RECORD 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; 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

BRIEF OF APPELLEES

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellees South Carolina State Election Commission, Hudgens, Bensch, Green, Pinson, and Waring

Matthew T. Richardson
WYCHE, BURGESS, FREEMAN & PARHAM, P.A.
Post Office Box 12247
Columbia, South Carolina 29211
(803) 254-6542

Counsel for Appellee Charleston County Democratic Party

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

JURISDICTIONAL STATEMENT

The Appellees do not dispute the Appellants' statement that this is, in part, a timely appeal from a final order. The Appellees agree that the district court adjudicated only one of the Appellants' three claims and declined to rule on the others. Consequently, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review the claim on which the district court ruled.

The Appellees deny that this Court has appellate jurisdiction to hear the claims on which the district court declined to rule. As discussed below, the Appellees submit this Court may not exercise pendent appellate jurisdiction over the Appellants' second and third issues on appeal, specifically their challenges to the party-loyalty pledge statute and the filing deadline statute.

STATEMENT OF THE CASE

The Appellants South Carolina Green Party, Eugene Platt, and Robert Dunham 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 prohibit Appellant Platt from being placed on the 2008 general election ballot for House Seat 115. The Appellants also raise as-applied challenges to the constitutionality of the filing deadline set forth in S.C. Code Ann. § 7-11-15, and of the party-loyalty pledge statute, S.C. Code Ann. § 7-11-210.

The Appellants originally brought this action against the South Carolina State Election Commission, and each of the members in their official capacities only. With their original complaint, the Appellants also filed a motion for preliminary injunction prohibiting the 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 Appellants further sought an injunction affirmatively requiring that Platt appear on the ballot for House Seat 115 for the November 2008 general election. The district court heard oral argument on September 18, 2008, and at the close of the hearing, the court issued a detailed oral order denying all preliminary injunctive relief. (J.A. 393-414). The Appellants did not appeal that order.

While the Appellants' motion for preliminary injunction was pending in the district court, the Appellee Charleston County Democratic Party filed an action in state court on August 22, 2009, to seek the state court's enforcement of the party-loyalty pledge as contained in S.C. Code Ann. § 7-11-210. The Charleston County Democratic Party had also filed a motion to intervene in this action prior to the hearing on the Appellants' motion for preliminary injunction, and the district court granted that motion on consent of the parties.

Eugene Platt's name was not on the general election ballot, and he was not elected to House Seat 115. After the election, the Appellants amended their complaint and added Charleston County Democratic Party as a party-defendant. In addition, the Appellants added two new causes of action raising as-applied challenges to the party-loyalty pledge statute and the filing deadline statute. The Appellants seek declaratory and injunctive relief as well as nominal damages.[1] The Appellants seek declaratory relief that the State Election Commission's application or enforcement of the three statutes violated their First and Fourteenth Amendment rights. The Appellants also ask this Court to enjoin the Appellees from enforcing these statutes "to the extent that they give other political parties an effective veto over a party's already chosen nominee." (J.A. 63-64).

[1] The district court ruled that the State Election Commission and its members, who were sued in their official capacities only, are entitled to Eleventh Amendment immunity for any claims for monetary relief. This ruling has not been appealed.

After limited discovery was conducted, the parties filed cross motions for summary judgment. On August 12, 2009, the district court issued an order finding that "South Carolina's sore-loser statute is constitutional as applied to Platt's candidacy for House Seat 115 in the 2008 general election." (J.A. 547). The court declined to address the constitutionality of the party-loyalty pledge statute and the filing deadline statute.[2] (J.A. 546-47). The court granted the Appellees' motions for summary judgment and denied the Appellants' motion for summary judgment. (J.A. 547). The action was dismissed with prejudice. (J.A. 548). On the following day, the Appellants filed an appeal to this Court. (J.A. 549).

[2] The district court also found Appellee State Election Commission is not a proper defendant and that it "need not resolve" "whether a political party [may be held] liable under § 1983 for a ministerial act required by statute," but it is "doubtful that CCDP is properly named as a Defendant in the § 1983 claim in Plaintiffs' amended complaint." (J.A. 533-34). The district court's rulings in this regard have likewise not been appealed.

STATEMENT OF FACTS

In the 2008 election cycle, the Appellant Eugene Platt was a candidate for the nomination of several political parties for South Carolina House Seat 115. On March 17, 2008, Platt filed a Statement of Intention of Candidacy for House Seat 115 with the Democratic Party. On that same date, Platt also signed a Notice of Candidacy and Pledge with the Democratic Party and as required by S.C. Code section 7-11-210. With that document, Platt expressly 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." (J.A. 416).

