THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM CHESTERFIELD COUNTY
The Honorable Roger E. Henderson

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Appellate Case No. 2019-000147

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Glenn Odom, .....Respondent,

v.

Town of McBee Election Commission and Shilon Green, .....Appellants.

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# FINAL BRIEF OF RESPONDENT

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## COUNTER STATEMENT OF THE CASE

This is an appeal from an election contest of a McBee Town Council election. On September 4, 2018, McBee held an election for two at large seats on Town Council with four candidates. On September 6, 2018, Mr. Odom filed a letter with the MEC disputing the election results based on challenged votes that the MEC did not count in the election results. (R. p. 166). On September 7, 2018, Appellant McBee Municipal Election Commission ("MEC") declared the election results as follows: Kemp McLeod 212 votes, Appellant Shilon Green 209 votes, Respondent Glenn Odom 208 votes, Don Robinson 182 votes, and Sim Tyner 8 votes. On October 12, 2018, the MEC issued a decision that four challenged votes for Mr. Odom should have been counted, giving him more votes than Appellant Green. (R. p. 11). Rather than counting the votes and declaring Mr. Odom the winner, the MEC invalidated the election and ordered a new election. (R. p. 11). Mr. Odom filed a Notice of Appeal to the Circuit Court. (R. p. 24). On November 13, 2018, the Honorable Roger E. Henderson issued an order affirming the MEC's decision to order a new election. (R. p. 1). On November 26, 2018, Mr. Odom filed a Rule 59(e), SCRCP, motion.

(R. p. 26). Appellants filed memoranda in opposition to the motion to reconsider. (R. pp. 37-45). On January 22, 2019, Judge Henderson filed an order granting Mr. Odom's motion to reconsider and remanding the case to the MEC to declare him the winner consistent with the Order. (R. p. 4). On February 1, 2019, Appellants filed a Notice of Appeal.

## FACTS

On September 4, 2018, the Town of McBee held an election for town council. (R. p. 111). There were two at large seats on town council with four candidates running for the seats. The two candidates with the most votes would be declared the winners.[1] At the end of the election there were over a dozen challenged or provisional votes, and the McBee Municipal Election Commission ("MEC") found Kemp McLeod and Appellant Shilon Green received the most votes. On September 6, 2018, Mr. Odom filed a letter to the MEC disputing the election results based on some of the challenged votes. (R. p. 166). Mr. Odom "contest[ed] the official results of the" election on, *inter alia*, the basis that five votes were not counted for people who met the voting residency requirements. (R. p. 166). On September 7, 2018, without addressing Mr. Odom's election dispute, the MEC certified the election results by declaring McLeod and Appellant Green as the winners, with Green winning by one vote (209) over Mr. Odom (208). (R. p. 11).

On September 25, 2018, the MEC held a hearing on Mr. Odom's contest of election.[2] (R. p. 47). At the hearing, Mr. Odom disputed the challenge to five voters—Sabrina DeJesus, Simone Bracee, Robert Liles, Cindy Kirk, and Gloria Sumner. (R. pp. 112-14). Odom called four of them

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[1] S.C. Code Ann. § 5-15-120 (2004) ("When all councilmen are to be elected at large, the persons receiving the highest number of votes in number equal to the number to be chosen shall be declared elected.").

[2] The transcript states the MEC is "resuming its September 10th protest hearing today" but there is no transcript of any prior hearing. (R. p. 50 lns. 2-3).

as witnesses—Sabrina DeJesus, Simone Bracee, Cindy Kirk, and Robert Lyles—and each testified that they voted for Mr. Odom but their votes were not counted because of a challenge.

