

LAWRENCE G. WASDEN
ATTORNEY GENERAL

BRIAN KANE (ISB No. 6264)
Assistant Chief Deputy Attorney General

STEVEN L. OLSEN (ISB No. 3586)
Chief of Civil Litigation Division

MICHAEL S. GILMORE (ISB NO. 1625)
CLAY R. SMITH (ISB NO. 6583)
Deputy Attorneys General
Civil Litigation Division
Office of the Attorney General
954 W. Jefferson St., Second Level
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-4130
Fax: (208) 854-8073
mike.gilmore@ag.idaho.gov
clay.smith@ag.idaho.gov

Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

THE IDAHO REPUBLICAN PARTY, its)
EXECUTIVE COMMITTEE, its STATE)
CENTRAL COMMITTEE, and) Case No. 1:08-CV-00165-BLW
CHAIRMAN, EXECUTIVE DIRECTOR;)
SIDNEY C. SMITH,)
) **TRIAL MEMORANDUM ON BEHALF**
Plaintiffs,) **OF DEFENDANT BEN YSURSA**
)
vs.)
)
BEN YSURSA, In his Official Capacity as)
Secretary of State of the State of Idaho,)
)
Defendant.)

Defendant Ben Ysursa hereby files his Trial Brief pursuant to Paragraph 9 of the Second
Case Management Order, Dkt. 3, p. 4.

INTRODUCTION

A. Procedural Background. The Idaho Republican Party, its Executive Committee, its State Central Committee, and its Chairman, currently Norman Semanko (referred to collectively as “the Republican Party,” “the Party,” or “Plaintiff”) seek a declaratory judgment that Idaho’s primary election statutes violate the Idaho Republican Party’s constitutional right to freedom of association. Doc. 1 ¶¶ 41-46. The Party further seeks injunctive relief prohibiting Defendant Ben Ysursa, the Idaho Secretary of State, from (1) conducting primary elections without party registration for members of the Idaho Republican Party; (2) “encouraging or facilitating ... party raiding by non-party members;” and (3) conducting primary elections without implementing procedures that authorize the Idaho Republican Party to (a) limit voter participation as to the Party’s nominees; (b) verify that individuals voting for Republican candidates are members of the Party; and (c) be able to subsequently communicate with those individuals who voted for Republican nominees. *Id.* ¶ 50. Eleven individuals and two political organizations independent of the Democratic and Republican Parties subsequently were granted leave to intervene as Defendants. Doc. 20.

The Republican Party, Defendant Ysursa and Intervenor-Defendants filed simultaneous cross-motions for summary judgment in November 2008. Doc. 25, 26, 28. This Court denied those motions in September 2009. Doc. 43; *Idaho Republican Party v. Ysursa*, 600 F. Supp. 2d 1195 (D. Idaho 2009). It reasoned in part that the Party:

suggests that regardless of whether there exists evidence of actual “cross over” voting, the threat of “cross over” voting alone causes IRP candidates to change their message, ideology and position, which is what ultimately violates IRP’s freedom of association. [¶] However, Chairman Semanko and IRP cite no evidence supporting this conclusion. Conclusory statements made by a party chairman are not the type of evidence the Supreme Court relied upon in [*California Democratic Party v. Jones*, 530 U.S. 567 (2000)] and they are not the type of evidence this Court can rely upon to reach a similar conclusion here. The Court cannot conclude, based on mere assertions, that Republican candidates have modified and will continue to modify their political messages, ideologies and positions because of Idaho’s current open primary system. Surveys, expert testimony, statistics and/or testimony from the candidates themselves is needed.

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600 F. Supp. 2d at 1201. The Court then identified certain factual issues deemed critical to resolving Plaintiffs' freedom-of-association claim under the Fourteenth Amendment: "[G]enuine issues of material fact remain—mainly whether and to what extent 'cross over' voting exists in Idaho, and whether and to what extent the threat of such 'cross over' voting affects the message of IRP and its candidates." Testimony concerning these and other considerations relevant to the challenge to Idaho's primary system will be proffered by the parties at a bench trial commencing on October 14, 2010.

B. Summary of Facts. Defendant Ysursa will introduce evidence to establish various material characteristics of the Idaho political environment and primary system, including:

- Idaho is the most Republican Party-dominated State in the Nation with respect to its electoral results; *i.e.*, it is the least electorally favorable State in the Union from the Democratic Party's perspective.

