

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

SOUTH CAROLINA GREEN PARTY, )  
et al., )  
 )  
Plaintiffs, )  
 )  
v. ) Civil Action No. 08-cv-02790-CMC  
 )  
SOUTH CAROLINA STATE )  
ELECTION COMMISSION, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

**PLAINTIFFS’ REPLY TO THE DEFENDANTS’ RESPONSE TO  
THE PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs Eugene Platt, Robert Dunham, and the South Carolina Green Party respectfully submit this reply to the defendants’ response to the plaintiffs’ motion for a preliminary injunction. At issue is whether the South Carolina Election Commission may constitutionally apply South Carolina’s sore-loser statute in a way that gives Democratic Party primary voters an effective veto over the already-chosen nominee of the Green Party. The defendants’ arguments in opposition to the plaintiffs’ motion have no merit.

**I. The defendants ignore the most apposite cases.**

The defendants’ brief simply ignores the long line of Supreme Court cases that protect a political party’s fundamental right to select its own standard bearers. *See California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (reaffirming “the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a

standard bearer who best represents the party's ideologies and preferences”) (internal quotation marks omitted); see also *New York State Bd. of Elections v. Lopez-Torres*, 128 S. Ct. 791, 797 (2008); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997).

The most important of these is *Jones*, in which the Supreme Court invalidated California’s blanket primary on the ground that it permitted non-party members to influence the process of selecting the party’s standard bearers in the general election. 530 U.S. at 577. In this case, the defendants’ application of South Carolina’s sore-loser statute to plaintiff Eugene Platt has not merely given Democratic Party voters an opportunity to *influence* the outcome of the Green Party’s nomination process. It has given Democratic voters *an effective veto* over the Green Party’s decision.

The defendants’ brief fails even to cite *Jones* or to dispute its import in this case.

## **II. The cases on which the defendants rely are readily distinguishable.**

This case is about the application of a sore-loser statute to a fusion candidate. In accordance with South Carolina law, plaintiff Eugene Platt simultaneously sought the nomination of two political parties, the Democratic Party and the Green Party, for a seat in the state legislature. He first won the Green Party nod and then subsequently lost the Democratic Party’s primary.

The South Carolina Election Commission then applied the State's sore-loser statute to disqualify Platt from appearing on the ballot as the Green Party's nominee. No court of which the plaintiffs are aware has ever addressed the constitutionality of a sore-loser statute under similar circumstances. The defendants nonetheless attempt to support their arguments with cases that are readily distinguishable from this case.

Only one of the cases on which the defendants rely actually involved a sore-loser statute, and that case arose out of a "typical" sore-loser scenario, in which a candidate first loses a party's nomination and *then* tries to get on the ballot as an independent or minor-party candidate to challenge his or her formal rival. In *National Committee of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71 (W.D. Tex. 1996), the district court refused to enjoin the enforcement of Texas' sore-loser statute against candidate Pat Buchanan. Buchanan had run unsuccessfully for President in the Republican primary and then subsequently sought ballot access as the candidate of the U.S. Taxpayers Party. *See id.* at 72-73. The district court upheld the sore-loser statute under those circumstances because the provision merely prevented the plaintiffs "from selecting as their nominee an individual who has already run in a party primary and lost." *Id.* at 74.

This case, by contrast, involves a very different scenario. Platt sought two nominations simultaneously – as permitted by South Carolina law. He first won the Green Party's nomination and then lost the Democratic Party's nomination. That context and timing are critical distinctions because they

create a different set of constitutional burdens and have to be justified by a different set of state interests.

For instance, the defendants' application of South Carolina's sore-loser statute in this case has given one political party an effective veto over another party's already-chosen nominee. A typical sore-loser statute doesn't do that. And where a state has chosen to allow fusion candidates, as South Carolina has, any interest that the state might otherwise have had in avoiding splintered parties loses its force. As a result, the reasoning and analysis in typical sore-loser cases like *Garza* don't even begin to answer the tough questions posed in this case.

The same is true of *Storer v. Brown*, 415 U.S. 724 (1974), another case on which the defendants rely. The *Storer* Court upheld California's disaffiliation requirement for independent candidates and mentioned but ultimately didn't rule on California's sore-loser statute. *See id.* at 736 ("there is no need to examine the constitutionality of the other provisions"). The Court's ruling is rooted in California's decision to adopt a candidate-selection process that expressly forbade fusion candidates and was designed, above all, to prevent factionalism and splintered parties. *See id.* at 735-36. About the sore-loser statute, the Court said only that "the provision against defeated primary candidates running as independents effectuates this aim," *id.* at 735, but it also noted that "[a] State need not take the course California has," *id.* at 736. *Storer* says nothing about the constitutionality of candidate-selection procedures in states like South Carolina that have indeed chosen a different

course. Unlike California, South Carolina has chosen to allow splintered parties, factionalism, and more robust competition in the electoral marketplace by allowing fusion candidates. In this case, moreover, the sore-loser statute doesn't merely prevent defeated primary candidates from running as independents. South Carolina's statute also prevents successful candidates like Eugene Platt from running as the standard-bearer of a recognized political party even though Platt hadn't lost anything when the party chose him.

