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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-08-2329

Robert O. Call, Jr.,Appellant,

v.

Berkeley County Republican Party (Timothy Callanan, as Chairman); South Carolina Republican Party (Matt Moore, as Executive Director, and Chad Connolly, as Chairman); Berkeley County Election Commission; South Carolina Election Commission (Marci Andino, as Executive Director, and Chris Whitmire as Director of Public Information and Training); Timothy Callanan and Kenneth Gunn, Respondents,

Appellate Case No. 2012-212872

**RESPONSE OF APPELLANT TO RESPONDENT SOUTH CAROLINA STATE ELECTION COMMISSION'S
MOTION TO DISMISS APPEAL AS MOOT**

Appellant Robert O. Call, Jr., (Call) hereby submits his Response to Respondent South Carolina State Election Commission's (SEC) Motion to Dismiss Appeal as Moot.

FACTUAL BACKGROUND

This case arises out of Respondent Gunn's failure to follow S.C. Code § 8-13-1356 when he filed for election to District 3 Berkeley County Council. Appellant Call, who at the time was the incumbent District 3, Berkeley County Councilman, brought this action shortly after he discovered the facts surrounding Gunn's filing in the District 3, Berkeley County Council race.

Facts before the circuit court relevant to the decision in granting Respondent SEC's Motion to

Dismiss on the grounds of the equitable doctrine of laches and relevant to Respondent SEC's Motion to Dismiss this Appeal as Moot are the following:

1. Call's action was brought before the certification date defined in SC Code § 7-13-350.
2. At the time of the hearing on August 17, 2012:
 - a. No ballots had been printed for the November 6, 2012 General Election;
 - b. Ballots were not going to be prepared until September 15, 2012;
 - c. No Costs had been incurred by the BCEC or the SEC as a result of the timing in which Call's case was brought;
 - d. No ballots had even been drafted for approval;
 - e. There were no costs in changing the name of the District 3 Berkeley County Council Candidate;
 - f. There were 90 days from the date Call's lawsuit was filed until the November 6, 2012 General Election; and
 - g. Berkeley County Election Commission (BCEC) in their Answer filed after the hearing does not raise the affirmative defense of laches.
3. Appellant Call filed this action with a Verified Complaint for declaratory judgment, writ of mandamus, injunction, spoliation (See Respondent SEC Ex. 1 Complaint.) and a Motion for Injunctive Relief. (See Ex. 1, Motion for Injunctive Relief.)
4. The only hearing held by the circuit court was a Motions Hearing on Call's Motion for Injunctive Relief and Respondent SEC's Motion to Dismiss. There was no hearing on the merits of Appellant Call's Complaint. Appellant Call is entitled to a reasonable opportunity to pursue discovery and a trial on the merits of his Complaint. (See Ex. 2, Excerpt of Transcript August 17, 2012 Motions Hearing.)
5. The conduct of Respondent Gunn, as alleged and timely brought, affects an essential

element of and the fundamental integrity of the election. If proven, the fact that the 2012 General Election has occurred is inconsequential and a new election must be held.

6. The circuit court did not rule on Appellant Call's Motion for Injunctive Relief. (Ex. 2, Tr., 93., See also, Ex. 3, Order.)
7. The circuit court made no finding of fact on any factual issue pertaining to the merits of Appellant Call's claims. (Ex. 2, Tr., 93., See also, Ex. 3, Order.)

In the transcript of the Motions Hearing and the written Order, the Circuit Court did not identify any basis for its finding of prejudice. Nor was there any factual basis to determine that the 4 month period between the Anderson and Florence County decisions of This Court and the filing of Call's action amounted to an unreasonable delay.

DISCUSSION

Respondent SEC's Motion seeking to dismiss this Appeal on the grounds of mootness fails on both a misapprehension of the posture of the case and the law.

I. Respondent Gunn's conduct violates an essential element and the fundamental integrity of the election and a new election can and should held, Therefore This Appeal is Not Moot.

