THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-05370

Richard. A. Harpootlian.....Respondent.

v.

South Carolina Senate Republican Caucus.....Appellant.

RETURN IN OPPOSITION TO MOTION FOR AN INJUNCTION/STAY PENDING APPEAL AND FOR EXPEDITED DISPOSITION

AND

MOTION TO DISMISS APPEAL

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October 24, 2018
Columbia, South Carolina

ATTORNEYS FOR RESPONDENT
RICHARD A. HARPOOTLIAN

INTRODUCTION

Appellant South Carolina Senate Republican Caucus has raised in excess of $800,000 from special interest corporations in increments of $10,000, even $25,000 into an "operating account." The caucus then transferred hundreds of thousands of these dollars into a "campaign account" to purchase almost $200,000 in television, Internet, and direct mail communications advocating for the election of its party nominee, Republican Benjamin Dunn, to state Senate District 20 and the defeat of Respondent Richard A. Harpootlian, the Democratic Party's nominee. Appellant's in-kind contribution violates South Carolina Code § 8-13-1316(A), which prohibits a legislative caucus committee from a contribution or expenditure to a state senate candidate in excess of $5,000 per election cycle. The Circuit Court found Appellant had exceeded the contribution limit and Respondent would be irreparably harmed by further illegal spending such that a preliminary injunction was necessary.

Appellant's emergency motion fails to identify a single reason warranting emergency relief. This Court reviews the decision to grant a preliminary judgment for a clear error of law. Appellant alleges two errors—one of which misapprehends the Preliminary Injunction Order and the overwhelming record below and the other is not preserved. This appeal should be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent defers to the procedural and factual background in the Preliminary Injunction Order and incorporates those findings here as if set forth verbatim. See Prelim. Inj. Order ¶¶ 1–13.

STANDARD OF REVIEW

"When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it

considers proper for the security of the rights of the adverse party." Rule 62(c), SCRCP. While the Court has power to stay, modify, or grant an injunction on appeal, "[a]n application for such relief should first be made to the trial court" and will only be granted on appeal "when such application is not practicable[.]" Rule 62(g), SCRCP.

"An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation." Compton v. S.C. Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). An applicant must show (1) immediate, irreparable harm; (2) likelihood of success on the merits; and (3) no adequate remedy at law. Id.; see also Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). A trial court's decision to grant a preliminary injunction is afforded deference and reviewed for clear error. Compton, 392 S.C. at 366–67, 709 S.E.2d at 642 (citing Atwood Agency v. Black, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007)).

REASONS TO DENY THE MOTIONS AND DISMISS THE APPEAL

The Senate Republican Caucus seeks interlocutory review of the Preliminary Injunction Order, an injunction or stay of that order, and an expedited briefing schedule for final disposition. The Court should hold there is no clear error in the Preliminary Injunction Order, decline to enjoin or stay its enforcement, and dismiss this appeal.

I. The caucus has not identified a clear error warranting modification of the Circuit Court's order.

The Preliminary Injunction Order should not be modified because the Senate Republican Caucus has failed to identify a clear error in the Circuit Court's finding of irreparable harm or in concluding Respondent was likely to succeed on the merits. The caucus argues the Preliminary

Injunction Order is "fatally flawed" because the Circuit Court "failed to analyze three of the four elements necessary for an injunction to issue." App. Mot., 5. The caucus fails to identify those three purportedly overlooked elements, but rests instead on two criticisms: one concerning the irreparable harm finding and another challenging the Circuit Court's decision not to require bond. These two issues are addressed in turn, followed by a discussion of the caucus's purported entitlement to injunctive relief.

A. The irreparable harm analysis is supported by record evidence.

First, the caucus contends the Circuit Court "gave short shrift" to the irreparable harm analysis and erroneously relied on South Carolina Code § 8-13-530(5), which provides that a violation of the Ethics Act by a candidate within 50 days of an election must be considered an irreparable harm by the reviewing court. See App. Mot. 5–6. The Senate Republican Caucus's complaint appears directed at paragraph 16 of the Preliminary Injunction Order, which concludes:

> The Court agrees that, if correct, campaign spending in excess of the legal limit constitutes an irreparable harm for which there is no adequate remedy at law. See S.C. Code Ann. § 8-13-530(5) (noting that 50-days prior to an election, any person may petition the court of common pleas alleging the violations complained of an praying for appropriate relief by way of mandamus or injunction, or both[,]" and that the alleged violation "must be considered to be an irreparable injury for which no adequate remedy at law exists.").

Prelim. Inj. Order ¶ 16 (bracket original). This conclusion of law is far from conclusory; it flows from specific factual findings that a special election is scheduled for November 6 (id. ¶ 1); the Senate Republican Caucus was disseminating communications advocating for the election of its party nominee and Respondent's defeat (id. ¶¶ 6–9); the caucus had already spent almost $200,000 on these communications (id. ¶¶ 10–11); and *could spend* up to $800,000 before Election Day (id. ¶ 12). Based on the foregoing, the Circuit Court agreed that, if Respondent's reading of § 8-13-

1316(A) was correct, further illegal spending by the caucus would inhibit the conduct of a fair and lawful election and there would be no adequate remedy at law. See Prelim. Inj. Order ¶¶ 15–16.