Sabrina DeJesus testified that when she appeared to vote, she "was told I was being challenged" but no one could tell her why and she voted on a paper ballot. (R. pp. 54-55). The paper provided to her at the voting place "said Kent [sic] McLeod" at the bottom but he did not appear to explain his challenge. (R. pp. 56-57). Ms. DeJesus testified under oath that she voted for Glenn Odom. (R. p. 54 lns. 7-12; p. 72 lns. 13-15). Simone Bracee testified that she "was challenged" when she appeared to vote. (R. pp. 76-78). Kemp McLeod also challenged her vote but she does not know the basis of the challenge. (R. pp. 76-77). Ms. Bracee testified under oath that she voted for Glenn Odom. (R. p. 74 lns. 20-25; p. 78 lns. 3-4). Cindy Kirk's vote was challenged by Appellant Shilon Green but she does not know the basis of the challenge. (R. pp. 93-94). Ms. Kirk testified under oath that she voted for Glenn Odom. (R. p. 91 lns. 4-11; p. 94 lns. 8-9). Robert Lyles voted absentee and found out on election night from a friend that "Kent [sic] McLeod had challenged my vote." (R. pp. 104-05). He does not know the basis of the challenge and "never received anything from the town of McBee or Chesterfield County Election." (R. p. 105 lns. 19-25). Mr. Lyles testified under oath that he voted for Glenn Odom. (R. p. 103 lns. 2-6; p. 105 lns. 15-16).

At the hearing, counsel for Shilon Green did not challenge a single witness's testimony about who they voted for in the election. Odom's counsel argued "he should be awarded those votes and be declared the winner." (R. p. 125 lns. 15-16). At the end of the hearing, the MEC went into executive session. (R. p. 133). The MEC decided that four of the challenged votes for Mr. Odom should have been counted, specifically the votes of Ms. DeJesus, Ms. Bracee, Ms. Kirk, and

Mr. Lyles. (R. p. 134-36). Rather than actually counting the votes in the election, the MEC decided to order a new election. (R. p. 134).

The MEC filed a written decision on October 12, 2018. (R. p. 11). It held that the four votes for Mr. Odom should have been counted and "Because adding the four votes to the total for Glenn Odom would have changed the outcome of the election, the Municipal Election Commission hereby invalidates the September 5, 2018 election and orders a new election as is required under S.C. Code Ann. § 5-15-130." (R. p. 11). The record does not show whether the MEC actually opened the challenged votes between the time of the hearing and when it issued its written decision. The MEC specifically cited to Title 7 of the South Carolina Code as the basis for its decision that the votes should have been counted. (R. p. 11). It then cited to Title 5 of the South Carolina Code to justify its decision to order a new election rather than simply count the votes for Mr. Odom. *Id.*

Mr. Odom filed an Amended[3] Notice of Appeal from the MEC's decision to the Circuit Court. (R. pp. 24-25). Mr. Odom argued the MEC should have declared him the winner of the election rather than ordering a new election. (R. p. 24). On October 17, 2018, the Honorable Roger E. Henderson held a hearing on Mr. Odom's appeal. (R. p. 139). Mr. Odom argued that the relief in S.C. Code Ann. § 7-13-830 applies to this case and requires that the votes be "counted and the totals added to the previously count[ed] regular ballot total." (R. pp. 145-46 (quoting § 7-13-830)). Appellants argued that S.C. Code Ann. § 5-15-130 applies and requires a new election "when the decision [of the election commission] invalidates the election." (R. p. 147 (quoting § 5-15-130)). The dispute in this case is what relief is applicable to these facts—counting the challenged votes

[3] On October 4, 2018, Mr. Odom filed a notice of appeal of the MEC's decision. (R. p. 13). In response, the MEC filed a motion to dismiss arguing that the appeal was premature because it had not yet filed a written decision. (R. pp. 18-19). Mr. Odom filed the amended notice of appeal after the MEC filed the October 12, 2018 written decision.

and declaring the winner in accordance with the added votes or invalidating the election and ordering a new election.

On November 13, 2018, the lower court filed an order in favor of Appellants, affirming the MEC's decision to invalidate the election and order a new election. (R. pp. 1-2). The court held the relief in § 5-15-130 applies and requires a new election. (R. p. 2). On November 26, 2018, Mr. Odom filed a motion to reconsider. (R. pp. 26-30). Mr. Odom argued that the court erred in applying § 5-15-130 rather than § 7-13-830 and, alternatively, even if § 5-15-130 applies that it does not require a new election in this case. (R. pp. 27-30).

Appellants filed memoranda in opposition to the motion to reconsider. The MEC argued Mr. Odom did not preserve the issue of whether he should be declared the election winner and that the only remedy available under § 5-15-130 is a new election. (R. pp. 37-40). Appellant Green argued Mr. Odom lacked standing to appeal because the decision was in Mr. Odom's favor and that the relief in Title 5 and not Title 7 applies to this case. (R. pp. 43-45).

