

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FILED

JAN 9 1975

C. FOSTER JR.
[Signature]

JUANITA WHITE, LINDA GRAY ELMORE,)
WASHINGTON BADGER, WILLIAM JASPER)
MYERS, JAMES P. DUNBAR, JR.,)
individually and as Chairman of the)
Allendale County United Citizens)
Party and successor in interest of)
William Maner; GEORGE M. JEFFERSON)
and JOHN ROY HARPER, II, individually)
and as Chairman of the United Citizens)
Party of S.C., for themselves and)
for others similarly situated,)

Plaintiffs,)

vs)

Civil Action 74-1709

JOHN C. WEST, Governor and Chief Magistrate)
of South Carolina, JAMES B. ELLISOR, DONALD)
F. FOWLER, as Chairman of the S. C. Democratic)
Party, THOMAS O. LAWTON, JR., as Chairman of)
the Allendale County Democratic Party, WALTER)
GRIFFIN, JR., LUKE N. BROWN, JR., and)
GENEVIEVE GAHAGAN,)

Defendants.)

O R D E R

This action was brought to test the constitutionality under the First and Fourteenth Amendments to the United States Constitution of a section of the South Carolina Election Law, 23-400.72 of the Code of Laws of South Carolina, 1962, as amended. (See Finding of Fact No. 1 attached hereto for the language of this statute.)

The plaintiffs Juanita White, Linda Gray Elmore, Washington Badger and William Jasper Myers were candidates for the House of Representatives, Magistrate and the Board of Directors of Allendale County respectively, in the primary held by the South Carolina Democratic Party on July 16, 1974. Prior to qualifying as candidates in said primary, each plaintiff signed and filed the pledge required by §23-400.72 to abide by the results of the primary, "and I authorize the issuance of an injunction upon ex parte application by the party chairman, as provided by law, should I violate this

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pledge by offering or campaigning in the ensuing general election for election to this office or any other office for which a nominee has been elected in said party primary election, unless the nominee for such office has become deceased or otherwise disqualified for election in said ensuing general election."

Each plaintiff was defeated in the primary, and thereafter each was certified as a nominee in the general election of November 1974 by the United Citizens Party.¹

On November 10, 1974, defendant Donald L. Fowler, acting as Chairman of the South Carolina Democratic Party, instituted an action against Juanita White in the Court of Common Pleas for Jasper County, South Carolina, and Thomas O. Lawton, Jr., acting as Chairman of the Allendale Democratic Party, instituted an action in the Court of Common Pleas for that county against Linda Gray Elmore, Washington Badger and William Jasper Myers to enjoin them from campaigning or offering for election to office in the general election of 1974, said suit sought to enforce the pledge each candidate had signed when filing in the preceding Democratic Primary. James P. Dunbar, Jr. was named a defendant in the state action as Chairman of the United Citizens Party for Allendale County, Luke N. Brown, Jr., Genevieve Gahagan and Walter Griffin, Jr. were named as the respective Chairmen of the Commissioners of Election of Jasper, Beaufort and Allendale Counties.²

¹ Political parties certified by the Secretary of State of South Carolina to nominate candidates to public office are: The American Party, The Democratic Party, The Independent Party, The Republican Party and The United Citizens Party.

² Juanita White was seeking election to House Seat No. 122, which contains precincts in both Jasper and Beaufort Counties.

On October 11, 1974, these actions were removed to the United States District Court for the District of South Carolina and were promptly remanded to the State Court on October 16, 1974, where they were consolidated and heard by Honorable Clarence E. Singletary, Presiding Judge of the Fourteenth Judicial Circuit of South Carolina. In an Order of October 20, 1974 Judge Singletary enjoined White, Badger, Myers and Elmore from offering or campaigning for office in the general election, and further enjoined Griffin, Gahagan and Brown from placing the names of these persons upon the ballot.