Thereafter, before the March 30, 2008 deadline set by S.C. Code Ann. § 7-11-15, Platt filed a Statement of Intention of Candidacy for House Seat 115 with the Working Families Party. On May 3, 2008, after the deadline, Platt filed a Statement of Intention of Candidacy for House Seat 115 with the South Carolina Green Party. That was the same date as the Green Party convention at which Platt received the Green Party's nomination for House Seat 115. Platt was also nominated as the candidate of the Working Families Party at its convention held on May 10, 2008.

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%).

After Platt lost the Democratic nomination, the staff at the State Election Commission determined that Platt was precluded by S.C. Code Ann. § 7-11-10 from appearing on the general election ballot as a candidate for any party for House Seat 115. S.C. Code Ann. § 7-11-10, which is also referred to as the "sore loser" statute, 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. By losing the Democratic Party primary, the State Election Commission staff determined that Platt was precluded by Section 7-11-10 from having his name placed on the general election ballot as the candidate for either the Green Party or the Working Families Party. That decision was conveyed to Platt and to the parties.[3]

Platt sought review of the staff's decision to the State Election Commission at a meeting held on June 27, 2008. The Commission addressed the issue of whether Platt should be permitted to have his name placed on the general election

[3] The Working Families Party is not a party to this action. The Working Families Party did not challenge the decision by the State Election Commission not to place Platt on the general election ballot.

ballot. The members of the Commission made no motion to overrule the staff decision, and no vote was taken. (J.A. 80, 418-420).

This litigation was then filed on August 7, 2008. Platt was subsequently enjoined by the Court of Common Pleas for Charleston County by order entered on September 19, 2008. Platt was enjoined from "offering or campaigning as a candidate" for House Seat 115. (J.A. 81, 98-99). Platt appealed that state court ruling, and that appeal is currently pending in the South Carolina Supreme Court. (J.A. 81).

Platt did not appear on the general election ballot as a candidate for House Seat 115. Anne Peterson Hutto, the Democratic nominee, was elected to that seat.

SUMMARY OF ARGUMENTS

The district court correctly ruled that the "sore loser" statute, S.C. Code Ann. § 7-11-10, was constitutional as applied to Eugene Platt so as to preclude Platt's name from being placed on the ballot for House Seat 115 for the 2008 general election. The Appellants try to make Platt's attempt at becoming a fusion candidate the distinction with prior case law upholding the constitutionality of "sore loser" statutes; but as the district court found, "the application of a sore-loser statute in connection with fusion does not elevate Plaintiffs' burdens to a level requiring strict scrutiny." (J.A. 543). Instead, the "sore loser" statute placed only reasonable, nondiscriminatory limitations on the Appellants' First Amendment rights, and accordingly, the interests articulated by the State Election Commission are sufficient to justify the application of the "sore loser" statute.

The constitutionality of "sore loser" regulations, in general, have been upheld by the U.S. Supreme Court. *See e.g., Clingman v. Beaver*, 544 U.S. 581 (2005); *Storer v. Brown*, 415 U.S. 724 (1974). More specifically, the South Carolina statute has been upheld as constitutional by prior decisions of this Court. *See e.g., Backus v. Spears*, 677 F.2d 397 (4th Cir. 1982); *Cromer v. State of South Carolina*, 917 F.2d 819 (4th Cir. 1990). Moreover, the Supreme Court has concluded that restrictions on electoral fusion, including an outright ban on fusion

candidates, does not severely burden the First Amendment rights of voters, candidates or political parties. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("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.").

Upon concluding that the "sore loser" statute is constitutional as applied to Platt's 2008 candidacy, the district court correctly concluded that it need not address the constitutionality of the party-loyalty pledge statute, S.C. Code Ann. § 7-11-210, and the filing deadline statute, S.C. Code Ann. § 7-11-15. The district court consequently did not rule on those claims. This Court, as a result, lacks appellate jurisdiction to hear the second and third issues raised on appeal. Alternatively, this Court is urged to follow longstanding practice and refrain from reaching a constitutional issue that is not first decided by the district court.

ARGUMENTS

STANDARD OF REVIEW

The standard of review of a grant of summary judgment is *de novo*. *Stone v. Liberty Mut. Ins. Co.*, 105 F.3d 188, 191 (4th Cir. 1997).

