No. 09-1915

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTH CAROLINA GREEN PARTY;
EUGENE PLATT; and ROBERT DUNHAM,
Plaintiffs - Appellants

v.

SOUTH CAROLINA STATE ELECTION COMMISSION;
JOHN H. HUDGENS, CYNTHIA M. BENSCH, TRACEY C. GREEN,
PAMELLA B. PINSON, and THOMAS WARING, in their official capacities as
members of the South Carolina State Election Commission; and the
CHARLESTON COUNTY DEMOCRATIC PARTY,
Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, Eugene Platt, Robert Dunham, and the South Carolina Green Party, who are the appellants in this case, make the following disclosure:

1. None of the appellants in this case is a publicly held corporation or other publicly held entity.

2. None of the appellants has any parent corporation.

3. Ten percent or more of the stock of the appellants is not owned by a publicly held corporation or other publicly held entity.

4. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

5. None of the appellants is a trade association.

6. The case does not arise out of a bankruptcy proceeding.

/s/Bryan Sells
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JURISDICTIONAL STATEMENT

The basis of this Court's jurisdiction is 28 U.S.C. § 1291, which confers jurisdiction over final decisions of the district courts. The district court entered a final judgment in the defendants' favor on August 12, 2009, after reaching only one of the plaintiffs' three claims and declining to rule on the others. (J.A. 548.) The plaintiffs timely filed their notice of appeal one day later. (J.A. 549.)

Because this case arose under the United States Constitution and federal civil-rights laws, the bases of the district court's original jurisdiction were 28 U.S.C. § 1331, which confers jurisdiction over federal questions, and 28 U.S.C. §§ 1343(a)(3) and (4), which confer jurisdiction over matters involving civil rights secured by the constitution or laws of the United States.

There is no dispute over the district court's original jurisdiction or this Court's jurisdiction to hear the appeal.

STATEMENT OF THE ISSUES

1. Sore-Loser Statute. South Carolina law allows a candidate for non-presidential public office to run simultaneously for the nomination of more than one political party. A candidate who secures more than one nomination appears more than once on the general-election ballot, and all votes cast for that candidate are aggregated when determining the winner. May the State, consistent with the First and Fourteenth Amendments to the United States Constitution, exclude from the ballot a candidate who won two party nominations but subsequently lost a third and thereby leave the two nominating parties without a candidate on the general-election ballot?

2. Party-Loyalty Oath Statute. South Carolina law requires every candidate seeking a party's nomination for a public office to sign a party-loyalty oath pledging not to authorize a petition drive or to campaign as a write-in candidate if the candidate loses in the party's primary. The Charleston County Democratic Party sought and obtained an injunction in state court prohibiting Eugene Platt from campaigning as the already-chosen nominee of two certified political parties because of the results of the Democratic Party's primary. May the State, consistent with the First and Fourteenth Amendments, so enjoin a candidate on the basis of a mandatory party-loyalty oath when: (1) the oath statute is only enforceable by some

parties and not others; (2) the oath clearly requires the candidate to foreswear protected political advocacy; (3) the oath statute does not unambiguously apply to the enjoined conduct; and (4) there is no evidence that the candidate violated the terms of the oath?

3. Filing Deadline. On April 16, 2008, the State Election Commission purported to change its interpretation of South Carolina's filing-deadline statute. In the initial phases of this lawsuit, the Commission had argued that a retroactive application of that new interpretation could bar one of the plaintiffs from the ballot, but it later conceded that its new interpretation was not, and could not have been, applied in 2008 to deny that candidate a place on the ballot. Is the issue of the retroactive application of the filing-deadline statute therefore moot?

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the District of South Carolina in a case involving the right of a certified political party to choose its own nominees for public office. The plaintiffs in the district court were the South Carolina Green Party, Eugene Platt, a Green Party nominee who was excluded from the ballot, and Robert Dunham, a Platt supporter. The defendants were the South Carolina State Election Commission and the Charleston County Democratic Party.

The plaintiffs filed this action on August 7, 2008, claiming that the Election Commission's decision to exclude Platt from the ballot as the Green Party's nominee on the basis of his subsequent defeat in the Democratic Party's primary election violated rights guaranteed to them by the First and Fourteenth Amendments. (J.A. 10.) The plaintiffs also filed a motion for a preliminary injunction along with their complaint. (J.A. 1.)

The district court held a hearing on the plaintiffs' motion at which the Charleston County Democratic Party intervened as a defendant. At the close of the hearing, the court denied the plaintiffs' motion in an oral ruling issued from the bench. (J.A. 4.) The plaintiffs subsequently filed an amended complaint. (J.A. 54.)

Following a brief period of discovery, the parties filed joint stipulations of fact and cross motions for summary judgment. (J.A. 78-527.) On August 12, 2009, the district court issued an opinion and order granting the defendants' motions for summary judgment and denying the plaintiffs' motions for summary judgment. (J.A. 528.) The court then entered judgment in favor of the defendants. (J.A. 548.)

This appeal followed. (J.A. 549.)

STATEMENT OF THE FACTS

Under South Carolina law, a certified political party can choose its nominees for election to public office either by convention or by primary election. (J.A. 79, 209.) The party's nominees "must be placed upon the appropriate ballot for the election as candidates nominated by the party" if the party certifies the names of those nominees to election officials by the August 15 deadline. S.C. Code Ann. § 7-13-350.