"As a general rule, election statutes are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election or when enforcement is sought before an election in a direct proceeding; however, the court may deem such provisions to be mandatory after an election, and thus noncompliance may nullify the results, when the provisions substantially affect the determination of the results, an essential element of the election, or the fundamental integrity of the election." Gecy v. Bagwell, 372 S.C. 237, 241, 642 S.E.2d 569, 571 (2007). Call sought to remove Kenneth Gunn from the November 6, 2012, General Election ballot for District 3, Berkeley County Council for failing to comply with S.C. Code § 8-13-1356 et seq., and this Court's holdings in Anderson v. South Carolina Election Commission, 397 S.C. 551, 725 S.E.2d

704 (2012) and Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 727 S.E.2d 418 (2012). Compliance with S.C. Code § 8-13-1356 et seq. is an essential element of the election and effects the fundamental integrity of the election. Indeed, noncompliance with this statute requires the removal of the candidate from the ballot before the election. “Where there is a total disregard of the statute, the violation of an election provision cannot be treated as an irregularity, but must be held and adjudicated to be cause for declaring the election void and illegal.” Gecy v. Bagwell, 372 S.C. 237, 241, 642 S.E.2d 569, 571 (2007). The fact that the 2012 General Election has been held is inconsequential. Noncompliance with § 8-13-1356 proven after the election that would impact the outcome of the election is noncompliance that affects an essential element of the election and/or the fundamental integrity of the election and a new election should be held.

II. No hearing was held and no ruling was issued on the merits of Appellant’s Complaint, Therefore the Appeal is Not Moot.

Respondent SEC is incorrect when they state that “a hearing on the merits has been held, therefore this appeal is moot.” Call filed this action with a Verified Complaint for declaratory judgment, writ of mandamus, injunction, spoliation and a Motion for Injunctive Relief. The only hearing held was on Call’s Motion for Injunctive Relief and on SEC’s Motion to Dismiss on, *inter alia*, laches. No trial on the merits of Appellant Call’s Complaint has ever been held. Injunctive relief is not the only relief sought and as such is distinguished from the holding cited by the Respondent SEC in Curtis v. State, 345 S.C. 577, 549 S.E.2d 591 (2001).

In the transcript of the “Motions Hearing” (not trial on the merits) (Ex. 2) the circuit court made only a one sentence conclusory ruling without any factual basis to support the decision. The circuit court stated, “[t]here’s been an unreasonable delay and the defendants would be prejudiced if the Court should move forward with the case at this time.” (Ex. 2, Tr., 93.) The circuit court failed to make any findings of fact in the transcript of the hearing or in the written order sufficient to uphold

its decision to grant Respondent SEC's Motion to dismiss on laches. The court made no finding of fact with respect to the merits of Appellant Call's claims. The circuit court made no ruling on Appellant Call's Motion for Injunctive Relief. Indeed, the only conclusion that can be drawn is the circuit court chose not to consider any of the facts testified to with respect to the merits of Appellant Call's claims and chose only to grant Respondent SEC's motion. (Ex. 3, Order.)

Further, the language cited by Respondent SEC in the circuit court hearing transcript wherein the court stated, *inter alia*, "So I am going to take it under advisement and proceed with the request for a restraining order" indicates the circuit court proceeded to take testimony only with respect to Appellant Call's **Motion** for Injunctive Relief. (Ex. 1.) No reference was made by the circuit court to Appellant Calls' claims for declaratory judgment, spoliation and mandamus included in his Complaint.

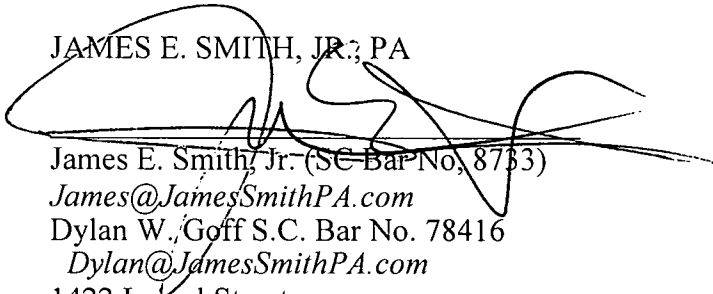
Appellant Call craves reference to his Initial Appellant Brief, providing that the timing in the filing of his lawsuit was not the result of an unreasonable delay; there is no prejudice to the SEC and the BCEC offered evidence to support the lack of any prejudice.

