

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

South Carolina Green Party, Eugene Platt,)
and Robert Dunham,)

Civil Action No. 3:08-02790-JFA

Plaintiffs,)

v.)

South Carolina State Election Commission,)
John H. Hudgens, Cynthia M. Bensch,)
Tracey C. Green, Pamela B. Pinson, and)
Thomas Waring, in their official capacities)
only as Chairman and members respectively)
of the South Carolina State Election)
Commission,)

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Defendants.)

_____)

The Plaintiffs have brought this action pursuant to 42 U.S.C. § 1983 alleging that the South Carolina "sore loser" statute, S.C. Code Ann. § 7-11-10, is unconstitutional as applied to the Plaintiff Eugene Platt. The Plaintiffs seek declaratory and injunctive relief prohibiting the South Carolina State Election Commission and its members from applying the "sore loser" statute to disqualify Platt from appearing as a candidate on the general election ballot as the nominee of Green Party for House Seat 115. The Plaintiffs further seek an injunction requiring that Platt appear on the general election ballot for the November 2008 General Election.

The Plaintiffs have filed a motion for preliminary injunction which is currently pending. The Defendants oppose that motion.

BACKGROUND

The "sore loser" statute, S.C. Code Ann. § 7-11-10, provides that "no person who was defeated as a candidate for nomination to an office in a party primary or party convention shall have his name placed on the ballot for the ensuing general or special election." S.C. Code Ann. § 7-11-10. The South Carolina State Election Commission staff determined that the "sore loser" statute applies to Eugene Platt. The record demonstrates that Platt submitted a Statement of Intention of Candidacy seeking the Democratic Party nomination for House Seat 115. Platt then competed in the Democratic Party primary on June 10, 2008. Of the 1,371 votes cast, Anne Peterson Hutto received 856 votes (62.44%) and Platt received 515 votes (37.56%). *See*, Exhibit #1. By losing the Democratic Party primary, Platt is prohibited by Section 7-11-10 from having his name placed on the general election ballot.

Platt nonetheless contends that he should appear on the general election ballot as the nominee of the Green Party for House Seat 115. Platt has alleged that he filed a timely Statement of Intention of Candidacy with the Green Party and that he was nominated by the Green Party as its candidate at the Green Party State Convention held on May 3, 2008. The Plaintiffs have offered no evidence to support these allegations. In fact, the Statement of Intention of Candidacy which was ultimately filed with the State Election Commission shows that it was received by the Green Party on May 3, 2008, the date of Platt's nomination as a Green Party candidate. *See*, Exhibit #2.

At a meeting held on June 27, 2008, the State Election Commission addressed the issue of whether Platt should be permitted to have his name placed on the general election ballot. The minutes from that meeting reflect that the State Election Commission staff had informed the

Green Party that Section 7-11-10 did not allow Platt to have his name on the general election ballot. *See*, Exhibit #3. The members of the Commission made no motion to overrule the staff decision, and no vote was taken.

DISCUSSION

I. Standard for Preliminary Injunction

The Fourth Circuit Court of Appeals has adopted the "hardship balancing test" for adjudicating a motion for preliminary injunction. *See, Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). Under that test, a court considers the following four factors:

- (1) The likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
- (2) The likelihood of harm to the defendant if the requested relief is granted;
- (3) The likelihood that the plaintiff will succeed on the merits;
and
- (4) The public interest.

Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991). The burden of proof lies on the plaintiff to establish each of these four factors. *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

Federal decisions have uniformly characterized the grant of interim relief as an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Direx Israel*, 952 F.2d at 811. Further, when considering whether to enjoin enforcement of a state statute, the court must consider

the statute as presumptively valid, and if the statute "can be construed in one way as constitutional and in another way unconstitutional, it should be construed in the constitutional way." *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1033 (4th Cir. 1980), citing *Graham v. Richardson*, 403 U.S. 365 (1971).