South Carolina is also one of seven states that permit two or more political parties nominate the same candidate for a particular office, a practice known as "electoral fusion."[1] *See* 1970 S.C. Op. Att'y Gen. 275, 1970 WL 12270; 1970 S.C. Op. Att'y Gen. 187, 1970 WL 12919. Candidates are free to seek multiple nominations, and political parties are free to nominate any qualified candidate.[2] A candidate who earns multiple

[1] The other six states are Connecticut, Delaware, Idaho, Mississippi, New York, and Vermont. *See* Adam Morse & J.J. Gass, Brennan Center for Justice, *More Choices, More Voices: A Primer on Fusion* 1 (2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39345.pdf. Four other states permit fusion under certain circumstances: California, Massachusetts, New Hampshire, and Pennsylvania.

[2] A candidate is qualified to hold office if he or she meets the age and residency requirements for the office sought and is not disqualified by virtue of a felony conviction for certain offenses. *See, e.g.*, S.C. Const. art. III, § 7 (qualifications for members of the general assembly); *see generally* http://www.state.sc.us/scsec/qualifi.htm (summarizing the qualifications for various offices).

party nominations appears on the ballot once for each party, and all votes for the fusion candidate must be combined when determining the winner of the election. *See* 1970 S.C. Op. Att'y Gen. 187, 1970 WL 12919.

Plaintiff Eugene Platt was a candidate for a seat in the South Carolina House of Representatives in the 2008 election. He sought the nominations of three certified political parties: the South Carolina Democratic Party, the South Carolina Green Party, and the South Carolina Working Families Party. (J.A. 80, 141.) Platt won the Green Party's nomination at its state convention on May 3. (J.A. 80, 141.) Platt then won the Working Families Party's nomination at its state convention on May 10. (J.A. 141.) A month later, on June 10, Platt came in second in the Democratic Party's primary election. (J.A. 80, 141, 182.)

A short time after the Democratic primary, an employee of the South Carolina State Election Commission notified Platt that he would not be allowed to appear on the ballot as the nominee of the Green Party or the Working Families Party. (J.A. 80, 142, 211.) That employee, Garry Baum, based his decision on South Carolina's "sore-loser statute," which 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. Because Platt was defeated in the Democratic primary, Baum determined that he was ineligible to have his name placed on the ballot as the nominee of any other party.

Platt sought review of Baum's decision by the State Election Commission. The Commission considered the matter at its June 27 meeting but let Baum's decision stand without a vote. (J.A. 80, 142, 180.) As a result, Platt's name did not appear on the general election ballot.

Baum's decision also meant that neither the Green Party nor the Working Families Party could have a candidate on the ballot for the seat Platt sought. Under South Carolina law, a party can nominate a substitute candidate only if its original nominee "dies, becomes disqualified after his nomination, or resigns his candidacy for a legitimate nonpolitical reason," which the statute defines as a health issue, family crisis, or a substantial business conflict. S.C. Code Ann. § 7-11-50; *see also* S. C. Code Ann. 7-11-55 (substitution of candidates where nominees selected by primary election). Because Platt's defeat in the Democratic primary neither "disqualified" him for the office he sought, *see Redfearn v. State Bd. of Canvassers*, 234 S.C. 113, 107 S.E.2d 10 (1959) (holding that sore-loser statute does not disqualify a candidate from office but merely regulates access to the ballot), nor constituted a "legitimate nonpolitical reason," the

Green Party and the Working Families Party could not nominate a substitute candidate in Platt's place.

This action ensued. The plaintiffs claimed that South Carolina's sore-loser statute, as applied to Platt, was unconstitutional because it gave Democratic primary voters an effective veto over the nominee chosen by the Green Party and Working Families Party. (J.A. 10-16.) The plaintiffs relied primarily on *California Democratic Party v. Jones*, 530 U.S. 657 (2000), in which the Supreme Court struck down California's blanket primary system on the ground that it permitted non-party members to influence the process of selecting the party's standard-bearers in the general election. The defendants denied the plaintiffs' claim, arguing that South Carolina's sore-loser statute was no different from the sore-loser provision upheld in *Storer v. Brown*, 415 U.S. 724 (1974).

While the case was pending in the district court, the defendants asserted two additional bases for keeping Platt off the ballot. First, the Charleston County Democratic Party claimed that South Carolina's mandatory party-loyalty oath prohibited Platt's candidacy as the nominee of any other party. Under South Carolina law, every candidate for public office who seeks a party's nomination must sign and file with party officials the following pledge:

> "I hereby pledge myself to abide by the results of the primary or convention. I shall not authorize my name to be placed on the general election ballot by petition and will not offer or campaign as a write-in candidate for this office or any other office for which the party has a nominee."

S.C. Code Ann. § 7-11-210. The statute requires party officials to enforce the oath in a court of competent jurisdiction, and it authorizes the court, "to issue an order" upon proof that a candidate who was defeated in a party's primary election thereafter "offer[s] or campaign[s] as a candidate against any nominee for election to any office in the ensuing general election." *Id.*

The parties stipulated that Platt had abided by the results of the Democratic primary, that he did not "authorize his name to be placed on the general election ballot by petition," and that he did not "offer or campaign as a write-in candidate" against any Democratic nominee. (J.A. 81.) The Party nonetheless sought to invoke the broader language in the statute's enforcement clause to enjoin Platt from offering or campaigning as any kind of candidate. The Party's chairman sued Platt in state court and obtained an injunction prohibiting Platt from offering or campaigning as any kind of candidate for the South Carolina House of Representatives.[3] (J.A. 81, 98-

[3] *Tempel v. Platt*, 08-CP-10-4978 (Charleston Cty. Cir. Ct. Sept. 18, 2008). Neither the South Carolina Green Party nor Robert Dunham, the other plaintiffs-appellants in this case, are parties to the state-court suit.