This is more than ample evidence to support the Circuit Court's irreparable harm analysis. Cf. Denman v. City of Columbia, 387 S.C. 131, 141, 691 S.E.2d 465, 470 (2010) (reversing preliminary injunction where, aside from his own statement, applicant "presented no evidence" of voter or candidate disenfranchisement). The partial record compiled to date is not only sufficient to support the findings below, it is far more substantive than necessary given the prima facie violation of state election law. Cf. Order, Anderson v. S.C. Election Comm'n, Case No. 27120 (S.C. April 20, 2012) (enjoining election commission from disseminating ballots without *any* record). Moreover, while Appellant criticizes the Circuit Court's reference to § 8-13-530(5), the Preliminary Injunction Order's irreparable harm finding did not turn on the statute's applicability here. That section, concerning the role of legislative ethics committees, prohibits a committee from accepting a pre-election complaint about a candidate and vests a circuit court with jurisdiction to hear the complaint and enjoin the wrong. See S.C. Code Ann. § 8-13-530(5). The statute is instructive here because it gives rise to a legal presumption of irreparable harm during the pre-election period—a circumstance identical to this one—and there was nothing improper or erroneous about the Circuit Court's consideration of that provision as part of its analysis.

B. The Circuit Court acted within its authority not to require a bond and Appellant's failure to raise the issue below forecloses its consideration here.

The Senate Republican Caucus faults the Circuit Court for not requiring Respondent to post a bond. See App. Mot., 6. This argument should be rejected for three reasons.

First, the issue is not preserved. "[I]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for

appellate review." S.C. Dep't of Transp. v. First Carolina Corp., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (quoting Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). The caucus failed to raise the issue of a bond at *any time* during the proceeding below. It did not argue for a bond during the plenary hearing or in its written submissions to the Circuit Court. Nor did it make a motion to reconsider, electing instead to seek emergency relief. The Court's error preservation rules are predicated on the notion that a trial court must be afforded an opportunity to rule before ascribing error. See Stone v. State, 419 S.C. 370, 798 S.E.2d 561, 569–70 (2017) ("Without an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion."). That did not happen here, so the Court should not address the issue.

Second, even if the issue were preserved, the notion that the Senate Republican Caucus is aggrieved by the absence of a bond is incongruent with its own request for an injunction backed by "only a nominal bond." See App. Mot., 13.

Third, the Circuit Court was correct not to require a bond. Rule 65 provides that a temporary injunction require security by the applicant "in such sum *as the court deems proper* ...." Rule 65(c), SCRCP (emphasis added). The purpose of requiring a bond is to ensure "an amount sufficient to protect [the enjoined party] in the event the injunction is ultimately deemed improper." See Atwood Agency, 374 S.C. at 73, 646 S.E.2d at 884. Typically, this means posting a bond commensurate with the potential damage the enjoined party will suffer if wrongly enjoined. See id. ($250 bond was inadequate in trade secret dispute). In this case, the appropriate bond is no bond because the "damage" to the caucus if wrongly enjoined is its inability to spend its $800,000 war chest to influence the election. The value of the thing underlying the dispute—the election—is not something that can be assigned a pecuniary value and there is no financial harm to the caucus as a result of the Preliminary Injunction Order. Notably, the Senate Republican Caucus's motion fails

to state what security, in its view, should have been required. Thus, under the circumstances in this case, the Circuit Court was correct to exercise its discretion under Rule 65 to waive bond.

C. The caucus's poorly reasoned justifications for its illegal conduct are addressed by the Preliminary Injunction Order and fail to establish an entitlement to relief.

The Senate Republican Caucus now seeks its own injunction based on arguments rejected below. See App. Mot., 7–13. In lieu of repeating the reasoning adopted by the Circuit Court, Respondent notes his agreement and incorporates it here as if set forth verbatim. See Prelim. Inj. Order, ¶¶ 14–63. The caucus advances three arguments that warrant some further discussion.

First, it claims the Circuit Court "allow[ed] Harpootlian to stifle constitutionally protected political speech that the Caucus was allowed to distribute under South Carolina law." App. Mot., 8. This conclusion is flawed. As explained in the Preliminary Injunction Order, the Constitution has long condoned limited restraints on speech necessary to protect the integrity of democratic elections. See Prelim. Inj. Order ¶¶ 31–34 (discussing Buckley v. Valeo, 424 U.S. 1 (1976) and North Carolina Right to Life Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008)). The Senate Republican Caucus does not dispute this proposition (because it cannot), but instead raises the specter of an ill-defined constitutional challenge. See also App. Mot., 2 ("Although these advertisements were politically inconvenient for Harpootlian, they were classic forms of political speech protected by the First Amendment of the U.S. Constitution."). To the extent the caucus has a colorable constitutional argument (it does not), it is not preserved for review (see Hoffman v. Powell, 298 S.C. 338 n.2, 380 S.E.2d 821 n.2 (1989) (issues, including constitutional challenges, must be both raised and ruled upon to be preserved)) and need not be addressed until after it is raised and ruled on by the Circuit Court and final judgment is entered.