The defendants also rely on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), in which the Supreme Court upheld Minnesota's total ban on fusion candidates. While *Timmons*, like *Storer*, suggests that South Carolina could ban fusion altogether, it doesn't answer the question presented here. South Carolina has clearly chosen to allow fusion candidates, and *Timmons* doesn't tell us whether the State's restrictions on fusion candidates are constitutional. A state could not, for example, limit fusion to candidates of one race or gender. Cases like *Jones*, *Lopez-Torres*, and *Eu* – all of which the defendants simply ignore in their brief – suggest that a state may not limit fusion to candidates that haven't been vetoed by other parties.

Finally, the defendants also rely on three cases that dealt not with South Carolina's sore-loser statute but with the "loyalty oath" that the State requires of all candidates who seek a party's nomination. See *Backus v. Spears*, 677 F.2d 397 (4th Cir. 1982); *Florence County Democratic Party v. Johnson*, 281 S.C. 218, 314 S.E.2d 335 (1984); *White v. West*, No. 74-1709 (D.S.C. 1976). These would be typical sore-loser cases if they dealt with the sore-loser statute

at all. In each case, a candidate sought and lost the Democratic Party's nomination before seeking ballot access through an alternate route. The courts held that the loyalty oath was enforceable under those circumstances and prohibited the candidates from getting on the ballot after having first been defeated. None of the cases held that the oath was enforceable against someone in Platt's position. And none of them addressed the constitutionality of the sore-loser statute at issue here.

### **III. The constitutional burdens here are heavy.**

The defendants contend that the constitutional burdens in this case are minimal. They offer no evidence to support this conclusion, however, and their contention doesn't square with other cases that have found similar burdens to be quite heavy.

The burdens on the Green Party's rights, in particular, are at least as heavy as those found to warrant strict scrutiny in *Jones*. 530 U.S. at 582. In that case, the Supreme Court invalidated California's blanket primary on the ground that it permitted non-party members to influence the process of selecting the party's standard bearers in the general election. *Id.* at 577. The Court could conceive of "no heavier burden on a political party's associational freedom" and determined that strict scrutiny should apply. *Id.* at 582. In this case, the current application of South Carolina's sore-loser statute hasn't merely given Democratic Party voters an opportunity to *influence* the outcome of the Green Party's nomination process. It has given Democratic voters an *effective veto* over the Green Party's decision.

This is not a case where, as the defendants put it, “the Green Party simply chose a candidate who was not qualified under state law.” This is a case where the Eugene Platt was qualified when the Green Party picked him and then had his qualifications yanked by Democratic voters more than a month later. Having to replace one’s candidate after the end of the selection process is dramatically more burdensome for the party and like-minded voters than being unable to select a particular candidate at the beginning of the process.

The defendants are certainly correct that a candidate facing South Carolina’s sore-loser statute could simply choose not to take advantage of the opportunity to run for more than one party’s nomination at a time, but this observation misses the point. It doesn’t mean that the burdens on a candidate are minor. It means that there’s a severe chilling effect on a candidate’s right to associate with like-minded citizens. This is particularly true because South Carolina law doesn’t permit a candidate to withdraw from a nominating process after entering it. The result is a political minefield that puts a heavy burden on would-be fusion candidates.

**IV. The defendants’ application of South Carolina’s sore-loser statute in this case doesn’t serve the interests asserted to justify it.**

The defendants offer three state interests to justify their application of South Carolina’s sore-loser statute in this case: (1) minimizing excessive factionalism; (2) preventing intra-party feuding; and (3) avoiding voter confusion.

The first two of these lose their force in a fusion state. When state law permits fusion, the state has made a choice to allow a greater degree of factionalism, and the distinction between *intra-party* and *inter-party* feuds melts away. *Cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (observing that anti-fusion laws promote a two-party system and reduce factionalism). South Carolina has thus made a choice to subordinate any interest it might have in reducing factionalism and preventing intra-party feuds to its legitimate interest in promoting a healthy and vigorous democracy by encouraging many points of view.