99.) Platt has appealed, and that appeal remains pending in the South Carolina Supreme Court.

Second, the Election Commission asserted that an unpublicized and retroactive change in the Commission's longstanding interpretation of South Carolina's filing-deadline statute meant that Platt's candidacy papers for the Green Party's nomination were untimely filed. The relevant part of that statute provides as follows:

> 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. For most of this decade, the Commission interpreted this statute as requiring a candidate to file *one* statement of candidacy within the statutory window. (J.A. 263-64.) However, on April 16, 2008, the Commission voted to change its policy and to require a candidate to file *all* statements of intention of candidacy by the March 30 deadline. (J.A. 195-96, 263-64, 309-11.) The Commission did not notify certified political parties of this change in policy. (J.A. 292, 315-17.) And Baum continued to tell Green Party representatives as late as August 12 that the Commission would accept statements of intention of candidacy filed after the March 30 deadline as long as the candidate had filed at least one

such statement before the deadline. (J.A. 43-53, 334-39.) The Commission nonetheless asserted that its April 16 policy change was retroactive and prevented Platt from appearing on the general-election ballot as the Green Party's nominee because, although he filed his statements of intention of candidacy with the Democratic Party and the Working Families Party before the March 30 deadline, he filed his statement with Green Party officials on or about May 4.

The plaintiffs thereafter amended their original complaint to challenge all three of the grounds asserted for keeping Platt off the ballot. (J.A. 54-64.) In granting summary judgment for the defendants, the district court upheld the Commission's application of the sore-loser statute to Platt and declined to rule on the other issues.

SUMMARY OF THE ARGUMENT

This is a case of first impression. Never before has a state applied its sore-loser statute to exclude from the ballot a candidate who was not a sore loser, but that is precisely what the South Carolina State Election Commission did here. The Commission's seemingly bizarre application of the state's sore-loser statute gave the members of one party an effective veto over the already-chosen nominee of two other parties. This application trod heavily on those parties' First Amendment right to choose their own nominees free from participation or influence from non-members – a right that the Supreme Court has repeatedly held sacred – and cannot be justified by a state's interest in minimizing Madisonian factionalism. In fact, the application of a sore-loser statute to a candidate who was not a sore loser tends to promote factionalism, not reduce it, by eliminating competition in the political marketplace.

And, as if the exclusion of an opponent from the ballot were not enough to prevent competition, Democratic Party officials invoked South Carolina's mandatory party-loyalty oath statute to obtain an injunction prohibiting Platt from engaging in any sort of campaign activity. Not only did this application of the oath statute reinforce the Democratic Party's unconstitutional veto power over two other parties' nominee, but the oath

statute itself suffers from several other constitutional defects – not the least of which is the fact that the statute does not apply equally to all political parties and that the Supreme Court has held that a State may not condition ballot access on signing a similar oath. The district court in this case did not address the constitutionality of the oath statute, but the issue remains in the case for decision.

The final issue is one that the Court probably need not decide. In the district court, the State Election Commission abandoned its earlier argument that Platt could be barred from the ballot by the retroactive application of a change in policy with respect to the South Carolina's filing-deadline statute. The Commission conceded that the statute was not applied and could not have been applied in this case, so the issue is now moot.

STANDARD OF REVIEW

The plaintiffs in this action appeal the district court's order and judgment denying their motion for summary judgment and granting the defendant's motion for summary judgment. This Court must therefore review the matter *de novo*, applying the same legal standard as the district court. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc).

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENT

I. South Carolina has given the Democratic Party an unconstitutional veto over the nominee of two other parties.

The First Amendment protects "the right of individuals to associate for the advancement of political beliefs." *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). This right includes the freedom to join together with like-minded voters as a political party in furtherance of a common agenda. *See Norman v. Reed*, 502 U.S. 279, 288 (1992); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."). The right to associate also includes a political party's freedom to choose and promote the "'standard bearer who best represents the party's ideologies and preferences.'" *Eu v. San Francisco County Democratic Central Comm.*, 489 U. S. 214, 224 (1989).

In fact, the Supreme Court has recognized that a political association's right to choose its own nominees lies at the heart of its First Amendment freedoms. *Jones*, 530 U.S. at 575. The choice of a standard-bearer often determines the association's positions on the issues, and it is that nominee who communicates the party's message to the voters and attempts to secure

their support. *Id.* The moment of choosing the party's nominee is "the crucial juncture at which the appeal to common principles may be translated into concerted action." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986).

Because of the central role that political parties play in our democracy, moreover, the Supreme Court has repeatedly affirmed "the special place the First Amendment reserves for, and the special protection it accords," the process by which a political party selects its nominees." *Jones*, 530 U.S. at 567; *see New York State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, ___, 128 S. Ct. 791, 797 (2008) ("A political party has a First Amendment right to . . . choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("[T]he New Party, and not someone else, has the right to select the New Party's standard bearer" (internal quotation marks omitted)); *Tashjian*, 479 U.S. at 216; *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981).

In *La Follette*, for example, the Supreme Court struck down the State of Wisconsin's open presidential preference primary because it required the Democratic Party's convention delegates to cast their votes in accordance

with the result of a primary in which non-members of the party were allowed to vote. The Court held that, whatever the strength of the state interests supporting the open primary itself, they could not justify this "substantial intrusion" upon the party's right to choose its own nominees. 450 U.S. at 126.