Second, Appellant claims "[i]t is beyond dispute that the Caucus did not coordinate with Dunn's campaign in connection with the rollout of these advertisements." App. Mot., 2. This contention is *not* beyond dispute, but that dispute is immaterial to the outcome here. The Ethics Act creates a legal presumption that legislative caucus committees are coordinating expenditures with their party nominee:

> Expenditures by party committees or expenditures by legislative caucus committees based upon party affiliation are considered to be controlled by, coordinated with, requested by, or made upon consultation with a candidate or an agent of a candidate.

S.C. Code Ann. § 8-13-1300(17). Thus, while Respondent harbors serious doubts concerning the veracity of the caucus's non-coordination claim, if true, it proves nothing and merely underscores the caucus's total misapprehension for the regulatory regime governing its political spending.

Third, the Senate Republican Caucus advances the view that *all* campaign finance restrictions imposed by the Ethics Act were abolished by S.C. Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708 (D.S.C. 2010) (Krawcheck I) and South Carolinians for Responsible Government v. Krawcheck, 854 F. Supp. 2d 336 (D.S.C. 2012) (Krawcheck II). According to the caucus, the consequence of these decisions is that "legislative caucus committees are not regulated by Title 8, Chapter 13." App. Mot., 10. The caucus's submission to the Circuit Court urged it to find "***we have no law***." App. Prop. Order, n.1 (emphasis original, quoting a former state Senator following Krawcheck I) (attached as **Exhibit A**). As the Preliminary Injunction Order explains, Krawcheck I and Krawcheck II held that the definition of "committee" codified at South Carolina Code § 8-13-1300(6) was unconstitutionally broad because it imposed speech restrictions on non-profit corporations engaged in citizen education, not electioneering. See Prelim. Inj. Order, ¶¶ 29–38. "In short, while Krawcheck I and Krawcheck II struck down the Ethics Act's definition of 'committee', neither precedent limited a state's ability to regulate political speech under the control

of a candidate or for which the major purpose is the nomination or election of a candidate." Id. ¶ 38. Indeed, this claim turns on the Ethics Act's regulation of "legislative caucus committee[s]" as defined by South Carolina Code § 8-13-1300(21), which has never been litigated.

Both here and below, the Senate Republican Caucus insists that § 8-13-1300(21) was struck down by Krawcheck I and Krawcheck II. See App. Mot., 9 (claiming the United States District Court "twice held that the definition of "committee" found in subsection 8-13-1300(21) of the South Carolina Code (Supp. 2017) was facially invalid on the ground that the definition is unconstitutionally overbroad."). This is false. But more troubling than Appellant's willingness to advance a patently false claim is the cynical, nihilistic view it has adopted in an effort to win here. To be sure, the Ethics Act is badly in need of reform and the General Assembly has failed to respond to the Krawcheck litigations by enacting a constitutionally acceptable "committee" definition to replace § 8-13-1300(6). But the absence of that provision has not relieved candidates from disclosure obligations or restrictions on the money they raise. Nor has it relieved legislative caucus committees from the contribution limit imposed by § 8-13-1316(A). Crediting the caucus's we-have-no-law view invites a parade of horribles that is unsupported in law and born out of sheer political expediency to save its legislative slush fund. These arguments should be rejected.

II. Expedited disposition is unwarranted.

Upon denying Appellant's motion for an injunction or a stay, the Court should also deny the motion for expedited briefing and then dismiss this appeal.

The appeal of a preliminary injunction stays *nothing* in the lower court. Poynter Invs., 387 S.C. at 588–89, 694 S.E.2d at 18 ("We also note that the parties appear to be laboring under the misconception that the appeal of this preliminary injunction prevented the circuit court from proceeding with the merits of the case."). So, while § 14-3-330(4) allows a party to seek

interlocutory review, "[s]ection 14-3-450 (1976) explicitly provides where an appeal is permitted by § 14-3-330(4), 'the proceedings in other respects in the court below shall not be stayed during the pendency of the appeal unless otherwise ordered by the court below.'" Poynter Invs., 387 S.C. at 588–89, 694 S.E.2d at 18 (quoting S.C. Code Ann. § 14-3-450).

Appellant's motion asks the Court to adopt a novel procedure to convert this partially litigated matter into, effectively, a final judgment capable of appellate review. See Not. Appeal (seeking review of a "final judgment" pursuant to Rule 203(d)(1)(A)(iv), SCACR); see also App. Mot., 13 (urging the Court to "decide this case on the merits, and issue an expedited opinion as soon as possible."). There is no rule or precedent that warrants such an approach. The sole question here is whether the Circuit Court clearly erred in concluding Respondent was *likely* to prevail on the merits, not whether he has prevailed on the merits. Cf. Compton, 392 S.C. at 367–68, 709 S.E.2d at 642–43. The latter question should be decided by the Circuit Court, reduced to a final judgment, and reviewed on appeal in the ordinary course.