CONCLUSION

This Court can and should grant the relief requested by the Appellant Call in this Appeal. The fact that the 2012 General Election has been held does not render this Appeal moot when Respondent Gunn's noncompliance with § 8-13-1356 effects an essential element and/or the fundamental integrity of the election. Further, no hearing has been held on the merits of Appellant Call's Complaint and no ruling was made on Appellant Call's Motion for Injunctive Relief. I respectfully submit that without any factual basis in the record to support the Circuit Court's finding of prejudice or unreasonable delay, the Order granting Respondent SEC's Motion to dismiss on the basis of laches must be overturned and the case remanded for a trial on the merits.

Respectfully submitted,

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ROBERT O. CALL, JR.

**RESPONSE OF APPELLANT TO RESPONDENT SOUTH
CAROLINA STATE ELECTION COMMISSION'S MOTION
TO DISMISS APPEAL AS MOOT**

Columbia, South Carolina
May 3, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

ROBERT O. CALL, JR.)

Plaintiff)

v.)

Berkeley County Republican Party, Et.Al.)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-08-2329



MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED
AUG 15 PM 3:36
CLERK OF COURT
BERKELEY COUNTY, SC

Plaintiff's Attorney: Frank M. Cisa, Bar No. _____ Address: 858 Lowcountry Blvd., Suite 101 Mt. Pleasant, SC 29464 phone: (843) 881-6530 fax: (843) 881-5433 e-mail: frank@cisadodds.com other: _____	Defendant's Attorney: _____, Bar No. _____ Address: phone: _____ fax: _____ e-mail: _____ other: _____
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for Injunctive Relief Estimated Time Needed: 30 mins Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"> <div> <u>Frank M. Cisa</u> Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant </div> <div> <u>August 14, 2012</u> Date submitted </div> </div>	
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: 25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other: _____	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 Robert O. Call, Jr.)
 Plaintiff,)
)
 vs.)
)
 Berkeley County Republican Party)
 (Timothy Callanan, as Chairman),)
 South Carolina Republican Party)
 (Matt Moore as Executive Director)
 & Chad Connolly, as Chairman),)
 Berkeley County Election)
 Commission; South Carolina State)
 Election Commission (Marci Andino,))
 as Executive Director & Chris)
 Whitmire as Director of Public)
 Information and Training);)
 Timothy Callanan and Kenneth)
 E. Gunn)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT COURT
 CASE NO.: 2012-CP-08-2329

MOTION FOR INJUNCTIVE RELIEF

FILED
 2012 AUG 15 PM 3:36
 CLERK OF COURT
 NINTH JUDICIAL CIRCUIT
 SC

TO: THE DEFENDANTS, ABOVE-NAMED AND/OR THEIR ATTORNEYS:

WILL YOU PLEASE TAKE NOTICE, that the Plaintiff, Robert O. Call, Jr., by and through his undersigned attorney, will move before the Court at a date and time to be scheduled by the Clerk of Court for a Preliminary, Temporary and Permanent Injunction as follows:

1. Restraining and enjoining the above-named Defendants from certifying the name of Kenneth E. Gunn, as the Republican Nominee for the November 6, 2012 General Election for the District 3, Berkeley County Council seat, and further to the extent the certification has already taken place, that the Defendants be required to decertify the name of Kenneth E. Gunn, as the Republican Nominee for the

November 6, 2012 General Election for the District 3, Berkeley County Council
seat and from issuing Berkeley County General Election Ballots which contain the
name of Kenneth E. Gunn, as a candidate.

This motion is supported by the Verified Complaint filed herein and any affidavits and
testimony to be presented at the hearing.

Please be present to defend if so minded.

CISA & DODDS, LLP



Frank M. Cisa
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464
(843) 881-6530
Fax: (843) 881-5433

This 14th day of August, 2012
Mt. Pleasant, SC

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO.: 2012-CP-08-02329

ROBERT O. CALL, JR.,)
)
PLAINTIFF,)
)
VS.)
)
BERKELEY COUNTY REPUBLICAN PARTY)
(TIMOTHY CALLANAN, AS CHAIRMAN))
SOUTH CAROLINA REPUBLICAN PARTY)
(MATT MOORE, as EXECUTIVE DIRECTOR,)
and CHAD CONNOLLY, AS CHAIRMAN))
BERKELEY COUNTY ELECTION COMMISSION,)
SOUTH CAROLINA STATE ELECTION COMMISSION)
(MARCI ANDINO, AS EXECUTIVE DIRECTOR,)
and CHRIS WHITMIRE, AS DIRECTOR OF)
PUBLIC INFORMATION AND TRAINING))
TIMOTHY CALLANAN and KENNETH E. GUNN)
)
DEFENDANT.)