In the state action White, Elmore, Badger and Myers defended themselves by contending that §23-400.72 violated:

"The First, Ninth, Thirteenth, Fourteenth Amendments . . . because the classification established therein discriminates against candidates defeated in a party primary and serves no rational state interest. Further, such classification unconstitutionally denies primary candidates equal protection of the law and unnecessarily burdens the right of the citizenry to vote and seek office in that it violates the right of the people to peaceably assemble and petition the government for redress of grievances as guaranteed by the First Amendment to the Constitution of the United States"

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No appeal was taken to the Supreme Court of South Carolina from the Order of Judge Singletary. In the general election Badger was elected to the Board of Directors of Allendale County by a write-in vote. White, Myers and Elmore received a number of write-in votes, but not sufficient for election. Since the present plaintiffs White, Badger, Elmore, Myers and Dunbar were parties to the State Court proceeding in which the same constitutional issues were raised, and none of these parties appealed the State Court decision or in any way reserved the right to relitigate their federal claim in this court in the event of an unfavorable decision by the State Court, they are barred from now doing so by the principle of res judicata. See 28 U.S.C.A. 1738 and decisions thereunder.

The present defendants contend that plaintiff John Roy Harper, II, suing in his capacity as Chairman of United Citizens Party of South Carolina should also be barred as he has no interest in the candidacies of his co-plaintiffs, and in his position as chairman of the party he "inherits the estoppel of his county chairman Mr. Dunbar". This Court cannot follow such an argument. Section 23-400.72 confers certain duties, powers and responsibilities upon the state chairman of each recognized political party, and Harper, as state chairman of one of these parties, has standing to challenge a section of the law that requires him to take action against a defeated primary candidate, who offers or campaigns for office in the general election. This is true even though the United Citizens Party has not yet used the primary as a method of nominating candidates. In the future it could adopt the primary rather than the convention method of nomination and is, therefore, affected by the provisions of 23-400.72. The plaintiffs rely upon the decision of this Court in Toporek v. South Carolina State Election Commission (Three Judge Court, Dist. of S.C.) 362 F. Supp. 613 (1973) and particularly the statement on page 618:

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"Another obstacle raised to Toporek's candidacy was Section 2 of Act 1354 hereinabove set forth, which Act specifically states that no candidate defeated in a party primary shall have his name placed on the general election ballot by 'petition or otherwise'. (Presumably, 'otherwise' meaning by convention). However, such statutory prohibition does not prevent one who is defeated in a convention contest from offering as a petition candidate in an ensuing general election, nor does it prevent one who is defeated in an earlier convention election from participating in a later primary. If there be a valid and rational state interest in prohibiting defeated but recalcitrant candidates from offering in a later general election, this interest is certainly not well served by such irrational treating of like things differently. It is clear to this court that the classification established by Section 2 of Act 1354 discriminates against candidates defeated in a party primary and serves no rational state interest. Since such classification unconstitutionally denies primary candidates equal protection of the law, this provision of Section 2 of Act 1354 is hereby declared invalid and the defendant's reliance thereon is rejected."

In Toporek there was also an attack upon the provisions of the South Carolina law requiring nomination of candidates five months prior to the general election and setting filing dates for candidates nominated other than by party primary. Toporek was decided without the extensive findings of fact which have been available to the Court in the present action, and Toporek was prior to the recent opinions in Storer v. Brown, 415 U.S. 724 and American Party of Texas v. White, 415 U.S. 767 (1974), which have helped to clarify the rights of the States to reasonably regulate elections.

The statement from Toporek that like things were being treated differently is not supported by the facts now available to this Court. Any likeness between nomination by primary, convention or petition is limited to the fact that each is a process by which a candidate may obtain ballot position. The procedures required by each type of nomination and the effect upon the public are vastly different. If all parties were required to nominate by primary, the most expensive form, not only to the candidate but to the party, it would prevent the creation and growth of new or minority parties in the state. See Finding of Facts 11 through 17, 23 through 28.

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In Toporek this Court raised a doubt as to whether the state has any legitimate interest in keeping a defeated primary candidate from appearing on the general election ballot. This has been clearly answered in Storer, which approved a California election system, much more restrictive than that now under attack in the present action. Justice White speaking for the Court at page 730 stated:

"Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualification of voters, and the selection and qualification of candidates.