Appellant contends the parties "agreed to the evidence entered into the record at the hearing before the circuit court[.]" App. Mot., 13. This claim is overstated. As the party with the burden, Respondent was prepared to proffer testimony necessary to introduce 16 exhibits outlining the contours of the Senate Republican Caucus's spending before Appellant stipulated to their admissibility. See Prelim. Inj. Order ¶ 6. This is *not* to say the parties "agree" concerning the evidence. See, e.g., id. ¶¶ 10 ("Further, Senator Massey conceded the caucus has already spent in excess of $5,000 to support Mr. Dunn's candidacy, but when pressed could not offer an exact amount.") & 11 (discerning the scope of caucus spending based on invoices).

Neither precedent nor the rules contemplate the Court taking this action on the partial record compiled to date. The sole question here is whether the Circuit Court abused its discretion

or committed a clear error of law. This Court should answer that question in the negative and decline any invitation to reach the merits.

CONCLUSION

For the reasons set forth above, Appellant's motion for an injunction or stay should be denied. The motion to expedite should be denied. Finally, this action should proceed to judgment in the ordinary course and this Court can review that fuller record after final judgment. Accordingly, the appeal should be dismissed.

Respectfully submitted,

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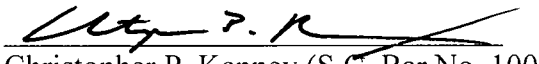

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ATTORNEYS FOR RESPONDENT
RICHARD A. HARPOOTLIAN

October 24, 2018
Columbia, South Carolina.

Exhibit A

(Appellant's proposed order)

From: Butch Bowers
To: cmanningj@sccourts.org
Cc: Joe McCulloch; Chris Kenney; cmanninglc@sccourts.org
Subject: RE: Harpootlian v SC Senate Republican Caucus 2018-CP-40-5370
Date: Tuesday, October 16, 2018 5:25:46 PM
Attachments: image001.png
image002.png
image003.png
image004.png
Harpootlian v Rep Senate Caucus Pro Order.docx
scan0440.pdf

Your Honor – on behalf of the Senate Republican Caucus, attached please find our proposed order in Word format. In addition, attached as a pdf is an article cited in a footnote on page 2 of our proposed order.

Please let me know if you have any questions or need anything else. Best regards,

Butch

Bowers Law Office LLC
1419 Pendleton St.
Columbia, SC 29201
www.butchbowers.com

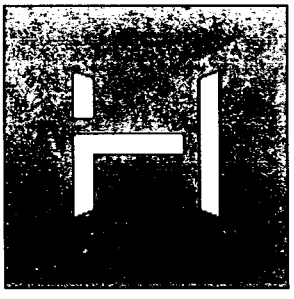
From: Tim Thames <tim@harpootlianlaw.com>
Sent: Tuesday, October 16, 2018 4:10 PM
To: cmanningj@sccourts.org
Cc: Butch Bowers <Butch@ButchBowers.com>; Joe McCulloch <joe@mccullochlaw.com>; Chris Kenney <cpk@harpootlianlaw.com>; cmanninglc@sccourts.org
Subject: Harpootlian v SC Senate Republican Caucus 2018-CP-40-5370

Judge Manning,

Please find attached correspondence and the proposed order pertaining to the hearing held yesterday, October 15, 2018. We are providing the word version of the proposed order for your convenience.

Please let us know if you have any questions or concerns.

Many thanks!



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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CA NO. 2018-CP-40-05370
RICHARD A. HARPOOTLIAN, Plaintiff, v. SOUTH CAROLINA SENATE REPUBLICAN CAUCUS, Defendant.	**ORDER**

This matter came before the Court on a verified petition and motion for a preliminary injunction complaint for declaratory and injunctive relief, and motion to expedite discovery filed by Richard A. Harpootlian, ("Plaintiff") the South Carolina Democratic Party's nominee for State Senate District 20, against the South Carolina Senate Republican Caucus ("Defendant").

Plaintiff's petition and complaint alleges the Defendant is violating the South Carolina Ethics Act ("Act") by purchasing positive and negative television and Internet ads and contacting voters with direct mail that advocates for the election of the Republican Party nominee for State Senate District 20, Benjamin Dunn, and Plaintiff's defeat. Specifically, Plaintiff alleges that as a "legislative caucus committee" within the meaning of S.C. Code § 8-13-1300(21), Defendant's ability to contribute to Dunn's campaign is limited to $5,000 in the aggregate. *See* S.C. Code § 8-13-1316(A).

The Court held a hearing in this matter on October15, 2018 where sworn testimony was taken and documentary evidence was introduced into the record. For the reasons set forth below, Plaintiff's petition and motion for declaratory and injunctive relief is **DENIED.**

In 2010 and then again in 2012, two different federal district courts in South Carolina found that the definition of "committee" located at S.C. Code § 8-13-1300(21) was facially invalid on

the ground that the definition is unconstitutionally overbroad. See *South Carolina Citizens for Life v. Krawcheck,* 759 F. Supp. 2d 708 (D.S.C. 2010); see also *South Carolinians for Responsible Government v. Krawcheck,* 854 F. Supp. 2d 336 (D.S.C. 2012). Neither of these cases was appealed, and at this time the South Carolina General Assembly has not enacted a statute that revives the definition of "committee" so that it passes constitutional muster. As a result, these two decisions represent the binding, applicable law on this subject in South Carolina.