Even if South Carolina could claim compelling interests in minimizing factionalism and preventing intra-party feuds, moreover, the defendants' application of the sore-loser statute in this case isn't narrowly tailored to advance those interests. It bars from the ballot not only sore losers – *i.e.*, candidates who seek ballot access through an alternative route *after* they lose a nomination – but also candidates like Platt who sought *at the outset* to win the nomination of two distinct parties. Platt was not a loser when he sought the Green Party nomination. He is not attempting to continue an intra-party struggle which was settled in a party primary. Platt sought both parties' nominations well before either party had chosen its nominee. He won the Green Party nomination *before* he lost the Democratic primary, and there was no way for him to withdraw from the latter after winning the former. Under these circumstances, the defendants have applied South Carolina's sore-loser

statute with a broad brush that goes well beyond any legitimate interests that the state might otherwise have.

The defendants also don't explain how their application of South Carolina's sore-loser statute serves any interest in avoiding voter confusion. Eugene Platt has been the Green Party's nominee since May 3 – there can hardly be any confusion if he remains on the ballot. In fact, his removal from the ballot after having received the Green Party's nomination is more likely to cause voter confusion than his presence on it.

**V. The plaintiffs have standing to bring this case.**

The defendants also argue that the plaintiffs lack standing to bring this case because, according to them, Platt didn't file a timely statement of intention of candidacy. The defendants' assertion, however, is flatly contradicted by the evidence attached to the defendants' own brief.

The defendants claim that Platt hasn't complied with Section 7-11-15 of the South Carolina Code, which provides:

In order to qualify as a candidate to run in the general election, all candidates seeking nomination by political party primary or political party convention must file a statement of intention of candidacy between noon on March sixteenth and noon on March thirtieth as provided in this section.

S.C. Code. Ann. 7-11-15. Attached to the defendants' brief are Platt's two candidacy statements – one for the Green Party and one for the Democratic Party. As is apparent on its face, Platt filed his statement with the Democratic Party on March 17, thereby satisfying Section 7-11-15.

Both as written and as applied by the South Carolina Election Commission this year and in the past, Section 7-11-15 does not require a candidate to file *all* candidacy statements by March 30. A candidate need only file *a* candidacy statement by that date – which Platt clearly did. Other candidacy statements need only be submitted in time for a political party to meet other deadlines on the election calendar, and there’s no suggestion that the Green Party missed any of those deadlines here. The defendants are either overlooking the plain language of the statute as well as their longstanding practice in applying it, or they’re asking this Court to re-write the statute wholesale.

The defendants also suggest in a footnote that the plaintiffs lack standing because the possibility of an injunction to enforce Platt’s loyalty oath to the Democratic Party raises questions about this Court’s ability to redress the wrongs alleged in this case. This is nonsense. Not only is the loyalty oath not at issue in this case, but the pledge, if enforced, wouldn’t keep Platt off the ballot as the Green Party’s nominee. At most, an injunction could only prevent him from campaigning. It wouldn’t prevent the Green Party from campaigning on his behalf. Nothing in the pledge authorizes or requires the defendants in this case to remove an otherwise qualified candidate from the ballot.

**VI. The plaintiffs are not guilty of laches.**

Laches is an affirmative defense. Fed. R.Civ. P 8(c)(1). Because it’s an affirmative defense, the defendants bear the burden of proof and persuasion. Giddens v. Isbrandtsen Co., 355 F.2d 125 (4th Cir. 1966). “Laches imposes on

the defendant the ultimate burden of proving ‘(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.’” *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (quoting *Costello v. U.S.*, 365 U.S. 265, 282 (1961)). The Fourth Circuit has described the first element of that standard as being met when “the plaintiff delayed inexcusably or unreasonably in filing suit.” *id.*

The defendants don’t acknowledge their burden of proof or the elements of their burden. They don’t even *claim* to meet the elements of their defense. They point to the time between the date on which they refused to place plaintiff Platt’s name on the ballot (June 27, 2008) and the date of filing the complaint in this case (August 7, 2008) and then assert that plaintiffs “have failed to explain or justify their substantial delay in pursuing this action.” Apart from misunderstanding that they bear the burden of proof, the defendants don’t even assert that their claim of “substantial delay” meets the legal standard of “lack of diligence”, “inexcusable” or “unreasonable.” Laches, of course, depends on the particular circumstances of each case. *White v. Daniel*, 909 F.2d at 102. Whether the brief interval between their action and the filing date could possibly meet that standard under all the facts and circumstances of this case is left for defendants to establish.