On January 22, 2019, the lower court granted Mr. Odom's motion to reconsider. (R. pp. 4-10). The lower court began its analysis by noting "No party challenged the Commission's finding that four of the challenged votes for Odom should have been counted and that counting them would have resulted in Odom being declared the winner of the election." (R. p. 6). As a result, the "only issue" before the lower court was "whether the Commission erred as a matter of law in ordering a new election rather than declaring Odom the winner." *Id.* The lower court held Mr. Odom preserved the request that the MEC declare him the election winner and that he has standing to seek that remedy. (R. pp. 6-7). It then held that the relief in S.C. Code Ann. § 7-13-830 applies to this case regarding challenged votes. (R. pp. 7-8). The lower court based its holding on S.C. Code Ann. § 7-1-40, that provides "This Title shall apply to and control all elections", and S.C. Code

Ann. § 5-15-10, that provides "Municipal primary, general and special elections shall be conducted pursuant to Title 7, mutatis mutandi, except as otherwise provided for specifically in Chapters 1 through 17" of Title 5. The result of these two statutes is that municipal elections are conducted pursuant to Title 7 unless another procedure is specifically provided in Title 5. (R. p. 7). This case involves challenged votes, the remedy for which is specifically provided in § 7-13-830. (R. p. 8). After stating that § 7-13-830 "requires that 'each ballot whose challenge was decided in favor of the voter must be removed from the envelope, mingled, and ***counted and the totals added to the previously counted regular ballot*** total of all precincts without attribution to a particular precinct'", the lower court held that to invalidate the election and order a new one in this case "would render § 7-13-830 meaningless because its remedy of counting the votes would never be used." (R. p. 8 (quoting § 7-13-830) (emphasis in order)). Alternatively, the lower court ruled that even if § 5-15-130 applies to this case, it does not *require* a new election in every case but only "'***when*** the [election commission's] decision invalidates the election.'" (R. pp. 8-9 (quoting § 5-15-130) (emphasis and alteration in order)). Finding that the decision to count four challenged votes does not invalidate the election, the lower court held a new election is not required in this case. (R. p. 9). It remanded the case to the MEC "to count the contested votes and declare Odom the winner of the Town Council Election consistent with the provisions of this Order." (R. p. 9). Appellants did not file a Rule 59(e), SCRCP, motion but, instead, filed this appeal.

## STANDARD OF REVIEW

"In municipal election cases, this Court reviews the judgment of the circuit court upholding or overturning the decision of a municipal election commission only to correct errors of law. This review only extends to findings of fact when those findings are wholly unsupported by the

evidence." *Cole v. Town of Atlantic Beach Election Comm'n*, 393 S.C. 264, 271, 712 S.E.2d 440, 444 (2011) (internal citation and quotation marks omitted).

## ARGUMENT

It is undisputed that the challenged votes should have been counted. The dispute in this appeal is whether the result of that finding is that (1) the votes are added to the total vote count and the election results entered accordingly or (2) the election is invalidated and a new one ordered. The lower court correctly held the relief in S.C. Code Ann. § 7-13-830 requires the MEC to add the four votes to the total vote count and enter the election results accordingly.

### I. APPELLANTS' FIRST AND THIRD ISSUES ARE UNPRESERVED

Appellants' Argument sections I. and III. (including all subparts) are not preserved because they did not raise them to the lower court. Odom filed a motion to reconsider, which the lower court granted in his favor. If Appellants wanted to contest a new ruling in that order, they were required to file a Rule 59(e), SCRCP, motion. *See Coward Hund Constr. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (noting that "challenging a new ruling in its second motion" for reconsideration is proper) (citing *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (stating that although the appellant learned for the first time upon receiving the order on a post-trial motion that the respondent would be granted certain additional relief, the appellant must move under Rule 59(e), SCRCP, to alter or amend the judgment to "preserve the record for appeal")). Appellants failed to raise an issue or seek a ruling as to the vote count or the application of S.C. Code Ann. § 7-13-810 to this case and cannot now complain about those rulings on appeal. The Court should find the arguments unpreserved.