In *South Carolina Citizens for Life,* the Court stated that "South Carolina cannot constitutionally impose committee restrictions on any group that distributes a communication that qualifies under 8-13-1300(31)(c) without regard for the group's major purpose." [1] S.C. Code § 8-13-1300(31)(c) expands the definition of "influence the outcome of an election" to include the following:

> (c) any communication made, not more than forty-five days before an election, which promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate. For purposes of this paragraph, "communication" means (i) any paid advertisement or purchased program time broadcast over television or radio; (ii) any paid message conveyed through telephone banks, direct mail, or electronic mail; or (iii) any paid advertisement that costs more than five thousand dollars that is conveyed through a communication medium other than those set forth in subsections (i) or (ii) of this paragraph. "Communication" does not include news, commentary, or editorial programming or article, or communication to an organization's own members.

Based on the evidence and testimony provided at the hearing, it is uncontroverted that Defendant has engaged in communications that are exclusively within the ambit of S.C. Code § 8-13-1300(31)(c) because they were all made within 45 days of the election. Moreover, it is also

[1] The Court takes judicial notice of an article published by the Center for Public Integrity in 2012 regarding this federal court case entitled "A campaign finance free-for-all in South Carolina," wherein then-Senator Wes Hayes (now retired), who was then-chairman of the S.C. Senate Ethics Committee, was quoted as saying "Until we clarify it [the definition of "committee"], it's the Wild West to a certain extent. Until we get that clarified, ***we have no law*** (emphasis added).

undisputed that the Defendant is a "committee" under the Act. As a result, the Court finds that based on its status as a committee that has engaged exclusively in 13-1300(31)(c) communications at all relevant times, the Defendant is not regulated by the Act and will not be unless and until the General Assembly changes the law to create a constitutionally valid definition of "committee." Accordingly, Plaintiff's petition and motion must be denied.

Alternatively, even if the two federal district court cases referenced above did not represent the binding, applicable law on this subject in South Carolina, Plaintiff's petition and motion must still be denied because of the undisputed fact that the entirety of Defendant's communications are exclusively covered by S.C. Code § 8-13-1300(31)(c). S.C. Code § 8-13-1300(7) exempts from the definition of "contribution" anything of value given to a committee used to pay for 31(c) communications made within 45 days of an election. Therefore, it is clear that funds given to pay for a 31(c) communication are not considered contributions under the Act. Accordingly, the Court finds that the Defendant is not restricted by the $5,000 contribution limit found in S.C. Code § 8-13-1316 and it may spend any amount on 31(c) communications within the 45 days of an election. Plaintiff's petition and motion must therefore be denied.

Finally, and in the further alternative, Plaintiff's petition and motion must be denied because the sworn testimony confirms that Defendant specifically relied on South Carolina Senate Ethics Committee Advisory Opinion 2007-1, dated July 23, 2007, in developing and conducting its actions regarding this matter. Pursuant to S.C. Code § 8-13-535, a formal advisory opinion issued by the Senate Ethics Committee is binding on the Defendant, so the Defendant was statutorily bound to comply with the opinion. Therefore, Plaintiff's petition and motion must be denied.

AND IT IS SO ORDERED.