MOTIONS HEARING

held before the Honorable J.C. Nicholson, Jr.
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Friday, August 17, 2012, Commencing at 9:50 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

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Pro Se

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PROCEEDINGS

THE COURT: All right. Who is here for who?

Mr. Cisa, you're here for the Plaintiff Mr.
Call; right?

MR. CISA: I am, Your Honor.

THE COURT: Let me see. Robert C. Call.

[Whereupon, the Court reviews documents]

THE COURT: Mr. Howell is here for the Election
Commission in Berkeley County; is that correct?

MR. HOWELL: That is correct, Your Honor.

THE COURT: And who is here for the South
Carolina Election Commission?

MS. KIRK: Your Honor, I'm Ariail Kirk, the
McNair Firm, and I represent the South Carolina
Election Commission.

THE COURT: Okay. Who's here on behalf of
Mr. Gunn? Anybody?

MR. BOLCHOZ: Your Honor, Mr. Gunn is not
represented.

I'm Robert Bolchoz. I'm here on behalf of the
Berkeley County Party.

Mr. Gunn is here and does not have an attorney.

THE COURT: Okay. You're representing the
Berkeley County Party --

MR. BOLCHOZ: Berkeley County.

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Motions Hearing
August 17, 2012

1 THE COURT: -- Republican Party?

2 MR. BOLCHOZ: Yes, sir.

3 THE COURT: Mr. Gunn, you're going to represent
4 yourself; is that correct?

5 MR. GUNN: Yes, Your Honor.

6 THE COURT: All right. I guess the first issue
7 is this is a Berkeley County case, and we're hearing
8 it in Charleston, so there's a venue question.

9 Are the parties willing to hear it in Charleston
10 County?

11 MR. CISA: Yes, sir, Your Honor.

12 MS. KIRK: Yes, sir.

13 MR. BOLCHOZ: Yes, sir.

14 THE COURT: Mr. Gunn, are you willing to hear it
15 in Charleston County?

16 MR. GUNN: Yes, Your Honor.

17 THE COURT: Okay. Thank you so very much.

18 I've read your affidavit. Do you want to offer
19 any other testimony?

20 And I believe -- I can't remember if the State
21 Election Commission filed a motion yesterday.

22 MS. KIRK: Yes, sir. The State Election
23 Commission filed a motion to dismiss.

24 THE COURT: What was the -- I saw that it was
25 filed but I didn't get a chance to read it.

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Motions Hearing
August 17, 2012

1 MS. KIRK: Sure.

2 Pursuant to section 7-13-350 --

3 THE COURT: 7-13-350?

4 MS. KIRK: Yes, sir.

5 -- all candidates that are going to appear on
6 the general election ballot must be certified by their
7 respective parties by noon on August 15th.

8 We included in our motion two cases, the Willis
9 case and the Sasser case, which has held that
10 essentially it's a statute of limitations issue. Once
11 the noon August 15th deadline has run, the courts are
12 without the authority to grant relief.

13 THE COURT: Okay.

14 MS. KIRK: And I'll be happy to address that in
15 more depth, if you would like.

16 THE COURT: I would like to find the motion and
17 read it.

18 MS. KIRK: Okay.

19 THE COURT: I don't know if it's in the file. I
20 don't think it's made it to the file. It's probably
21 in Berkeley County.

22 MS. KIRK: If there's no objection, I'll be
23 happy to approach with a --

24 THE COURT: Would you, please --

25 MS. KIRK: -- a copy of it.

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1 THE COURT: -- and let me take a look at it.

2 [Whereupon, Ms. Kirk proffers documents to the
3 Court]

4 MS. KIRK: And the cases that we cited --
5 there's three that are attached and one was actually a
6 federal case regarding the same primaries but found
7 that latches applied.

8 THE COURT: Okay. Well, I'm familiar with that
9 concept, okay? But let me just take a look at your
10 motion real quick.