Similarly, in *Jones*, the Court struck down the State of California's blanket primary system, which listed every candidate on the primary ballot, regardless of political affiliation, and allowed primary voters to choose freely among them. 535 U.S. at 586. The candidate of each party winning the greatest number of votes was declared to be that party's nominee and would appear on the general election ballot. *Id.* at 570. The effect of the open primary system was that non-members of a party could participate in choosing the party's nominees. *Id.* at 577-82. Both the district court and court of appeals held that the open primary system did not impose severe burdens on a party's right of association and that, in any event, the system was justified by California's legitimate state interests. *Id.* at 571. The Supreme Court, however, disagreed. Justice Scalia, writing for a seven-justice majority, observed that he could "think of no heavier burden on a political party's associational freedom" than forcing the party to give non-members influence over its candidate-selection process. *Id*. at 582. The

Court then considered seven interests offered by California in support of its open primary and quickly rejected them all as either illegitimate or insufficient. *Id.* at 582-86. Concluding that the open primary's burden on a party's rights of political association were "both severe and unnecessary," the Supreme Court reversed. *Id*. at 586.

Of course, the Supreme Court has also recognized that not every restriction on a party's associational rights is unconstitutional and that States have "a major role to play in structuring and monitoring the election process." *Id*. at 572; *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1986). To determine whether a particular restriction violates the First and Fourteenth Amendments, a court must first weigh the "character and magnitude" of the burdens that the State imposes on those rights against the interests that the State offers as justification for those burdens. *Anderson*, 460 U.S. at 789. When the law "imposes only 'reasonable, nondiscriminatory restrictions'" upon a party's rights 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law imposes severe or discriminatory burdens, the regulation "must be narrowly tailored and advance a compelling state interest." *Timmons*, 520 US. at 358.

South Carolina's application of its sore-loser statute to deny Platt a place on the ballot as the nominee of the Green Party and Working Families Party fails *Anderson*'s constitutional balancing test.

A. The constitutional burdens imposed by the application of South Carolina's sore-loser statute in this case are at least as heavy as those found to be "severe" in *California Democratic Party v. Jones*.

The most obvious burden of South Carolina's decision to apply its sore-loser statute in this instance was to deny ballot access to a candidate who was not a sore loser. "A 'sore loser' candidacy is one in which an individual loses in a party primary and then seeks to run in the same election as an independent or minor party candidate." *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 73 n.11 (3d Cir. 1999) (Alito, J.); *see also id.* at 80 ("A 'sore loser' candidacy is one in which an individual loses in a party primary and then seeks to run in the same election as an independent or minor party candidate."); *see, e.g.*, *Tashjian*, 479 U.S. at 224; *Anderson*, 460 U.S. at 805 n.31. But Platt sought *at the outset* to win the nomination of three certified political parties. Platt was not a loser in any sense of the word when he sought the nominations of the Working Families Party and the Green Party in addition to the Democratic Party. (J.A. 145, 151-54 (Declaration of Professor J. David Gillespie).) He did not "splinter" off of the Democratic Party after losing its nomination. He was not attempting to

continue an intra-party struggle which was settled in a party primary. Platt filed his statement of intention of candidacy with all three parties well before any of them had chosen its nominee.[4] (J.A. 141.)

The particular application of the sore-loser statute in this case also had the effect of giving the members of one party an effective veto over the nominee already chosen by two other political parties. It gave the Democratic Party's primary voters an effective veto over the candidate selected at the state conventions of the Working Families Party and the Green Party. Platt was not ineligible when those parties selected him; he only became ineligible for the ballot when Democratic voters rejected him. This strikes at the core of a political party's autonomous right to choose its own candidates and, by extension, to shape its own message.

The veto power also transforms the candidate-selection process from a marketplace of ideas into a political minefield. A political party faces the

[4] The fact that Platt sought and won the nominations of the Green Party and Working Families Party before losing the Democratic Party's primary distinguishes this case from *National Committee of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71 (W.D. Tex. 1996), in which 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.

prospect of having its message, borne by a candidate into whom it may have invested substantial resources, go up in smoke though no fault of its own. Candidates, who may also have invested heavily in their own campaigns, face the same possibility. Voters, who may have already coalesced around a particular candidate or party, can suddenly be left with no way to cast an effective ballot. And because South Carolina law gives parties until August 15 to choose their nominees, *see* S.C. Code Ann. § 7-13-350, candidacies can explode very late in the election cycle. The net effect of this minefield is to discourage parties, candidates and voters from forming the kinds of cross-party coalitions that South Carolina law permits. The chilling effect on associational activity is obvious.

Furthermore, the risk of a political explosion is compounded by two other features of South Carolina's candidate-selection processes. First, no provision of law governs a candidate's withdrawal from a party's nominating process before its primary or convention. This means that a candidate like Platt who wins one or more nominations can only withdraw from another party's nominating process (to avoid the possible application of South Carolina's sore-loser statute) if the other party's rules and officials allow it. And because the effect of refusing to allow a candidate to withdraw would be to shield the party from competition in the general election, party

officials have every incentive to refuse. Once a candidate files a statement of intention of candidacy, it may therefore be too late to withdraw. Second, South Carolina law allows a party to replace a nominee on the general-election ballot only if its nominee "dies, becomes disqualified after his nomination, or resigns his candidacy for a legitimate nonpolitical reason," which the statute defines as a health issue, family crisis, or a substantial business conflict. S.C. Code Ann. § 7-11-50; *see also* S.C. Code Ann. § 7-11-55. As a result, a party that nominates a candidate who seeks another nomination will not have an opportunity to nominate a replacement if its nominee later becomes ineligible for the ballot – but not disqualified[5] – by virtue of South Carolina's sore-loser statute. Both features thus add to the sore-loser statute's chilling effect on associational activity when applied to candidates who are not sore losers.