SIGNATURE PAGE ATTACHED

The Honorable L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit

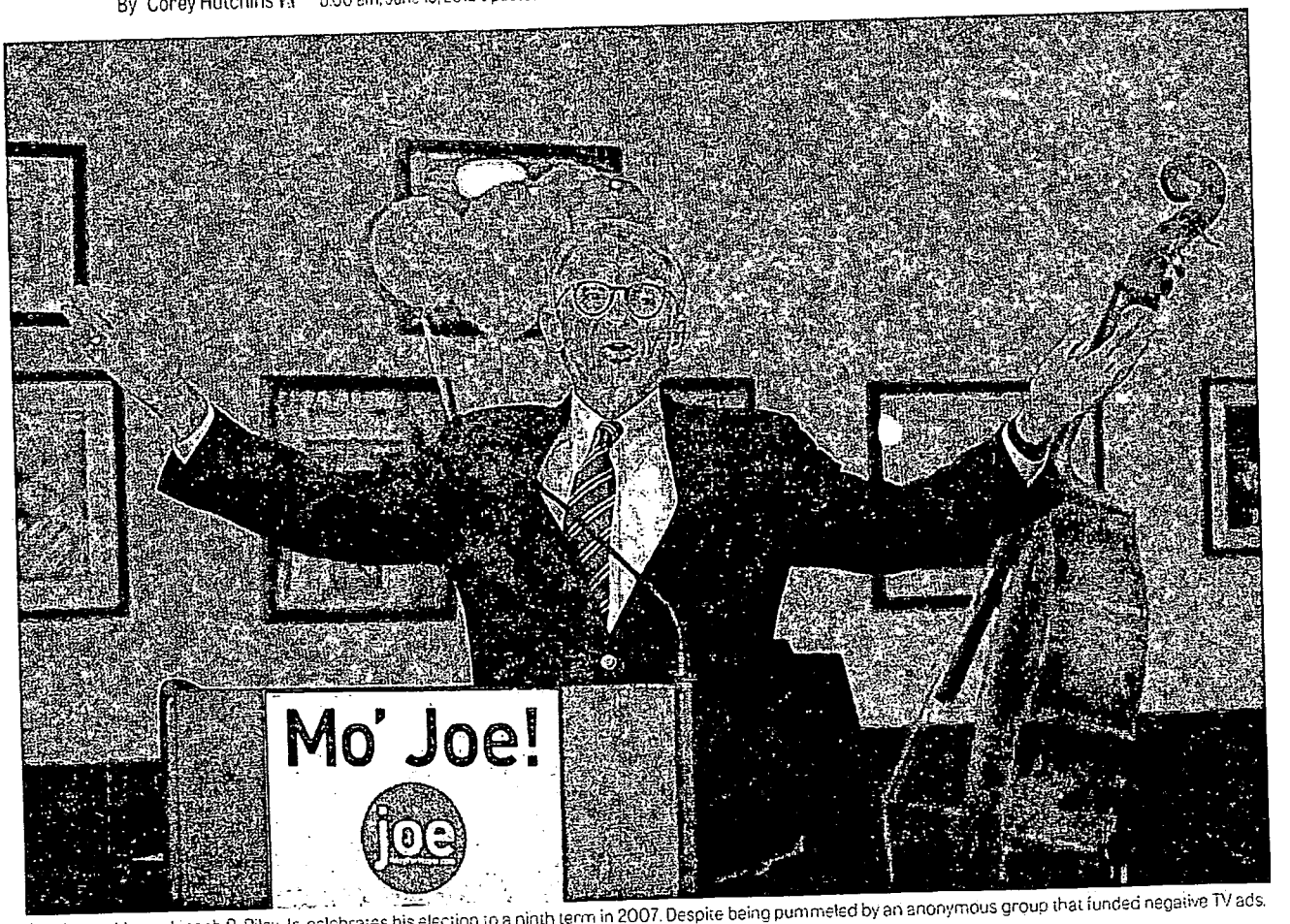
Date: _____

State Integrity 2012

A campaign finance free-for-all in South Carolina

Federal judge's ruling has opened the gates for election spending with no disclosure

By Corey Hutchins 6:00 am, June 15, 2012 Updated: 5:19 pm, October 13, 2015



Charleston Mayor Joseph P. Riley Jr. celebrates his election to a ninth term in 2007. Despite being pummeled by an anonymous group that funded negative TV ads, flyers and a website, Riley was sworn in for a 10th term in January 2012. Alice Keeney/AP

Longtime Charleston Mayor Joe Riley had run a lot of high-minded races in this coastal city known for charm and manners, so nothing really prepared him for the bare-knuckle politics he faced in a re-election bid last fall. A shadowy group popped up seemingly out of nowhere and spent an untold amount of secret money to pummel Riley's record in support of one of his rivals.

None of the mayor's opponents declared allegiance to the anonymous group that funded TV ads, flyers and a slick website

State Integrity Investigation

A comprehensive assessment of state government accountability and transparency.

called "The Riley Files" that read like a private investigator's report. The website came complete with images of manila folders titled "Crony Capitalism" and "Misplaced Priorities" along with photos of the mayor paper-clipped to them.

No one ever found out who was behind the group calling itself Citizens for a Better Charleston. That's because new rules in South Carolina meant the group did not have to file paperwork with the state or disclose what it was doing, how much it was spending, where its money was coming from and who was bankrolling it.

The mayor won his re-election campaign, but the victory came with a few bruises — and a lesson: in the realm of money and politics, things had changed dramatically in the Palmetto State.

In the past, an independent entity attempting to influence an election — like Citizens for a Better Charleston — would have had to file disclosure paperwork as a "committee" with the state's ethics agency, allowing a bit of sunlight to shine on its work.

But not anymore.

In 2010, a little-noticed ruling by U.S. District Court Judge Terry Wooten in Florence, S.C., kicked the regulatory teeth out of a key statute in the state's campaign finance laws and opened the floodgates for untraceable political spending by many of the groups seeking to influence elections.

The case revolved around a seemingly mundane sliver of minutiae — how the word "committee" is defined under South Carolina law. But the effects of Wooten's ruling were far-reaching indeed, and that's likely just how famed conservative lawyer James Bopp — the star of the case — wanted it. In the Palmetto State, suddenly all bets were off when it came to independent expenditures meant to influence elections. And they still are.

"Until we clarify it, it's the Wild West to a certain extent," says Wes Hayes, a Republican lawmaker who chairs the S.C. Senate Ethics Committee. "Until we get that clarified we have no law."

State legislators, ethics regulators and good government groups here haven't yet been able to put back the pieces — not in last year's legislative session, and not in the one just finished either.

Stories in this series


Only three states score higher than D+ in State Integrity Investigation; 11 flunk
By Nicholas Kusnetz November 9, 2015


How does your state rank for integrity?
By Yue Qiu, Chris Zubak-Skees and Erik Lincoln November 9, 2015


States flunk at integrity

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Campaign finance loophole comes back to bite South Carolina senator
By Corey Hutchins June 26, 2012


South Carolina gets F grade in 2012 State Integrity Investigation
By Corey Hutchins March 19, 2012

Unless and until they do, many worry that South Carolina will remain in a state of anarchy in regard to secret money and its effect on campaigns — with a high-stakes election just five months away.