I. The district court correctly ruled that the application of the "sore loser" statute to preclude Eugene Platt's name from being placed on the 2008 general election ballot was constitutional.

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 "[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, 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 Appellants here complain that their First and Fourteenth Amendment rights were 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 one else, has the right to determine who their candidate may be. They claim that the "sore loser" statute effectively gave the Democratic Party a "veto" over the Green Party's choice of Platt as its nominee. The district court disagreed and upheld the constitutionality of the "sore loser" statute as applied to Platt. The district court's refusal to apply strict scrutiny and overall analysis of the issue are correct and should be affirmed.

A. Level of Scrutiny

In arguing strict scrutiny should apply, the Appellants rely exclusively on the Supreme Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which is inapposite. In *Jones*, the Court addressed the constitutionality of California's blanket primary system, in which "each voter's primary ballot ... lists every candidate regardless of party affiliation and allows the voter to choose freely among them," with the candidate of each party who wins the most votes becoming the nominee of that party for the general election. 530 U.S. at 570. Various political parties, each of which had adopted a rule prohibiting nonmembers from voting in the party's primary, challenged the blanket primary law on the ground that it violated their associational rights. The Supreme Court agreed that the law impermissibly burdened the parties' right of free association,

finding that it "forces political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. at 577.

However, the "sore loser" statute as applied to Platt for House Seat 115 in the 2008 election presents a much different scenario. Most significantly, the "sore loser" statute does not permit each primary voter to participate in the selection of all political parties' nominee as in the Court struck down in *Jones*. In assessing the appropriate level of scrutiny, the Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), is more instructive and analogous than *Jones*.

In *Timmons*, 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. (emphasis added). 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. Similarly, the Appellants' challenge in this case to what is indisputably a non-discriminatory application of the "sore loser" statute by the State Election Commission did not impose "severe" burdens on the Appellants' associational rights.

From the outset, it is important to note that the Appellants do not contest or dispute the district court's analysis of the burdens imposed by the "sore loser" statute. The Appellants do not even cite to the district court's opinion nor specify an error in the court's analysis. In short, the Appellees submit that the district court's analysis of the burdens is correct.

It must also be observed that the Appellants try to redefine what constitutes a sore loser candidate. They argue that "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." *See* Appellants' Brief, p. 20. They argue that Eugene Platt was not a "sore loser" because he received the Green Party

nomination before he lost the Democratic Party primary. The Appellants suggest that the "sore loser" statute should only apply to those candidates who seek another party's nomination *after* losing a primary rather than before. In the district court, the Appellants in fact began using the term "true sore loser" and suggested that Platt was not a "true sore loser." Frankly, that is a distinction without any basis in the statute or that makes any difference. The timing of the lost nomination is truly immaterial. The burdens on the associational rights are also no different. More importantly, the numerous state interests underlying the "sore loser" statute – including minimizing excessive factionalism, preventing intra-party feuding or disputes, and avoiding voter confusion – would not be served by drawing a distinction between a "sore loser" and a "true sore loser" as the Appellants are arguing and as they need to win reversal in this appeal. If a defeated primary candidate is allowed to appear on the general election ballot, there arise legitimate issues of voter confusion, excessive factionalism, and intra-party feuding or disputes. Those issues are not negated simply because the candidate won a particular party's nomination before he subsequently lost another party's nomination. These very real problems – which this Court and the district court have previously found to be addressed by enforcement of the "sore loser" statute – result regardless of the timing of the candidate's lost nomination. Realistically it

makes no credible difference whether the candidate loses the first nomination he seeks or the last.

As the district court concluded, the burdens on the Appellants were not severe. The Appellants were aware of the "sore loser" statute when Platt decided to seek multiple nominations and the Green Party nominated him. Platt could have sought only the Green Party nomination thereby ensuring his presence on the general election ballot if he were successful with that one party's nomination process. Instead, he deliberately chose to seek multiple parties' nominations and did so with knowledge that, if he lost one nomination, he would be precluded from appearing on the general election ballot for any party. The risks were known, but Platt took those risks because there clearly was a benefit to being the nominee of multiple parties with multiple ballot lines.

