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

The Greenville County Republican Party Executive Committee, Betty S. Poe, in her official capacity as the Chairman of the Greenville County Republican Party, and William "Billy" Mitchell, Plaintiffs, v. Billy Way, Jr., in his official capacity as the Chairman of the South Carolina State Election Commission, the Greenville County Election Commission and the Greenville County Board of Registration, Defendants, and, Wayne Griffin, Reginald Griffin, Brett Bursey, Alan Olson, the South Carolina Independence Party, the South Carolina Constitution Party, the Progressive Network Education Fund, Inc., the Columbia Tea Party, Inc., the 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 and Robert Williams, Defendant-Intervenors.	Civil Action No.: 6:10-1407-MGL **OPINION AND ORDER**

This case involves challenges to several election laws of the State of South Carolina brought by current Plaintiffs the Greenville County Republican Party Executive Committee, Betty S. Poe, in her official capacity as the Chairman of the Greenville County Republican Party, and William "Billy" Mitchell ("Plaintiffs") against current Defendants the Greenville County Election

Commission, the Greenville County Board of Registration, and Billy Way, Jr., in his official capacity as Chairman of the South Carolina State Election Commission ("Defendants"). Also party to this action are Wayne Griffin, Reginald Griffin, Brett Bursey, Alan Olson, South Carolina Independence Party, South Carolina Constitution Party, Progressive Network Education Fund, Inc., Columbia Tea Party Inc., 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 Saab, and Robert Williams ("Defendant-Intervenors"), various organizations and self-identified independent voters, who moved to intervene and participate in this case based on their interest in the outcome of this matter. (ECF No. 41.) Before the court is Defendant-Intervenors' Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(c) and 56 and to Preclude Testimony by Plaintiffs' Expert Witnesses (ECF No. 139) and Motion for Summary Judgment of Defendant Billy Way, Jr. (ECF No. 141).[1] For the reasons set forth in this order, the court grants the relief requested in the pending motions (ECF Nos. 139, 141, & 142) and dismisses Plaintiffs' action for lack of standing.

FACTUAL AND PROCEDURAL BACKGROUND

The Greenville County Republican Party Executive Committee, the South Carolina Republican Party, Patrick B. Haddon, in his official capacity as the Chairman of the Greenville

[1]Defendants Greenville County Election Commission and Greenville County Board of Registration also moved for summary judgment adopting arguments made by Defendant Way and Defendant-Intervenors, particularly concerning the remaining Plaintiffs' lack of standing. (ECF No. 142-1 at 7.) Defendants Greenville County Election Commission and Greenville County Board of Registration also refute any liability under a municipal liability theory in their motion for summary judgment. (ECF No. 142-1.)

County Republican Party,[2] and William "Billy" Mitchell ("original Plaintiffs") brought this civil action on June 1, 2010, requesting declaratory judgment and permanent injunctive relief against the State of South Carolina and John H. Hudgens, III, in his official capacity as the Chairman of the South Carolina State Election Commission ("original Defendants") for alleged violations of the original Plaintiffs' First and Fourteenth Amendment rights of free association and the Equal Protection clause of the U.S. Constitution. (ECF No. 1 at 1.) The original Plaintiffs also sought an order from this court directing the original Defendants to comply with a certain South Carolina state election statute as it related to South Carolina's open primary system and other perceived restrictions to the candidate nomination process.

On February 10, 2011, the original Defendants and original Plaintiffs filed cross-motions for summary judgment only as to the original Plaintiffs' facial constitutional challenge[3] to the various South Carolina state election statutes. (ECF Nos. 28 & 30.) Defendant State of South Carolina filed a separate motion seeking dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the complaint was barred by the doctrines of sovereign immunity and Eleventh Amendment immunity. (ECF No. 29.) In an order dated March 30, 2011, the Honorable J. Michelle Childs denied the original Plaintiffs' Motion for Summary Judgment (ECF No. 28), granted the original Defendants' Motion for Summary Judgment (ECF No. 30), and denied Defendant South Carolina's Motion to Dismiss without prejudice (ECF No. 29). (ECF No. 54.) Specifically, Judge Childs found that: 1) South Carolina's open primary laws are not facially unconstitutional and do

[2]The court entered a consent order substituting Betty S. Poe as the newly elected Chairman of the Greenville County Republican Party on May 20, 2011. (ECF No. 60.)