## II. THE LOWER COURT ORDERED THE CORRECT RELIEF

It is important to clarify exactly what the lower court ordered because Appellants misstate it. The lower court did not order "the MEC to declare Odom the winner, regardless of whether the votes were counted." (Br. of App. p. 6). The lower court ordered the MEC "to ***count*** the contested votes and declare Odom the winner of the Town Council Election ***consistent with the provisions of this Order.***" (R. p. 9) (emphasis added). The Order expressly states: "No party challenged the Commission's finding that four of the challenged votes ***for Odom*** should have been counted and that ***counting them would have resulted in Odom being declared the winner*** of the election." (R. p. 27) (emphasis added). Appellants did not challenge the lower court's ruling that "it is the law of the case" that counting the challenged votes "would have resulted in Odom being declared the winner" by way of a Rule 59(e) motion. The dispute before the lower court was always whether the votes should be counted and, accordingly, Mr. Odom declared the winner, or whether a new election is required.

The lower court correctly ordered the MEC to count the votes and declare Odom the winner. Appellants' argument that this violates election laws and invades the election process is meritless and a narrow reading of the order. Appellants cite to Title 5, which states only the procedure for an election dispute but not the legal basis of a dispute over challenged votes. (Br. of App. p. 6). Title 7 contains the substantive law applicable to challenged votes and provides that "each ballot whose challenge was decided in favor of the voter must be removed from the envelope, mingled, and counted and the totals added to the previously counted regular ballot total." S.C. Code Ann. § 7-13-830. The lower court quoted this exact statutory language in its order. (R. p. 8). Therefore, taking the entirety of the Order into account, when the lower court ordered the MEC "to count the contested votes and declare Odom the winner of the Town Council Election

consistent with the provisions of this Order", it ordered the MEC to count the votes in accordance with the law and assumed, as no one challenged, the votes are for Mr. Odom and he should be declared the winner. The Order cannot be interpreted to order the MEC to declare Mr. Odom the winner without counting the votes. The lower court correctly ordered the MEC to follow the procedure for counting challenged votes and declaring the election winner accordingly.

## III. MR. ODOM PRESERVED THE ISSUES OF DECLARING HIM THE ELECTION WINNER CONSISTENT WITH THE CHALLENGED VOTES

Appellants' argument on this point misstates issue preservation law, is overly technical, and places form over substance. Mr. Odom satisfied the issue preservation requirements by raising to the MEC the issue of whether he should be declared the winner, and the MEC ruled on it by ordering a new election.

Mr. Odom disputed the election results by submitting a letter to the MEC. It stated, "I would like to contest the official results of the September 4th, 2018 Town Council election on the following grounds: . . ." and listed numerous challenged votes that should have been counted and why they should have been counted. (R. p. 166). The letter also stated, "These contested votes will affect the outcome and results of the election." *Id.* At the hearing on Mr. Odom's protest, he argued to the MEC that "he should be awarded those votes and be declared the winner." (R. p. 125-26, 131-32). Mr. Odom directly raised to the MEC the issue of being declared the winner based on the votes for him, and the MEC ruled on the issue by denying his request and ordering a new election.

Appellants' argument is based solely on the assertion that an issue may only be raised in the written letter to the election commission and that the letter must specifically cite to the statute[4]

[4] The MEC must not have interpreted the letter as solely falling within § 5-15-130 because that statute requires that "[w]ithin ***forty-eight hours after the filing of such notice***, the Municipal Election Commission ***shall***, after due notice to the parties concerned, conduct a hearing on the

at issue and expressly request the relief sought. This is not supported by the law and is contrary to long-standing issue preservation law. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal quotation marks omitted). The MEC had a fair opportunity to rule on the issue of challenged votes and whether to declare Mr. Odom the winner. Every witness testified about a "challenge" to their vote. (R. pp. 54-55, 76-78, 93-94, 104-05). At the hearing, Mr. Odom argued to the MEC "These votes should be counted. They – Mr. Odom should be declared the winner and certified as the winner of the election for the town council." (R. pp. 126, 131-32). In response, counsel for Appellant Green did not argue that Mr. Odom should have raised that issue in his letter to the MEC but, instead, responded on the merits by arguing "if they do win, he's not awarded – he's not just made the winner. You get a new election." (R. pp. 126-27). A review of the record shows that Mr. Odom raised the issue of challenged votes under Title 7 and asked to be declared the winner, that all parties (including the MEC) understood that to be the issue before the MEC, and the MEC ruled on the issues by finding the challenges to the votes unjustified and ordering a new election. Mr. Odom satisfied issue preservation requirements.

