

June 19, 2012

**Hand Delivered**

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11649  
Columbia, South Carolina 29211

**RECEIVED**

JUN 19 2012

**S.C. Supreme Court**

M. Elizabeth Crum

lcrum@mcnair.net  
T (803) 799-9800  
F (803) 753-3219

Re: *Donnie McBride and Vincent Masterpaul v. South Carolina Election Commission and Marci Andino, as Executive Director and Representative of the South Carolina Election Commission* (Case No. 2012-CP-26-4709)

Dear Mr. Shearouse:

Enclosed herewith for filing with the Court, please find the original and six (6) copies of the Reply of Appellants-Defendants South Carolina State Election Commission and Marci Andino, as Executive Director and Representative of the South Carolina State Election Commission, to Plaintiff's Return to Amended Emergency Petition for Writ of Supersedeas and Memorandum of Law in Opposition in the above-captioned appeal.

By copy of this correspondence and by Certificate of Service, we are serving the Reply on all counsel of record and defendants by United States Postal Service as well as by electronic mail.

Should you have any questions with respect to this filing, please do not hesitate to contact us.

Very truly yours,



M. Elizabeth Crum

Enclosure

cc: L. Morgan Martin, Esquire, Attorney for Plaintiffs  
D. Malloy McEachin, Esquire, Attorney for Florence County Election Comm.  
Sanford C. Graves, Esquire, Attorney for Horry County Election Comm.  
Donna Mahn, Georgetown County Election Commission  
Teresa C. Moody, Marion County Election Commission  
Joe Moffet, Dillon County Election Commission  
Lori Moses, Marlboro County Election Commission  
Lois Burr, Chesterfield County Election Commission  
Hoyt Campbell, Darlington County Election Commission

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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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Civil Action No. 2012-CP-26-4709

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**RECEIVED**

JUN 19 2012

**S.C. Supreme Court**

Donnie McBride and Vincent Masterpaul, ..... Respondents-Plaintiffs,

v.

South Carolina Election Commission; Marci Andino, as Executive Director and Representative of the South Carolina Election Commission; Horry County Election Commission; Russell W. Hall, III, Chairman of Horry County Election Commission; Georgetown County Election Commission; Dean Smith, Director of Georgetown County Election Commission; Florence County Election Commission; David K. Alford, Director of Florence County Election Commission; Marion County Election Commission; Teresa C. Moody, Director of Marion County Election Commission; Dillon County Election Commission; Joe Moffet, Chairman of Dillon County Election Commission; Marlboro County Election Commission; Phyllis Hagan, Director of Marlboro County Election Commission; Chesterfield County Election Commission; Donald Sellers, Director of Chesterfield County Election Commission; Darlington County Election Commission; Hoyt Campbell, Director of Darlington County Election Commission, ..... Defendants,

Of whom

South Carolina Election Commission and Marci Andino, as Executive Director and Representative of the South Carolina Election Commission, are..... Appellants-Defendants.

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**REPLY TO RETURN TO AMENDED EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS  
MEMORANDUM OF LAW IN OPPOSITION**

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Appellants-Defendants South Carolina State Election Commission and Marci Andino, as Executive Director and representative of the South Carolina State Election Commission, (SEC), file this Reply to the Respondents-Plaintiffs' Return to the Amended Emergency Petition for Writ of Supersedeas filed with the Court this morning.

First, Plaintiffs argue that the SEC "decided to throw away approximately 2400 votes cast for a candidate in the democratic primary election to select a candidate to run as the Democratic nominee for the Seventh Congressional District." (footnote omitted) No votes have been "thrown away". Instead, the votes were preserved but not counted toward the total votes cast for the seventh congressional district (District). Federal law requires that all records and papers relating to any application, registration or other act requisite to voting be retained for 22 months following the election to which such records and papers pertain (42 U.S.C.,1974). S.C. Department of Archives and History Record Retention Schedule 12-517.4 requires records to be retained for 24 months. The SEC and the county election commissions have and will continue to comply with this law. The total number of votes cast for Vick was 2,341. See Exhibit 7, Affidavit of Andino dated June 19, 2012, ¶ 4, Attachment D). If Vick's votes are not counted, Tinubu captured 52.47 % of the vote for the District in the Democratic Primary. If the votes are counted, Tinubu captures 48.81 % of the votes for the District.

In advising the county election commissions in which the District is located as to how to deal with the votes cast for Vick, SEC followed its long standing interpretation requiring that votes for candidates that had formally withdrawn their candidacy prior to the primary election not be counted. This policy had been in place since at least 2006. See Exhibit 1, Adino Affidavit dated June 17, 2012, ¶ 10 and Attachment C. The decision not to count the votes for Mr. Vick,

who had formally withdrawn (*Id.*, ¶ 7, Attachment B) was not arbitrary and capricious but in accord with the agency's long standing policy and the policy applied by the various county election commissions since at least 2006 (*Id.*, ¶ 10, Attachment C) .

Plaintiffs contend that Vick "suspended" his campaign on May 28, 2012. Return, p. 3. Pursuant to the uncontested clear language of his letter before this Court, Vick withdrew from the campaign and did not "suspend" his campaign (Return, p. 3). See Exhibit 1, Andino June 17, 2012 affidavit, ¶ 7, Attachment B. Suspending a campaign is different from withdrawing from a campaign. A candidate suspending a campaign is still in the race seeking the nomination but no longer actively campaigning for the office. A candidate withdrawing from a campaign is no longer in the race and is not seeking the nomination. If Vick had suspended his campaign, the primary election would not be covered by the requirements of S.C. Code Ann. § 7-17-610 (Supp. 2012).

On June 13, 2012, the SEC requested an opinion from the S.C. Attorney General how to determine the majority vote when a candidate withdraws from a race prior to the primary but still receives votes. Exhibit 7, ¶ 2, Attachment E. On June 14, 2012, the Attorney General sent a letter to the SEC stating, in pertinent part:

In the brief amount of time available to us to reasearch this matter, we have found no South Carolina decision which is determinative. Nor have we located a statute expressly requiring that Mr. Vick's votes not be counted for the limited purposes of determining a majority. Therefore, we cannot advise you with certainty.

However, we are able to point out the general law. The authorities which we have located strongly suggest that Mr. Vick's votes are to be counted for the limited purpose of determining a majority.

Exhibit 7, ¶ 3, Attachment F. The general law relied upon by the Attorney General is 26 Am. Jur. 2d *Elections* § 358 and 29 CJS *Elections* § 224. CJS provides: “Whether a candidate must receive a majority or plurality of the votes cast is dependent on statute ... It is within the power of the legislature to define what shall constitute a majority.” 29 CJS *Elections* § 224. It is within the purview of the South Carolina General Assembly to provide for the conduct of primary elections in South Carolina and to provide how a majority shall be calculated. “It is within the province of the legislature to prescribe the method of voting at primary elections and to adopt reasonable regulations for that purpose. Except as to matters which are merely directory, the primary must be conducted in accordance with the statutes.” 29 C.J.S. Elections, § 215. Primary elections are unknown at common law, 29 C.J.S. Elections, §200, and therefore the “power of a governmental unit to hold primary elections depends on constitutional or statutory provisions,” 29 C.J.S. Elections, § 201. “Unless the primary act contravenes the [state] constitution, it is supreme to the extent of its provisions . . . .” *Id.*

The General Assembly has defined what constitutes a majority for purposes of a runoff in a primary election and how that majority is to be calculated.<sup>1</sup> In clear and unambiguous language, S.C. Code Ann. § 7-17-610 provides in pertinent part:

It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of Sections 7-17-600 and 7-13-50.

(1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee. ...

---

<sup>1</sup> State law requires that a candidate have a majority in a primary election and a plurality in a general election.

(Emphasis added). The General Assembly intended that to determine the majority vote, the total vote cast for all candidates seeking nomination to a particular office be divided by two. Clearly, in section 7-17-610, the General Assembly uses the words “candidate” and “person” synonymously.