Similarly, the Green Party knew or should have known that there were risks and rewards associated with selecting a nominee who was also seeking other parties' nominations. The Green Party could have elected to nominate a candidate who was not seeking dual nominations and, as a result, could have protected its right to offer the candidate of its choice without potential restrictions due to failure in another party's primary. However, the Green Party selected a nominee who they hoped would also be a major party candidate which would have presumably increased its candidate's electability and the party's exposure and influence. As the

district court observed, "[t]he sore-loser statute did not prevent the Green Party from having a candidate of its choice appear on the general election ballot, but only prevented it from having its *first* choice (Platt) appear on the ballot." (J.A. 541-42).[4] *See Timmons*, 520 U.S. at 359 ("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.").

The Appellants complain that a political party and the candidate may have invested resources in a candidate's campaign only to have it "go up in smoke though [sic] no fault of its own." *See* Appellants' Brief, p. 22. However, that scenario totally ignores that the party deliberately chose to pursue electoral fusion and its benefits knowing full well the risks involved. As indicated, Platt could have chosen not to run for the Democratic Party nomination; and similarly, the Green Party could have chosen a candidate who was not seeking multiple nominations. The burdens were, therefore, voluntarily accepted and essentially self-imposed. Those minimal burdens in light of the important state interests that are furthered by the "sore loser" statute do not violate the Plaintiffs' First Amendment rights.

[4] The Appellants make no mention in their brief of the burdens on Robert Dunham's rights. However, the district court's analysis is again correct: "Dunham was burdened in the sense that his first choice candidate's name did not appear on the general election ballot in 2008. However, Dunham was not prevented from voting for Platt as a write-in candidate." (J.A. 543).

In sum, the burdens on associational rights presented by the "sore loser" statute are no more severe than those at issue in *Timmons*.[5] In effect, if an outright ban on electoral fusion does not impose severe burdens, then certainly minimal limitations on electoral fusion resulting from application of the "sore loser" statute impose even lesser burdens than what was at issue in *Timmons*.[6] Consequently, the district court correctly ruled that strict scrutiny does not apply.

B. State Interests

The State Election Commission raised numerous state interests that are served by the "sore loser" statute including insuring orderly, fair, and honest elections; minimizing excessive factionalism; maintaining the integrity of various routes to the ballot; maintaining a stable political system; preventing intra-party feuding or disputes; avoiding voter confusion, avoiding ballot overcrowding; and ensuring that elections are operated equitably and efficiently. The district court found that these were "significant state interests" and further concluded that "South

[5] While the Appellants suggest that the burdens here are "as heavy" as those created by the blanket primary struck down in *Jones*, they remarkably offer no argument to distinguish *Timmons* which without reasonable dispute is more analogous – if not on point – with the scenario presented by this case.

[6] The district court similarly observed that "[i]f states can prohibit fusion, then states can certainly limit fusion based on an otherwise constitutional sore-loser statute." (J.A. 539-40).

Carolina's asserted interests are sufficient to justify the application of the sore-loser state to preclude Platt's name from being placed on the ballot." (J.A. 544, 546).[7]

The Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), is also instructive in assessing the validity and sufficiency of the state interests asserted. The Supreme Court in *Timmons* 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

[7] Strangely, the Appellants claim in their brief that the State Election Commission only offered one state interest – minimizing excessive factionalism – to justify the application of the "sore loser" statute. That is clearly not accurate. The State Election Commission asserted numerous state interests in the district court, and indeed the district court focused on two of those interests – maintaining party stability and avoiding voter confusion – in its decision. The Appellants nonetheless spend numerous pages in their brief challenging whether a sore loser statute indeed minimizes excessive factionalism. However, they never discuss – let alone refute – the other state interests cited by the State. More importantly, they do not refute the state interests actually addressed by the district court. In short, even if minimizing excessive factionalism is not a valid governmental interest, as the Appellants suggest, they have not shown that every other governmental interest served by the "sore loser" statute is also invalid or inapplicable.

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 Supreme 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 South Carolina "sore loser" statute and its application herein disqualifying Eugene Platt as a candidate in the general election meet

constitutional muster. The constitutionality of "sore loser" laws has also been previously upheld in *White v. West*, No. 74-1709 (D.S.C. 1976),[8] and by this Court in *Backus v. Spears*, 677 F.2d 397 (4th Cir. 1982). Additionally, in *Cromer v. State of South Carolina*, 917 F.2d 819 (4th Cir. 1990), this Court also recognized that "sore-loser provisions (which South Carolina has in place under S.C. Code Ann. § 7-11-210) are justifiable measures for preventing splintering and factionalism within the major parties." 917 F.2d at 825.

