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South Carolina Green Party v. South Carolina State Election Commission

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SOUTH CAROLINA GREEN PARTY V. SOUTH CAROLINA STATE ELECTION COMMISSION

South Carolina, like many other states, has what is commonly called a "sore-loser" statute, which prohibits a candidate who loses a party primary from appearing on the ballot in the general election as that party's candidate.[1] But South Carolina also allows individuals to run as "fusion candidates," which are candidates who appear as the nominee of at least two certified political parties on the general election ballot.[2] Under the practice called electoral fusion, these fusion candidates receive all the votes cast for them in the general election, in their capacities as nominees for individual parties combined.[3] In other words, the votes follow the person, not the party. Even so, should a would-be fusion candidate lose the nomination contest for any of its intended parties, the sore-loser statute would appear to bar that candidate's name from appearing on the general election ballot for any of its intended parties.[4]

Last year, in *South Carolina Green Party v. South Carolina State Election Commission*, the United States Court of Appeals for the Fourth Circuit upheld a district court decision in favor of the defendants, a group consisting of the South Carolina State Election Commission, members thereof, and the Charleston County Democratic Party.[5] The plaintiffs in the case, the South Carolina Green Party; its 2008 nominee for South Carolina House Seat 115, Eugene Platt; and Robert Dunham, a citizen-supporter of Platt, asserted that the sore-loser statute violated the Green Party's First and Fourteenth Amendment rights to association.[6]

In 2008, Platt filed to run for South Carolina House Seat 115, representing Charleston County.[7] Platt sought the nomination of three political parties, filing statements of intent with the South Carolina Democratic Party on March 17, 2008, the South Carolina Working Families Party on March 27, and the South Carolina Green Party on May 3.[8] The Green Party chose Platt as its nominee at its state convention on May 3, and one week later, the Working Families Party also selected Platt as its nominee.[9] On June 10, however, "Platt lost the Democratic Party election."[10] After Platt lost the Democratic primary, the South Carolina Election Commission informed him that the state's sore-loser statute prohibited him from appearing on the general election ballot as the nominee of either the Green Party or the Working Families Party.[11] The Election

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1. S.C. CODE ANN. § 7-11-10 (Supp. 2010).
2. S.C. Green Party v. S.C. State Election Comm'n, 612 F.3d 752, 754 n.2 (4th Cir. 2010).
3. *Id.*
4. *See* § 7-11-10.
5. *S.C. Green Party*, 612 F.3d at 754.
6. *Id.* at 755.
7. *Id.* at 754.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

Commission based its decision on the section of the statute that prohibits the name of anyone "who was defeated as a candidate for nomination to an office in a party primary or party convention" from appearing on the subsequent general or special election ballot.[12]

Though Platt's complaint stems from his participation in the 2008 election cycle, his challenge to the sore-loser statute is not moot because its alleged burden on association rights is potentially recurring, or "capable of repetition, yet evading review."[13] The plaintiffs contended that their case warranted strict scrutiny review because of the severe burden the statute imposed on their right to associate and because the statute lacked narrow tailoring to advance a compelling government interest—in this case, "minimizing excessive factionalism."[14] The defendants responded that the statute advanced several important regulatory interests, thereby justifying the modest burden it potentially imposed on a political party's right to associate.[15]

The plaintiffs sought a declaratory judgment under § 1983[16] and injunctive relief to stop the Election Commission, its members, and the Charleston County Democratic Party from enforcing the statute.[17] The district court granted the defendants' motion for summary judgment and denied the plaintiffs' motion for declaratory and injunctive relief, upholding the constitutionality of the sore-loser statute as applied to Platt's Green Party application to appear on the ballot in the 2008 election.[18] The plaintiffs appealed, focusing on Platt's Green Party candidacy and emphasizing that he had already "successfully secured" that nomination before running in the Democratic Party primary election.[19] The plaintiffs' appeal addressed only the party members' collective right of association, not Platt's individual right.[20] In doing so, the plaintiffs argued that the operation of the statute effectively allowed the voters in the Democratic Party primary to "veto" the Green Party nominee by preventing a chosen primary candidate from appearing on the general election ballot, while also stopping the Green Party from electing a replacement candidate.[21] The defendants disagreed, instead blaming the absence of Platt's name from the general election ballot on Platt's own decision to run in the Democratic primary.[22]