In addition the the definition of “candidate” cited in the Petition, “candidate” is defined in the S.C. Code as:

"Candidate" means a person who seeks appointment, nomination for election, or election to a state or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or election. It also means a person on whose behalf write-in votes are solicited if the person has knowledge of such solicitation. 501)R Candidate' does not include a person<sup>2</sup> within the meaning of Section 431(b) of the Federal Election Campaign Act of 1976.

S.C. Code Ann. § 8-13-100(5)(Supp. 2011). S.C. Code Ann. § 8-13-1300(4)(Supp. 2011) also defines candidate as:

"Candidate" means: (a) a person who seeks appointment, nomination for election, or election to a statewide or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or election; (b) a person who is exploring whether or not to seek election at the state or local level; or (c) a person on whose behalf write-in votes are solicited if the person has knowledge of such solicitation. "Candidate" does not include a candidate<sup>3</sup> within the meaning of Section 431(b) of the Federal Election Campaign Act of 1976.

Vick does not meet the definitions of “candidate” in Black’s Law Dictionary, or Sections 8-13-100(5) or 8-13-1300(4). He formally and consciously withdrew from the race for the office and he is no longer a “person seeking nomination.”

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<sup>2</sup> The SEC is cognizant of the fact that the office in question is a federal office, but believes that the definition of candidate as one seeking nomination can be instructive as an aid in legislative interpretation.

<sup>3</sup> See footnote 2.

Further, Plaintiffs state that when a “candidate fails to earn a majority of the votes, the state Election Commission and the county election commissions must conduct a second primary within two weeks of the first primary, citing S.C. Code Ann. § 7-13-50 (Supp. 2011).

This statement is incomplete. Section 7-13-50 provides, in pertinent part:

A second primary, when necessary, must be held two weeks after the first and is subject to the rules governing the first primary. At the second primary the two candidates among those who do not withdraw their candidacies and who received more votes in the first primary than any other remaining candidate alone shall run for any one office and if only one candidate remains, he is considered nominated, except that if there are two or more vacancies for any particular office, the number of candidates must be double the number of vacancies to be filled if so many candidates remain. ...

We ask the Court to take judicial notice that the withdrawal of candidates between the primary and the runoff for the 2008 S.C. House District 105 Republican Party primary allowed a person who did not get the majority vote in the primary to be certified as the nominee by the Republican Party for the general election. The fact that when votes for candidates who withdraw after the primary but before the runoff are not counted for purposes of determining a majority further bolsters the fact that the General Assembly did not intend for the votes cast for a withdrawn candidate prior to the primary to be counted toward determining the majority vote.

Plaintiffs also quote the Attorney General’s June 14, 2012 letter stating: “[Vick’s] votes are counted, not in favor of the candidate himself, but for the limited purpose to determine whether a majority has been achieved by one candidate or another.” This is contrary to the clear and unambiguous, expressly stated intention of the General Assembly in § 7-17-610 that only votes for candidates seeking office are to be counted. If the candidate died or withdrew,

there was no longer a person seeking office. Therefore the votes cast are a nullity and not to be counted.

The Attorney General's letter also relies on *Murphy v. Democratic Executive Committee of the City of Harahan*, 140 So. 2d 249 (La. Ct. App. 1962). There, the court concluded ballots voting for a withdrawn candidate must be counted towards the total number of votes cast for the office for purposes of determining a majority. The Attorney General cited this case for the proposition that votes for withdrawn candidates must be counted towards determining the majority. However there is a clear distinction between the statutory language in Louisiana and South Carolina. The Louisiana statute in question provides:

Whenever in any political district or political subdivision there are two or more officers of the same kind or character to be elected, such as two or more senators to be elected from the same senatorial district, or two or more representatives to the House of Representatives to be elected from the same representative district, or two or more district judges from the same judicial district, or two or more members of the school board or two or more justices of the peace, or two or more police jurors from the same ward, or two or more members of a party committee, each elector shall vote for as many candidates as there are places to be filled. Whenever an elector shall vote for a lesser number of candidates than there are places to be filled, the ballot shall not be counted for any one of the plural candidates voted for thereon, but shall be considered and counted as if no one of the plural candidates had been voted for. In other respects and for other offices the ballot shall be considered good, and shall be counted.

The important, dispositive point is that the Louisiana statute states, “[i]n other respects and for other offices the ballots shall be considered good, and shall be counted.” Our primary statutes contain no such language. Rather, § 7-17-610 requires that only the votes for candidates seeking nomination be counted toward determining the majority.

The Attorney General further notes the similar language in the Louisiana statutes and our own—“a majority of votes cast for the office for which he was a candidate”—but did not

address the more specific plain language of section 7-17-610 of the South Carolina Code, “the majority shall be ascertained by dividing the total vote cast for all candidates by two.” Section 7-17-610 dictates how the majority vote number will be calculated, and is the more specific of the two statutes at issue. Thus, although section 7-17-600 references “votes cast for the office,” as discussed in the Petition, the more specific language in section 7-17-610 requires the majority be ascertained from the “total vote cast for all candidates” and is controlling.

The SEC’s interpretation of § 7-17-610 is consistent with this Court’s holdings in both the *Anderson* and *Florence County Democratic Party* decisions. In those cases, this Court directed that votes not be counted for political party candidates whose names had been incorrectly certified as party candidates but whose names still appeared on the ballot because there was insufficient time to take them off of the ballot or remove them from the voting machines. While it is undisputed that Vick was properly on the ballot originally, by withdrawing his candidacy, his name could have been taken off the ballot, except for the fact that there was simply not enough time.

Plaintiffs have sought to cure the procedural defects in their original filing of the Petition for Writ of Mandamus (Mandamus Petition), the fact that the circuit court never had personal jurisdiction over the SEC and, on information and belief, other defendants, and their failed to state claims sufficient to constitute a cause of action. The SEC reaffirms its arguments on pages 5 through 7 of the Emergency Petition for Supersedeas and the Amended Emergency Petition for supersedeas.

Finally, the Plaintiffs do not address the fact that the *Ex Parte* TRO, on its face, has enjoined the SEC and the affected eight (8) county election commission from taking any actions to prepare for the Republican Party runoff for the seventh congressional district race or to be voting absentee now. There is no issue before this Court, nor was there before the Circuit Court, regarding the Republican Primary. Voters who need to vote absentee in the Republican Primary are being disenfranchised and denied the right to vote absentee. The county election commissions need time to prepare the voting machines for the Republican Party runoff primary (and the Democratic Party runoff if there is one) and there needs to be time to deliver the voting machines to the various polling precincts. The *Ex Parte* TRO, at the least, should be lifted as to the Republican Party runoff primary for the District.

#### CONCLUSION

In order not to disenfranchise voters who seek absentee ballots to vote in the Republican Primary runoff for the Seventh Congressional District, Appellants-Defendants request this Court to grant SEC's Petition, supersede the *Ex Parte* TRO and dismiss the Mandamus Petition. This is an important issue that should be decided immediately by this State's highest court. Delay in this Court's adjudication of the issue could be detrimental to the integrity of the mandated election process.

[signature on next page]

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By: 

Attorneys for Appellants-Defendants  
South Carolina State Election Commission  
and Marci Andino

June 19, 2012

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No. 2012-CP-26-4709

Donnie McBride and Vincent Masterpaul, ..... Respondents-Plaintiffs,

v.

South Carolina Election Commission; Marci Andino, as Executive Director and Representative of the South Carolina Election Commission; Horry County Election Commission; Russell W. Hall, III, Chairman of Horry County Election Commission; Georgetown County Election Commission; Dean Smith, Director of Georgetown County Election Commission; Florence County Election Commission; David K. Alford, Director of Florence County Election Commission; Marion County Election Commission; Teresa C. Moody, Director of Marion County Election Commission; Dillon County Election Commission; Joe Moffet, Chairman of Dillon County Election Commission; Marlboro County Election Commission; Phyllis Hagan, Director of Marlboro County Election Commission; Chesterfield County Election Commission; Donald Sellers, Director of Chesterfield County Election Commission; Darlington County Election Commission; Hoyt Campbell, Director of Darlington County Election Commission, ..... Defendants,

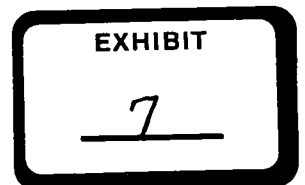
Of whom

South Carolina Election Commission and Marci Andino, as Executive Director and Representative of the South Carolina Election Commission, are ..... Appellants-Defendants.

