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

SOUTH CAROLINA GREEN PARTY, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
SOUTH CAROLINA STATE ELECTION COMMISSION, et al.,	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Eugene Platt, Robert Dunham, and the South Carolina Green Party respectfully submit this brief in support of their motion for a preliminary injunction prohibiting the defendants from disqualifying Eugene Platt from the general election ballot as the Green Party's nominee for State House Seat 115 on the ground that S.C. Code Ann. § 7-11-10, as applied to Platt, violates their rights under the First and Fourteenth Amendments to the United States Constitution.

I. Background

South Carolina's election laws permit a practice, known as "fusion," whereby more than one political party can nominate a single candidate for a political office. *See* 1969-70 Ops. Atty. Gen. No. 2996 p. 275. A candidate can appear on the ballot as the nominee of both the Republican Party and the Libertarian Party, for example, if he or she wins both parties' nomination.

Plaintiff Eugene Platt, a resident of Charleston County, sought the nomination of the Democratic Party and the Green Party for State House Seat 115. In accordance with state law, he filed a statement of candidacy with each party prior to the March 30, 2008, filing deadline. *See* S.C. Code Ann. § 7-11-15(2). Platt won the Green Party's nomination at its state convention on May 3. More than a month later, on June 10, Platt failed to win the Democratic Party's nomination in that party's primary election.

At the urging of the Democratic Party, the South Carolina State Election Commission subsequently disqualified Platt from appearing on the general election ballot as the Green Party's nominee. The Commission relied 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 lost the Democratic Primary, the Commission determined that he was ineligible to appear on the ballot as the Green Party's nominee.

The Green Party, Platt, and a would-be Platt voter now ask this Court for a preliminary injunction restoring Platt to the ballot until this case can be decided on a full record.

II. Argument

A district court should grant a motion for preliminary injunctive relief when the movant demonstrates: (1) a substantial likelihood of prevailing on the merits; (2) irreparable injury unless the injunction issues; (3) the threatened

injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Merrill, Lynch, Pierce, Fenner & Smith v. Bradley*, 756 F.2d 1048, 1054-55 (4th Cir. 1985); *Blackwelder Furniture Co. v. Sellig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). While the granting of injunctive relief depends upon a "flexible interplay" among the four factors, the two most important are likely irreparable injury to the movant if relief is denied, and likely harm to the defendant. *Blackwelder Furniture Co.*, 550 F.2d at 196. As explained below, the balance weighs heavily in the plaintiffs' favor when considering each of the four factors.

A. Likelihood of Success

The concept of "liberty" assured by the Due Process Clause of the Fourteenth Amendment embraces those rights and freedoms which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). Among these most fundamental rights and freedoms are those that flow from the First Amendment, including the freedom of speech, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the freedom "to engage in association for the advancement of beliefs and ideas," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (Harlan, J.), "the right of citizens to create and develop new political parties," *Norman v. Reed*, 502 U.S. 279, 288 (1992), and the right of political parties to select their own nominees, *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000).

Ordinarily, state laws which impinge upon such fundamental liberties are automatically subject to strict judicial scrutiny. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Supreme Court has recognized, however, that "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." *Storer v. Brown*, 415 U.S. 724, 730 (1974). For this reason, the Court has adopted a special balancing test for evaluating due process claims against state election laws, all of which inevitably affect the fundamental rights of political parties, candidates, and voters:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of that scale, the law "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." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places "severe" burdens on the rights of political parties, candidates or voters,

"the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. at 289).

1. The Character and Magnitude of the Burdens

The defendants' application of South Carolina's sore-loser statute in this case burdens three distinct kinds of rights. First, and most importantly, it burdens the Green Party's fundamental right to select its own nominees by giving the Democratic Party's voters an effective veto over the Green Party's chosen candidate. *See Jones,* 530 U.S. at 575 (reaffirming "the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences") (internal quotation marks omitted); *New York State Bd. of Elections v. Lopez-Torres*, 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."); *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 224 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 123-24 (1981); *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 216 (1986); *see also id.,* at 235-36 (Scalia, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate ... unquestionably implicates an associational freedom"); *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359 ("[T]he New Party, and not someone else, has the right to select the New Party's standard bearer" (internal quotation marks omitted)); *id.*, at 371 (Stevens, J.,

dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office"). Indeed, the statute, as currently applied, operates to make the outcome of one party's nominating process completely dependent on the outcome of every other party's convention or primary.