Most damaging to their argument is that the defendants don’t even assert that they meet the second element of laches – prejudice to them. The Fourth Circuit has held that in a proper case, this second element can be aided by “the inference of prejudice warranted by the plaintiff’s delay.” *White v.*

*Daniel*, 909 F.2d at 102. But the defendants assert nothing more than a state-law procedural deadline to certify candidates for inclusion on the ballot that expired eight days after this suit was filed. The defendants haven't asserted that their defense is hampered, and, most significantly, they haven't even suggested that relief would in any way make preparation for the election difficult.

The defendants have only asserted – without support – that “it is simply too late for this Court to fully address what the Plaintiffs contend is an issue of first impression and allow for the electoral process to proceed in an orderly and efficient manner.” This is not a redistricting case which can be rejected if brought too close to an election. *See Maryland Citizens for a Representative General Assembly v. Maryland*, 429 F.2d 606 (4th Cir. 1970); *Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980). This case involves placing a name on the ballot. Given that national party nominees for the November election were not set until yesterday, the defendants don't contend that ballots cannot be prepared or corrected in the time remaining, or that other relief cannot be granted. *Compare, Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in-chambers opinion enjoining election the day before it was to be held in lawsuit filed four days before election); *Hadnott v. Amos*, 393 U.S. 904, 393 U.S. 815 (1968) (order entered on October 14, 1968, directing names to be placed on November ballot; the district court had entered temporary restraining order on September 18 to place names on ballot but had later vacated that order).

Tellingly, the defendants cite *Fuliani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990), for the proposition that “the state’s interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made.” But having done so, they make no claims that anything of this nature has occurred. The defendants simply point to the state law which gave them a deadline for certifying candidates. They also cite the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff, and assert that ballots for military and overseas voters must be printed and mailed by September 20, 2008. Of course, that date hasn’t yet arrived, but the plaintiffs note that UOCAVA doesn’t contain that deadline. There is an administrative guideline of the Federal Voter Assistance Program (FVAP), which enforces the Act, that ballots should be mailed out to allow for 15 days to reach the voter and 15 days to be executed and returned, and FVAP encourages allowing for 35 days for this process. September 20 is 45 days before the election. The defendants don’t claim that irrevocable steps have been taken or resources committed in election preparation. They don’t even claim that relief can’t be granted after ballots go to press. Even if *some* adjustments become necessary to ensure the plaintiffs’ rights, those alone would not establish the defendants’ burden under the law they quote.

The defendants’ reliance on state cases which merely uphold state election procedural deadlines also doesn’t help to establish their defense. Those cases didn’t involve claims of fundamental constitutional rights but merely interpreted the requirements of South Carolina statutes. The

defendants of course could have timely certified plaintiff Platt after this lawsuit was filed. But, in any event, the state-law deadline in and of itself has little bearing on the defense asserted and much less on plaintiffs' constitutional claims.

In sum, defendants have raised laches as a defense, but they've failed to establish the defense at this point.

#### **VII. The defendants aren't immune from suit.**

In a footnote, the defendants contend that the State Election Commission is not subject to suit, even for injunctive relief, under 42 U.S.C. § 1983. Relying in part on *Kentucky v. Graham*, 473 U.S. 159, 167, n.14 (1985), they argue that the State and its agencies are not "persons" within the meaning of that statute. The same opinion acknowledges, however, that "in an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants." *Graham*, 473 U.S. 169, n.18; *see also Ex Parte Young*, 209 U.S. 123 (1908).

That's precisely what the plaintiffs have done here. Each of the officials on the South Carolina State Election Commission was named as a defendant in his or her official capacity, in accordance with this principle. The officials are indisputable "persons" acting under of color of state law when acting in their official capacities and are therefore subject to suit for declaratory and injunctive relief. While the Commission itself might have a viable argument on a future motion to dismiss the Commission as a defendant, that alone is an unpersuasive defense to the merits of the claim in this case.

In addition, it's also beyond dispute that the South Carolina State Election Commission has been subject to suit under § 1983 in the past notwithstanding the defendants' argument in this case. *See, e.g., United Citizens Party of South Carolina v. South Carolina State Election Commission*, 319 F. Supp. 784 (D.S.C. 1970); *Toporek v. South Carolina State Election Commission*, 362 F. Supp. 613 (D.S.C. 1973). While the Commission isn't necessarily bound by its own silence in previous cases, it's nonetheless worth noting the Commission's silence on this issue in the past.

### **VIII. Conclusion**

This Court should grant the plaintiffs' motion for a preliminary injunction prohibiting the defendants from removing plaintiff Eugene Platt from the ballot as the Green Party's candidate for House Seat 115.

Respectfully Submitted,

/s/Laughlin McDonald  
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