**AFFIDAVIT**

PERSONALLY APPEARED BEFORE ME, Marci B. Andino, who, first being duly sworn, deposes and says that:

1. She is the duly appointed Executive Director of the South Carolina State Election Commission (SEC) and is a resident of Richland County, South Carolina.



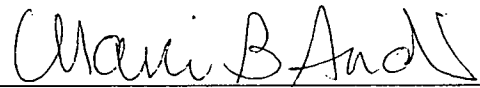
2. Attached as Attachment D is a true and accurate copy of a June 13, 2012, letter I sent to the Office of the Attorney General on behalf of the SEC seeking a formal opinion.

3. Attached as Attachment E is a true and accurate copy of a June 14, 2012, letter I received in response to Attachment A from Robert D. Cook, Deputy Attorney General.

4. Attached as Attachment F is a true and accurate copy of the 2012 Primary Results for the U.S. House of Representatives District 7 which shows as follows:

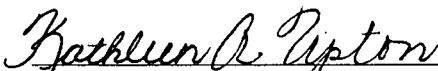
- a. If the 2,341 votes cast for Ted Vick are counted in the total, then the 16,384 votes cast for Gloria Bromell Tinubu constitutes 48.81 % of the total votes.
- b. If the 2,341 votes cast for Ted Vick are not counted in the total due to Mr. Vick's withdrawal of his candidacy, then the 16,384 votes cast for Gloria Bromell Tinubu constitutes 52.47 % of the total votes.

Further Affiant saith not.



Marci B. Andino

SWORN TO and subscribed before me  
this 19<sup>th</sup> day of June, 2012.

 (L.S.)  
Notary Public for the State of South Carolina.  
My Commission expires: 07-29-2015

**SOUTH CAROLINA  
ELECTION COMMISSION**

June 13, 2012

JC Nicholson  
Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211

Dear JC:

Thank you for providing the 1959 Attorney General's Opinion, AmJur and CJS material this morning concerning determining a majority of votes cast. I appreciate the guidance, but Chairman Hudgens and I feel it is necessary to obtain a formal opinion in this matter before the commission meets on Friday. I hope the following background information will be helpful to you.

The Democratic Primary held in Congressional District 7 had five candidates in the race when the ballot database and the absentee ballots were finalized. After preparations were finalized, Ted Vick, a candidate in this district, sent a letter to the State Democratic Party formally withdrawing from the race. On May 29, 2012, the Party forwarded a copy of Vick's withdrawal letter to the agency. A copy of the letter was posted on his campaign website and reported statewide by news media.

If the SEC had received the Vick withdrawal letter earlier, Vick's name could have been removed as a candidate. However, when the SEC received the withdrawal letter, it was too late to remove his name from the ballot and his name remained on the Democratic Party primary ballot for the 7<sup>th</sup> Congressional district.

According to media reports, if the votes for Mr. Vick are included in the total vote to determine what constitutes a majority for purpose of determining a runoff, there will be a runoff between Gloria Bromell Tinubu and Preston Brittain. If the votes for Mr. Vick are not counted toward the total vote to determine what constitutes a majority for purposes of determining a runoff, Tinubu has a majority of the vote and there is no runoff.

The following lays out the policy the Election Commission followed since at least 2006 (see memorandums attached):

- There are two Code sections that address primary election runoffs.

**SECTION 7-17-600.** No candidate shall be declared nominated in first primary without majority vote.

No candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate. The question of a majority vote shall be determined by the number of votes cast for any particular office and not by the whole number of votes cast in the primary.

**SECTION 7-17-610.** What constitutes majority vote.

COMMISSIONERS

JOHN H. HUDGENS, III  
Chairperson

MARK A. BENSON

MARILYN BOWERS

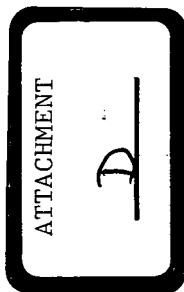
THOMAS WARING

NICOLE S. WHITE

MARCI ANDINO  
Executive Director

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It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of Sections 7-17-600 and 7-13-50.

(1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee.

Under the current policy, Mr. Vick is no longer a "candidate" and no longer "seeking nomination"; therefore, votes for Vick would not be considered in determining majority.

Furthermore, in the Florence County Democratic Party v. Florence County Republican Party, et al. case, the Supreme Court held that the "Florence County Election Commission is directed not to count any votes cast for an improperly certified candidate." The Court directed the county commission not to count any votes for a candidate who should not have been on the ballot. Vick should not have been on the ballot because he had withdrawn but remained on the ballot simply because of timing. Therefore, since his name should not have been on the ballot, any votes for him should not be counted and cannot count toward the majority vote determination. Under this theory, votes cast for Vick should not count toward determining what constitutes a majority vote for the 7<sup>th</sup> Congressional Democratic Primary Race.

Based on our conversation today and the materials you provided, seem to indicate that votes for Vick should be counted toward the majority vote determination. However, I also understand from our conversation that is no case on point in South Carolina addressing the issue before us.

Opinion No. 583, August 25, 1959 interpreted the majority vote requirement for election to the Board of Trustees of School District no. 51, conducted under the provisions of 1959 Acts 523. There were five candidates and one of the five was determined to be ineligible to have been on the ballot after the primary was over. The opinion determined that although the individual was determined ineligible to be on the ballot after the primary, the votes cast for him "are to be counted in determining the result of the election regards the other candidates. 133 ALR 320.

The AmJur section you sent provides that where votes are cast without the knowledge of voters for a person appearing on the ballot who is dead, ineligible or disqualified, the votes may be considered in order to determine a majority vote count. Under the American rule, it is not material whether the voter knew the person was dead, etc, but under the English rule voter knowledge of the person's situation is material to determining a majority vote count. This section does not address a candidate who withdrew prior to the election but whose name remains on the ballot.

CJS specifically addresses how to compute the majority vote for a candidate that legally withdrew from the race and states that such votes must be taken into account and included in the vote total for purposes of determining the majority vote number. CJS goes on to state: "it is within the power of the legislature to define what shall constitute a majority."

Under this theory, votes cast for Vick should be counted toward determining what constitutes a majority vote for the 7<sup>th</sup> Congressional Democratic Primary Race, in which case a runoff is necessary.

Our question is whether the General Assembly under the plain statutory language of "candidate" and "seeking nomination" intended for votes cast for withdrawn candidates to be counted in determining majority.

Thank you again for your assistance in this matter.

Sincerely,

*Marci Andino*

Marci Andino

/mba

Enclosure(s)

Memo To: Director/ Chair County Election Commission  
From: Chris Whitmire, Director of Public Information & Training  
Date: June 5, 2012  
Subject: Memo 14 - Determining Winners in Primary Election

One of the important differences between a primary and a general election is that to win a primary election, one must receive a majority of the votes cast for that office. In general elections, the winner is determined by plurality (most votes wins). S.C. Code of Laws 7-17-600 sets out the requirement for determining winners in primaries:

**7-17-600** No candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate. The question of a majority vote shall be determined by the number of votes cast for any particular office and not by the whole number of votes cast in the primary.

Section 7-17-610 provides the method for determining which candidates have received a majority of the votes cast for a particular office. Remember that a majority of votes does not have to be a whole number; it may be a partial number.

**7-17-610** What constitutes majority vote.

It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of Sections 7-17-600 and 7-13-50.

(1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee.