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, this Court 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), this Court 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. This Court concluded that "South Carolina's prohibition of candidates in a

[8] A copy of *White v. West* is included in the Joint Appendix. (J.A. 17-30). *White v. West* was decided by a distinguished panel including members of this Court, specifically Judge Clement F. Haynsworth, Jr., Judge Donald S. Russell, and Judge Robert F. Chapman.

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.[9]

The decision of the federal district court in *National Committee of U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71 (W.D. Tex. 1996), is also instructive in evaluating the state interests served by a "sore loser" statute. 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.

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

[9] 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.

> 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 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:

> 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*.[10] 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. *See also*, *Cromer v. State of South Carolina*, 917 F.2d 819, 825 (4th Cir. 1990)

---

[10] The Appellants attempt to distinguish *Garza* factually based upon the timing of the failed nomination. They claim that *Garza* is unpersuasive because Pat Buchanan lost the major party nomination first and then sought the nomination of the minor party. As the district court correctly recognized,

> The same interests advanced by the state and recognized by the Supreme Court in *Storer* apply to a candidate who first obtains one party's nomination and then loses another party's nomination. The timing of the candidate's loss does not substantially alter the state interests served by the sore-loser statute.

(J.A. 545).

(sore-loser statute is "justifiable measure[] for preventing splintering and factionalism within the major parties").

The enforcement of the "sore loser" statute to disqualify Eugene Platt during the 2008 election satisfied these very state interests. The burdens on the Appellants, 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, the existing authority from the United States Supreme Court, this Court, and other federal courts strongly support the constitutionality of the South Carolina "sore loser" statute and its application in this case. The district court's analysis and the summary judgment in favor of the Appellees should be affirmed.

II. This Court lacks appellate jurisdiction to hear the Appellants' challenges to the party-loyalty pledge statute and the filing deadline statute, issues which the district court declined to address.

In the district court, the Appellants also challenged the application of the party-loyalty pledge statute, S.C. Code Ann. § 7-11-210, to Eugene Platt as well as the constitutionality of the filing deadline for statements of intention of candidacy as set forth in S.C. Code Ann. § 7-11-15 as applied to Platt. Relying on *Storer v. Brown*, 415 U.S. 724 (1974), the district court declined to adjudicate these constitutional questions. The district court concluded that even if these statutes were wholly or partially unconstitutional, Platt was still barred from having his name placed on the general election ballot by operation of the "sore loser" statute. The district court explained that "[t]he application of the other challenged statutes, although potential additional bars to Platt's candidacy, was not necessary to exclude Platt's name from the ballot." (J.A. 546). The district court therefore did not reach those claims. Summary judgment was not granted or denied on these claims.

Despite the fact that the district court declined to rule on the challenges to the party-loyalty pledge statute and the filing deadline statute, the Appellants have nonetheless raised those issues on appeal. The Appellees submit that this Court lacks appellate jurisdiction to hear that portion of the Appellants' appeal. Alternatively, the Appellees submit that this Court should likewise follow Fourth

Circuit precedent and refrain from deciding claims that were not first decided by the district court.

Even where a district court reaches a constitutional claim and denies summary judgment, an appeal is not yet appropriate. In *O'Connor v. United States*, 956 F.2d 48 (4th Cir. 1992), this Court recognized that "it is clear that an order denying summary judgment is generally an interlocutory order which is not appealable. Such an order does not lose this characterization merely because an appeals court reverses the granting of summary judgment in favor of the other party." 956 F.2d at 52 (internal citation omitted). *See Kendall v. City of Chesapeake*, 174 F.3d 437 (4th Cir. 1999). This Court may exercise pendent appellate jurisdiction to review an order denying summary judgment *only if* the order is "(1) inextricably intertwined with the decision of the lower court on the appealable issue or (2) consideration of the additional issue is necessary to ensure meaningful review of the appealable issue." *United States v. North Carolina*, 180 F.3d 574, 581, n.4 (4th Cir. 1999); *see also Swint v. Chambers County Commission*, 514 U.S. 35, 51 (1995).