[3]The court did not address the merits of any as-applied constitutional challenges to the statutes.

not violate political parties' freedom of association given the availability of other nomination methods (ECF No. 54 at 16); 2) South Carolina's convention nomination statute, on its face, does not burden the original Plaintiffs' First Amendment right to freedom of association because it does not have any direct impact on political parties' internal processes (ECF No. 54 at 17); 3) the original Plaintiffs' equal protection challenges to the statutes fail as a matter of law as political parties are not an inherently suspect class nor could the court find any discrimination or other violation of equal protection (ECF No. 54 at 19-22); and 4) the original Defendants offered several state interests in justification of the challenged statutes which serve as legitimate state interests (ECF No. 54 at 24.). The court denied the original Plaintiffs' Motion to Alter or Amend Judgment (ECF No. 56) but did clarify its March 30, 2011 order to reiterate that the ruling was limited to a facial challenge to the applicable statutes and that the court found that there were issues of material fact remaining as to Plaintiffs' as-applied challenge to the election statutes. (ECF No. 66.) The parties thus proceeded on the original Plaintiffs' as-applied challenge to the statutes.

On January 6, 2012, the original Plaintiffs amended the complaint to add the City of Greenville Municipal Election Commission as a party defendant and also dropped the State of South Carolina as a party defendant. (ECF No. 75.) By consent of the parties, this court granted Defendants City of Greenville Municipal Election Commission's Motion to Dismiss. (ECF No. 108.) On June 7, 2013, the South Carolina Republican Party dismissed its claims in this matter without prejudice. (ECF No. 137.) Thus, the current Plaintiffs in this matter are the Greenville County Republican Party Executive Committee, Betty S. Poe, in her official capacity as the Chairman of the Greenville County Republican Party, and William "Billy" Mitchell. Current Defendants in this action are John H. Hudgens, III, in his official capacity as the Chairman of the

South Carolina State Election Commission, the Greenville County Election Commission and Greenville County Board of Registration. (ECF No. 75.)

Plaintiffs' complaint states that Plaintiff Greenville County Republican Party Executive Committee is a "political organization formed pursuant to the Rules of the South Carolina Republican Party and the Greenville County Republican Party" with certain rights, duties, and authority conferred upon it by South Carolina Code Annotated Section 7-1-10, *et seq*. (ECF No. 75 at 4-5.) Plaintiff Betty S. Poe is a resident and citizen of Greenville County, South Carolina and is the current Chairman of the Greenville County Republican Party. (ECF No. 75 at 5.) Plaintiff Poe brings this action as "county chairman," based on her official capacity as the Chairman of the Greenville County Republican Party. (ECF No. 75 at 5.) Plaintiff William "Billy" Mitchell is a resident and citizen of Greenville County, South Carolina. (ECF No. 75 at 5.)

Plaintiffs' first cause of action is for violation of Plaintiffs' right to free association under the First Amendment to the United States Constitution in conjunction with the Fourteenth Amendment pertaining to South Carolina Code Annotated Sections 7-11-30, 7-13-15, 7-9-20, 7-5-420, 7-5-610, 7-5-630, 7-15-320, 7-5-340, 7-9-80 and 7-9-100 ("Code Sections") and City of Greenville Ordinances, Chapter 14, Article I, Sec. 14-8(b) and Chapter 14, Article I, Sec. 14-10 ("City Ordinances"). Plaintiffs seek declaratory judgment and injunctive relief in the form of an order enjoining Defendants from enforcing the referenced Code Sections and City Ordinances which they maintain are a severe burden on Plaintiffs' right of free association. Plaintiffs also seek monetary damages from the Greenville County Election Commission. (ECF No. 75 at 23-24.) Plaintiffs' second cause of action asserts a violation of Plaintiffs' right of equal protection under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution pertaining to the