The Fourth Circuit has explained that "[t]he purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal proofs and according to the principles of equity." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980). "The authority of the district court judge to issue a preliminary injunction, especially a mandatory one should be sparingly exercised." *Id.* "Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Id.* "Mandatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored, and *should not be issued unless the facts and law clearly favor the moving party.*" *Taylor v. Freeman*, 34 F.3d 266, 270, n.2 (4th Cir. 1994), citing *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976). (Emphasis added).

Other circuits have similarly recognized that the "moving party must meet a heightened standard when requesting one of three types of historically disfavored injunctions." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 (10th Cir. 2007). The three types of disfavored injunctions are (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. *Id.* "When a preliminary injunction falls into one of these categories, it must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." 483

F.3d at 1048-1049. "A district court may not grant a preliminary injunction unless the moving party makes a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." 483 F.3d at 1048. *See also, Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (stating that, when issuing a mandatory preliminary injunction, the court must find that the "facts and law clearly favor" plaintiffs); *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 35 (2d Cir. 1995) ("if a preliminary injunction will make it difficult or impossible to render a meaningful remedy to a defendant who prevails on the merits at trial, then the plaintiff should have to meet the higher standard of substantial, or clear showing of, likelihood of success to obtain preliminary relief").

II. The Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

The Plaintiffs are seeking mandatory preliminary injunction relief. They are requesting that this Court issue an order requiring the State Election Commission to place Eugene Platt's name on the general election ballot. Such a preliminary injunction clearly alters the status quo. Furthermore, such an injunction would award the Plaintiffs all of the relief that they seek, and if the Defendants were to prevail at the summary judgment stage or at trial, the Court could not "un-do" the effects of the mandatory preliminary injunction sought. The Plaintiffs indeed claim in their motion that the issue presented is one of first impression, which itself militates against mandatory preliminary injunctive relief. At any rate, the heightened standard that applies to mandatory preliminary injunctions requires a *substantial* showing of a likelihood of success on the merits. The Plaintiffs have clearly not met that heightened standard.

A. Standing

There are several defenses that the Court must consider and address before issuing the mandatory preliminary injunction that the Plaintiffs seek. "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, 404 (4th Cir. 1998). "A justiciable case or controversy requires a plaintiff who has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 789 (4th Cir. 2004). Therefore, "to establish standing, a plaintiff must show (1) an actual or threatened injury (2) that was caused by the putatively illegal conduct of the defendant and (3) that is likely to be redressed by a favorable decision." *Id.*, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *See also, Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002) ("[t]he plaintiff bears the burden of establishing injury, traceability, and redressability because it is the party seeking to invoke federal jurisdiction").

The Plaintiffs have presented no evidence in support of their motion for preliminary injunction. The motion was not supported by any affidavits nor other admissible evidence. In order to establish standing, it is incumbent on the Plaintiffs to present evidence of redressability, meaning that the Plaintiffs must show that Eugene Platt is qualified to appear on the general election ballot as the nominee of Green Party in the event that Court determines that the "sore loser" statute is unconstitutional as applied to him. Indeed, the doctrine of constitutional avoidance mandates that this Court may not decide the constitutionality of the state statute unless that decision will afford the requested relief. *See, Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008).

The Defendants submit that the evidence would show that Platt was not qualified to be the Green Party nominee, and irregardless of the constitutionality of the "sore loser" statute, he cannot appear on the general election ballot as the Green Party nominee. Section 7-11-15 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. Eugene Platt's Statement of Intention of Candidacy shows that it was received by the Green Party on May 3, 2008. *See*, Exhibit #2. Because that Statement of Intention of Candidacy was not received by March 30, 2008, as required by law, Platt is not qualified to run in the general election on the Green Party ticket.