- Over the 1994-2008 period, less than one-third of state legislative primary elections were contested, and less than ten percent of those primary contests were decided by a vote differential less than ten percent; *i.e.*, only a small fraction of contested state-legislative primary elections are actually competitive.

- While individuals self-identifying as more likely to vote for a Democratic Party candidate than for a Republican Party candidate may participate in the Republican Party primary, there is no substantial evidence connecting such "cross-over" voting behavior to elector intent to select a candidate who will be more susceptible to defeat in the general election; *i.e.*, nothing reflects any systematic pattern of individuals hostile to the Republican Party using the primary system in a manner calculated to *improve* the general election prospects of an opposing candidate.

In short, the trial evidence will show no legally significant adverse impact to the Republican Party from operation of Idaho's long-standing primary system. The Party instead has thrived electorally and achieved a level of political dominance unmatched in any other State.

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C. Summary of Law. The Republican Party has mounted a *facial* challenge to those aspects of the Idaho primary-election system that permit a voter to vote for either Republican or Democratic candidates in the primary election. It thus seeks broad declaratory and injunctive relief that not only would preclude Defendant Ysursa from enforcing the existing statutory scheme but also would require him to implement Party rules restricting primary ballot access to individuals who had previously affiliated with the Republican Party in accordance with such rules. The Party's burden in such a challenge is daunting. *E.g.*, *United States v. Kaczynski*, 551 F.3d 1120, 1125 (9th Cir. 2009) (“a generally applicable statute is not facially invalid unless the statute ‘can never be applied in a constitutional manner’”) (quoting *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150 (9th Cir.2008)). Whether it has shouldered that burden, in turn, must be determined against the applicable constitutional standard.

Here, the applicable standard imposes two hurdles that the Republican Party cannot clear. *First*, the Party must pass the threshold of showing that the Idaho system—which does not provide for voter registration with a particular party or as an independent—embodies an unconstitutional “open” primary process, since the very act of participating in a primary election constitutes a form of “affiliation” through selection of only one party’s ballot and thus effectively transforms this State’s approach into one more analogous to a “closed” system for freedom-of-association purposes. Defendant Ysursa believes the latter characterization applies.

Second, the burden imposed upon the Republican Party’s right to associate is, if not nonexistent, quite minimal. Under these circumstances, “a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *see Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003) (“We apply a balancing test to determine whether an election law violates a political party’s associational rights A state law that imposes a severe burden on those rights must be narrowly tailored and advance a compelling state interest. A law that imposes a lesser burden is subject to a less exacting review, and ‘important regulatory interests’ are sufficient to justify it”) (citations omitted).

Weighed against this at most *de minimis* burden is Idaho’s interest in furthering the opportunity for all voters to participate, on a primary election-by-election basis, in selecting the candidates of the party who among the available choices will provide the best representation if successful in the general election. The state primary laws nevertheless accommodate the political parties’ associational rights by requiring electors to participate only in one party’s primary. A political party cannot be heard to complain if its slate of primary candidates is sufficiently compelling to attract the “affiliation” of a voter in a particular election, and the Republican Party will offer no persuasive evidence to the contrary—particularly in light of its political dominance in this State over the recent decades.

D. Dist. Idaho Local Civ. R. 16.3(b)(1) and (2) Objections. The parties have agreed that depositions taken and witness affidavits exchanged during discovery may be used in lieu of trial testimony. Defendant Ysursa reserves the right to object to Plaintiffs' exhibits on the ground that they have not been provided prior to submission of this memorandum. Defendant Ysursa does not oppose the Plaintiffs' reserving the same right to object to his exhibits at the time of offer.

SYNOPSIS OF LIKELY TRIAL EVIDENCE

A. Defendant Ysursa’s principal evidence will be the report and testimony of two experts, Andrew D. Martin and Kyle L. Saunders. Both hold doctorates in Political Science and hold full-time academic positions at, respectively, Washington University in St. Louis and Colorado State University. Their extensive report contains seven substantive chapters, denominated exhibits, which address various issues and draw related conclusions relevant to the Republican Party’s challenge to the Idaho primary system. Each exhibit begins with its summary points. A brief digest of those points follows.