Code Sections and City Ordinances. (ECF No. 75 at 24-26.) Plaintiffs contend that the Code Sections and City Ordinances discriminate between the parties and other corporations, partnerships, and non-profit organizations which are allowed to pass a motion or make decisions with a majority vote or by executive committee as opposed to the three-fourths supermajority vote required to pass a motion to nominate by convention. (ECF No. 75 at 25.) Plaintiffs also contend that the Code Sections and City Ordinances discriminate between Greenville County registered voters who can only vote in an open primary conducted by the government and Greenville city registered voters who can vote in a municipal primary conducted by the Greenville County Republican Party. (ECF No. 75 at 25.) Plaintiffs seek declaratory judgment and injunctive relief in the form of an order enjoining Defendants from enforcing the referenced Code Sections and City Ordinances. Plaintiffs also seek monetary damages from the Greenville County Election Commission. (ECF No. 75 at 26.) Plaintiffs' third cause of action seeks permanent injunctive relief enjoining Defendants from enforcing the Code Sections and City Ordinances in a manner which violates their First and Fourth Amendment rights of free association and equal protection of the laws by allowing Democrats and other rivals of the Republican Party to vote in Republican-oriented primaries. (ECF No. 75 at 26-28.) Finally, Plaintiffs seek declaratory relief in the form of a judicial determination of the parties' rights and duties under the United States Constitution and a judicial declaration that the Code Sections and City Ordinances are unconstitutional. (ECF No. 75 at 28-29.) Plaintiffs ask this court to declare that South Carolina Code Annotated Section 7-11-20 already authorizes the parties to issue rules setting forth who can vote in the parties' primaries.[4]

[4] The March 30, 2011 order considered this issue and the court found Plaintiffs' arguments interpreting South Carolina Code Annotated Section 7-11-20 to be unpersuasive and declined to make a declaration consistent with Plaintiffs' requested reading of the statute. (ECF

This matter was scheduled for a bench trial to begin on August 21, 2013 before the undersigned. (ECF No. 132.) A few pre-trial motions (ECF No. 139 & 140) remain pending as well as the above-mentioned motions for summary judgment/dismiss (ECF No. 139, 141 & 142), a motion for summary judgment filed by Plaintiffs (ECF No. 143), and a Motion to Amend/Correct the Amended Complaint filed by Plaintiffs on July 29, 2013 in an effort to add a cause of action challenging the constitutionality of 2013 Act No. 61, recently signed by the Governor of South Carolina on June 13, 2013. (ECF No. 159.) This court ordered the remaining parties to be prepared to argue all pending motions in this matter immediately prior to the start of the bench trial and further directed the parties to be particularly prepared to address the arguments made challenging Plaintiffs' standing to pursue this action. (ECF No. 174.) This court heard arguments on the motions on August 21, 2013 and issued a ruling from the bench dismissing this case for lack of standing with a formal written order to follow.

STANDARD OF REVIEW

Summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The moving party has the burden of proving that summary judgment is appropriate. When the defendant is the moving party and the plaintiff has the ultimate burden of proof on an issue, the defendant must identify the parts of the record that demonstrate the plaintiff lacks sufficient evidence. Once the moving party makes this showing,

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No. 54 at 14-15.)

however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed.R.Civ.P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A party asserting that a fact is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56 (c)(1)(A). A litigant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir.1985). Therefore, "[m]ere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.,* 53 F.3d 55, 62 (4th Cir. 1995). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir.1996).

PARTIES' ARGUMENTS

Defendant-Intervenors filed a Motion Pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure and to Preclude Testimony by Plaintiffs' Expert Witnesses, arguing *inter alia* that with the withdrawal of the State Republican Party, the claims in this case are being asserted by the local Republican organization and individuals in Greenville County. (ECF No. 139-6.) Defendant-Intervenors maintain that Plaintiffs lack standing to assert a claim that the associational rights of the Republican Party, under the First and Fourteenth Amendments to the United States Constitution, have been violated. (ECF No. 139-6 at 3.) In response, Plaintiffs argue that