In sum, even if this Court were to decide the constitutional questions presented by the Plaintiffs, the Plaintiffs would not be entitled to the ultimate relief that they seek. A favorable ruling on the constitutional question will not overcome the simple fact that Platt is not otherwise qualified to be on the general election ballot because he did not timely file a Statement of Intention of Candidacy with the Green Party. Consequently, the Plaintiffs cannot meet the redressability prong of the standing analysis and have not demonstrated the existence of an Article III case or controversy.¹

¹ Eugene Platt is also subject to enforcement under Section 7-11-210 of the pledge that he made to the Democratic Party. By that pledge, Platt authorized "the issuance of an injunction ... should I violate this pledge by offering or campaigning in the ensuing general election for election to this office [House Seat 115] for which a nominee has been elected in the party primary election." *See*, Exhibit #4. Therefore, until it is determined that Platt is not subject to an injunction under Section 7-11-210 and the pledge that he gave to the Democratic Party, the Plaintiffs cannot demonstrate that a ruling on the constitutional question presented will redress the alleged wrong and result in Platt's name being placed on the general election ballot.

B. Laches

In addition to failing to meet the threshold requirement of standing, the Plaintiffs' claim for preliminary injunctive relief is also barred by the doctrine of laches. "Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant." *Fuliani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990). "In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously." *Id.* "As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made." *Id.* See also, *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Citing the defense of mootness (rather than laches), the South Carolina Supreme Court recently dismissed an appeal from a primary election in the case of *Willis v. Wukela*, 2008 WL 3153435 (S.C. 2008). The State Supreme Court concluded that candidates by state law must be certified by August 15, 2008, and that the appeal was moot because it was impossible to hold a new election prior to that date. The *Willis* Court pointed out that "as a general rule, courts have held that they are without power to grant substantial relief once the time passes for the name of a contestant to be certified for the election of officers to be placed on the official ballot." 2008 WL 3153435, *3, citing *Sasser v. South Carolina Democratic Party*, 277 S.C. 67, 282 S.E.2d 602, 603 (1981).

In the present case, Section 7-13-350 requires that candidates nominated by petition, primary, or convention be certified for inclusion on the general election ballot by August 15, 2008. The Plaintiffs, however, did not even file this action or move for a preliminary injunction until August 7, 2008. They have failed to explain or justify their substantial delay in pursuing this action. The Plaintiffs were aware since June that the State Election Commission was

applying Section 7-11-10 to disqualify Eugene Platt from having his name on the general election ballot. The Commission addressed Platt's situation at its June 27, 2008 meeting and declined at that time to place his name on the ballot. *See*, Exhibit #3. No further action was requested or taken by the State Election Commission since that date. Yet, the Plaintiffs waited a full *six weeks* to commence this action with full knowledge that the candidates needed to be certified by August 15th in order to appear on the general election ballot. Thus, the Plaintiffs have slept on their rights, and 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.

C. Merits of First Amendment Claim

In the event that the Court concludes that the Plaintiffs have satisfied justiciability concerns and have not slept on their rights in waiting until a week before the certification deadline to bring this action,² the Defendants submit further that the Plaintiffs have not demonstrated that they will succeed on the merits.

The United States Supreme Court has recognized that the "First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). However, the Court has also recognized that "[i]t does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). "Common sense, as well as constitutional law,

² In accordance with the doctrine of constitutional avoidance, the Court should dispose of this case, if possible, on non-constitutional grounds and avoid deciding the constitutional issue raised by the Plaintiffs.

compels the conclusion that government must play an active role in structuring elections; 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." *Id.*, citing *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Supreme Court has determined that every election law does not merit strict scrutiny. "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. "[T]he mere fact that a State's system creates barriers tending to limit the field of candidates from which voters might choose does not in itself compel close scrutiny." *Id.* The Court therefore applies a "more flexible" standard under which "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. Where rights are subjected to "severe restrictions," strict scrutiny is appropriate; yet "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.*

The Plaintiffs here complain that their First and Fourteenth Amendment rights have been infringed by the application of the "sore loser" statute to disqualify Eugene Platt as the Green Party candidate for House Seat 115. They contend that the Green Party, and no other party, has the right to determine who their candidate may be.