Exhibit 2102 discusses politics and elections in Idaho with a focus on the 1994-2008 period. Its summary points state, *inter alia*, that the Republican Party has a substantially higher percentage of the electorate identifying their political preference with it than either the second highest group of self-identifiers—no party—or the lowest—Democratic Party. Professors

Martin and Saunders additionally report that, while the Republican candidates contest most statewide federal and state elections, a low percentage of state legislative races have contested primaries and far fewer are truly competitive races—*i.e.*, where the successful candidate’s margin of victory is less than ten percent. The Republican Party’s dominance is reflected in its control of the Idaho House and Senate for over 50 years and its large majorities in both chambers since 1994. Professors Martin and Saunders further report that Idaho has been deemed the least competitive State, “by a considerable margin, with regard to lack of interparty competition in the United States since 1994” under the Ranney Party Control Index commonly relied upon in political science literature.

Exhibit 2103 addresses parties and primaries in Idaho. Professors Martin and Saunders identify three levels of political party structure: Party in the Electorate, Party in Government, and Party Organization. The least partisan of these levels is the Electorate; the most partisan is the Organization. Professors Martin and Saunders further report that numerous factors affect electoral results and that “[b]laming any electoral loss solely on a single factor, like crossover voting or primary type, is an extraordinarily difficult case to make.” They discuss the several types of primaries—from “open” to “closed”—and opine that open primaries “encourage broader participation” and “produce less ideologically extreme candidates than closed primaries” and “candidates that are more representative of the Party in the Electorate as well as the overall electorate.”

Exhibit 2104 critiques the “Moore Information Survey”—a January 2010 survey of 400 Idaho voters in the 2008 primary election relied upon by the Republican Party’s expert, Professor Michael C. Munger, in reaching his conclusions. Professors Martin and Saunders opine that the Moore results are compromised by (1) the length of time, 19 months, between the election and the survey’s preparation; (2) the “question construction for key questions” which they found “problematic and outside the norms of academic and commercial political polling”; and (3) “an

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incredibly small sample, especially for key sub-groups” and “an unusually low response rate” and reliance “on sampling weights which are not replicable.” They add that the survey’s reported sampling error rate for Democratic voters “is plus or minus 10% or greater.”

Exhibit 2105 reviews the concepts of party identification, crossover voting and strategic voting in the Idaho context. Professors Martin and Saunders again criticize the Moore Information Survey as, *inter alia*, drawing conclusions concerning party identification that, given its idiosyncratic question construction, “prevents valid comparisons with existing research on crossover voting in primaries.” They further criticize inclusion of Independents as an element of crossover voting as inconsistent “scholars that Professor Munger cites in his report” who adhere to the generally accepted principle that “crossover voting should be defined by the number of one side’s partisan identifiers voting in another party’s primary—that is, not including independents as crossover voters.” Professors Martin and Saunders report, moreover, that “[c]rossover voting is rarely a hostile act” but, rather, “is a sincere expression of democratic preferences.” They add that “negatively strategic voting” is viewed by the political science community as “very rare” and “even more rarely affects electoral outcomes.” A concern raised by Professor Munger—“Trojan Horse” voting under which an adherent of one party enters another party’s primary—finds “no proof ... in the academic literature.” In sum, Professors Martin and Saunders conclude that “[c]losing the primary to reduce crossover voting *may* reduce the probability of a very rare set of negatively strategic behaviors, but it could also have the very real and immediate effect of (1) excluding part of the general electorate, and their very likely sincere democratic preferences, from the candidate selection process in Idaho’s elections, (2) producing more ideologically extreme candidates, and (3) reducing political participation in the process.”

Exhibit 2106 examines the “Trojan Horse” voting strategy in more detail. Professors Martin and Saunders observe in part that the strategy is, even if successful in one race, not likely to lead to re-election and thus “not in the candidate’s or party’s long-term interest to pursue.” No evidence suggests that this strategy has been employed in Idaho or, in any event, would be obviated by adoption of a closed primary system.

Exhibit 2107 examines roll call voting data from the 2003-2008 Idaho legislative sessions and reports that the Democratic and Republican members “are extremely ideologically cohesive and quite strong”—*i.e.*, that “little overlap—if any—between the most liberal Republican and the most conservative Democrat in the legislature” exists. Professors Martin and Saunders find the legislature “already extremely polarized” and that a closed primary system would “exacerbate” this polarization.