11 MS. KIRK: If it would help, I've also got a
12 copy of Section 7-13-350.

13 THE COURT: You have a copy of that?

14 MS. KIRK: Yes, sir. Well, I've got --

15 THE COURT: Can we hand it up?

16 MS. KIRK: -- highlighting on --

17 [Whereupon, Ms. Kirk proffers documents to the
18 Court]

19 [Whereupon, the Court reviews documents]

20 THE COURT: The Anderson case, what's the date
21 on it?

22 MR. CISA: ~~May 2nd, Judge:~~

23 THE COURT: May 2nd?

24 MR. CISA: Yes, sir.

25 THE COURT: When did the Florence case come

Call v. Berkeley County Republican Party, et al
Motions Hearing
August 17, 2012

1 down? What was the date? I've got it here. I can
2 look it up.

3 MR. CISA: ~~Filed June 5th.~~

4 THE COURT: June the 5th?

5 MR. CISA: Yes, sir.

6 THE COURT: Okay.

7 [Whereupon, the Court reviews documents]

8 THE COURT: All right. I really -- thank you
9 for the motion. I've reviewed it. But I'm sorry.
10 I'm unfamiliar with that issue.

11 Mr. Cisa --

12 MR. CISA: Yes, sir?

13 THE COURT: -- please tell me why the Court
14 shouldn't grant the motion based upon the law and the
15 cases as cited in the motion.

16 MR. CISA: I guess I'll address the latches
17 issue first. As I understand latches --

18 THE COURT: Well, I think the latches issue --
19 they sort of go hand-in-hand.

20 MR. CISA: Yes, sir.

21 THE COURT: I'm not sure it's a jurisdictional
22 issue but I do think it's a very -- latches is, in my
23 opinion, a real question. And jurisdiction may be an
24 issue, too.

25 MR. CISA: Well, as far as the latches are

1 concerned, I would suggest that the State Election
2 Commission is looking at the wrong side of the
3 analysis.

4 What happened in the case cited in federal --
5 the three-judge federal case, what happened was the
6 lawsuit was actually filed on June 11th, 2012, to try
7 to change a primary that's scheduled on June 12th, one
8 day later. What this court decided was that -- read
9 it to you. It says: the relief sought by the
10 plaintiffs is not in the public's best interest as it
11 seeks to add all these certified candidates to the
12 ballot or halt the election at the last minute.

13 So in this particular case they came in one day
14 before the primary and they said, look, we want you to
15 add more people to the ballot or we want you to push
16 the election away. Well, by that time, you know, all
17 the voting booths were set up in the gyms, the tables
18 were done, the ballots were done, and that type of
19 thing.

20 And my case is very distinguishable, Judge, on
21 that issue. We are today eighty-one days away from
22 the general election. ~~When I filed my suit back on~~
23 August 10th, we were ninety days away. So I suggest
24 to you that latches does not apply because we're not
25 bumping up the day before the general election. We've

1 got eighty-one days. Nothing has happened. The
2 ballots haven't been prepared. The ballots won't be
3 prepared until September 15th. Absentee ballots won't
4 go out until forty-five days before the general
5 election.

6 So I suggest to the Court that the latches
7 arguments put -- decided by the three-judge federal
8 panel was based upon the fact that they filed one day
9 before the primary. I'm not filing one day before the
10 primary. There's been no prejudice in my particular
11 case. There would have been prejudice probably in
12 this case because, like I say, everything was done,
13 everything was ready to go. But I say there is no
14 prejudice in my case and they can't show any.

15 THE COURT: Well, I mean, looking at your
16 affidavit, apparently Mr. Callanan, who's chairman
17 of the Berkeley County Republican Party, put out on
18 his -- what you've attached as an exhibit was dated
19 May the 3rd, 2012, talking about the -- I assume the
20 Anderson case.

21 MR. CISA: Yes, sir.

22 THE COURT: And your client has had knowledge of
23 that since May.

24 MR. CISA: Well, what --

25 THE COURT: Now here it is June, July, August,

1 three months later, and you file a lawsuit Friday
2 before the party has to certify to the election
3 commission that they're candidates on noon on August
4 the 15th.