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12. *Id.* at 754–55 (quoting S.C. CODE ANN. § 7-11-10 (Supp. 2010)).
13. *Id.* at 754 n.1 (internal quotation marks omitted).
14. *Id.* at 755. "[A] faction . . . [is] a number of citizens . . . 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." THE FEDERALIST NO. 10 (James Madison).
15. *S.C. Green Party*, 612 F.3d at 755.
16. 42 U.S.C. § 1983 (2006).
17. S.C. Green Party v. S.C. State Election Comm'n, 647 F. Supp. 2d 602, 608 (D.S.C. 2009).
18. *Id.* at 617–18.
19. *S.C. Green Party*, 612 F.3d at 755.
20. *Id.*
21. *Id.*
22. *Id.*

Writing for the majority, Judge Keenan, joined by Senior Judge Hamilton and Samuel G. Wilson, United States District Judge for the Western District of Virginia, sitting by designation,[23] affirmed the district court's grant of summary judgment to the defendants and held (1) that the burden the sore-loser statute imposed on the plaintiffs was not severe enough to merit strict scrutiny and (2) that the statute advanced important state regulatory objectives.[24] The court began with a brief survey of case law regarding the First Amendment right to associate as applied to the states in the context of political elections and followed it with a description of the appropriate test and standard for a constitutional inquiry.[25] After this introduction, the court addressed the severity of the burden that the statute imposed on the Green Party's right to choose its own candidate and the legitimacy of the state interests that the statute purportedly advanced.[26] Finally, the court considered the effect of electoral fusion and the state's "party loyalty" statute.[27]

As applied to the political process, the right to associate "protects the rights of individuals to associate for the advancement of political beliefs and ideas"[28] and "the freedom for individuals to 'band together' in political parties to promote electoral candidates who support their political views";[29] in other words, the right to associate allows individuals to "choose their 'standard bearer' in the form of a nominee."[30] In determining whether a state election law unconstitutionally burdens an individual's right to associate, a court "must weigh the character and magnitude of the burden . . . against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary."[31] The Supreme Court has stressed the effectiveness of sore-loser statutes in minimizing "intra-party feuding," in saving "'major struggles' for general election ballots,"[32] and in preventing the "splinter" of major political parties.[33] In *Storer v. Brown*, the Supreme Court upheld California's sore-loser statute,[34] which the Fourth Circuit has previously found to be "substantially identical" to South Carolina's.[35] The Fourth Circuit upheld the

23. *Id.* at 754.
24. *Id.* at 759.
25. *Id.* at 755–56.
26. *Id.* at 756–59.
27. *Id.* at 760 (citing S.C. CODE ANN. §7-11-210 (Supp. 2010)).
28. *Id.* at 755–56 (citing Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973)).
29. *Id.* at 756 (quoting Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000)).
30. *Id.* (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989)).
31. *Id.* (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)) (internal quotation marks omitted).
32. *Id.* (citing and quoting Storer v. Brown, 415 U.S. 724, 735 (1974)).
33. *Id.* (citing Clingman v. Beaver, 544 U.S. 581, 596 (2005)).
34. *Storer*, 415 U.S. at 736.
35. *S.C. Green Party*, 612 F.3d at 756 (quoting Backus v. Spears, 677 F.2d 397, 400 (4th Cir. 1982)) (internal quotation marks omitted).