(2) If nominees for two or more offices (constituting a group) are to be selected, and there are more persons seeking nomination than there are offices, the majority shall be ascertained by dividing the total vote cast for all candidates by the number of positions to be filled, and by dividing the result by two. Any excess of the sum so ascertained shall be a majority, and the candidates who obtain a majority shall be declared the nominees in the first primary. If more candidates obtain a majority than there are positions to be filled, those having the highest vote (equal to the number of positions to be filled) shall be declared the nominees.

**IMPORTANT:** In the 2012 Primaries, many counties have candidates who were decertified, or who withdrew as candidates, but whose names remain on the ballot. Candidates who withdrew or were decertified are no longer candidates. Votes cast for these names should not be included in the formulas set out below for determining majority. Only use the votes cast for those candidates who remain eligible for the nomination. Formal withdrawals and decertifications should be in writing signed by the candidate (withdrawal) or appropriate party official (decertification).

Example: Candidates A, B, C and D are running for sheriff. Candidate B was decertified after ballots were printed and his name could not be removed. Votes were cast as follows: Candidate A – 30, Candidate B – 5, Candidate C – 55, Candidate D - 10. The five (5) votes for Candidate B should be disregarded, making the total votes cast for this office 95 (not 100).

COMMISSIONERS

JOHN H. HUDGENS, III  
Chairperson

MARK A. BENSON

MARILYN BOWERS

THOMAS WARING

NICOLE SPAIN WHITE

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MARCI ANOINO  
Executive Director

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### **One Seat to Fill**

Subsection (1) provides that in a single office such as sheriff, coroner, or State House district or single member county council district, a majority is determined by dividing the total votes for all candidates in that race by two. Any number in excess of that figure is a majority. The key word to remember is *excess*.

Example: A county council primary has four (4) candidates. The total number of votes cast for all candidates is 1,001. Divide the total votes cast (1,001) by two (2), and you get 500.5. If any candidate receives more than 500.5 votes, he is declared the winner. In this example, a candidate with 501 votes has a majority because he has a number of votes in *excess* of 500.5.

### **Multiple Seats to Fill**

For multi-seat offices (some school boards and a few county councils) that select nominees in primary elections, follow subsection (2) to determine majority. Divide the total votes for all candidates in the race by the number of seats to be filled, and divide that result by two. Any *excess* of that sum is a majority.

Example: A school board primary has four (4) seats to fill and six (6) candidates running. The total votes cast for all six candidates is 5,000. Divide the total votes cast (5,000) by four (the number of seats to fill), and you get 1,250. Then divide that result by two, and you get 625. Any candidate who receives a number of votes in *excess* of 625 has a majority (in this case, at least 626 votes). In offices with multiple seats to fill, it is mathematically possible for more candidates to receive a majority votes than there are seats to fill. If this occurs, the candidates who received the highest number of votes are declared the nominees.

### **Runoffs**

If no candidate receives a majority in the first primary, or in the case of a multi-seat office, fewer candidates receive a majority than there are seats to fill, a second primary (runoff) must be held. Any runoff will be held two weeks after the first primary. This year, runoff elections will be held on June 26. County election commissions (CECs) will order any runoffs necessary for countywide and less than countywide offices (with the exception of Solicitor, State Senate and State House of Representatives) as part of the canvass and certification hearing on Thursday, June 14. Runoffs for Federal offices, State offices (including Solicitor, State Senate and State House) and multi-county offices are ordered by the SEC.

Runoffs in one-seat-to-fill offices are held between the two candidates who received the most votes in the first primary who have not withdrawn. If one of the candidates who would be in a runoff withdraws (signed, in writing), the remaining candidate is considered the nominee.

In multi-seat offices, any necessary runoff is held between double the number of candidates necessary to fill the remaining seats to fill.

Example: There are four (4) seats to fill for a particular office, and six (6) candidates running. In the original primary, three (3) candidates received majority votes, leaving one (1) seat remaining to fill. In this example, a runoff will be held between the top two (2) candidates who did not receive a majority and have not withdrawn.

In all runoffs, the candidate receiving the largest number of votes cast for a particular office is declared the nominee whether or not he receives a majority of the votes cast (7-13-50).

A second primary, when necessary, must be held two weeks after the first and is subject to the rules governing the first primary. At the second primary the two candidates among those who do not withdraw their candidacies and who received more votes in the first primary than any other remaining candidate alone shall run for any one office and if only one candidate remains, he is considered nominated, except that if there are two or more vacancies for any particular office, the number of candidates must be double the number of vacancies to be filled if so many candidates remain.

In all second primaries the candidate receiving the largest number of votes cast for a given office must be declared the nominee for the office whether or not he has received a majority of the votes cast for that office, and when there are several candidates for several different offices, then the several candidates receiving the largest number of votes for the several positions are considered as nominated for the offices whether or not they received a majority of the votes cast. Other primaries, if necessary, must be ordered in a similar manner by the CEC or the SEC, as appropriate.

### **Recounts**

In addition to determining if candidates have received a majority of the votes, the CEC must also determine if a recount is necessary. Section 7-17-280, below, provides that whenever the difference between any candidates declared nominated in a primary election and any other candidate not declared nominated is 1% or less of the total votes cast for that office, a recount of the votes for that office must be conducted unless the candidates waive such recount in writing.

#### **7-17-280 Mandatory recounts.**

Whenever the difference between the number of votes received by a candidate who has been declared nominated for an office in a primary election or who has been declared elected to an office in a general election and the number of votes received by any other candidate or candidate not declared so nominated or elected or whenever the difference between the number of votes received by a candidate who received the least number of votes to qualify for a runoff election and a candidate or candidates who did not so qualify shall be not more than one percent of the total votes which were cast for such office therein, the committee or board charged by law with canvassing such votes shall order a recount of such votes to be made forthwith unless such other candidate or candidates shall waive a recount in writing.

The SEC will order any necessary recounts for U.S. House, State Senate, State House, Solicitor, and any other multi-county offices on Friday, June 15. CECs will order any necessary recounts for other countywide and less-than-countywide offices at the Thursday, June 14 canvass hearing.

Conduct any recounts as soon as possible **after** your Thursday canvass of results. Be sure to notify all candidates in the affected office of the date, time and location of the recount. Also notify these candidates that they may appoint observers to be present at the recount. Once the recount is completed, you will hold another canvass and certification hearing to certify the results of the recount for that race. Remember to post appropriate FOIA notice for the recount certification hearing.

If you have any questions regarding this memo, please feel free to contact me directly at (803) 734-9070. Thank you.

[Home](#)

## Determining Winners in a Primary (Majority)

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Submitted by [gbaum](#) on Wed, 05/19/2010 - 10:40

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Memo 14 One of the important differences between a primary and a general election is that to win a primary election, one must receive a *majority* of the votes cast for that office. In general elections, one receives a *plurality* (the highest number) of votes cast to be declared the winner. S.C. Code of Laws 7-17-600, shown below, sets out this requirement.

**7-17-600** No candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate. The question of a majority vote shall be determined by the number of votes cast for any particular office and not by the whole number of votes cast in the primary.

Section 7-17-610 provides the method for determining which candidates have received a majority of the votes cast for a particular office. Remember that a majority of votes does not have to be a whole number; it may be a partial number.

**7-17-610** What constitutes majority vote.

It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of Sections 7-17-600 and 7-13-50.

(1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be

ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee.

(2) If nominees for two or more offices (constituting a group) are to be selected, and there are more persons seeking nomination than there are offices, the majority shall be ascertained by dividing the total vote cast for all candidates by the number of positions to be filled, and by dividing the result by two. Any excess of the sum so ascertained shall be a majority, and the candidates who obtain a majority shall be declared the nominees in the first primary. If more candidates obtain a majority than there are positions to be filled, those having the highest vote (equal to the number of positions to be filled) shall be declared the nominees.