Defendant-Intervenors' Motion does not appear to challenge Plaintiff Mitchell and the Greenville County Republican Party Executive Committee's lack of standing to pursue equal protection claims and thus does not address the standing of these Plaintiffs on the merits. (ECF No. 149 at 2-4.) Plaintiffs also maintain that the Greenville County Republican Party Executive Committee has standing to prosecute its freedom of association claims based on the Fourth Circuit Court of Appeals' decision in *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006). (ECF No. 149 at 4.) Plaintiffs argue that the Greenville County Republican Party Executive Committee has suffered several definite and concrete injuries as a result of the state's open primary laws and because of its forced association with members of rival parties, that a causal connection exists between Plaintiffs' injuries and the challenged laws, and that Plaintiffs' injury can be redressed by a favorable court decision. (ECF No. 149 at 4-11.) Plaintiffs further argue that the Fourth Circuit's decision in *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997) is distinguishable and inapplicable to Plaintiffs' case (ECF No. 149 at 11-12) because no Republican Party organization (i.e., county, district, or state affiliate) was a party in that case. Defendant-Intervenors filed a reply memorandum reiterating that their motion explicitly seeks dismissal of all claims based on all remaining Plaintiffs' lack of standing. (ECF No. 157 at 1-2.) Defendant-Intervenors also clarify that they contend Plaintiffs lack standing to assert an equal protection argument regarding the three-fourths supermajority vote required to opt-out of nomination by primary. (ECF No. 157 at 2.) Finally, Defendant-Intervenors also argue that the *Miller* case is distinguishable on the issue of standing, particularly as it relates to the positioning of the State Republican Party on the issue of open primaries. (ECF No. 157 at 3-8.)

Defendant Way also filed a motion for summary judgment in this matter. (ECF No. 141.) In doing so, Defendant Way joined the motion for summary judgment and arguments filed by

Defendant-Intervenors concerning Plaintiffs' lack of standing, and as a result, the lack of a judiciable case or controversy needed to proceed to trial. Defendant Way also argues that *Miller* is distinguishable based on the facts of this case because the *Miller* plaintiffs were able to show that they met the constitutional standing requirements because the State Republican Party had authorized and supported the use of a closed primary, thereby deciding to exclude certain voters from its nomination process. (ECF No. 141-1 at 3-7.) Defendant Way highlights that the South Carolina Republican Party has not adopted any rule requiring the use of a closed primary or rejecting the use of an open primary. (ECF No. 141-1 at 6.) Thus, Defendant Way asks this court to apply the reasoning and standing analysis of *Marshall* where the court found the plaintiffs lacked standing. (ECF No. 141-1 at 6-7.) In responding to Defendant Way's motion for summary judgment (ECF No. 152), Plaintiffs reiterate the standing arguments made in response to Defendant-Intervenors' motion. Defendant Way filed a response in support of his motion for summary judgment (ECF No. 163) distinguishing between the *Miller* and *Marshall* cases and focusing the court's attention on the causation and redressability prongs of the standing analysis. (ECF No. 163 at 2.)

ANALYSIS AND DISCUSSION

I. Overview on Standing.

Standing is a threshold legal question to be considered by this court. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013); *see also Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 134 (4th Cir. 2011) ("We begin—and end—our inquiry with the question of whether the Plaintiffs possess standing to pursue this action."). "Article III of the United States Constitution limits federal courts to resolving actual cases and controversies." *Burke v. City of Charleston*, 139 F.3d 401(4th Cir. 1998)(quoting *Finlator v. Powers*, 902 F.2d 1158, 1160 (4th Cir. 1990))(internal

quotation marks omitted). "The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government," and standing to sue and invoke the power of a federal court "is perhaps the most important of these doctrines." *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Benham*, 635 F.3d at 134 ("Standing to sue is one aspect of the mandate that an action must present a 'case or controversy' under Article III of the Constitution.").

A party does not satisfy the requirements of Article III "merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Further, "the judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Id.* "The power to declare the rights of individuals and to measure the authority of governments . . .'is legitimate only in the last resort and as a necessity in the determination of real, earnest and vital controversy.'" *Id.* (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). It is for these reasons the Supreme Court requires a litigant to have standing to challenge the action or conduct sought to be adjudicated, meaning that a litigant has sufficient personal stake in the outcome of the controversy so as to warrant the invocation of the court's jurisdiction and justify the exercise of the court's remedial powers on his behalf. *See generally Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Allen*, 468 U.S. at 790.