The magnitude of these burdens is not difficult to gauge. They 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 participate* in

[5] South Carolina's sore-loser statute does not disqualify a candidate from holding the office but merely prevents him from "hav[ing] his name placed on the ballot." S.C. Code § 7-11-10; s*ee Redfearn v. State Bd. of Canvassers*, 234 S.C. 113, 107 S.E.2d 10 (1959) (holding that sore-loser statute does not disqualify a candidate from office but merely regulates access to the ballot). Such a candidate could still be elected as a write-in.

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, by contrast, the current application of South Carolina's sore-loser statute hasn't merely given the Democratic Party's primary voters an opportunity to participate in Green Party's and the Working Families Party's nomination processes. It has given Democratic voters *an effective veto* over the parties' decisions. As a result, *Jones* requires this Court to apply strict scrutiny.

This is not a case where the Green Party and the Working Families Party simply chose a candidate who was not qualified under state law. Platt was qualified when those parties nominated him, and then he had his eligibility to appear on the ballot revoked by Democratic voters more than a month later. Having one's candidate removed from the ballot after the end of the selection process is dramatically more burdensome for parties and for like-minded voters than being unable to select a particular candidate at the beginning of the process.

Nor is it an answer to suggest that a party and its members could simply choose to nominate someone who is not seeking multiple nominations. As a matter of principle, this is akin to suggesting that the

party is free to nominate any candidate except the particular "standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224 (internal quotation marks omitted). It is heavy burden when a party and its members can nominate any qualified candidate they want except the one they want the most.

As a practical matter, moreover, a party may not even be aware that a candidate seeks multiple nominations. There is no reason to believe, for example, that the Democratic Party was aware, when Platt filed for its primary, that Platt might later file for other nominations. And, even if a party is aware, there may not be anything it can do about it. The Democratic Party's rules, for example, do not allow party officials to refuse a candidate based on her desire to seek another party's nomination.[6] Nor can party officials prevent its members from nominating a candidate who has already lost another party's nomination and from thereby forfeiting the party's place on the ballot.

As is apparent, South Carolina has not merely limited a party's right to associate; it has redistributed two parties' First Amendment rights to another. The sore-loser statute, as applied to candidates like Platt who are

[6] *See* South Carolina Democratic Party Rules 12 (2007), "http://208.112.106.188/scdp/SCDP_2007 Party Rules.pdf" (providing that candidate filing and nominations "shall be governed by the laws of the State of South Carolina").

not sore losers, allows one party to veto the other parties' already-chosen nominee and creates a powerful chilling effect on associational freedoms. South Carolina can certainly limit the Green Party's right to choose its own nominees, but it may not do so by these means without first satisfying strict scrutiny under the *Anderson* test.

B. South Carolina's interest in "minimizing excessive factionalism" does not justify the application of its sore-loser statute to a candidate who was not a sore loser.

The second step in the *Anderson* test requires a court to: (1) "determine the legitimacy and strength of each of [the state interests asserted to justify the challenged scheme];" and (2) "consider the extent to which those interests make it necessary to burden the [plaintiffs'] rights." *Anderson*, 460 U.S. at 789. The defendant bears the burden of proof on both of these elements. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161, 203 (2d Cir. 2006), *rev'd on other grounds* 128 S. Ct. 791 (2008); *Patriot Party v. Allegheny County Dept. of Elections*, 95 F.3d 253, 267-68 (3d Cir. 1996); *see, e.g.*. *Nader v. Brewer*, 531 F3d 1028, 1039-40 (9th Cir. 2008), *cert. denied* 129 S.Ct. 1580 (2009).

In the district court, the State Election Commission offered only one state interest to justify their application of South Carolina's sore-loser statute

to a candidate who was not a sore loser: "minimizing excessive factionalism." (J.A. 355.) This is a reference to *The Federalist No. 10* (James Madison), which addressed the question of how to control the destabilizing effects of factionalism in a democratic society. Madison defined a faction as "a number of citizens, whether amounting to a minority or majority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* Pure democracies allowed factionalism to run unchecked, according to Madison, and this, in turn, fostered instability by sacrificing the public good and individual liberties to the passion and interests of the majority faction. *Id.* The result, he said, was that "democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths." *Id.*

The "cure for the mischiefs of faction," Madison reasoned, was representative democracy – a republic. *Id.* In particular, Madison argued that a *large* republic would have three advantages over small republics (individual states) in controlling factionalism. *Id.* First, a large republic would increase the probability of electing an "enlightened" and "virtuous"

representative. *Id.* Second, a large republic would have "a greater variety of parties and interests," making it less likely that any one of them will become an entrenched and oppressive majority. *Id.* And, third, even if a majority faction were to arise, a large republic spread over vast territory would make it harder for members of the majority faction to work in concert to oppress minorities. *Id.* Hence, Madison concluded, the size and structure of the Union set out in the federal Constitution provided "a republican remedy" for the ills of factionalism. *Id.*

Citing to *The Federalist No. 10*, the Supreme Court has recognized the danger that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S. 724, 736 (1974). Because of that danger, the Court has upheld a California disaffiliation statute designed to protect political parties and the political system from the party-weakening effect of sore-loser candidacies. *Id.* The Court has also upheld a New York statute designed to protect against the destabilizing effect of party-raiding. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973). The statutes in both cases advanced the states' interest in stable government because they were designed to "prevent the disruption of political parties from without." *Tashjian*, 479 U.S. at 224; *accord Eu*, 489 U.S. at 227 (explaining *Storer*). In Madisonian terms, the statutes prevented

one faction from engaging in "the mischiefs of faction" to undermine its rivals and thereby to gain disproportionate and oppressive political power.