It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree', Dunn v. Blumstein. *supra*. at page 348, very much a matter of

the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification."

The state interest in reasonably regulating and simplifying the election process is also supported by the language in Bullock v. Carter, 405 U.S. 134 (1972) at page 145:

"The Court has recognized that a state has a legitimate interest in regulating the number of candidates on the ballot. Jenness v. Fortson, 403 U.S. at 442; Williams v. Rhodes, 393 U.S., at 32. In so doing, the state understandably and properly seeks to prevent clogging of its election machinery, avoid voter confusion and assure that the winner is the choice of the majority, or at least a strong plurality of those voting, without the expense and burden of run-off elections. Although we have no way of gauging candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the state in avoiding overcrowded ballots. Moreover, a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."

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The California system under attack in Storer disqualified any candidate seeking to run in a party primary if he had been affiliated with any other political party within 12 months immediately prior to his filing as a candidate. It also prevented a candidate who had been defeated in the party primary from being nominated as an independent or a candidate for any other party and prevented any person from filing nomination papers for more than one office in the same election or for nomination by a party and as an independent for the same office.

The Storer court found the requirement that an independent candidate not be affiliated with a political party for a year prior to the primary was expressive of the general state policy to maintain the integrity of the various routes to the ballot and involved no discrimination against independents.

In describing the role of the primary the Court stated
at page 735:

"The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively."

The state's interest in the election process is further explained at 736:

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"A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison). It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. Nor do we have reason for concluding that the device California chose, §6830(d) (Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals. We indicated in Rosario³, the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot."

It is obvious from a review of §23-400.72 that its purpose is to prevent a primary candidate who has appealed to the entire electorate in seeking his party's nomination and lost to again appeal

³ Rosario v. Rockefeller, 410 U.S. 752 (1973)

to the entire electorate as a candidate in the general election. This effort to protect the integrity of the ballot is commendable, and necessary to prevent confusion. It is in keeping with the language of Storer "to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified." The findings of fact clearly establish that such confusion will not result with defeated convention candidates.

There is no discrimination in the application of this section since the state party chairman or the county party chairman bringing the suit against the defeated primary candidate has no discretion in deciding whether the suit shall be brought. The language of the section " . . . the county chairman of the party which held such primary . . . shall forthwith institute an action in a court of competent jurisdiction for an order enjoining such person from offering or campaigning in the general election, and the Court is hereby empowered upon proof of such facts to issue such order." (emphasis added)

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The provision is not a restriction upon the rights of the voters, since they may still write in the name of the defeated candidate if they so desire. Plaintiff Badger was actually elected to office by a write-in vote after being enjoined from campaigning or offering for such position and was not prevented from taking office and serving.

Plaintiffs argue that Redfearn v. Board of State Canvassers, 234 S.C. 113, 107 EE 2d 10 (1959) found the candidate's pledge to abide by the results of the primary and support the candidate's nominated in the general election to be unenforceable. Redfearn was decided prior to the enactment of §23-400.72 which contains the new language of the candidate's pledge authorizing the issuance of an injunction upon application by the party chairman if the defeated candidate violates his pledge by offering or campaigning for office in the ensuing general election. Redfearn involved an

action by a candidate, who has won the primary, but was defeated by a write-in candidate in the general election, said write-in candidate having been defeated by Redfearn in the primary. In the present action plaintiff Washington Badger was also defeated in the primary election and won as a write-in candidate in the general election after being enjoined from offering or campaigning. Badger has taken his office and no issue has been raised by defendants that he was illegally elected. The party chairman took the action required by 23-400.72 and obtained an injunction against offering and campaigning in the general election, but this did not prevent Badger's election. It is obvious that the code section in dispute does not operate as a bar to a person being elected to office.

The right to offer for election is not unrestricted. Minimum age, citizenship and residency requirements for President⁴, Senator⁵ and Representative⁶ all appear in the Constitution, together with a place of birth requirement for the President. Residency requirements for candidates are common and Storer approved periods of party affiliation or disaffiliation as a prerequisite to candidacy.