### **One Seat to Fill**

Subsection (1) provides that in a single office such as sheriff, coroner, or State House district or single member county council district, a majority is determined by dividing the total votes for all candidates in that race by two. Any excess of that figure is a majority. The key word to remember is excess.

Example: You have a county council election with four candidates. The total votes cast for all candidates is 1,001. Divide the total votes cast (1,001) by two, and you get 500.5. If any candidate receives more than 500.5 votes, he is declared the winner. In our example, a candidate with 501 votes has a majority because he has *exceeded* 500.5 votes.

### **Multiple Seats to Fill**

For multi-seat offices (some school boards and a few county councils) that select nominees in primary elections, follow subsection (2) to determine the majority. You will divide the total votes for all candidates in the race by the number of seats to be filled, and divide that result by two. Any excess of that sum is a majority.

Example: You have a primary election for school board with four seats to fill and six candidates running. The total votes cast for all six candidates is 5,000. Divide the total votes cast (5,000) by four (the number of seats to fill), and you get 1,250. You then divide that result by two, and you get 625. Any candidate who receives a number of votes in excess of 625 has a majority (in this case, at least 626 votes). In some cases it is mathematically possible for more candidates to receive majority votes than

there are seats to fill. If this occurs, the four candidates who received the highest number of votes are declared the nominees.

Any votes cast for a candidate who has officially withdrawn should be disregarded and not included when determining majority. This formal withdrawal should be in writing signed by the candidate.

### **Runoffs**

If no candidate receives a majority in the first primary, or in the case of a multi-seat office, fewer candidates receive a majority than is necessary to fill the full number seats, a second primary (runoff) must be held. Any runoff will be held two weeks after the first primary. This year, runoff elections will be held on June 22. You will order any runoffs necessary for countywide and less than countywide offices (with the exception of State House of Representatives) for June 22, **after** you have canvassed and certified the results of primary elections in your county on Thursday, June 10. Runoffs for Federal offices, State offices (including State House of Representatives) and multi-county offices (Solicitor) are ordered by the State Election Commission.

Runoffs in single offices are held between the two candidates who received the most votes in the first primary who have not withdrawn. If only one candidate remains, he is considered the nominee.

In multi-seat offices, any necessary runoff is held between double the number of candidates necessary to fill the remaining vacancies. For example, there are four seats to fill for a particular office, and six candidates running. In the original primary, three candidates received majority votes, leaving one seat vacant. A runoff will be held between the top two candidates who did not receive a majority and have not withdrawn, for the remaining seat.

In all runoffs, the candidate receiving the largest number of votes cast for a particular office is declared the nominee whether or not he receives a majority of the votes cast. See 7-13-50.

#### **7-13-50** Second and other primaries.

A second primary, when necessary, must be held two weeks after the first and is subject to the rules governing the first primary. At the second primary the two candidates among those who do not withdraw their candidacies and who received more votes in the first primary than any other remaining candidate alone shall run for any one office and if

only one candidate remains, he is considered nominated, except that if there are two or more vacancies for any particular office, the number of candidates must be double the number of vacancies to be filled if so many candidates remain.

In all second primaries the candidate receiving the largest number of votes cast for a given office must be declared the nominee for the office whether or not he has received a majority of the votes cast for that office, and when there are several candidates for several different offices, then the several candidates receiving the largest number of votes for the several positions are considered as nominated for the offices whether or not they received a majority of the votes cast. Other primaries, if necessary, must be ordered in a similar manner by the county election commission or the State Election Commission, as appropriate.

### **Recounts**

In addition to determining if candidates have received a majority of the votes, you must also determine if a recount is necessary. Section 7-17-280, below, provides that whenever the difference between any candidate declared nominated in a primary election and any other candidate not declared nominated is 1% or less of the total votes cast for that office, a recount of the votes for that office must be conducted unless the candidates waive such recount in writing.

#### **7-17-280** Mandatory recounts.

Whenever the difference between the number of votes received by a candidate who has been declared nominated for an office in a primary election or who has been declared elected to an office in a general election and the number of votes received by any other candidate or candidate not declared so nominated or elected or whenever the difference between the number of votes received by a candidate who received the least number of votes to qualify for a runoff election and a candidate or candidates who did not so qualify shall be not more than one percent of the total votes which were cast for such office therein, the committee or board charged by law with canvassing such votes shall order a recount of such votes to be made forthwith unless such other candidate or candidates shall waive a recount in writing.

Whenever the difference between the number of votes cast in favor of and opposed to any constitutional amendment, question or other issue is not more than one percent of the total cast thereon, the Board of State Canvassers shall order a recount of these votes.

You will order recounts, if necessary, for countywide and less than countywide offices (with the exception of State House of Representatives) following the Thursday canvass hearing.

If you have to conduct a recount, do it as soon as possible **after** your Thursday canvass of results. Be sure to notify all candidates in the race to be recounted of the date, time and location of the recount. Also notify these candidates that they may appoint observers to be present at the recount. Once the recount is completed, you will certify the results of that race.

This is a lot to consider, but you are and will continue to do an excellent job in the conduct of these primary elections. If you have any questions regarding this memorandum, please let us know.

State of South Carolina



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State Election Commission

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FAX: (803) 734-9366  
www.SCVotes.org

Memo To: Director/ Chair County Election Commission  
From: Marci Andino, Executive Director *MA*  
Date: May 23, 2008  
Subject: Determining Winners in Primary Election

Memo Number 10

One of the important differences between a primary and a general/special election is that, to win a primary election, one must receive a majority of the votes cast for that office. In general elections, one receives a plurality (the highest number) of votes cast to be declared the winner, but a primary election requires a majority. S.C. Code of Laws 7-17-600, shown below, sets out this requirement.

**7-17-600** No candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate. The question of a majority vote shall be determined by the number of votes cast for any particular office and not by the whole number of votes cast in the primary.

Section 7-17-610 provides the method for determining which candidates have received a majority of the votes cast for a particular office. Remember that a majority of votes does not have to be a whole number; it may be a partial number.

**7-17-610** What constitutes majority vote.

It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of Sections 7-17-600 and 7-13-50.

(1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee.

(2) If nominees for two or more offices (constituting a group) are to be selected, and there are more persons seeking nomination than there are offices, the majority shall be ascertained by dividing the total vote cast for all candidates by the number of positions to be filled, and by dividing the result by two. Any excess of the sum so ascertained shall be a majority, and the

candidates who obtain a majority shall be declared the nominees in the first primary. If more candidates obtain a majority than there are positions to be filled, those having the highest vote (equal to the number of positions to be filled) shall be declared the nominees.

Subsection (1) provides that in a single office such as sheriff, coroner, a State Senate or State House district or single member county council district, a majority is determined by dividing the total votes for all candidates in that race by two. Any excess of that figure is a majority. The key word to remember is *excess*. For example, in a county council election with four candidates, the example total votes for all candidates is 1,001 votes. Dividing by two equals 500.5 votes. If any candidate receives over 500.5 votes, he is declared the winner. In our example, a candidate with 501 votes has a majority because he has *exceeded* 500.5 votes.

For multi-seat offices (some school boards and a few county councils) that select nominees in primary elections, follow subsection (2) to determine the majority. You will divide the total votes for all candidates in the race by the number of seats to be filled, and divide that result by two. Any excess of that sum is a majority. Example: You have a primary election for school board with four seats to fill and six candidates running. The total votes cast for all six candidates is 5,000. Divide that total by four (the number of seats to fill) and you get 1,250. You then divide that result by 2 which equals 625. Any candidate who receives in excess of 625 votes or more has a majority (in this case, 626 votes). If more candidates obtain a majority than there are seats to fill, the four candidates receiving the highest majority vote are declared the nominees.

Votes should be disregarded and not counted for a candidate who has formally withdrawn. This formal withdrawal should be in writing signed by the candidate.