Whatever the strength of South Carolina's interest in minimizing excessive factionalism, the Election Commission's application the state's sore-loser statute in this case is not narrowly tailored to advance that interest. 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 three distinct parties. Platt did not seek the nominations of the Green Party and the Working Families Party because he wanted to undermine the Democratic Party. He did not "splinter" off of the Democratic Party after losing its nomination. He is not attempting to continue an intra-party struggle which was settled in a party primary. He sought all three nominations at once. Similarly, the Green Party and the Working Families Party did not nominate Platt in order to undermine their rival. Each presumably would have been pleased if Platt had succeeded in winning the Democratic nod. When a candidate seeks multiple nominations from the outset, or when a party nominates a candidate who has won or is seeking another party's nomination, neither the candidate nor the party is engaging in the kind of "unrestrained factionalism" that animated *Storer* and *Rosario*. Under these

circumstances, the Commission has applied South Carolina's sore-loser statute with a broad brush that goes well beyond any legitimate interests that the state might have.

On the other hand, there is no doubt that the application of South Carolina's sore-loser statute to a candidate who is not a sore loser promotes political stability. Even Madison recognized that one could remedy the mischiefs of factionalism "by destroying the liberty which is essential to its existence" or by eliminating the diversity of opinion that causes factions to arise. The Supreme Court has similarly recognized that election laws designed to reduce electoral competition theoretically make government more stable. *See, e.g., Anderson*, 460 U.S. at 801-02 & n.29; *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968). But Madison and the Court have both recognized that the "cure" in each instance is worse than the disease.

A court must therefore be careful not to confuse a state's legitimate interest in putting a check on the kind of factionalism described in *The Federalist No. 10* with a state's illegitimate interest in shielding parties from competition. As Justice O'Connor has explained, the political party or parties in power have an incentive "to shape the rules of the electoral game to their own benefit." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). Heightened scrutiny is often necessary to ensure

that the state's asserted interest in political stability is "not merely a pretext for exclusionary or anticompetitive restrictions." *Id.* While South Carolina's sore-loser statute might serve as a check on factionalism when applied to sore-loser candidates, it becomes exclusionary and anticompetitive when applied to a candidate who is not a sore loser.

In fact, the Election Commission's attempt to justify its application of the sore-loser statute in this case turns *The Federalist No. 10* on its head. One of the primary virtues of a large republic, according to Madison, is that it fosters more factions and electoral competition – not less – and thereby protect individual rights from oppression by large factions. Relying on *The Federalist* to shield a large faction like the Democratic Party from electoral competition is absurd.

Although it remains to be seen what interests, if any, the defendants will identify to justify the statutes on appeal, the State cannot have any legitimate interest in giving one party's primary voters an effective veto over two other parties' already-chosen nominee. In a state that allows electoral fusion, applying a sore-loser statute to deny nomination winners a place on the ballot makes no sense.

The burdens imposed by the application of South Carolina's sore-loser statute in this case are thus both severe and unnecessary. This court should therefore reverse the judgment of the district court.

II. South Carolina's mandatory party-loyalty oath, as applied in this case, suffers from several constitutional defects.

South Carolina's mandatory party-loyalty oath statute is designed to prevent a candidate from getting on the ballot by petition, or from offering or campaigning as a write-in, after losing a party's primary election. *See* S.C. Code Ann. § 7-11- 210. Notwithstanding the limited nature of the oath, however, the Charleston County Democratic Party obtained an injunction in state court prohibiting Platt from offering or campaigning as the nominee of the Green Party and Working Families Party. The plaintiffs amended their original complaint in federal court to challenge this application of the oath statute, but the district declined to decide the issue because it determined that the State could exclude Platt from the ballot under the state's sore-loser statute.

As the state-court applied it, the oath statute suffers from the same constitutional defect as does the state's sore-loser statute: it gives the Democratic Party an effective veto over the nominee of two other parties.[7]

[7] The fact that Platt sought and won the Green Party and Working Families Party nominations before he lost the Democratic Party's primary

The state-court enjoined Platt from campaigning as the already-chosen nominee of the Green Party and Working Families Party because of the results of the Democratic Party's primary election. As interpreted and applied by the state court, South Carolina's oath statute can be no more constitutional than its sore-loser counterpart.

The application of the oath statute in this case also suffers from three additional defects. First, the oath statute is facially discriminatory. By its own terms, the oath is enforceable only when a candidate loses "in a party's primary election." S.C. Code Ann. § 7-11-210. It does not apply to a candidate who loses at a convention.[8] Second, the oath statute is mandatory. No candidate can appear on the ballot as the nominee of a political party unless he or she signs the oath. And third, the oath statute is vague. It is worded so that a candidate of ordinary intelligence cannot determine what

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distinguishes this case from the three cases upon which the defendants relied in the district court: *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); and *White v. West*, No. 74-1709 (D.S.C. 1976) (J.A. 17-30). The courts in those cases held that the loyalty oath was enforceable against a true sore-loser candidate 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. This distinction is critical because, as described above, a state may have a legitimate interest in protecting political parties against the mischief of sore-loser candidacies but not in shielding them from competition in the electoral marketplace.