This precise issue was presented in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), where the Supreme Court upheld the constitutionality of Minnesota's anti-fusion

laws which prohibited a candidate from appearing on the ballot as the candidate of more than one political party. The Twin Cities Area New Party claimed a First and Fourteenth Amendment right to select its own candidate. The Court noted at the outset that "[t]he New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes." *Timmons*, 520 U.S. at 359. The Court nonetheless concluded:

It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate. A particular candidate might be ineligible for office, unwilling to serve, or, as here, another party's candidate. That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights.

Id. The Supreme Court therefore concluded that the fusion ban did not impose "severe" burdens on the New Party's associational rights, and as a result, "the State's asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the party's rights." *Timmons*, 520 U.S. at 364.

In assessing those interests, the *Timmons* Court held that "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Id.* "States also have a strong interest in the stability of their political systems, and may adopt measures that "temper the destabilizing effects of party-splintering and excessive factionalism." *Timmons*, 520 U.S. at 366-67.

These same interests were addressed earlier by the Supreme Court in *Storer v. Brown*, 415 U.S. 724 (1974), where the Court upheld a California disaffiliation law that denied ballot access to independent candidates who had voted in the immediately preceding primary elections or had a registered party affiliation at any time during the year before the same primary elections. The Court found that "the one-year disaffiliation provision furthers the State's interest in the

stability of its political system." 415 U.S. at 736. In *Storer*, the Court also addressed favorably the application of a "sore loser" statute similar to what is at issue in the case at bar:

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

Storer, 415 U.S. at 735. In *Clingman v. Beaver*, 544 U.S. 581 (2005), the Court likewise recognized that laws preventing "sore loser" candidacies "advance[] ... regulatory interests that this Court recognizes as important." 544 U.S. at 593-94, *citing Storer, supra*.

Based upon current Supreme Court precedent, including *Timmons* and *Storer*, the Defendants submit that the South Carolina "sore loser" statute and its application herein disqualifying Eugene Platt as a candidate in the general election meets constitutional muster. The constitutionality of "sore loser" laws has also been previously upheld by this Court in *White v. West*, No. 74-1709 (D.S.C. 1976), and by the Fourth Circuit Court of Appeals in *Backus v. Spears*, 677 F.2d 397 (1982).

In *Backus*, the plaintiffs consisted of signers of a petition to place Mordecai Johnson on the general election ballot for a city council position. Johnson had been defeated in the Democratic Party primary election and was barred from appearing on the general election ballot by the "sore loser" statute. The plaintiffs argued that laws disqualifying Johnson were

unconstitutional. Addressing the merits, the Fourth Circuit described the plaintiffs' constitutional claims as "frivolous." 677 F.2d at 399. Citing the Supreme Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), the Fourth Circuit held that "South Carolina certainly has the power, as a permissible adjunct to promoting orderly primary elections, to forbid petition candidacies by persons who have been defeated in party primaries." 677 F.2d at 399. The Fourth Circuit concluded that "South Carolina's prohibition of candidates in a primary from appearing independently on the ballot would less impinge on the right to effectively vote than does the California provision upheld in *Storer*; and, correspondingly, the South Carolina statute would even more clearly promote the legitimate state interest in the stability of its political system." 677 F.2d at 400.

The *Backus* Court also discussed the South Carolina "sore loser" statute at issue here:

Indeed, in the course of upholding California's "disaffiliation" requirement, *Storer* approvingly discusses a California "sore-loser" provision -- a provision substantively identical to the South Carolina provision that arguably applies here -- as effectuating the valid policy of avoiding intraparty disputes in the general election.