The constitutional minimum of standing requires three elements: (1) the plaintiff must have suffered an injury in fact (an invasion of a legally protected interest) that is concrete, particularized, actual, and imminent; (2) there must be a causal connection between the injury and the conduct

complained of, meaning that the injury has to be fairly traceable to be challenged action of the defendant and not the result of a third party not before the court; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Additionally, there are prudential, non-jurisdictional dimensions of the standing doctrine which are "judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen,* 468 U.S. at 751*; see also U.S. v. Day*, 700 F.3d 713, 721 (4th Cir. 2012). "Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500. The court turns to a consideration of these fundamental standing principles in light of the issues, parties, and factual and legal backdrop of this case.

II. South Carolina Primary Law.

This court's previous order of March 30, 2011 sets forth a useful overview on South Carolina primary election law and the court incorporates the discussion herein, summarizes below in relevant part, and adds to the relevant discussion.

South Carolina law currently provides for an open primary[5] election system as the general

[5]A "primary" means a party primary election held by a political party under the provisions of the South Carolina Election Law. S.C. Code. Ann. § 7-1-20. A "political party" means a political party, organization, or association certified by the State Election Commission as

method of nominating political party candidates for inclusion on the general election ballot. Under the law, any qualified elector is allowed to vote in the party primary of his or her choice; provided, however, that the elector may vote in only one party's primary during any single election cycle. *See* S.C. Code. Ann. §§ 7-11-10, 7-9-20, 7-13-1010; *see also Gordon v. Executive Committee of Democratic Party of City of Charleston*, 335 F. Supp. 166, 169-170 (D.S.C. 1971)("one who had voted in a primary of one party could not participate in the primary of another party held to select the nominee in the same special general election.") The state convention of any political party, organization, or association in the state may add by party rules to the qualifications for membership in the party, organization, or association, and for voting in the primary elections if the qualifications do not otherwise conflict with state law or with the South Carolina and United States Constitutions. S.C. Code Ann.§ 7-9-20. If a party nominates candidates by party primary, a party primary must be held by the party and conducted by the State Election Commission and the respective county election commission. S.C. Code. Ann. § 7-13-40. Primaries in South Carolina are conducted as open primaries regardless of whether the primary is conducted by the State Election Commission, County Election Commission, or the political parties.

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. To nominate candidates by convention, however, three-fourths of the total membership of the party's state

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provided for in the provisions of the South Carolina Election Law. *Id.* The South Carolina Election Law further defines: (1) a "state committee" as the state executive committee of a political party; (2) a "state chairman" as the chairman of the state executive committee of a political party; (3) a "county committee' as the county executive committee of a political party; and (4) a "county chairman" as the chairman of the county executive committee of a political party. *Id.*

convention must vote to use the nomination method. *See* S.C. Code Ann. § 7-11-30. As a third nominating method under state election law, candidates may also be placed on the general election ballot by petition, provided generally that no person who was defeated as a candidate for nomination to an office in a political party or primary convention shall have his named placed on the ballot for the general election. *See* S.C. Code Ann. § 7-11-10. Although 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.

Political parties desiring to nominate candidates for offices to be voted on in a general or special election must apply to the State Election Commission for certification. *See* S.C. Code Ann. § 7-9-10. Parties must nominate candidates of that party on a regular basis in order to remain certified. *Id.* Former Plaintiff South Carolina Republican Party is a certified political party within the meaning of South Carolina Code Annotated § 7-9-10. Plaintiff Greenville County Republican Party Executive Committee is a political organizational affiliate of the South Carolina formed pursuant to the Rules of the South Carolina Republican Party and the Greenville County Republican Party (ECF No. 75 at 4), but it is not itself a certified political party within the meaning of South Carolina Code Annotated Section 7-9-10. *See* S.C. Code. Ann. § 7-1-20. Plaintiff Betty S. Poe is the Chairman of the Greenville County Republican Party and is thus the "county chairman" under South Carolina Code Annotated Section 7-1-20. The county chairman, in this case the chairman of the Greenville County Republican Party, has the authority to call the county convention to order pursuant to South Carolina Code Annotated Section 7-9-80. The South Carolina Election law requires any certified political party to organize on a precinct level, hold county conventions as

provided by South Carolina Code Annotated Sections 7-9-70 and 7-9-80, and to hold a state convention as provided by South Carolina Code Annotated Sections 7-9-100 in order to maintain certification with the State Election Commission. *See* S.C. Code. Ann. § 7-9-10. The county chairman also performs some functions set forth in the statutes to include receiving and forwarding various documents from candidates seeking the nomination of the political party, pursuant to South Carolina Code Annotated Sections 7-11-210, 7-11-220, and 7-13-45.