Past as present

The series of events that turned campaign finance upside down here began in 1998. That's when a big bet by a band of power brokers in the state's video poker industry — a bet totaling millions in secret money — vanquished a sitting Republican governor, David Beasley, who opposed video poker.

Back then, there was no state law requiring groups to report independent expenditures designed to influence an election. And so the pro-video-poker forces unmercifully criticized Beasley with TV, radio and newspaper ads, billboards, phone banking and bumper stickers. According to a *USA Today* report, the industry spent $3 million on the race — most of it soft money that did not have to be disclosed. And Beasley lost big.

In the wake of that notorious election, the S.C. Supreme Court abolished video poker in the state — and lawmakers tightened up the disclosure requirements for independent campaign expenditures. The new rules mandated that any group seeking to influence an election — "committees," they called them — must disclose its political spending.

Things seem pretty settled until 2006, when a lawsuit challenging the status quo was initiated by South Carolina Citizens for Life, an anti-abortion group with a colorful history of punching holes in state campaign finance statutes.

The pro-life advocacy organization had wanted to mail out a voter guide for a legislative race, and it worried that by doing so it might run afoul of the state's campaign finance laws. The group, court records show, was worried that by sending out the voter guide it would have to register with the state as a "committee," and be subject to filing expenditure reports or risk criminal or civil penalties.

So before sending out the voter guide, the group asked the State Ethics Commission if doing so would be legal. The ethics agency said it would have to discuss the question at a meeting of its commissioners, but the meeting would not have been held until after the election. And so, with assistance from conservative hero Bopp, the Indiana attorney whose arguments were at the root of the Supreme Court's landmark *Citizens United* decision, the pro-life group sued the State Ethics Commission.

At its heart, the lawsuit "challenges the constitutionality of applying political action committee ('PAC') regulations to organizations that have the major purpose of advocating on behalf of issues," rather than candidates, Bopp said in an Oct. 5, 2006 statement.

After four years of litigation that found the case traveling to the Fourth Circuit Court of Appeals in Richmond, Va., before being remanded back down to South Carolina, Judge Wooten essentially agreed with Bopp.

And back in South Carolina, on Sept. 13, 2010, Wooten wrote, "This Court concludes that the committee provisions of the South Carolina Ethics Act at issue simply sweep too far."

Herbert Hayden, director of the State Ethics Commission, says it was as if the judge had used a pair of scissors to cut the word "committee" out of the state's ethics laws.

While money given directly to political candidates must still be reported, and those contributions are still subject to limits, when it comes to non-candidate committees, the bottom line, according to Hayden, is that with no 'committee provisions,' the ethics laws are essentially moot relating to the disclosure of political groups trying to influence elections.

"Any organized group ... can raise and spend any money that they want to," Hayden says. "They are not limited [as] to the amount of money they can accept, they are not limited [as] to the amount of money that they can spend, and they are not required to disclose where the money came from or how they spent it."

And that includes the state's political parties.

Thinking it through

None of those effects, though, were immediately clear. The judge's ruling went largely unnoticed even within the state's clubby political world. Even the parties to the lawsuit didn't appear to understand the implications. The first mention of the decision in the press, published in *The State* newspaper more than a month later, noted that the chairmen of both the S.C. House and S.C. Senate ethics committees, which regulate the campaign finances of current and former lawmakers, were unaware of what had transpired.

But a few others were not. Working with Bopp as local counsel in the case were two Columbia-based election lawyers, Kevin Hall and Butch Bowers, whose clients also included the South Carolina Republican Party. Shortly after the ruling, the state GOP began taking in larger donations into its campaign account than were previously allowed.

Before the ruling, corporations and individuals could only give $3,500 to a party campaign account. But in the month after the ruling, the GOP took $20,000 from a state-based school choice advocacy group and $10,000 from a PAC — the Palmetto Leadership Council — with ties to the House speaker, Republican Bobby Harrell.

When the State Ethics Commission's general counsel, Cathy Hazelwood, saw that the party was taking in such large and unprecedented donations into its campaign account, she was stunned.

"We thought it was illegal," she said.

Turns out it wasn't.

Attorney Bowers, who was working for the party, explained to Hazelwood that the state GOP was simply taking advantage of the new court decision that had abolished committees in the South Carolina Citizens for Life case. After a bit of reflection, Hazelwood had to agree; under the Wooten decision, the GOP's actions were legal.

Hazelwood never imagined the ruling would have such implications.

"That was shortsighted on my part because I should have known that somebody is going to look for an angle, [that] there will be an angle to be played in this," she said. "And they played it first."

Bowers did not respond to requests for comment.

Since then, others have caught on, and no one has taken advantage more aggressively than that stealth group opposing Mayor Riley in Charleston. Its only disclosure:

"Paid for by Citizens for a Better Charleston. Not authorized by any candidate or committee."

One of the group's flyers supporting a Riley opponent was partly written in the first person, though the candidate it seemed to be coming from said he had nothing to do with it.