A ruling to the contrary would require exact, precise use of statutes and legal doctrines in written motions to raise an issue. That is something our courts have never required. "Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. Further, assuming a letter disputing an election is

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contest . . . ." S.C. Code Ann. § 5-15-130 (emphasis added). Mr. Odom filed his letter on September 6, 2018, and the MEC did not conduct its hearing until September 25, 2018, well past the mandatory forty-eight-hour deadline.

treated as a complaint,[5] the parties may try an issue not raised by the pleadings by consent. Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Finally regardless of whether the Court looks to Title 5[6] or Title 7, neither one requires a person disputing an election to request specific relief in his notice letter. Section 5-15-130 requires only that the notice includes "a concise statement of the grounds therefor", and Section 7-13-810 states only that "[a] candidate may protest an election in which he is a candidate pursuant to § 7-17-30 when the protest is based in whole or in part on evidence discovered after the election" but does not specify any material required for the protest. Appellants' assertion that Mr. Odom must have cited to a specific statute and asked for specific relief in his letter to the MEC to preserve the issue is not supported by election law or issue preservation law. The Court should find the issue is properly preserved.

## IV. THE LOWER COURT CORRECTLY APPLIED THE RELIEF IN § 7-13-830 TO THIS CASE

In response to Appellants' third Argument section, it is necessary to explain the procedure and legal substance of Mr. Odom's election dispute. Appellants' interpretation of the lower court's order as based on § 7-13-180—a statute that it does not even cite—is incorrect and misconstrues the merits of this appeal. Appellants' Argument sections III.A.-C. are related and addressed below.

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[5] An election dispute is a creature of statute, whereas the procedure for instituting a civil action is governed by the Rules of Civil Procedure. *See, e.g.*, Rule 3, SCRCP ("A civil action is commenced when the summons and complaint are filed with the clerk of court . . . .").

[6] Appellants argue that Mr. Odom's use of the word "contest" indicates he only sought relief under § 5-15-130. Appellants' own word choices disprove this argument. At the hearing before the MEC, the MEC and counsel for Appellant Green used the word "protest" to refer to this action. (R. p. 50 ln. 3, p. 51 ln.21).

An understanding of the interplay between Title 5 and Title 7 is vital to deciding this appeal because provisions from both Titles apply to this case. Title 5 provides that "Municipal primary, general and special elections shall be conducted pursuant to Title 7, mutatis mutandi, except as otherwise provided for specifically in Chapters 1 through 17" of Title 5. S.C. Code Ann. § 5-15-10. "Municipal elections must be conducted pursuant to the South Carolina Election Law contained in Title 7, with any necessary changes in points of detail." *George v. Municipal Election Comm'n*, 335 S.C. 182, 190, 516 S.E.2d 206, 210 (1999) (citing S.C. Code Ann. § 5-15-10 (1976)). In other words, a municipal election is conducted pursuant to Title 7 unless a provision of Title 5 specifically applies.

The substantive ***legal*** basis of Mr. Odom's election dispute is S.C. Code Ann. § 7-13-830, which "Appellants do not dispute . . . appl[ies] to this election." (Br. of App. p. 11). The ***procedure*** for raising that legal issue is stated in S.C. Code Ann. § 5-15-130, which provides that "[w]ithin forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported by the managers by filing a written notice of such contest together with a concise statement of the grounds therefor with the Municipal Election Commission." § 5-15-130. By applying § 7-13-830 to this case, the lower court did not, as Appellants argue, create a new way to contest an election. (Br. of App. pp. 11-12). Rather, the lower court's order stands for the proposition that § 7-13-830 may be the legal basis of an election dispute made using the procedure stated in § 5-15-130 when it is timely made.