Exhibit 2108 addresses the second affidavit of David Ripley, also relied upon by Professor Munger, containing analysis of crossover voting and its impact in various Republican races between 2002 and 2008. The affiant has been Executive Director of Idaho Chooses Life since 1995 and a participant in the Idaho political process since 1984 in other capacities. Professors Martin and Saunders deem the affidavit’s analysis “scientifically unsound” because it (1) analyzed counties and districts that were not selected randomly among contested legislative races; (2) failed to consider possible alternative explanations for the voting behavior analyzed; (3) drew conclusions based upon the fallacy that aggregate group characteristics are shared by each group member—here “drawing conclusions about individual voting behavior from aggregate vote totals.” They also viewed the Ripley affidavit as deficient in failing to discuss how the election of the involved candidates altered the ideological composition of the Idaho legislature and observed that, in light of their analysis of the 2003-2008 sessions, the effect was “trivial at best.” Finally, Professors Martin and Saunders disputed the Ripley affidavit’s characterization of the successful Republican candidates as “liberal,” since all were more conservative than the most conservative Democratic legislator.

Last, Defendant Yursa and four county clerks (or a deputy clerk) will testify concerning administrative impact of the relief sought by the Republican Party. In relevant part, they will detail their best estimates of the costs of the State and/or their counties of implementing a system of party registration for the Idaho primary. *See* Exhibits 2001, 2002, 2003, 2004, and 2005,

B. The Republican Party will rely chiefly on Professor Munger’s report that, in turn, relies heavily upon the Moore Information Survey and the second Ripley affidavit for the

report's Idaho-specific observations. Professor Munger holds an academic position at Duke University and has a doctorate in Economics. Almost the entirety of his 14-page report is devoted to a general discussion of crossover voting, including what he characterizes as the "Trojan Horse" strategy. He identifies as other crossover categories "sincere," "hedging," "impact," and "raiding." Professor Munger observes that "[t]here is considerable evidence in the literature that the [latter] four types of cross-over voting are widely observed in states with open or semi-closed primaries" and have "*always, in every case, been found to exist unless the primaries are closed.*" He does not report, however, on either the proportion of crossover voting attributable to the latter four categories and the extent to which they have been found to affect electoral outcomes. With respect to Idaho, Professor Munger's report opined that although "I have not found any studies that were specific to Idaho's primary system ... there is no reason to assume that the Idaho open primary system has produced results any different than in other states."

Professor Munger continued on to formulate certain conclusions concerning Idaho crossover voting on the basis of the Moore Information Survey, the second Ripley Affidavit's analysis, and anecdotal experiences contained in affidavits from eight Republican office holders or candidates. He found "considerable evidence" that crossover voting exists "in at least some Idaho elections." Professor Munger deemed as "simply remarkable" data derived from the Moore Information Survey that 41 percent of individuals who self-identify as always or usually vote Democratic have voted Republican in primaries and that "of the remainder of the non-GOP registered voters, ... it is plausible to think that at least 1/3 of these have voted in a Republican primary." From these data, he deduced "that more than half of those *registered* something other than Republican have voted in Republican primaries." [Emphasis supplied.] Idaho, of course, does not register electors by political party or preference, and, if one assumes the accuracy of the party self-identification data reported by the Boise State University Social Science Research

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Center from a 2008 study and relied upon by Professors Martin and Saunders, 41 percent of the 25 percent Democratic self-identifiers constitutes 10.25 percent and 33.3 percent of the 28 percent self-identifying as Independents constitutes 9.3 percent—or a total of 19.55 percent.

Beyond these legally and arithmetically problematic Idaho-specific determinations, Professor Munger’s conclusions are non-Idaho specific and include his prior observation that general political science analysis finds crossover voting in all non-closed primary States and opines that such voting “weakens parties[] and interferes with their ability to carry out their core functions in a democratic society.” [Emphasis removed.] In support of this conclusion, he quotes extensively from a Chicago Law Review case note published 37 years ago. Glen S. Lewy, Student Note, The Right to Vote and Restrictions on Crossover Voting, 40 Chi. L. Rev. 636 (1973).

The Moore Information Study and the second Ripley affidavit have been described generally above. The anecdotal testimony is directed in substantial measure to various individual races that, taken as a whole, constitute a minute fraction of the Idaho Republican primary contests during the period discussed.

RELEVANT LEGAL STANDARDS

I. FACIAL CHALLENGE STANDARD

The Republican Party challenges the Idaho primary system “not in the context of an actual election, but in a facial challenge.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). It seeks prospective relief predicated on the proposition that, as a matter of law and without reference to a particular set of circumstances, a political party may compel a State to limit primary elections to voters who have satisfied pre-election affiliation requirements. *See John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2817 (2010) (“The important point is that plaintiffs’ claim and the relief that would follow—an injunction barring the secretary of state ‘from making referendum petitions available to the public,’ ... —reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach”). The Party therefore “can only succeed in [this] challenge

by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ *i.e.*, that the law is unconstitutional in all of its applications” or, at least, that the relevant statutes lack “a ‘plainly legitimate sweep.’” *Wash. State Grange*, 552 U.S. at 449 (some internal quotation marks omitted).

