they are in Montana and throughout the nation, it is impossible for a party to identify such persons. This characteristic of open primaries renders them inherently unconstitutional.

II. There is More Than Adequate Time to Cure the Defects in Montana's June 2016 Primary

The State's incorrectly claims that it lacks time to cure the defects in its

primary system. State’s Resp., pp. 23-24. There are at least three options, however, that could be promptly implemented in response to an injunction issued by this Court: (1) a nonpartisan blanket primary, (2) a non–mandatory open primary or (3) a closed primary. Each option is detailed below.

1) Nonpartisan Blanket Primary

A nonpartisan blanket primary, sometimes referred to as a “top-two” primary, uses a ballot that includes the names of all candidates for each office. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 447 (2008). The two candidates garnering the most votes for each office advance to the general election regardless of their party affiliation. *Id.* at 447-48.

This system would protect the Montana Republican Party’s right to select its own nominee by whatever method it desires because “[p]rimary voters are not choosing a party’s nominee.” *Jones*, 530 U.S. at 586. By contrast, Montana’s current open primary removes from the Party the authority to bestow Party nominations and places it in the hands of nonmembers. Mont. Code Ann. § 13-10-601(1). A nonpartisan blanket primary would enable Montana to “ensure more choice, greater participation, increased ‘privacy’ and a sense of ‘fairness’ – all without severely burdening a political party’s First Amendment right of association.” *Jones*, 530 U.S. at 586.¹

¹ In 2013, the Montana Legislature approved a ballot initiative for a nonpartisan blanket primary, but the Montana Supreme Court removed it from the ballot due to technical deficiencies. *MEA-MFT v. State of Montana*, 323 P.3d 198, 202 (Mont. 2014).

No party registration is required in a nonpartisan blanket primary, thereby alleviating the State's alleged concerns about the feasibility of such registration. As the District Court correctly noted, Washington state currently conducts nonpartisan blanket primaries without registering voters' party affiliation. App. 28a, citing Wash. Rev. Code Ann. § 29A.08.166. There is no reason why Montana couldn't do the same.

2) Open Primary with Opt-Out Provision

Another option available to the State is to maintain its open primary system while allowing political parties to opt out and select their nominees by convention, thereby eliminating *forced* association between a political party and nonmembers. This would not require any registration of voters' party affiliation. Other states such as Virginia have preserved their open primary system in this manner. See, e.g., Va. Code Ann. § 24.2-509(A).

Montana election law, as well as the bylaws of Montana's registered political parties, contemplate reliance upon party conventions to replace nominees who die or withdraw after a primary election. Mont. Code Ann. § 13-10-327.² These procedures could be utilized by the Montana Republican Party to select its nominees in this election cycle.

² Indeed, Montana Democrats successfully used a convention in August 2014 to replace the party's original U.S. Senate nominee, who withdrew shortly after winning the primary in June 2014. See <[washingtonpost.com/news/post-politics/wp/2014/08/16/montana-democrats-will-pick-a-new-senate-candidate-today-heres-how-it-all-works/](http://www.washingtonpost.com/news/post-politics/wp/2014/08/16/montana-democrats-will-pick-a-new-senate-candidate-today-heres-how-it-all-works/)>, accessed on March 22, 2016.

3) Closed Primary

Party registration for a closed primary could easily be conducted at polling stations on Election Day by asking voters desiring a Republican ballot to sign a simple registration form identifying themselves as Republicans. These forms could also be included in mailings by the State to absentee voters with instructions to sign and return the forms if they choose to cast a Republican ballot in the upcoming primary election.

Any of these alternatives could be promptly implemented by (1) the State acting either administratively or through a special session of the Legislature, (2) the State and the Party executing a consent decree approved by the District Court or (3) additional injunctive relief provided by the District Court or this Court should the State refuse to take any corrective action. In short, injunctive relief from this Court will not prevent the State from providing the Montana Republican Party a workable and constitutional method by which to select Party nominees.

III. The Party Has Diligently Sought Relief

The State criticizes the Party for its “long delay” in seeking injunctive relief. State’s Resp., p. 2. Seeking injunctive relief from the District Court any earlier than the Party did, however, would have been futile. The Party initially filed a motion for preliminary injunction in September 2014. D.C. Doc. 3 (filed 9/10/2014). In opposing that motion, the State argued that the Party filed too early because it would not be harmed “until the next regularly scheduled partisan primary election,

in early June of 2016, or more than a year and a half from now.” Dist. Ct. Doc. 19, (filed 10/14/2014), p.16. The District Court accepted this argument and denied the Party’s motion in January 2015 because “the next primary election in which non-Republicans could vote for Republican precinct committeemen will not take place until June 2016” and thus there was no “impending irreparable harm to Plaintiffs.” D.C. Doc. No. 40, pp. 7-8 (filed 1/8/2015).

Under these circumstances, the Party did not unduly delay in waiting until August 2015 to file a subsequent preliminary injunction motion. Indeed, in response to that motion, the State again argued that the Party’s actions were premature. D.C. Doc. No. 90, (filed 9/9/2015), pp. 3-4 (“The next primary election will not occur until June of 2016, some nine months from now” and therefore “[a]n immediate injunction ... is unnecessary to protect Plaintiffs’ asserted rights.”). For the State to now claim that the Party waited too long to file its second preliminary injunction motion is disingenuous. Two days after the District Court denied that motion on December 14, 2015, the Party filed a notice of appeal. D.C. Doc. No. 115 (filed 12/16/2015). It then filed a motion the following day requesting that the Ninth Circuit expedite the appeal. 9th Cir. Dkt No. 3 (filed 12/17/2015). The State objected and disagreed that “an expedited appeal is necessary to avoid irreparable harm,” and “specifically disagree[d] that an opinion from [the Ninth Circuit] must be issued prior to March 14, 2016.” 9th Cir. Dkt No. 6-1 (filed 12/17/2015).

In short, the Party has moved heaven and earth in attempting to obtain relief prior to Montana’s June 2016 primary, while the State has resisted those efforts.

The State's complaints about delays are not well taken.

CONCLUSION

For all of the foregoing reasons, the Montana Republican Party respectfully requests this Court issue an injunction pending appeal prohibiting Respondents from applying Montana's open primary system to the Party.

DATED: March 22, 2016

Respectfully submitted,

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Respondents.

PROOF OF SERVICE

I, Matthew G. Monforton, declare that on March 22, 2016, I served the enclosed APPLICANTS' REPLY BRIEF, via U.S. Mail and electronic mail to the following:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 22, 2016

/s/ Matthew G. Monforton
Declarant