South Carolina's statute, like all ballot-access restrictions, also burdens "two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). As the Supreme Court has repeatedly recognized,

> voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish,* 415 U.S. 709, 716 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." *Ibid.; Williams v. Rhodes, supra,* 393 U.S., at 31. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.

Anderson, 460 U.S. at 787-88. Platt's exclusion from the ballot thus deprives him of the opportunity to advance his positions on the issues of the day and deprives would-be Platt voters of the opportunity to express their support for those positions in the marketplace of ideas.

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

The burdens on Platt's associational rights are similarly severe. In the statute's current application, winning one party's nod is not enough for a fusion candidate to secure a place on the ballot. Indeed, South Carolina may be the only state in the nation where winning a qualified party's nomination is not enough to guarantee a candidate a place on the general-election ballot. Rather, South Carolina's statute requires a fusion candidate to run the table by winning every nomination he seeks. Even a candidate who first wins several party nominations, including one of the major parties, will be excluded from the ballot if a single minor party whose nomination he seeks subsequently nominates someone else.

Not only does this all-or-nothing approach make it exceedingly difficult for a fusion candidate to get on the ballot, but it also transforms the candidate-selection process from a marketplace of ideas into a political minefield. While a candidate is free under South Carolina's fusion system to seek the nomination of any qualified party, the candidate runs the risk in doing so of total exclusion from the ballot if he fails to secure every nomination he seeks. This risk is compounded, moreover, by the fact that South Carolina law requires candidates to file statements of candidacy for all qualified parties by March 30 and then does not permit a candidate to withdraw from a nominating process after entering it. Platt, for example, could not have withdrawn from the Democratic primary after winning the Green Party's nomination. The net effect of this minefield is to discourage fusion candidacies and thus to create a severe chilling effect on a candidate's right to associate with like-minded citizens.

Finally, the burdens on the voters themselves are also heavy. The Supreme Court has repeatedly recognized that the exclusion of candidates from the ballot puts a heavy burden on the voters' First Amendment rights by denying them the opportunity to associate with like-minded candidates and parties. *Lubin v. Panish,* 415 U.S. at 716; *Williams v. Rhodes,* 393 U.S. at 31; *Anderson,* 460 U.S. at 787-88. This is particularly true where, as here, the exclusion comes at the end of the nominating process rather than at the beginning. Voters who associated themselves with Platt and the Green Party throughout the course of the nominating process will now, in the absence of an

injunction, be left with no way to cast an effective vote for their chosen candidate or party for State House Seat 115.

2. State Interests and Narrow Tailoring

Because the defendants' application of South Carolina's sore-loser statute imposes heavy constitutional burdens, that application must be narrowly tailored to advance a compelling state interest. Although it remains to be seen what interests, if any, the defendants will identify to support their actions, the State cannot have any legitimate interest in giving Democratic primary voters an effective veto over the Green Party's 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.

In a non-fusion context, the Supreme Court has upheld a sore-loser statute as justified by a state's interest in preventing "splintered parties and unrestricted factionalism" and ensuring that "the general election ballot is reserved for major struggles; it is not a forum for continuing intra-party feuds." *Storer*, 415 U.S. at 735-36. But this interest loses its force in a fusion state. When state law permits fusion, the state has made a choice to allow splintered parties, factionalism, and more robust competition in the electoral marketplace. *Cf. Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 367 (1997) (observing that anti-fusion laws promote a two-party system and reduce factionalism). South Carolina has thus made a choice to subordinate any interest it might have in reducing factionalism to its legitimate interest in

promoting a healthy and vigorous democracy by encouraging many points of view.

Even if South Carolina could claim a compelling interest in preventing factionalism and splintered parties, moreover, the defendants' application of the 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 two distinct parties. Platt was not a loser when he sought the Green Party nomination. 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. Platt filed his statement of candidacy for both parties prior to the March 30 deadline and well before either party had chosen its nominee. He won the Green Party nomination *before* he lost the Democratic primary, and there was no way for him to withdraw from the latter after winning the former. Under these circumstances, the defendants have applied South Carolina's sore-loser statute with a broad brush that goes well beyond any legitimate interests that the state might have.