If no candidate receives a majority in the first primary, or in the case of a multi-seat office, less candidates than necessary to fill the full number of seats receive a majority of the votes cast, a second primary, or runoff, must be held. Any runoff will be held two weeks after the first primary. This year, runoff elections will be held on June 24. You will order any runoffs necessary for countywide and less than countywide offices (with the exception of the State Senate and State House of Representatives) for June 24, after you have canvassed and certified the results of primary elections in your county on Thursday, June 12. Runoffs for Federal offices, State offices (including Senate and House of Representatives) and multi-county offices (Solicitor) are ordered by the State Election Commission.

Runoffs in single offices are held between the two candidates who received the most votes in the first primary who have not withdrawn. If only one candidate remains, he is considered the nominee. In multi-seat offices, a runoff, if necessary, is held between double the number of candidates necessary to fill the vacancies if that many candidates remain.

In all runoffs, the candidate receiving the largest number of votes cast for a particular office is declared the nominee whether or not he receives a majority of the votes cast. See 7-13-50.

#### 7-13-50 Second and other primaries.

A second primary, when necessary, must be held two weeks after the first and is subject to the rules governing the first primary. At the second primary the two candidates among those who do not withdraw their candidacies and who received more votes in the first primary than any other remaining candidate alone shall run for any one office and if only one candidate remains, he is

considered nominated, except that if there are two or more vacancies for any particular office, the number of candidates must be double the number of vacancies to be filled if so many candidates remain.

In all second primaries the candidate receiving the largest number of votes cast for a given office must be declared the nominee for the office whether or not he has received a majority of the votes cast for that office, and when there are several candidates for several different offices, then the several candidates receiving the largest number of votes for the several positions are considered as nominated for the offices whether or not they received a majority of the votes cast. Other primaries, if necessary, must be ordered in a similar manner by the county election commission or the State Election Commission, as appropriate.

**Recounts** - In addition to determining if candidates have received a majority of the votes, you must also determine if a recount is necessary. Section 7-17-280, below, provides that whenever the difference between any candidates declared nominated in a primary election and any other candidate not declared nominated is less than 1% of the total votes cast for that office, a recount of the votes for that office must be conducted unless the candidates waive such recount in writing.

#### 7-17-280 Mandatory recounts.

Whenever the difference between the number of votes received by a candidate who has been declared nominated for an office in a primary election or who has been declared elected to an office in a general election and the number of votes received by any other candidate or candidate not declared so nominated or elected or whenever the difference between the number of votes received by a candidate who received the least number of votes to qualify for a runoff election and a candidate or candidates who did not so qualify shall be not more than one percent of the total votes which were cast for such office therein, the committee or board charged by law with canvassing such votes shall order a recount of such votes to be made forthwith unless such other candidate or candidates shall waive a recount in writing.

Whenever the difference between the number of votes cast in favor of and opposed to any constitutional amendment, question or other issue is not more than one percent of the total cast thereon, the Board of State Canvassers shall order a recount of these votes.

You will order recounts, if necessary, for countywide and less than countywide offices (with the exception of State Senate and House of Representatives) following the Thursday canvass of your votes.

If you have to conduct a recount, do it as soon as possible after your Thursday canvass of results. Be sure to notify all candidates in the race to be recounted to the date, time and location of the recount. Also notify these candidates that they may appoint observers to be present at the recount. Once the recount is completed you will certify the results of that race.

I know that this is a lot to consider and to keep in mind, but I also know that you are and will continue to do your excellent job in the conduct of these primary elections. If you have any questions regarding this memorandum, please call on me.

# State of South Carolina

MARCI ANDINO  
Executive Director

DONNA C. ROYSON  
Deputy Executive Director  
Director, Voter Services

JANET REYNOLDS  
Director  
Administrative Services

GARRY BAUM  
Director,  
Public Information and  
Training

CHRIS WHITMIRE  
Public Information Officer



## Election Commission

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FAX: (803) 734-9366  
[www.state.sc.us/scsec](http://www.state.sc.us/scsec)

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JOHN SAMUEL WEST

Memo To: Director/ Chair County Election Commission  
From: Marci Andino, Executive Director  
Date: May 24, 2006  
Subject: Determining Winners in Primary Election

We have discussed that we should look at primary elections just like any other elections but with a few differences.

One of the important differences for this June 13 primary is that, to win a primary election, one must receive a majority of the votes cast for that office. In general elections, one receives a plurality (the highest number) of votes cast to be declared the winner, but a primary election requires a majority. S.C. Code of Laws 7-17-600, shown below, sets out this requirement.

**7-17-600** No candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate. The question of a majority vote shall be determined by the number of votes cast for any particular office and not by the whole number of votes cast in the primary.

Section 7-17-610 provides the method for determining which candidates have received a majority of the votes cast for a particular office. Remember that a majority of votes does not have to be a whole number; it may be a partial number.

**7-17-610** What constitutes majority vote.

It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of Sections 7-17-600 and 7-13-50.

(1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee.

(2) If nominees for two or more offices (constituting a group) are to be selected, and there are more persons seeking nomination than there are offices, the majority shall be ascertained by dividing the total vote cast for all candidates by the number of positions to be filled, and by dividing the result by two. Any excess of the sum so ascertained shall be a majority, and the candidates who obtain a

majority shall be declared the nominees in the first primary. If more candidates obtain a majority than there are positions to be filled, those having the highest vote (equal to the number of positions to be filled) shall be declared the nominees.

Subsection (1) provides that in a single office such as sheriff, coroner, a State House district or single member county council district, a majority is determined by dividing the total votes for all candidates in that race by two. Any excess of that figure is a majority. The key word to remember is *excess*. For example, in a county council election with four candidates, the example total votes for all candidates is 1,001 votes. Dividing by two equals 500.5 votes. If any candidate receives over 500.5 votes, he is declared the winner. In our example, a candidate with 501 votes has a majority because he has *exceeded* 500.5 votes.

If any of you have multi-seat offices (some school boards and a few county councils) that select nominees in primary elections, follow subsection (2) to determine the majority. You will divide the total votes for all candidates in the race by the number of seats to be filled, and divide that result by two. Any excess of that sum is a majority. Example: You have a primary election for school board with four seats to fill and six candidates running. The total votes cast for all six candidates is 5,000. Divide that total by four (the number of seats to fill) and you get 1,250. You then divide that result by 2 which equals 625. Any candidate who receives in excess of 625 votes or more has a majority (in this case, 626 votes). If more candidates obtain a majority than there are seats to fill, the four candidates receiving the highest majority vote are declared the nominees.

Votes should be disregarded and not counted for a candidate who has formally withdrawn. This formal withdrawal should be in writing signed by the candidate and/or party.

If no candidate receives a majority in the first primary, or in the case of a multi-seat office, less candidates than necessary to fill the full number of seats receive a majority of the votes cast, a second primary, or runoff, must be held. Any runoff will be held two weeks after the first primary. This year, runoff elections will be held on June 27. You will order any runoffs necessary for countywide and less than countywide offices (with the exception of the State Senate and State House of Representatives) for June 27, after you have canvassed and certified the results of primary elections in your county on Thursday, June 15. Runoffs for Federal offices, State offices (including Senate and House of Representatives) and multi-county offices (Solicitor) are ordered by the State Election Commission.

Runoffs in single offices are held between the two candidates who received the most votes in the first primary who have not withdrawn. If only one candidate remains, he is considered the nominee. In multi-seat offices, a runoff, if necessary, is held between double the number of candidates necessary to fill the vacancies if that many candidates remain.

In all runoffs, the candidate receiving the largest number of votes cast for a particular office is declared the nominee whether or not he receives a majority of the votes cast. See 7-13-50.

#### 7-13-50 Second and other primaries.

A second primary, when necessary, must be held two weeks after the first and is subject to the rules governing the first primary. At the second primary the two candidates among those who do not withdraw their candidacies and who received more votes in the first primary than any other

remaining candidate alone shall run for any one office and if only one candidate remains, he is considered nominated, except that if there are two or more vacancies for any particular office, the number of candidates must be double the number of vacancies to be filled if so many candidates remain.