This court has already determined that the Greenville County Republican Party is not compelled by state law to conduct and fund municipal primary elections in Greenville County. (ECF No. 54 at 21.) As noted in this court's March 30, 2011 order, South Carolina Code Annotated Section 7-13-15 only provides that neither the State Election Commission nor the county election commission are required to conduct municipal elections. Municipalities can adopt one of three nonpartisan methods for nominating candidates for and determining the results of its non partisan elections, or may also handle the nomination of candidates for municipal offices by party primary, party convention, or by petition in accordance with state law. *See* S.C. Code Ann. § 5–15–60. In sum, this court previously noted that political parties are not required to nominate candidates by primary at any level of government—state, county, or the municipal level. (ECF No. 54 at 22.)

III. Standing Analysis.

Defendants have challenged the remaining Plaintiffs' ability to bring constitutional as-applied challenges to the open primary system. The court has set forth the applicable constitutional standing elements above, all three of which must be satisfied to confer standing. In Plaintiffs' opposition to the various standing arguments, Plaintiffs contend that the Greenville County Republican Party has standing to prosecute its claims, particularly arguing that the injury component of standing is

satisfied in that the Greenville County Republican Party conducted and paid for a 2011 City of Greenville Republican Party municipal primary even though Democratic party voters elected to participate in the primary. (ECF No. 152 at 5-11.) Plaintiffs focus significantly on the alleged definite and concrete injuries suffered by the Greenville County Republican Party. (ECF No. 152 at 7-11.) Relying entirely on language from *Miller*, without more, Plaintiffs also contend that the Greenville County Republican Party meets the causal connection requirement because the municipal primary at issue is an open primary and that the injury can be redressed because a favorable court decision would allow for the exclusion of others from participating in the primary. (ECF No. 152 at 6.) Putting the alleged injuries aside, the court finds it prudent to focus on the latter prongs of the standing analysis—causation and redressability. *See Perry v. Sheahan*, 222 F.3d 309, 314 (7th Cir. 2000) ("Standing does not automatically attach once an ongoing injury is identified.")

The second prong of the standing analysis requires proof of a causal connection between the injury and the conduct complained of—specifically, the injury has to be fairly traceable "to the challenged action of a defendant, and not solely to some third party." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Here, the link between the remaining Plaintiffs and remaining Defendants is highly indirect and attenuated at best. *See Frank Krasner Enterprises, Ltd. v. Montgomery County, MD*, 401 F.3d 230, 234 (4th Cir. 2005). "[T]he actions of an independent third party, who [is] not a party to the lawsuit, [stands] between the plaintiff and the challenged actions" of Defendants. *Id.* at 235. In this case, the associational rights Plaintiffs seek to assert are those of the State Republican Party, and the State Republican Party's "absence from the suit render[s] it stillborn." *Frank Krasner Enterprises, Ltd.*, 401 F.3d at 235 (reviewing the Fourth Circuit's decision in *Burke v. Charleston*, 139 F.3d 401 (4th Cir. 1998) where the court found that

an artist who painted a mural for a business lacked standing to assert a First Amendment challenge to Charleston's historical conversation law which banned the mural's display where the artist had sold his rights to the mural's owner). Here Plaintiffs' ability to satisfy "one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the court and whose exercise of broad and legitimate discretion the court[] cannot presume either to control or predict.'" *Frank Krasner Enterprises, Ltd.*, 401 F.3d at 235 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989)). In this case, one or more intermediaries (not parties to this case) "stand[] directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain." *Id.* at 236. Plaintiffs' freedom of association claims regarding the open primary as well as Plaintiffs' equal protection claim as it concerns the three-fourths supermajority vote required to nominate by convention are being asserted by a local Republican party affiliate, county chairman, and an individual in Greenville County on behalf of the State Republican Party. The South Carolina Republican Party is capable of representing its own interests. "It is well settled that under Article III of the United States Constitution, a plaintiff must establish that a 'case or controversy' exists 'between himself and the defendant' and 'cannot rest his claim to relief on the legal rights or interests of third parties.'" *Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007) (*citing Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)). Thus, Plaintiffs lack standing to assert these claims and seek the desired relief.