In this case, Mr. Odom filed his letter disputing the election results on September 6, 2018. (R. p. 166). "Within forty-eight hours after the filing of such notice, the Municipal Election Commission shall, after due notice to the parties concerned, conduct a hearing on the contest, decide the issues raised . . . ." S.C. Code Ann. § 5-15-130. The MEC failed to conduct a hearing

on Mr. Odom's dispute within forty-eight hours of the filing of his letter. (R. p. 47). Instead, it held a meeting to consider provisional ballots and then declared the election results on September 7, 2018, while Mr. Odom's dispute was still pending and unresolved. (Br. of App. p. 13). The timing is significant. Appellants argue that "§ 7-13-830 only applies to challenges made before the vote total was declared." (Br. of App. p. 13). Mr. Odom did dispute the challenged votes ***before*** the MEC declared the election results, but the MEC failed to timely address it and rule on it. Therefore, it cannot now argue that Mr. Odom's dispute is untimely under § 7-13-830.

> Section 7-13-830 applies when a voter is challenged.
>
> When any person is so challenged, the manager must explain to him the qualifications of an elector and may examine his as to the same. If the person insists that he is qualified and the challenge is not withdrawn, his provisional vote must be received and placed in an envelope on which must be written the name of the voter and that of the challenger.

S.C. Code Ann. § 7-13-830. In this case, the four challenged voters who testified at the overdue MEC hearing on Mr. Odom's dispute stated that they were only told they were being challenged and voted on paper. (R. pp. 55-58, 77, 93-94, 104-06).[7] No one explained the "qualification of an elector" or "examine[d] him as to the same." § 7-13-830. "At the meeting specified in either § 7-17-10 or 7-17-510, whichever is applicable, this authority must hear all objections to these votes, and when no person appears or offers evidence before the meeting to sustain an objection made at the polls, the ballot is no longer a provisional ballot." § 7-13-830. Neither S.C. Code Ann. § 7-17-10 nor § 7-17-510 appear applicable to a municipal town council election. *See* § 7-17-10 (referring to "[t]he commissioners of election for Governor and Lieutenant Governor, state officers, circuit

[7] Ms. DeJesus testified she "asked why I was being challenged. And the lady told me she wasn't sure." (R. p. 56 lns. 9-10). She was instructed to call the MEC, which she did, and "they told me that at that point, when I came into the election that Kent [sic] McLeod should have been there to explain to me why I was being challenged. And he was not present that day when I was here." (R. pp. 56-57).

solicitors, members of the General Assembly, and county officers of any of these officers"); § 7-17-510 (referring to "[t]he board of voter registration and elections for the counties"). The MEC, presumably as "the authority" referenced in § 7-13-830, met and declared the election results on September 7, 2018, with full knowledge of Mr. Odom's pending dispute regarding challenged votes.

There is no evidence in the record as to whether the MEC considered the four challenged votes involved in this appeal prior to declaring the election results. The evidence suggests the contrary because the MEC did consider them in its hearing on Mr. Odom's contest. If its position is that the prior election results were final and no more challenged votes may be considered—the position it now argues on appeal for the first time—then the MEC presumably would not have held the September 25, 2018 hearing with testimony from the challenged voters, gone into executive session to consider it, and come out to determine that the challenges were incorrect and the votes should have been counted. Contrary to Appellants' assertions, the MEC's actions do not comply with § 7-13-830 because it declared the election results with a dispute as to challenged votes still pending. (Br. of App. pp. 13-14).

The records shows the MEC deliberately certified the election results with a pending election contest that it failed to timely consider as required by law. The lower court correctly applied § 7-13-830 to a challenged voter dispute that was filed under the procedure provided in § 5-15-130. Sections 7-13-830 and 5-15-130 are not mutually exclusive. If the MEC followed the law in this case, it could have addressed Mr. Odom's challenge and certified the election results, addressing all challenged votes, in a timely manner. The Court should affirm the lower court's decision to apply § 7-13-830.