South Carolina sore-loser statute in an earlier challenge as a "justifiable measure[] for preventing splintering and factionalism within the major parties."[36]

Next, the court analyzed the burden imposed by the sore-loser statute on the Green Party's right to select a nominee of its choosing. The court disagreed with the plaintiffs' contention that the sore-loser statute imposed a burden similar to that of a California election law regarding "blanket" primary elections that the Supreme Court invalidated.[37] The California law allowed voters of any party to vote in the primary election of any other party and thus potentially manipulate the intention of an associated group and their right to associate.[38] The court did conclude, however, that a Minnesota ban on electoral fusion that the Supreme Court upheld was comparable to the present case, in that although the challenged Minnesota laws could keep a person's name from appearing on the general election ballot as nominee for more than one party, they did "not restrict the ability of the [party] and its members to endorse, support, or vote for anyone," and left the party "'free to try to convince' its nominee to refrain from seeking the nomination of another political party."[39]

The court held that South Carolina's sore-loser statute, like the Minnesota electoral fusion ban, did not severely burden the Green Party's association rights.[40] Platt's decision to seek the nomination of more than one party, and not the interference of the Democratic primary voters, ultimately undermined his general election bid.[41] The Green Party was not severely burdened in selecting a candidate of its choice because it could have tried to convince Platt not to seek a competing nomination.[42] Furthermore, despite the plaintiffs' contention that the sore-loser statute's disqualification of Platt left them without the ability to nominate a substitute, the court found that the party could have nominated a substitute candidate after Platt's loss.[43] As such, the party was only burdened to the extent that it could not have its first-choice candidate on the ballot, not so severely burdened that the party would be eliminated from the ballot.[44] The court held that this burden was not severe enough to warrant strict scrutiny.[45]

The court next turned to the state interests that the sore-loser statute purportedly advanced, and noted that "[w]hen . . . a statute places only a modest burden on association rights, 'a State's important regulatory interests will usually

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36. *Id.* (alteration in original) (quoting Cromer v. South Carolina, 917 F.2d 819, 825 (4th Cir. 1990)) (internal quotation marks omitted).

37. *Id.* (citing Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)).

38. *See id.* at 757 (citing *Cal. Democratic Party*, 530 U.S. at 577).

39. *Id.* (alteration in original) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 360, 363 (1997)) (internal quotation marks omitted).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 759.

44. *See id.*

45. *Id.*

be enough to justify its reasonable, nondiscriminatory restrictions.'"[46] In addition to the previously recognized important regulatory interest of preventing party splintering, the court also cited the desirable government objectives of (1) reducing voter confusion likely to occur when a candidate who lost the primary election appears on the general election ballot and (2) "ensuring orderly, fair, and efficient procedures for the election of public officials."[47] In so holding, the court rejected the plaintiffs' argument that splintering the Democratic Party was not an issue because Platt sought the Green Party nomination prior to losing the Democratic nomination.[48] Instead the court reasoned that Democratic party voters who supported Platt could still vote for him in the general election and thereby splinter the party.[49] The court held that these important regulatory objectives justified the modest burden that the statute imposed.[50]

Last, the court observed that electoral fusion did not change its analysis of the Green Party's association rights because it "[did] not in any respect limit a political party's association rights to choose its nominee."[51] Additionally, the court held that the plaintiffs' separate challenge to the state election law commonly referred to as the "party loyalty" statute was rendered moot by the court's holding regarding the sore-loser statute.[52]

Historically, the two major political parties have largely dominated elections in the United States. However, the political climate in America may lead to growing dissatisfaction with the two-party system and, as a result, strengthen third parties and powerful factions, such as the Tea Party, within the existing parties. Should the Tea Party or another group like it decide to break from its major party and establish a certified third party, election laws like the sore-loser statute could become increasingly important.

Regardless of whether party splintering is desirable, the state objectives of reducing voter confusion and ensuring efficient and fair election procedures as discussed in this case will continue to be vitally important to the health and advancement of our society.

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46. *Id.* (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 760.
52. *Id.* at 760 (citing S.C. CODE ANN. §7-11-210 (Supp. 2010)).