The court also finds that Plaintiffs fail to satisfy the causation and redressability prongs of the standing analysis—which concerns whether an injury will be redressed by a favorable decision—as it relates to Plaintiffs' remaining equal protection claims. This court heard oral arguments in this matter on August 21, 2013 and at that time it was evident that the scope of Plaintiffs' current

argument focuses on the contention that the Greenville County Republican Party has been forced to pay for its municipal primary and that it 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. *See* S.C.Code Ann. § 5–15–60. As noted above, the court has already made several determinations relative to the Greenville County Republican Party and Greenville municipal primary elections that also bear on the standing issues in this case. In particular, this court was careful to note the several ways municipalities can go about nominating candidates for municipal offices. (ECF No. 54 at 21-22; ECF No. 66 at 6.) State law allows municipalities to make the decisions about the nominating methods they choose (*see* S.C. Code Ann. § 5–15–60) and it is the City of Greenville's exercise of this choice which apparently creates the Greenville County Republican Party's as-applied equal protection claim in that another city in another county may choose another nominating method. 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. *See Frank Krasner Enterprises, Ltd.,* 401 F.3d at 236.

The above analysis holds true for Plaintiff Mitchell and Plaintiff Poe on behalf of the Greenville County Executive Committee. Defendants moved for dismissal of these Plaintiffs as well based on lack of standing and the court finds the arguments made in support of the motions to be persuasive. (ECF Nos. 139-6 at 4, 141-1 at 3, & 142-1 at 7.)

IV. Miller and Marshall Cases.

Plaintiffs address the merits of Defendants' standing arguments by relying heavily on the

Fourth Circuit's opinion in *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) which involved a challenge to Virginia's open primary law. Plaintiffs maintain that the *Miller* case is directly on point and clearly gives the Greenville County Republican Party standing to prosecute their claims. (ECF No. 149 at 4.) As is the case here, in *Miller*, the lawsuit was brought not by the commonwealth (statewide)'s republican party but instead was brought by a subsect group, there, the 11th Senatorial District Republican Committee and its chairman. The local republican committee and its chairman appealed a district court's order dismissing their constitutional challenge to Virginia's open primary law for lack of justiciability. *Miller*, 462 F.3d at 314. The Fourth Circuit reversed the district court's decision and remanded the case for a decision on the merits. Particularly relevant to the Fourth Circuit's decision in *Miller* was the Republican Party of Virginia's decision to amend its Plan of Organization to exclude voters who participated in the nominating process of another party within the proceeding five years from voting in the Republican Party. *Id.* at 314.

Defendants argue that the withdrawal of the State Republican Party and its failure to adopt a rule or "plan of organization" stating that its primaries shall be confined to enrolled Republicans, leaves the remaining Plaintiffs in a position where they cannot claim to speak for the State Republican Party or advocate on behalf of the associational and equal protection rights of the political party. The court does not find that the *Miller* case changes the standing analysis above and the facts are distinguishable. In the *Miller* case, the Republican Party of Virginia had made some significant internal efforts, by amending its Plan of Organization to exclude certain voters and implement closed primaries, a fact which was key in distinguishing the facts of *Miller* from an earlier Virginia primary case, *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997), as it relates to the issue of standing. In *Marshall*, the Fourth Circuit agreed with the district court's conclusion that two

individuals, a Republican representing Virginia's 13th House of Delegates District and the former Chairman of the Virginia Republican Party, lacked standing to bring the suit. *Marshall*, 105 F.3d at 905-906. At the time the *Marshall* case was decided, the Virginia Republican Party had not made any statement that it was forced to hold an open primary because of Virginia's Open Primary Law and for all intents and purposes had chosen an "open" primary and not to legally challenge the Open Primary Law. *Marshall*, 105 F.3d at 907. Accordingly, "because the alleged injury is caused by a voluntary choice made by the Virginia Republican Party and not the Open Primary Law, the plaintiffs have not established causation. . . [t]he Virginia Republican Party has made its choice to conduct a party primary in the manner it desires and there is no reason for us to interfere with that voluntary decision." *Id.* at 906.