## V. THE LOWER COURT CORRECTLY RULED THAT THERE IS NO BASIS TO INVALIDATE THE ELECTION

The lower court correctly held that, in this case, adding four votes to the total vote count, even if it changes the outcome, does not invalidate the election. Appellants' argument focuses on the mathematics—that adding the previously uncounted votes to Mr. Odom's total would affect the results because Mr. Odom, rather than Green, would be the winner. (Br. of App. pp. 14-16). Respondent does not dispute the math or that it changes the election results. Respondent argues that there is no "irregularity" to begin with such that the Court never reaches the mathematical analysis of whether the election results are affected. This is simply not a case where the election dispute is one about irregularity or illegality. Rather, the only issue is whether to actually count the legally cast votes in this election.

The Court "will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful." *Cole v. Town of Atlantic Beach Election Comm'n*, 393 S.C. 264, 712 S.E.2d 440 (2011) (internal quotation marks omitted). Without an irregularity or illegality, the question of whether the election result is changed never arises. "[I]t is incumbent upon a contestant to show, ***not only*** that there were irregularities or illegalities in the conduct of an election, ***but*** that such irregularities or illegalities were either such as to produce an erroneous result or to leave that question in doubt." *Smith v. Saye*, 130 S.C. 20, 65, 125 S.E. 269, 282 (1924) (emphasis added). Appellants do not articulate an irregularity or illegality but misconstrue the law by arguing the change in the outcome of the election as the irregularity. (Br. of App. p. 15). This case comes down to the undisputed fact that four votes were legally cast and should have been counted. The initial failure to count the votes was not due to an irregularity or illegality but only an incorrect challenge as to voter eligibility.

No party puts forth an argument regarding an irregularity or illegality of the election. A finding that the facts of this case require invalidation of the election puts every election in which a voter is challenged at risk of invalidation. That is not what the law intends. Rather, it intends invalidation to apply only to circumstances of irregularity or illegality. *See, e.g.*, *Taylor v. Town of Atlantic Beach Election Comm'n*, 363 S.C. 8, 18, 609 S.E.2d 500, 505 (2005) (referring to the compromised secrecy of challenged ballots as the "irregularity" at issue); *Easler v. Blackwell*, 195 S.C. 15, 18, 10 S.E.2d 160, 162 (1940) (listing as some of the irregularities in the election that the polls stayed open past the legal closing hour and at least 125 people voted that were not in line at the legal closing hour; "that 14 ballots in excess of the number of voters entered upon the poll lists were deposited in the ballot box . . . and that two persons who had not paid poll tax were permitted to vote."); *Smith*, 130 S.C. at 61, 125 S.E. at 281 (listing as the alleged irregularities or illegalities "the unauthorized use of duplicate registration certificates, the lack of the proper proof of the payment of taxes, and the omission to administer the oath to voters")

It is not an election irregularity for a challenged vote to later be found valid and counted in the election. It is the MEC's own failure to timely address Mr. Odom's election dispute and deliberate decision to certify the results with a dispute pending that caused this situation that Appellants now claim requires invalidation, namely that the election results are declared and now will change if the votes are counted. The MEC's own failures should not be the basis of ordering a new election in this case when Mr. Odom and the challenged voters fully complied with the law and there is no dispute that the votes should have been counted. The lower court correctly held there is no basis to invalidate the election in this case.

## VI. THE ELECTION RESULT IS NOT DOUBTFUL AND THE LOWER COURT CORRECTLY RULED THAT THE MEC SHOULD HAVE COUNTED THE VOTES RATHER THAN ORDERING A NEW ELECTION

As explained above, the analysis of whether the election result is doubtful does not apply to this case. As such, there is no basis to invalidate the election, and Mr. Odom never sought that as a remedy. He sought only to have the challenged votes declared valid and counted towards the total vote count, and to have the election results declared accordingly. (R. pp. 126-26, 131-32).

There is no dispute that sections 5-15-130 and 7-13-830 apply to this case. Appellants never argued that Mr. Odom could not dispute the election results based on the challenged votes and admit in their Brief that § 7-13-830 "appl[ies] to this election." (Br. of App. p. 11). The issue is, in an election dispute based on challenged votes, does the relief stated in 5-15-130 or 7-13-830 apply? The lower court correctly held the relief stated in 7-13-830 applies because it is the more specific statute. *See* S.C. Code Ann. § 5-15-10 ("Municipal primary, general and special elections ***shall*** be conducted pursuant to Title 7, mutatis mutandi, except as otherwise provided for ***specifically*** in Chapters 1 through 17" of Title 5. (emphasis added)). Title 5 does not discuss challenged votes.