[8] While any certified party can choose to select its nominees by primary election, as a practical matter only the Democratic and Republican parties regularly do so in South Carolina.

conduct will violate the oath; or, to put it another way, a candidate cannot determine what protected speech she or he may be agreeing to forego when signing it.

Under the *Anderson* test, the oath statute's discriminatory effect automatically warrants strict scrutiny. *See Anderson*, 460 U.S. at 788 & 788-89 n.9 (1983) (lower-level scrutiny applies only to "reasonable, nondiscriminatory" restrictions); *see also Burdicki*, 504 U.S. at 434 (quoting *Anderson*). *But see Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 312-18 (3d Cir. 1999) (en banc) (applying intermediate scrutiny to invalidate an anti-fusion statute that applied only to minor parties). There can be no question but that the burdens of the oath fall unequally on an identifiable class of people. The last paragraph of the statute makes clear that its enforcement mechanism is only triggered when a candidate is defeated in a primary election. The oath thus gives primary-party voters the ability to veto the nominee of a convention party, but it leaves convention-party members without the corresponding ability to veto the nominees of a primary party. This discriminatory impact, alone, is enough to warrant strict scrutiny no matter how severe the burden.

The mandatory nature of the oath casts further doubt on the statute's constitutionality.[9] The Supreme Court has held that a mandatory oath cannot be a condition to public employment or ballot access if the oath requires the person affected to foreswear protected political advocacy. *See Communist Party v. Whitcomb*, 414 U.S. 441 (1974); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Here, South Carolina conditions participation in an election on an individual foreswearing the right to campaign for office. Campaigning is, of course, nothing more than political advocacy. If making employment conditional on an individual giving up their right to political advocacy violates the First and Fourteenth Amendments, then conditioning the right to campaign on the same requirement is certainly impermissible.

Finally, the oath statute is unconstitutionally vague. The Supreme Court has repeatedly struck down loyalty oaths required as a condition of public employment, requiring a high degree of precision in wording because the oaths touch on First Amendment activity. *See Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). Here, as in *Baggett* and *Cramp*, the party-loyalty oath fails

[9] The state-mandated and judicially enforceable nature of South Carolina's party-loyalty oath also distinguishes this case from *Kucinich v. Texas Democratic Party*, 563 F.3d 161, 166-67 (5th Cir. 2009), and the cases upon which it relies. The oath at issue here is not a party requirement but a state one, and state law purports to turn what would otherwise be an unenforceable moral commitment into a legally binding obligation.

adequately to describe the prohibited conduct. In this case the ambiguity arises because of a linguistic gap between the oath and its enforcement mechanism.

As described above, a candidate who signs the oath pledges "to abide by the results of the primary or convention." S.C. Code Ann. § 7-11-210. A candidate also swears not to "authorize [the candidate's] name to be placed on the general election ballot by petition" or to "offer or campaign as a write-in candidate" for the office in question or any other office for which the party has a nominee. *Id.* In the next sentence, the candidate authorizes the issuance of an injunction if he or she should "violate *this pledge* by offering or campaigning in the ensuing general election." *Id.* (emphasis added).

Yet the statute's enforcement clause – which is not signed by the candidate – arguably goes beyond the pledge and purports to authorize a party chairman to seek an injunction whenever a defeated candidate "shall thereafter offer or campaign as a candidate . . . in the ensuing general election." *Id.* As a result, a candidate signing the oath could reasonably think that she is only pledging not to authorize a petition drive and not to "offer or campaign as a write-in candidate" while the party chairman could reasonably believe that he or she has the authority to enjoin any kind of

candidacy. It is certainly not clear from the oath or its enforcement clause that a candidate signing the oath is agreeing to refrain from campaigning as the already-chosen nominee of another party if he or she loses the Democratic Party's primary election.

Platt, who holds a Master's Degree in English, did not believe that he was agreeing to refrain from campaigning as another party's nominee, and he would have testified as much if he had been permitted to offer evidence. He understood the oath only to prohibit him from trying to get on the ballot by petition or from campaigning as a write-in candidate. There is nothing in the oath itself from which a person of common intelligence could conclude with any certainty that it would require someone in Platt's position to refrain from campaigning as the already-chosen nominee of the Green Party if he or she subsequently lost the Democratic Party's primary election. This is particularly true because South Carolina has long permitted a candidate to appear on the ballot as the nominee of more than one political party. *See* 1970 S.C. Op. Att'y Gen. 275, 1970 WL 12270; 1970 S.C. Op. Att'y Gen. 187, 1970 WL 12919.

For the statute to operate essentially as a waiver of a candidate's fundamental right to associate with others for the advancement of political beliefs, it ought to be much clearer. "Waivers of constitutional rights not

only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (recognizing waiver of the constitutional right to a trial in a criminal case); *see, e.g.*, *Lake James Cmty. Volunteer Fire Dep't., Inc. v. Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998) (holding enforceable a Fire Department's "limited waiver" of some First Amendment rights in a contract with a county government); *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (upholding a contractual waiver of First Amendment rights where it was knowing, voluntary, and intelligent).