Plaintiffs contend that they have been denied the constitutional rights to peaceably assemble and to petition for redress of grievances. The right to petition for redress of grievances does not include the right of a defeated primary candidate to have his name appear on the general election ballot. If plaintiffs consider the election process as a part of the constitutional right to petition for redress of grievances, they had the alternate route to ballot position through nomination by petition rather than by primary.

⁴ Art 2, Sec. 1, Clause 4.

⁵ Art. 1, Sec. 3, Clause 3.

⁶ Art. 1, Sec. 2, Clause 2.

The argument as to freedom of association or assembly is answered in Rosario v. Rockefeller, supra, at page 758. Rosario involved a section of the New York election law which required voters to enroll in a political party at least 30 days before a general election in order to be eligible to vote in the party primary election held the following year. This meant voters were required to enroll in such political party at least by early October (the general election usually being in November) in order to vote in the primary the following June. Restrictions on voters are always examined more carefully than restrictions on candidates, and the Supreme Court found that this provision was not a ban on freedom of association but merely a time limitation as to when a voter had to act in order to participate in his chosen party's next primary. Similar reasoning and a close examination of the South Carolina election law clearly establishes that it does not violate the constitutional rights of freedom of association, freedom of assembly and the right to petition for redress of grievances.

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The plaintiff candidates freely and voluntarily chose to seek nomination by primary and in so doing they signed the pledge required and subjected themselves to the provisions of 23-400.72. Having used the Democratic Party primary they should not complain that it has certain restrictions preventing defeated primary candidates from running against successful primary candidates. Even though plaintiffs demonstrated a lack of loyalty to the party conducting the primary, restrictions on voters and candidates for the purpose of encouraging party loyalty were approved in Rosario and Storer.

Certainly, the plaintiffs do not have a constitutional right to run in the general election, after they have been defeated in the primary, or to run twice for the same office in the same year.

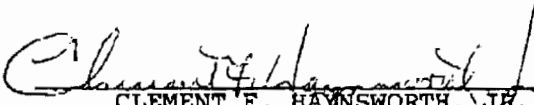
Plaintiff argues the power granted to chairman of political parties, which hold primary elections, to prevent defeated candidates from campaigning or offering in the ensuing general election is an unconstitutional delegation of state power to a private citizen. The Court cannot follow this reasoning. It is both logical and reasonable for the legislature to require the recognized political parties through their county and state chairman to enforce the provisions of 23-400.72 in a commendable effort to avoid confusion, limit the number of candidates appearing on the general election ballot and preserve the integrity of the election process.

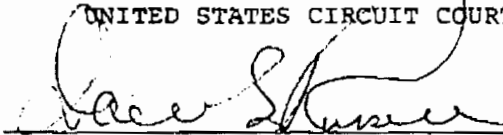
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The Democratic primary in South Carolina has always been open to any citizen of legal age who files his notice as a candidate affiliating with the party and agrees to abide by the results thereof. The State has a right to conduct a meaningful and orderly election process and the primary is a part of such process. The section of the election law under attack is a valid effort by the State to achieve this end, and the fact that it applies only to defeated primary candidates does not make it unconstitutional, since primary nomination is quite different from convention or petition nomination. The state has the right to adopt an effective way of keeping defeated primary candidates off the general election ballot. This has been done by the duty imposed upon the party chairman by §23-400.72 to seek an injunction.

This decision modifies Toporek only as to that portion relating to the right to seek an injunction against defeated primary candidates. Having found the provisions of §23-400.72 which require the party chairman to enjoin defeated primary candidates from campaigning or offering for office in the general election to be constitutional, the Court orders that this matter be and the same is hereby dismissed.

AND IT IS SO ORDERED.


CLEMENT F. HAYNSWORTH, JR.
CHIEF JUDGE
UNITED STATES CIRCUIT COURT


DONALD S. RUSSELL
UNITED STATES CIRCUIT JUDGE


ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

January 9th, 1976
Columbia, South Carolina