The *Washington State Grange* Court additionally counseled that “[i]n determining whether a law is facially invalid, [a court] must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases” and noted that “[the Washington state] courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions.” *Id.* at 449-50 (citations omitted).

II. FREEDOM-OF-ASSOCIATION IMPAIRMENT STANDARD

The First Amendment of the United States Constitution, as incorporated into the Fourteenth Amendment, has been interpreted to contain the guarantee of the right to freedom of association, including the right to associate with the political party of one’s choosing. In upholding this right, the courts have recognized that the right to freedom of association can include the right of a political party to choose its candidates. *See, e.g., Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). This right, however, is not absolute; nor does every statute affecting this right constitute an unreasonable burden, particularly in light of the State’s significant right and obligation to regulate elections. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“[a] court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights’ ”); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“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 the case at hand, the Idaho Republican Party cannot demonstrate that the Idaho primary

election laws place an unreasonable burden on the Party's associational rights. Thus, as the Fourth Circuit Court of Appeals recently held: "When analyzing whether a state election law impermissibly infringes on association rights protected by the First and Fourteenth Amendments, courts must 'weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.'" *S.C. Green Party v. S.C. State Elec. Comm'n*, 612 F.3d 752 (4th Cir. 2010).

APPLICATION OF THE RELEVANT LEGAL STANDARDS TO THE IDAHO PRIMARY SYSTEM

The Supreme Court has issued several decisions directly addressing freedom-of-association-based challenges to state primary election statutes. *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 119 (1981) ("The question ... is not whether Wisconsin may conduct an open primary election if it chooses to do so, or whether the National Party may require Wisconsin to limit its primary election to publicly declared Democrats. Rather, the question is whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules") (footnote omitted); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (political party in closed primary State not entitled to open primaries to registered Independents); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (blanket primary statute invalidated); *Clingman v. Beaver*, 544 U.S. 581 (2005) (political party not entitled to open semi-closed primary to voters registered with another party). None of these cases has reached the question whether open primaries, as a matter of law, violate the right to freedom of association encompassed within the Fourteenth Amendment. *See Jones*, 530 U.S. at 577 n.8 (observing that California's "blanket primary also may be constitutionally distinct from the open primary ... in which the voter is limited to one party's ballot"). The Republican Party therefore asks this Court to go where the Supreme Court has never gone.

The Court should decline the Republican Party's invitation for two reasons. The first turns on a straightforward question of law. Idaho does not register voters according to party, or no party, affiliation. See Idaho Code § 34-411 (registration form requirements). Professor Munger's error in this regard is revealing because Idaho's approach differs from ordinary "open" primary legislation to which he apparently is accustomed to assessing. The act of choosing to participate in a particular party's primary election, however, may be characterized as the elector's determination to affiliate with the party for purposes of that election. Justice O'Connor accordingly reasoned in *Clingman* that:

registration with a political party surely may signify an important personal commitment, which may be accompanied by faithful voting and even activism beyond the polls. But for many voters, registration serves principally as a mandatory (and perhaps even ministerial) prerequisite to participation in the party's primaries. The act of casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering. See *La Follette, supra*, 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 fact that voting is episodic does not, in my judgment, undermine its associational significance; it simply reflects the special character of the electoral process, which allows citizens to join together at regular intervals to shape government through the choice of public officials.

544 U.S. at 600-01 (O'Connor, J., concurring). Justice O'Connor went further—she argued that even voters registered with another party maintained the right to associate with another party for purposes of a particular election. *Id.* at 601 ("I fail to see why registration with one party should negate a voter's First Amendment interest in associating with a second party. We surely would not say, for instance, that a registered Republican or Democrat has no protected interest in associating with the Libertarian Party by attending meetings or making political contributions.").

Here, Idaho merely makes a forum available for parties to conduct their primary elections and leaves the party "affiliation determination" to the voter. Its Legislature nonetheless gave weight to the parties' freedom of association interest by requiring voters to participate only in one party's primary contests. This approach balanced the State's interest in Idaho citizens having an opportunity to vote for the candidates of their choice, and thereby to associate with a political party for purposes of a primary election, with the parties' interest in limiting primary

electors to those ideologically sympathetic in the context of the particular primary election. To contend that the elector is engaging in “crossover” voting thus assumes a predicate—*i.e.*, a pre-existing state-recognized party affiliation—which does not exist.