The political landscape had changed in Virginia by the time the court decided the *Miller* case, in that the Republican Party of Virginia had changed their Plan of Organization after *Marshall* was decided. Thus, in *Miller*, the Fourth Circuit distinguished *Marshall* by acknowledging the alignment of the state party and the local party in opposition to the state primary law itself: "[t]he *Marshall* plaintiffs lacked standing because the party's decision to hold an open primary, not the open primary law itself, caused their alleged injuries." *Miller*, 462 F.3d at 318. The importance of the statewide party's involvement, either positionally, in the case itself, or both, was acknowledged by the Fifth Circuit in *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538 (5th Cir. 2008). In that case the Mississippi State Democratic Party and its executive committee relied on *Miller* to support its standing argument. The district court in that case declared Mississippi's semi-closed primary statute unconstitutional and issued an injunction that required party registration and photo identification to vote in a party's primary. *Barbour*, 529 F.3d 53 at 540-541. "The court's ruling

spawned a free-for-all on appeal." *Id.* at 541. The Fifth Circuit found that the plaintiffs failed to establish standing and distinguished *Miller* "because while the GOP had made and attempted to implement plans to hold closed primaries, the [Mississippi State Democratic Party] has done neither." *Id.* at 546.

Here, Plaintiffs argue that the South Carolina Republican Party has taken the same or similar steps as was done by the Republican Party of Virginia in the case of *Miller* which were sufficient to establish standing in that case. (ECF No. 149 at 12-15.) Plaintiffs also contend that the Republican Party of Virginia was not subject to certain legal and statutory impediments which purportedly prohibit the South Carolina Republican Party from taking any further position than it already has to limit crossover voting, i.e., Rule 11 of the Rules of the State Republican Party. (ECF No. 149 at 13-15; ECF No. 139-1 at 29.) Although the court does not read the statutes (S.C. Code Ann. § 7-11-20 and § 7-25-190) cited by Plaintiffs as broadly or interpret Judge Childs' order to be a pronouncement on standing, Plaintiffs' contentions are beside the point. First, Rule 2(b) of the Rules of the State Republican Party would operate to cancel out any conflict between the Rules of the State Republican Party and the South Carolina election law except for laws which have been judicially held to be unconstitutionally unenforceable or which are "patently unconstitutional." (ECF No. 139-1 at 4.) Next, Rule 11 of the Rules of the State Republican Party, which deals with potential cross-over voting, is consistent with the South Carolina election law and the open primary system in that they both limit an elector from voting in more than one party's primary during a single (same) election cycle. All that is left of Plaintiffs' argument is the South Carolina Republican Party Platform which at most states a possible preference or partiality for primaries that are only open to registered voters of a particular party but such a position is undoubtedly trumped by its rules and conduct. (ECF No.

149 at 15.) Without more, the conduct Plaintiffs are seeking to redress is merely the position of the State Republican Party. *See Beck v. Ysursa*, No. CV-07-299, 2007 WL 4224051 (D. Idaho 2007) ("The Idaho Republican Party may decide . . . to adopt rules implementing its closed primary rule in spite of Idaho's open primary election laws . . . .[i]t is for the Idaho Republican Party, and not the Court, to decide how best to govern the associational rights of its members, and Plaintiffs lack the ability to substitute their judgment for that of the Party.")

CONCLUSION

For the foregoing reasons, the court grants the relief requested in the pending motions (ECF Nos. 139, 141, & 142) and dismisses Plaintiffs' action for lack of standing. Accordingly, all other pending motions are DENIED as MOOT.

IT IS SO ORDERED.

s/ Mary G. Lewis
United States District Judge

August 30, 2013
Spartanburg, South Carolina