The oath statute is none of these things. It is not voluntary. It is "knowing" only in that a candidate signing the oath knows that he or she is agreeing to forego constitutionally protected activity, but the extent of that waiver is unknown. And, to the extent that the oath requires someone in Platt's position to refrain from campaigning as the already-chosen nominee of another party, it fails to make the candidate aware of its draconian consequences.

Finally, it is undisputed in this case that Platt did not, in fact, violate the oath he signed. A candidate who signs the party-loyalty oath pledges "to abide by the results of the primary or convention." S.C. Code Ann. § 7-11-210. A candidate also swears not to "authorize [the candidate's] name to be

placed on the general election ballot by petition" or to "offer or campaign as a write-in candidate" for the office in question or any other office for which the party has a nominee. *Id.* Those are the only three things that a candidate signing the oath is pledging to do or not to do, and the undisputed facts in this case show that Platt did none of them.

The defendants stipulated that Platt abided by the results of the Democratic primary. (J.A. 81.) The defendants also stipulated that Platt did not "authorize his name to be placed on the general election ballot by petition." (J.A. 81.) And the defendants further stipulated that Platt did not "offer or campaign as a write-in candidate" against any Democratic nominee. (J.A. 81.) Under these circumstances, there was no basis to enforce the oath against Platt.

For all of these reasons, it is apparent that South Carolina's oath statute, as applied to Platt, cannot survive constitutional scrutiny. This Court should therefore reverse the judgment of the district court on this issue.

III. The State Election Commission has abandoned its argument that a retroactive application of its new interpretation of the filing deadline would bar Platt from the ballot.

If any proposition of election law should be self evident it is this: you can't change the rules in the middle of the game. Or, at least, you can't change a filing deadline to a date that has already passed. Doing so strikes

at the heart of fundamental fairness. Perhaps recognizing this unfairness, the State Election Commission abandoned its argument that a retroactive deadline could bar Platt from the ballot. (J.A. 466-67.)

Federal courts have on numerous occasions invalidated similar changes made in the middle of an election cycle. In *Brown v. O'Brien*, for example, the United States Circuit Court for the District of Columbia concluded that a political party's retroactive application of a new and unannounced ban on winner-take-all presidential primaries violated due process. 469 F.2d 563, 570 (D.C. Cir.), *stay granted*, 409 U.S. 1 (per curiam), *vacated as moot*, 409 U.S. 816 (1972). The court noted that if the party had announced its rule change prior to the primaries, candidates might have campaigned differently, voters might have voted differently, and the State of California might have altered its delegate selection scheme. *Id.* at 569-70. The court observed that "there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Id.* Other examples of federal courts striking down mid-cycle rule changes are legion. *See, e.g., Roe v. Alabama,* 43 F.3d 574, 580 (11th Cir. 1995); *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970); *Griffin v. Burns*,

570 F.2d 1065, 1078-80 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 708 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 1012 (1982). *See generally Landgraf v. USI Film Products*, 511 U.S. 241, 270 (1994) (holding that a change in law has an impermissibly retroactive effect if it "attaches new legal consequences to events completed before its enactment).

The Election Commission's policy change on April 16, 2008, is the very kind of retroactive rule change that these cases prohibit. It had the effect of changing the filing deadline to a date in the past. Candidates like Platt, who might have otherwise complied with the March 30 deadline, if given advance notice of the change, were left with no recourse. The unfairness of the Commission's action is obvious, and it is further compounded by the fact that the Commission failed to notify political parties about the change, gave no indication that the change would be retroactive, and continued to tell parties and candidates as late as August 12 that its old policy would apply.[10] This is a textbook case of impermissible retroactivity, and the Commission offered no argument to the contrary in the district court.

There is also no dispute that Platt filed his candidacy papers in a timely manner under the Election Commission's old policy. He filed two of

[10] The latter two factors raise doubts about whether the Commission did, in fact, intend to apply its policy change retroactively before the plaintiffs filed this lawsuit.

his statements of intention of candidacy within the statutory window. (J.A. 80.) He won one of those nominations and also won the Green Party nod. Under the old policy, the Commission would have treated Platt's Green-Party filing as timely because he had filed a timely statement of intention of candidacy with the Democratic Party and the Working Families Party.

Although the Commission asserted the filing-deadline issue at the hearing on the plaintiffs' motion for a preliminary injunction, it conceded at the summary-judgment stage that the filing deadline did not, in fact, bar Platt from the ballot. The filing-deadline issue is therefore moot because it was not, and could not have been, applied in 2008 to deny Platt a place on the ballot.

CONCLUSION

The right of a political party to choose its own standard-bearers without the participation or influence of non-members is sacred but not unfettered. States have broad authority to regulate the political process. But when, as is the case here, a state's regulations impose heavy or discriminatory burdens, close constitutional scrutiny is required, in the words of Justice O'Connor, "to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman*, 544 U.S. at 603 (2005) (O'Connor, J., concurring). South Carolina's sore-loser statute and party-loyalty oath statute, applied in this case to a candidate who won two nominations before losing a third, cannot withstand such scrutiny.

This Court should therefore reverse the judgment of the district court.

REQUEST FOR ORAL ARGUMENT

The Appellants submit that this case warrants at least ten minutes of oral argument per side for the following reasons:

(1) this is a case of first impression;

(2) this case implicates fundamental political rights; and

(3) this case involves a challenge to the constitutionality of several state statutes.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 8,577 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Rule. 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

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I hereby certify that, on this 28th day of September, 2009, the foregoing Appellants' Brief was served on all parties or their counsel through the CM/ECF system.

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