Based on this authority, this Court lacks appellate jurisdiction to hear the Appellants' constitutional challenges to the party-loyalty pledge statute and the filing deadline statute. Those challenges were not decided by the district court. This Court may not exercise pendent appellate jurisdiction because neither of the

exceptions from *Swint* apply. Because the district court declined to decide those claims on the merits, those claims are not "inextricably intertwined" with the appealable order granting summary judgment on the application of the "sore loser" statute. Likewise, as the district court itself explained, a decision on the constitutionality of the party-loyalty pledge statute and the filing deadline statute is not necessary for the district court's order upholding the application of the "sore loser" statute. Consequently, the two constitutional claims the district court refused to reach are not necessary for meaningful review of district court's decision, and this Court lacks appellate jurisdiction to hear the Appellants' second and third issues for appeal.

Alternatively, this Court generally will not adjudicate a constitutional issue that is not first decided by the district court. In *United States v. Rizzi*, 434 F.3d 669 (4th Cir. 2006), this Court declined to rule on a constitutional issue not reached by the district court. The Court explained: "Because the district court did not reach this or any other constitutional issues, we are reluctant to do so on this appeal without first having afforded the district court the opportunity to consider them." 434 F.3d at 674. *Accord*, *Hotaling v. Church of Jesus Christ of the Latter-Day* Saints, 118 F.3d 199, 204 (4th Cir. 1997) ("Because the district court did not reach this issue, we decline to address it for the first time on appeal."). The same rule of judicial restraint should be followed in the present case. If this Court concludes

that the Appellants' constitutional challenges to the party-loyalty pledge statute or the filing deadline statute should be adjudicated,[11] the Appellees submit that a remand of those issues to the district court would be the appropriate result.[12]

[11] In the event this Court hears the Appellants' second issue on appeal, the Appellees submit that the party-loyalty pledge statute is constitutional and rely on the arguments briefed to the district court. (J.A. 361-64, 462-63). The Appellees would reiterate that the constitutionality of the party-loyalty pledge statute has been upheld previously by this Court, the district court, and the South Carolina Supreme Court. *See, Backus v. Spears*, 677 F.2d 397 (1982); *White v. West*, No. 74-1709 (D.S.C. 1976); *Florence County Democratic Party v. Johnson*, 281 S.C. 218, 314 S.E.2d 335 (1984). In *Backus v. Spears*, 677 F.2d 397 (1982), this Court found that the constitutional challenge to the party-loyalty pledge statute was "frivolous." 677 F.2d at 399. Relying on *Storer v. Brown*, 415 U.S. 724 (1974), the Court ruled 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." *Id*. The same is also true with respect to a defeated candidate seeking placement on the general election ballot for a different political party. The Appellees would further remind this Court, as was recognized by the district court (J.A. 529), that the Appellants pled *only an as-applied challenge* to the party loyalty-pledge statute and should not be permitted to pursue a facial challenge for the first time on appeal.

[12] With respect to the Appellants' claim pertaining to the filing deadline statute, S.C. Code Ann. § 7-11-15, the parties are in agreement that the as-applied challenge to that statute does not present a case or controversy under Article III. There is no basis for the Appellants to proceed with their appeal on that claim. As the district court recognized, and the Appellants do not dispute on appeal, "Plaintiffs and SCSEC Defendants concede that the issue is moot as it related to any prospective relief. ... They agree that Platt's particular circumstances as to filing deadlines for the 2008 election have no effect on the application of this policy in future elections." (J.A. 547). Furthermore, the district court highlighted that the State Election Commission conceded "declaratory relief as to whether the Election Commission could have denied Platt placement on the general election ballot based upon the correct interpretation of Section 7-11-15, as clarified at the April 2008 meeting, does not present a live case-or-controversy. Importantly, the reason that the SCSEC staff did not place Eugene Platt on the general election ballot was the fact that Platt lost the Democratic Party primary which implicated the 'sore loser' statute." (J.A. 466-67).

CONCLUSION

Based on the foregoing discussion, the Appellees respectfully request that this Court affirm the order of United States District Judge Cameron McGowan Currie granting summary judgment to the Appellees.

The Appellees respectfully request oral argument.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: s/ *Andrew F. Lindemann*

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellees South Carolina State Election Commission, Hudgens, Bensch, Green, Pinson, and Waring

and

WYCHE, BURGESS, FREEMAN &
PARHAM, P.A.

BY: *s/ Matthew T. Richardson*
MATTHEW T. RICHARDSON
Post Office Box 12247
Columbia, South Carolina 29211
(803) 254-6542

Counsel for Appellee Charleston County Democratic Party

Columbia, South Carolina

November 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Moffatt Laughlin McDonald, Esquire
Bryan L. Sells, Esquire
Matthew T. Richardson, Esquire

s/ *Andrew F. Lindemann*