The mayor went on to an easy win, but not before condemning the use of that "secret committee" to attack him. Others echoed the mayor's thoughts. Laurel Suggs, who has tracked campaign finance issues for the League of Women Voters of South Carolina for years, calls it a "terrible thing" that the public can't know who or what entity is behind anonymous advertising campaigns.

And, she believes, it's led to a decrease in the number of folks willing to take part in the democratic process in South Carolina.

"Open elections are being undermined, [and it] keeps people from having a level playing field," she says. "I think it's going to take a long time before it's rectified."

In the wake of the mayor's race, *The (Charleston) Post and Courier* asked in a news story, "Could this become a new norm in South Carolina politics?" Indeed, that now seems likely. Primaries were held June 12, and this year every member of the S.C. House and Senate is up for re-election, along with the state's six U.S. House members.

Previously, those "committee" reports would have been due April 10.

But now, "we're not getting the reports," said Sen. Hayes. "So we don't know what money is being spent to influence who in their election bid — and we'll never know."

Indeed, "there may be a whole bunch of committees operating and pumping money into politics, buying ads, and hiring phone banks and operatives and so on, and we don't know about that," said John Crangle, a retired attorney and political science professor who has run the state chapter of Common Cause for 25 years.

Bopp did not respond to requests for comment, but said previously in a statement that the decision in the Wooten case meant that "once again, a federal court has ruled that government cannot regulate groups as political committees simply because they spend a certain amount on communications that mention candidates and their positions on issues."

And not everyone thinks the situation here represents a crisis.

Phil Noble, president of the South Carolina New Democrats, who call themselves "modernizers in the progressive tradition," said he isn't sure the court ruling in question has made any "material difference" in the state.

He likened the ramifications of the judge's decision and how groups have taken advantage of it to "a broken window in a train wreck," because he feels campaign finance laws in the state were already too loose.

South Carolina earned a D- in political financing in the State Integrity Investigation, a March report by the Center for Public Integrity, Public Radio International and Global Integrity that graded states on their risk for corruption.

For her part, Hazelwood, the Ethics Commission lawyer, says there are likely still plenty of political hands in the state that haven't yet grasped the implications of the ruling or understood how to use it to their advantage.

Reform forecast: Mostly cloudy

In the wake of the Charleston mayoral race that drew attention to the implications of the Wooten decision, legislative leaders in the House and Senate said they would likely try to address it.

The president of the Senate at the time, Glenn McConnell, and House Speaker Bobby Harrell, both Charleston Republicans, said they wanted to be careful about violating an individual's right to free speech, according to *The Post and Courier*.

And the state's GOP governor, Nikki Haley, said, "It's finding that line between freedom of speech and letting people say what they need to say and also having disclosure so that people feel like they know who's behind it," the paper reported.

A variety of reform efforts have since been initiated in the state legislature, but ultimately, nothing has happened.

Among those efforts: a bill sponsored by GOP Sen. Hayes in February of 2011 that would have re-defined "committee" and put regulatory teeth back into the law. It would have done so by defining a committee as any group, organization, association or club that takes in or spends more than $500 during an election cycle with a major purpose of supporting or opposing a candidate.

After sitting in the state's Senate Judiciary Committee for four months, the panel voted the legislation out favorably. Ten months later, on April 24 of this year, lawmakers debated the bill briefly on the Senate floor and approved amendments to the text by a vote of 31-5.

Because of the way the South Carolina Senate works, though, one senator has the ability to effectively stop legislation from moving. And a GOP senator, Lee Bright of Roebuck, did so in this case by objecting to the bill after it was amended.

Bright said in two recent phone conversations that he was too busy with the end of the session and his own re-election campaign to talk about the bill.

The root of the problem, said Democratic Senator Vincent Sheheen, was agreeing on language lawmakers felt the State Ethics Commission could enforce that wouldn't conflict with the federal court's decision to declare the "committee" definition unconstitutional.

Hayes said he will be re-introducing his bill when lawmakers reconvene in January as part of an omnibus ethics reform bill. But Sheheen for one sounds skeptical.

"In fairness to the Legislature, we can make an attempt to fix that problem," he says. "But I think it's an open question as to whether or not we can."

For its part, the State Ethics Commission is likely finished trying to challenge court rulings that punch holes in the ethics laws it is tasked with enforcing. Bopp received more than $225,000 in state taxpayer money for court fees in the 'committee' case and the agency itself spent at least $150,000 trying to defend the law as it existed.

Says Hazelwood:

"I don't have the stomach for it anymore."

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Court of Common Pleas
The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-05370

Richard. A. Harpootlian.....Respondent.

v.

South Carolina Senate Republican Caucus.....Appellant.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for Richard A. Harpootlian, P.A. representing Respondent, with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 24, 2018, served the following document to the below mentioned person:

Document: Return in Opposition to Motion for an Injunction/Stay Pending Appeal and for Expedited disposition and motion to dismiss appeal

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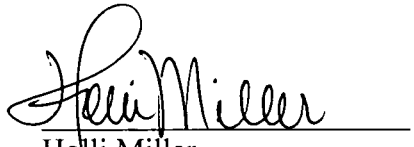

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