No court of which the plaintiffs are aware has ever upheld a sore-loser statute in the fusion context. In fact, no court has even addressed the application of a sore-loser statute under remotely similar circumstances. This is a case of first impression. But it almost seems too obvious for argument that the plaintiffs here have serious constitutional interests at stake and that the

defendants have overstepped their bounds in applying a sore-loser statute to a candidate who is clearly not a sore loser. This Court should therefore conclude that the plaintiffs have a substantial likelihood of prevailing on the merits.

The first of the *Blackwelder* factors weighs heavily in the plaintiffs' favor.

B. Threat of Irreparable Harm to the Plaintiffs

Harm is irreparable for purposes of a preliminary injunction when a court would be unable to compensate the plaintiffs adequately if they should ultimately prevail when the case is fully resolved on its merits. *See generally*, 13 James Wm. Moore et al., *Moore's Federal Practice* § 65.22[1][b] (3d ed. 1999). Free-speech restrictions and harms that touch upon the constitutional and statutory rights of political parties, candidates and voters are generally not compensable by money damages and are therefore considered irreparable. *See*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Part of the reason for this treatment of political and voting harms is the special importance of the right to vote in the American democratic tradition:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); *accord Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of

having a voice in the election of those who make the laws under which, as good citizens, we must live."). Money cannot fully compensate an individual for the loss of a right so fundamental. Part of the reason is also practical: a court simply cannot undo—by means of a special election or otherwise—all of the effects of an invalid election. Tremendous practical advantages accrue to those who win even invalid elections, and a court simply has no way to re-level the playing field.

In this case, the irreparable nature of the threatened injuries to the plaintiffs is apparent. In the absence of an injunction, Platt will not be able to run for South Carolina State House Seat 115 in the general election. The Green Party will not have its duly chosen nominee appear on the ballot. And like-minded voters will not have an opportunity cast an effective vote in support Platt and the Green Party. The general election will be long over and the opportunity that the election presents for voters to elect Platt as the Green Party nominee will have passed. Under these circumstances, the plaintiffs will suffer actual, imminent, and irreparable harm in the absence of preliminary relief.

The second *Blackwelder* factor weighs heavily in the plaintiffs' favor.

C. Balancing the Harms

The third *Blackwelder* factor requires the Court to consider the potential impact that the requested injunction might have upon the defendants and to balance that potential with the harms that the plaintiffs could suffer should the request be denied.

While the absence of an injunction would allow the plaintiffs to be unconstitutionally shut out of the political process, the defendant is unlikely to suffer any harm if the injunction is granted. The requested relief would simply require the defendants to include Platt on the general election ballot for the November general election as the Green Party nominee. Any inconvenience to the defendants is far outweighed by the severe injury to the plaintiffs should the preliminary relief not be granted.

In addition, the defendants will not suffer the harms that sore-loser statutes are generally intended to prevent. Putting Platt on the ballot will not continue any intra-party struggle that was supposedly settled in a primary, nor will it lead to an increase in factionalism that South Carolina law doesn't already allow. An injunction will simply allow the Green Party's chosen nominee for State House Seat 115, selected prior to the Democratic Party primary, to appear on the general election ballot.

This factor, too, weighs in the plaintiffs' favor.

D. The Public Interest

The public interest in this case is clear. The requested injunction will ensure that voters will have the opportunity to vote for the Green Party's chosen candidate for South Carolina State House Seat 115. Without it, voter choices will be limited. The public undoubtedly has a vital interest in a broad selection of candidates as well as the conduct of free, fair and constitutional elections. The requested injunction, if granted, would therefore favor the public interest.

III. Conclusion

This Court should grant the plaintiffs' motion for a preliminary injunction.

Respectfully Submitted,

/s/Laughlin McDonald
LAUGHLIN McDONALD (ID#2804)
BRYAN SELLS
American Civil Liberties Union
Foundation, Inc.
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303-1513
(404) 523-2721
(404) 653-0331 (fax)

ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the defendants, by first-class mail, postage prepaid, addressed as follows:

South Carolina State Election Commission
John H. Hudgens
Cynthia M. Bensch
Tracey C. Green
Pamella B. Pinson
Thomas Waring
2221 Devine Street, Suite 105
Columbia, South Carolina 29205

This 7th of August, 2008.

/s/Laughlin McDonald