Second, even if the requisite “affiliation” is not achieved by opting to participate in one party’s primary, the Republican Party’s evidence will fall woefully short of establishing facial unconstitutionality. Clearly enough, the Party has enjoyed significant success under the current primary system, and Professor Munger’s report contends that the absolute amount of participation in its primary elections by persons who more typically vote for Democratic candidates is approximately ten percent of the electorate. The Republican Party compounds the paucity of evidence reflecting a meaningfully significant level of voting that it deems “crossover” by offering no evidence concerning the amount of non-sincere crossover voting. Perhaps even more telling for facial challenge purposes is the quite low percentage—8 percent—of state legislative Republican primaries that were actually competitive between 1994 and 2008. It is impossible to extract from these data any legally or practically significant impact on the Republican Party’s ideological message given its overall dominance in the Idaho electoral environment—a dominance greater than in any other State. No reasonable doubt exists that the Idaho primary system possesses a “plainly legitimate sweep” insofar as it has not imposed a significant burden on the Party in the vast majority of elections.

Balanced against the absence of any substantial impact on the Republican Party’s electoral prospects or “message” control are various state interests. *See Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992) (“Turning the entire electoral apparatus over to political parties would pose as great a threat to the integrity of our system of government as would the state’s unprincipled meddling in the political process. This recognition informs the Supreme Court’s direction to lower courts to strike a balance between the interests of the parties and those of the state that will best enhance the democratic character of our system”). Most important, the current primary system serves the concededly weighty interest in encouraging the full participation of Idaho’s voters and ensuring, for example, that independent voters are not effectively disenfranchised by a

Party registration requirement. It also promotes the state interest in protecting voter privacy, which is specifically guaranteed by Article VI, § 1 of the Idaho Constitution. In contrast, the Republican Party's proposed system would force voters to identify themselves publicly as Republicans or not in order to vote for Republican candidates in Idaho's primary election.

Beyond those important public policy interests, the current primary system provides an organized, streamlined method to ensure that all voters have the opportunity to participate in the election. Rather than speculating on the number of Republican and Democratic ballots that need to be printed in each county, resulting in potential waste from over-printing of a particular ballot or potential shortages of a ballot in high demand, a single ballot is all that is required for Idaho's primary election. Implementing the Republican Party's proposed system thus would inflict significant additional costs upon the State, costs that the Party has made no indications it intends to cover. They would include: (1) creating and printing separate ballots for voters who refused to disclose party affiliation but wanted to vote in judicial and other non-partisan elections; (2) creating and maintaining a Republican Party registration system, including creating and printing registration cards providing an option to show party affiliation and creating and maintaining lists of registered Republican voters; (3) policing the primary elections to ensure that only registered Republicans receive the separate Republican Party ballot and/or vote for Republican nominees; (4) training the County Clerks and others who work at the polling places regarding the new Republican registration requirement; and (5) educating the public about the need to register as a Republican in order to vote for Republican candidates in the primary election. The current system serves Idaho's legitimate interest of carrying out primary elections in a simple, straightforward, and cost-effective manner.

In evaluating the costs to Idaho, this case must be analyzed against a backdrop that balances the interests of the Party, which fully avails itself of the State's system without bearing any of the State's costs, with those of citizens of Idaho who have constructed, financed, and organized the current primary system. In sum, Idaho's provision of the primary election system represents a reasonable balancing of the interests of the political parties that voters commit

themselves to only one political party's candidates, while ensuring the system is cost effective and accessible to meaningful participation by voters.

CONCLUSION

Judgment should be entered in Defendant Ysursa's favor.

DATED this 14th day of September, 2010.

/s/ Michael S. Gilmore

Michael S. Gilmore
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Christ T. Troupis
TROUPIS LAW OFFICE P.A.
1299 E. Iron Eagle, Ste. 130
P.O. Box 2408
Eagle, ID 83616
Fax: (208) 938-5482
ctroupis@troupislaw.com

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: _____
- CM/ECF

Gary Allen
GIVENS PURSLEY
P.O. Box 2720
Boise, ID 83701-2720
garyallen@givenspursley.com

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: _____
- CM/ECF

Harry Kresky
LAW OFFICE OF HARRY KRESKY
250 W. 57th Street, Suite 2017
New York, NY 10107
212-581-1516
harrykres@aol.com

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: _____
- CM/ECF

/s/ Michael S. Gilmore

Michael S. Gilmore
Deputy Attorney General