In all second primaries the candidate receiving the largest number of votes cast for a given office must be declared the nominee for the office whether or not he has received a majority of the votes cast for that office, and when there are several candidates for several different offices, then the several candidates receiving the largest number of votes for the several positions are considered as nominated for the offices whether or not they received a majority of the votes cast. Other primaries, if necessary, must be ordered in a similar manner by the county election commission or the State Election Commission, as appropriate.

**Recounts** - In addition to determining if candidates have received a majority of the votes, you must also determine if a recount is necessary. Section 7-17-280, below, provides that whenever the difference between any candidates declared nominated in a primary election and any other candidate not declared nominated is less than 1% of the total votes cast for that office, a recount of the votes for that office must be conducted unless the candidates waive such recount in writing.

#### 7-17-280 Mandatory recounts.

Whenever the difference between the number of votes received by a candidate who has been declared nominated for an office in a primary election or who has been declared elected to an office in a general election and the number of votes received by any other candidate or candidate not declared so nominated or elected or whenever the difference between the number of votes received by a candidate who received the least number of votes to qualify for a runoff election and a candidate or candidates who did not so qualify shall be not more than one percent of the total votes which were cast for such office therein, the committee or board charged by law with canvassing such votes shall order a recount of such votes to be made forthwith unless such other candidate or candidates shall waive a recount in writing.

Whenever the difference between the number of votes cast in favor of and opposed to any constitutional amendment, question or other issue is not more than one percent of the total cast thereon, the Board of State Canvassers shall order a recount of these votes.

You will order recounts, if necessary, for countywide and less than countywide offices (with the exception of State House of Representatives) following the Thursday canvass of your votes.

If you have to conduct a recount, do it as soon as possible after your Thursday canvass of results. Be sure to notify all candidates in the race to be recounted to the date, time and location of the recount. Also notify these candidates that they may appoint observers to be present at the recount. Once the recount is completed you will certify the results of that race.

I know that this is a lot to consider and to keep in mind, but I also know that you are and will continue to do your excellent job in the conduct of these primary elections. If you have any questions regarding this memorandum, please call on me.

cc: county voter registration offices  
SC Republican Party; SC Democratic Party  
j/election/memo/primary/determiningwinnersinprimary/5.01.06



ALAN WILSON  
ATTORNEY GENERAL

June 14, 2012

Ms. Marci Andino  
Executive Director  
State Election Commission  
PO Box 5987  
Columbia, SC 29250

Dear Ms. Andino:

You have requested a formal opinion on the following situation:

The Democratic Primary held in Congressional District 7 had five candidates in the race when the ballot database and the absentee ballots were finalized. After preparations were finalized, Ted Vick, a candidate in this district, sent a letter to the State Democratic Party formally withdrawing from the race. On May 29, 2012, the Party forwarded a copy of Vick's withdrawal letter to the agency. A copy of the letter was posted on his campaign website and reported statewide by news media.

If the SEC had received the Vick withdrawal letter earlier, Vick's name could have been removed as a candidate. However, when the SEC received the withdrawal letter, it was too late to remove his name from the ballot and his name remained on the Democratic Party primary ballot for the 7<sup>th</sup> Congressional district.

According to media reports, if the votes for Mr. Vick are included in the total vote to determine what constitutes a majority for purpose of determining a runoff, there will be a runoff between Gloria Bromell Tinubu and Preston Brittain. If the votes for Mr. Vick are not counted toward the total vote to determine what constitutes a majority for purposes of determining a runoff, Tinubu has a majority of the vote and there is no runoff.

ATTACHMENT

E

Law / Analysis

You reference S.C. Code Ann. Section 7-17-600 and 7-17-610 as supporting a conclusion that these votes for Mr. Vick are not counted for purposes of determining whether the leading candidate received a majority, thereby not necessitating a runoff. Section 7-17-600 provides:

**§ 7-17-600. No candidate shall be declared nominated in first primary without majority vote.**

No candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate. The question of a majority vote shall be determined by the number of votes cast for any particular office and not by the whole number of votes cast in the primary.

Further, Section 7-17-610 reads as follows:

**§ 7-17-610. What constitutes majority vote.**

It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of §§ 7-17-600 and 7-13-50.

(1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee.

(2) If nominees for two or more offices (constituting a group) are to be selected, and there are more persons seeking nomination than there are offices, the majority shall be ascertained by dividing the total vote cast for all candidates by the number of positions to be filled, and by dividing the result by two. Any excess of the sum so ascertained shall be a majority, and the candidates who obtain a majority shall be declared the nominees in the first primary. If more candidates obtain a majority than there are positions to be filled, those having the highest vote (equal to the number of positions to be filled) shall be declared the nominees.

You read these provisions such that "Mr. Vick is no longer a 'candidate' and no longer 'seeking nomination'; therefore, votes for Vick would not be considered in determining majority."

In the brief amount of time available to us to research this matter, we have found no South Carolina decision which is determinative. Nor have we located a statute expressly requiring that

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Mr. Vick's votes not be counted for the limited purpose of determining a majority. Therefore, we cannot advise you with certainty.

However, we are able to point out the general law. The authorities which we have located strongly suggest that Mr. Vick's votes are to be counted for the limited purpose of determining a majority.

We note that *Op. S.C. Atty. Gen.* No. 586 (dated August 25, 1959) (1959 WL 11613) stated as the general rule that "votes cast for a deceased, disqualified, ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards other candidates." This 1959 Opinion was reaffirmed by this Office in another Opinion, dated June 8, 1966 (1966 WL 12033). There, the question was as follows:

one of the candidates for office to be voted on in the June 14, 1966, democratic party primary has died suddenly; however, his name will appear on the ballots, which were printed prior to his death. In view of this, the possibility exists that this deceased candidate receives votes in the upcoming primary and you have requested an opinion of this office as to what procedure should be followed in the event this takes place.

We concluded:

[b]ased on the above, it is the opinion of this office that should a candidate for a particular office die before the election, but receive enough votes to prevent any other candidate from receiving sufficient votes for a majority and a second primary election is necessary, then, the executive committee could only permit the entry of additional candidates if only one candidate remained to run for that office. The executive committee ... [could] not open the election for entry of additional candidates if two or more candidates remain on the ballot for the office involved.

The general law appears to support the conclusions expressed in these two opinions. For example, in 26 *Am.Jur.2d Elections* § 358, it is stated that "[a]ccording to the American rule, votes cast for a deceased or disqualified person are not to be treated as void or thrown away, but are to be counted, although to voters knew of the death or disqualification." Moreover, in 29 *C.J.S. Elections*, § 224, it is recognized that:

[i]n computing the number of votes which constitute a majority, all votes are to be considered ... . Thus, votes cast for an ineligible candidate ... *or for a legally withdrawn candidate* ... are to be taken into account and included in the total vote cast.

(emphasis added).

Reference is also made to decisions in Louisiana regarding legally withdrawn candidates. In *Murphy v. Dem. Exec. Committee*, 140 So.2d 249 (La. 1962), the Louisiana Court of Appeals addressed the question of how a majority is determined where a candidate has legally withdrawn, but remained on

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the ballot. The Court interpreted the various statutes applicable, including a statute which stated that "if any *candidate* has failed to receive a majority of the votes cast for the office for which he was a candidate ... a second primary shall be held ...." The Court quoted from the lower court as follows:

'With this proposition in mind, when these two sections of the election laws are read together, it would seem that the legislature makes a distinction by the use of the word 'candidates' in one section and the words 'office for which he was a candidate'. In other words, a vote for an ineligible or withdrawn candidate could not count for him, but in determining the amount needed for a majority insofar as the other candidates were concerned, his votes must be added since they were votes 'cast for the office for which he was a candidate'. This premise is based upon the fact that the voter could hardly be expected to be able to determine that a candidate whose name is on the ballot is a legally qualified candidate. The presumption is that if he is on the ballot he is legally qualified and an unsuspecting or unknowing voter would otherwise be deprived of his vote. Our courts have so held in a long line of cases.'