Id. The Court also rejected an attempt to distinguish *Storer*. The Fourth Circuit wrote:

Backus attempts to distinguish *Storer* and *White v. West* by pointing out that in those cases the challengers were frustrated candidates, whereas here voters are asserting their right to have their preferred candidate on the ballot, regardless of the candidate's wishes. We find the distinction unpersuasive. *Backus* wants an exception by which a defeated candidate could avoid an admittedly constitutional "sore loser" law simply by having "independent" voters rather than the candidate himself promote his candidacy. Such an exception would vitiate the law, and is not constitutionally required. We conclude that *Storer v. Brown* unmistakably indicates that a city may constitutionally refuse to accept an otherwise valid petition that seeks to place the name of a defeated primary candidate on the general election ballot.

Id.

The same is likewise true with respect to a defeated primary candidate who is nominated by a different political party. The rationale is no different, and the important state interests identified and approved in *Storer* and *Backus* support the constitutionality of South Carolina's "sore loser" statute and its application to Eugene Platt.³

In assessing the merits of the Plaintiffs' constitutional claim, the Court is also urged to give great weight to the analysis of the federal district court in *National Committee of U.S. Taxpayers Party v. Garza*, 924 F.Supp. 71 (W.D. Tex. 1996), which involves substantially similar facts as the present case. In *Garza*, the U.S. Taxpayers Party had nominated Pat Buchanan as its candidate for President. The State of Texas determined that Buchanan was ineligible for placement on the general election ballot as the U.S. Taxpayers Party candidate in accordance with a "sore loser" statute because Buchanan had run for President in the Republican Primary and had lost. The U.S. Taxpayers Party argued that the "sore loser" statute violated their First Amendment rights and sought a preliminary injunction.

In denying the preliminary injunction, the *Garza* Court explained as follows:

The "sore loser" statute does not prohibit the Plaintiffs from selecting a Presidential nominee and placing his or her name on the ballot. It does not discriminate against independent candidates, nor does it create burdensome ballot access requirements for third parties. Rather, the provision bars Plaintiffs from selecting as their nominee an individual who has already run in a party primary and lost, namely Pat Buchanan. This is not to say that Pat Buchanan could not have been the U.S. Taxpayers Presidential nominee. Had Mr. Buchanan aligned himself with the Plaintiffs earlier and never run in the Republican Primary, there would be no obstacle to the Plaintiffs placing his name on the ballot this November. Furthermore, there is nothing to prevent the U.S. Taxpayers Party

³ In *Florence County Democratic Party v. Johnson*, 281 S.C. 218, 314 S.E.2d 335 (1984), the South Carolina Supreme Court similarly ruled that "the restriction on offering or campaigning in a general election for an office for which there is a party nominee after a candidate is defeated in the primary election is a reasonable restriction necessary to preserve the integrity of the electoral process." 314 S.E.2d at 338.

from running Mr. Buchanan in the next Presidential election. Although the "sore loser" statute impacts the Plaintiffs' fundamental rights as voters, the magnitude of the injury is not great.

924 F. Supp. at 74. The Court recognized that the State had a "strong interest in insuring orderly, fair, and honest elections rather than chaos; maintaining the integrity of various routes to the ballot; preventing interparty raiding; avoiding voter confusion, ballot overcrowding, or the presence of frivolous candidacies; and in seeking to ensure that elections are operated equitably and efficiently." 924 F.Supp. at 73. The Court agreed that the State's stated reasons for the "sore loser" statute were "valid, legitimate justifications for the restriction." 924 F.Supp. at 74. In particular, the Court agreed that,

The November general election is not an arena for continuing intraparty feuds, nor is it a proper arena for a failed party candidate to run yet again in the same election cycle as a candidate of another separate and distinct political party. The "sore loser" statute prohibits, and thus avoids, divisive and internecine intraparty fights after a political party had decided its nominee. ... [T]his section and the Texas Election Code as a whole seek to minimize unrestrained political factionalism and bickering that can only serve to confuse the electorate.