Section 5-15-130 states "***when*** the decision [of the Municipal Election Commission] invalidates the election the council shall order a new election as to the parties concerned." S.C. Code Ann. § 5-15-130 (emphasis added). Fatal to Appellants' argument is that § 5-15-130 does not say that when the decision of the MEC does not invalidate the election, the previously entered election results must stand. Appellants overcomplicate a simple matter. Four challenged votes should have been counted. The remedy in that situation is to add the votes to the ballot totals and enter the election results accordingly. The remedy is not to expend taxpayer money to order a new election.

Appellants take issue with the lower court's citation to *Trapp v. S.C. Board of State Canvassers*, 273 S.C. 163, 255 S.E.2d 670 (1979). (Br. of App. p. 17). They argue that *Trapp* does not apply because it involved a county election rather than a municipal election and the protest procedures come from different statutes. *Id.* The lower court correctly rejected this argument because, "[i]t is irrelevant that *Trapp* involved a County Election and this case involves a Municipal election. The point is that both cases involve challenged votes, and that procedure and remedy are provided for in Title 7." (R. p. 9). *Trapp* involved challenged votes under § 7-13-830, and the lower court ordered a new election. 273 S.C. at 165, 255 S.E.2d at 671. On appeal to the Supreme Court, the case was remanded to recanvass the challenged ballots. *Id.* at 169-70, 255 S.E.2d at 673. The Supreme Court specified that "[t]he prevailing candidate is to be declared elected." *Id.* The point is that both *Trapp* and this case involve challenged votes, and a new election is not the exclusive remedy in a case regarding challenged votes. That the procedure for Mr. Odom to raise the substance of this dispute is by way of § 5-15-130 does not negate the fact that the substance of the dispute is under § 7-13-830. As in *Trapp*, this Court should find that the challenged votes should be counted and the election results entered accordingly.

Finally, Appellants incorrectly rely on *Armstrong v. Atlantic Beach Municipal Election Comm'n*, 380 S.C. 47, 668 S.E.2d 400 (2008), to argue that a new election is required in this case. (Br. of App. pp. 17-18). In *Armstrong*, an election for mayor resulted in a candidate winning by one vote. *Id.* at 48, 668 S.E.2d 401. The losing candidate "filed a protest of election, and the Atlantic Beach Municipal Election Commission ordered a new election." *Id.* Both candidates appealed to the circuit court, which ordered a *de novo* election and reopened the filing period for candidates, thus allowing additional candidates to enter the election rather than ordering a new election with the same two candidates. *Id.* Only the candidate who originally won the election

appealed from the circuit court's order. *Id.* The losing candidate that filed the original protest did not appeal to the Supreme Court. *Id.* Therefore, the only issue on appeal was whether the circuit court should have reopened the filing period for candidates as part of ordering a new election. *Id.* at 49, 668 S.E.2d at 401-02. This Court held the circuit court did not have the authority to order a *de novo* election that allowed additional candidates because "The only relief the Commission may order is 'a new election as to the parties concerned.' S.C. Code Ann. § 5-15-130. The circuit court does not have the authority to order any further relief. Accordingly, the circuit court judge erred in ordering the reopening of the filing period for candidates for mayor." *Id.* at 49, 668 S.E.2d at 401-02. Considering the context of the appeal, it is clear that the Supreme Court did not hold that a new election is the only remedy that may be ordered under § 5-15-130 but that, when a new election is ordered, it may only be as to the parties concerned in the original election. *Armstrong* does not support Appellants' position.

## CONCLUSION

For the reasons stated herein, the Court should affirm the lower court's decision to remand the case to the MEC, count the challenged votes, and enter the election results accordingly.

Respectfully submitted,

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March 26, 2019

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHESTERFIELD COUNTY
The Honorable Roger E. Henderson

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Glenn Odom, .....Respondent,

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Town of McBee Election Commission and Shilon Green, .....Appellants.

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CERTIFICATE OF COUNSEL

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The undersigned certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

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The undersigned certifies that a copy of the foregoing *Final Brief of Respondent* has been served upon the following counsel of record by emailing one copy to the attorneys listed below on March 26, 2019.

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