Accordingly, the Murphy Court concluded that since the candidate "had properly withdrawn before the election, he could not be declared the winner." However, unless the votes were counted for purpose of determining a majority, those "who unwittingly voted for the withdrawn candidate, would be denied a voice in the election ... . This would be contrary to democratic process of free elections that all qualified voters should have equal opportunity to vote and have their votes counted ...." 140 So.2d at 251. See also, *Wayne v. Green*, 389 So.2d 104 (La. 1980) [citing *Murphy* with approval, concluding that in primary elections for position of school board member votes cast for withdrawn candidate had to be included in total votes cast for all candidates in determining number needed to constitute a majority for declaring a winner]. Both of these Louisiana decisions found that "a vote for an ineligible or withdrawn candidate could not count for him, but in determining the amount needed for a majority insofar as the other candidates are concerned, his votes must be added since they were votes 'cast to the office for which he was a candidate.'" *Murphy*, 140 So.2d at 251; *Green*, 389 So.2d at 105. It is important to note that § 7-17-600, like Louisiana, refers to a "majority of the votes cast for the office for which he was a candidate."

You correctly note that in the recent decision *Florence Co. Dem. Party v. Florence Co. Republican Party*, Op. No. 27128 (June 5, 2012), our Supreme Court, with respect to those candidates who were improperly on the ballot because of failure to comply with 8-13-1356, ordered that "[t]he Florence County Election Commission is directed not to count any votes *for an improperly certified candidate*." (emphasis added). However, the Florence County decision addressed whether the votes *for ineligible* candidates would be counted *for that candidate*, not whether votes for a withdrawn candidate would be counted *for the limited purpose* of determining a majority. Mr. Vick was never ineligible *as a candidate*, but withdrew his candidacy voluntarily. Moreover, the Court in *Florence* had no occasion to address the issue before us now. It is one thing to say the votes will not count *for him*; it is entirely different to conclude that such votes will not count *for any purpose whatsoever, even the limited purpose of determining a majority*. We cannot assume that the Florence decision was intended to disenfranchise the 2000 plus voters who voted for Mr. Vick in determining whether another candidate achieved a

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majority. As the Louisiana Court stated in *Murphy*, such a conclusion would be "contrary to [the] democratic process of free elections ..."

#### Conclusion

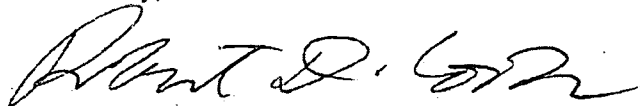
We have found no South Carolina decision which addresses the issue of whether votes for a legally withdrawn candidate are counted for the purpose of determining a majority in a primary contest. Thus, only the courts of this State may definitively resolve this issue and a declaratory judgment may be needed to do so.

However, opinions of this Office and decisions of courts elsewhere resolve this question by concluding that such votes are counted, not in favor of the candidate himself, but for the limited purpose to determine whether a majority has been achieved by one candidate or another. The Louisiana decisions construe a statute similar to our own 7-17-600. Moreover, such decisions conclude that, from the perspective of the voter, unless such votes are counted for the purpose of determining a majority, it is "contrary to [the] democratic process of free elections that all qualified voters should have equal opportunity to vote ... ." *Murphy, supra*. These courts in other jurisdictions conclude, in other words, that such votes may not simply be "thrown away" completely. It is our best judgment that this is the conclusion our courts would reach as well.

The recent *Florence* decision is, in our judgment, not dispositive. *Florence* dealt with whether the votes cast for an ineligible candidate, not in compliance with § 8-13-1356, would be counted. However, *Florence* had no occasion to speak to the separate question of whether votes for a voluntarily withdrawn candidate would be counted for the limited purpose of determining a majority. In short, courts have dealt with the "majority" determination far differently than whether votes count in favor of an ineligible or withdrawn candidate in order to elect that candidate. Thus, we do not deem *Florence* to be controlling.

In summary, while we do not currently have guidance from South Carolina courts, based upon the general law, we believe a court would conclude that Mr. Vick's votes would count for the limited purpose of determining a majority in the primary. In our best judgment, a court would conclude that such votes may not be thrown away completely.

Sincerely,



Robert D. Cook  
Deputy Attorney General

RDC/an

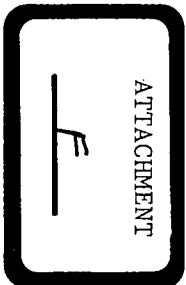
**2012 Primary Results**  
**U.S. House of Representatives District 7**

**Results Including Votes Cast for Withdrawn Candidate Ted Vick**

	Chesterfield	Dillon	Darlington	Florence	Georgetown	Horry	Marion	Marlboro	Total	Percentage
Preston Brittain (DEM)	819	1,043	2,939	2,173	1,032	1,495	1,972	830	12,303	36.66%
Parnell Diggs (DEM)	48	136	310	300	98	259	162	93	1,406	4.19%
Harry Pavilack (DEM)	22	92	309	168	87	121	244	87	1,130	3.37%
Gloria Bromell Tinubu (DEM)	469	998	2,662	2,785	2,352	3,295	2,853	970	16,384	48.81%
Ted Vick (DEM)	199	226	788	268	106	90	430	234	2,341	6.97%
									<b>33,564</b>	<b>100.00%</b>

**Results Not Including Votes Cast for Withdrawn Candidate Ted Vick**

	Chesterfield	Dillon	Darlington	Florence	Georgetown	Horry	Marion	Marlboro	Total	Percentage
Preston Brittain (DEM)	819	1,043	2,939	2,173	1,032	1,495	1,972	830	12,303	39.40%
Parnell Diggs (DEM)	48	136	310	300	98	259	162	93	1,406	4.50%
Harry Pavilack (DEM)	22	92	309	168	87	121	244	87	1,130	3.62%
Gloria Bromell Tinubu (DEM)	469	998	2,662	2,785	2,352	3,295	2,853	970	16,384	52.47%
Ted Vick (DEM)	199	226	788	268	106	90	430	234		
									<b>31,223</b>	<b>100.00%</b>



THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas  
Larry B. Hyman, Jr., Circuit Court Judge

**RECEIVED**

JUN 19 2012

Civil Action No. 2012-CP-26-4709

**S.C. Supreme Court**

Donnie McBride and Vincent Masterpaul, ..... Respondents-Plaintiffs,

v.

South Carolina Election Commission; Marci Andino, as Executive Director and Representative of the South Carolina Election Commission; Horry County Election Commission; Russell W. Hall, III, Chairman of Horry County Election Commission; Georgetown County Election Commission; Dean Smith, Director of Georgetown County Election Commission; Florence County Election Commission; David K. Alford, Director of Florence County Election Commission; Marion County Election Commission; Teresa C. Moody, Director of Marion County Election Commission; Dillon County Election Commission; Joe Moffet, Chairman of Dillon County Election Commission; Marlboro County Election Commission; Phyllis Hagan, Director of Marlboro County Election Commission; Chesterfield County Election Commission; Donald Sellers, Director of Chesterfield County Election Commission; Darlington County Election Commission; Hoyt Campbell, Director of Darlington County Election Commission, ..... Defendants,

Of whom

South Carolina Election Commission and Marci Andino, as Executive Director and Representative of the South Carolina Election Commission, are ..... Appellants-Defendants.

**CERTIFICATE OF SERVICE**

I, ElizaBeth A. Blich, do hereby certify that I have this date served one (1) copy of the Reply of Appellants-Defendants to Plaintiffs' Return to Amended Emergency Petition for Writ of Supersedeas and Memorandum of Law in Opposition upon the following counsel of record and defendants by the service method below their information:

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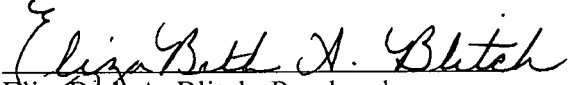
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June 19, 2012

Columbia, South Carolina