Id. Relying on *Storer v. Brown*, 415 U.S. 724 (1974), the Court concluded that "[t]he State's interest in preventing factionalism, intra-party feuding, and voter confusion outweighs the minimal burden the statute places on the Plaintiffs' rights" and that "the Texas 'sore loser' statute is a reasonable, nondiscriminatory restriction that protects the integrity and reliability of the electoral process itself and does not overly burden Plaintiffs' fundamental rights as voters." 924 F.Supp. at 75.

The reasoning and analysis of the *Garza* Court apply equally to the present case. The South Carolina "sore loser" statute satisfies the very same state interests articulated in *Garza*. The State of South Carolina has an interest in minimizing excessive factionalism, preventing

intra-party feuding or disputes, and avoiding voter confusion. As recognized in *Backus*, the State has the right and obligation to foster orderly, fair and efficient elections and to maintain a stable political system. The enforcement of Section 7-11-10 to disqualify Eugene Platt serves these very state interests. The burden on the Plaintiffs, including the Green Party and Platt himself, are minimal. Platt knew or should have known the repercussions of seeking multiple party nominations and not being successful. Platt could have been the Green Party candidate if he had chosen not to run for the Democratic Party nomination as well. Likewise, Platt can be the Green Party candidate in the future. Moreover, the "sore loser" statute did not prohibit the Green Party from fielding a candidate for House Seat 115 and having his or her name on the general election ballot. As addressed in *Timmons, supra*, the Green Party simply chose a candidate who was not qualified under state law. The application of the "sore loser" statute does not discriminate against or create burdensome ballot access for third party candidates.

In sum, in the event that the Court reaches the merits of the Plaintiffs' constitutional claim, the Defendants submit that existing authority from the United States Supreme Court, the Fourth Circuit, and other federal courts strongly support the constitutionality of the South Carolina "sore loser" statute and its application in this case. The Plaintiffs have not demonstrated a likelihood of success on merits -- and certainly not a *substantial* likelihood as is required under the heightened standard for mandatory injunctive relief. The Plaintiffs have not shown that "the facts and law clearly favor the moving party." *See, Taylor v. Freeman*, 34 F.3d 266, 270, n.2 (4th Cir. 1994). For these reasons, the motion for preliminary injunction should be denied.⁴

⁴ As an additional defense, the State Election Commission submits that it is not subject to suit even for injunctive relief. The Commission is not a "person" amenable to suit under 42 U.S.C. § 1983 regardless of the relief sought. In *Will v. Michigan State Police*, 491

III. A balancing of the harms and a consideration of the public interests at stake further support the denial of the Plaintiffs' motion for a preliminary injunction.

Finally, if the Court balances the harms and addresses the other factors considered by a Court in deciding a motion for preliminary injunction, those considerations support the denial of the Plaintiffs' motions. As discussed at length above, the State has a strong interest in ensuring and maintaining order and efficiency in the electoral process, in preventing excessive factionalism and intra-party disputes, and in avoiding voter confusion. The burden on the Plaintiffs' rights, as recognized in the case law discussed above, is minimal and could have been avoided, certainly by Platt and the Green Party. The Plaintiffs have also been slow to file this action, and the Defendants are under strict deadlines set by state and federal law to ensure that the electoral process moves forward in a timely manner. In fact, federal law mandates that the general election absentee ballots be printed and mailed to military and overseas citizens no later than September 20, 2008. *See generally*, Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff. The public interest is certainly best served by a denial of the Plaintiff's request for mandatory injunctive relief.

U.S. 58 (1989), the United States Supreme Court held that the state is not a "person" amenable to suit under Section 1983. *See also*, *Alabama v. Pugh*, 438 U.S. 781 (1978); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). The same is true for a state agency such as the State Election Commission. The Court further explained that "a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 169, n.14 (1985). Similarly, in *Arizonians for Official English v. Arizona*, 520 U.S. 43 (1997), the Court held that "§ 1983 creates no remedy against a State." 520 U.S. at 69.