5 MR. CISA: Well, Judge, what I'm suggesting to
6 you --

7 THE COURT: That's my concern.

8 MR. CISA: Well, but this is the way the law
9 works, Judge. What I'm saying is is --

10 THE COURT: I mean, it's not like this came down
11 right away. He had three months to file this lawsuit.

12 MR. CISA: I understand what you're saying.

13 But what I'm suggesting to you is you don't look
14 at the time frame between the time that the decision
15 came down on May 2nd. You look prospectively. What
16 they were looking at is -- what they were saying is
17 you filed a lawsuit one day before the primaries, that
18 creates prejudice.

19 I'm filing a lawsuit --

20 THE COURT: I understand that. But that's just
21 talking about latches of the state court. I
22 understand that's a persuasive argument from the
23 federal system.

24 But why should the -- in other words, let me
25 just tell you my concern. Okay? I think there's an

1 argument in federal court even against the Anderson
2 and the Florence case, i.e., the federal courts have
3 jurisdiction over elections. And they were very
4 specific in those cases to state they were
5 interpreting the state statute as qualifications of
6 candidates to the election commission and on that
7 basis they ruled.

8 Now, as of August the 15th at twelve o'clock, it
9 was no longer a question of who was proper for the
10 parties to certify to the election commission. After
11 that it's been certified, we've got candidates for
12 office, now we're in the electoral process.

13 So how can the state courts get involved in an
14 election now --

15 MR. CISA: Well, Judge --

16 THE COURT: -- is my question to you. And I
17 guess it probably does go to jurisdiction.

18 MR. CISA: And I'll be glad to answer that
19 question --

20 THE COURT: Yes, sir. Because that's my concern
21 at this conjecture.

22 MR. CISA: Well, what I'm suggesting to you is
23 all over this state, since this decision came down on
24 May 2nd, candidates have been certified, de-certified.
25 Some of the candidates re-certified and then de-

1 THE COURT: Okay. Anything else?

2 MR. CISA: No, sir.

3 THE COURT: All right. Thank you very much.
4 Let me go read these cases.

5 We'll take about a thirty-minute break. If
6 y'all will be back in the courtroom in thirty minutes.

7 [Whereupon, a recess is taken from 11:22 a.m. to
8 12:31 p.m.]

9 THE COURT: All right. I have reviewed the
10 cases and reviewed the testimony and the documents,
11 and the Court is going to grant the state election
12 commission's motion that Ms. Kirk has filed based on
13 latches.

14 There's been an unreasonable delay and the
15 defendants would be prejudiced if the Court should
16 move forward with the case at this time.

17 Ms. Kirk, if you'll prepare me a proposed order,
18 please.

19 MS. KIRK: Yes, sir.

20 THE COURT: Thank you very much.

21 [HEARING CONCLUDES AT 12:34 P.M.]

22

23

24

25

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT

Robert O. Call, Jr.,)
)
 Plaintiff,)
)
 v.)
)
 Berkeley County Republican Party (Timothy)
 Callanan, as Chairman); South Carolina)
 Republican Party (Matt Moore, as Executive)
 Director, and Chad Connolly, as Chairman);)
 Berkeley County Election Commission; South)
 Carolina State Election Commission (Marci)
 Andino, as Executive Director, and Chris)
 Whitmire, as Director of Public Information and)
 Training); Timothy Callanan and Kenneth E.)
 Gunn,)
)
 Defendants.)

Civil Action No. 2012-CP-08-2329

ORDER

FILED
 2012 AUG 23 PM 1:43
 HARRY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, SC

Gunn

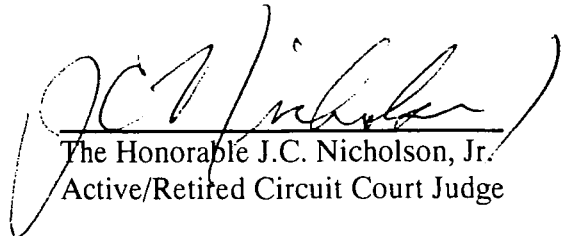
This matter involves the allegations by Plaintiff Robert O. Call, Jr., that non-incumbent Republican candidate Kenneth E. Gunn, the winner of the Republican Party Primary Election for Berkeley County Council District 3, did not meet the eligibility requirements to be on the Republican Primary Election ballot because he did not file his statement of economic interest (SEI) and statement of intention of candidacy (SIC) at the same time and with the same official as required by S.C. Code Ann. § 8-13-1356 and Anderson v. South Carolina Election Commission, 397 S.C. 551, 725 S.E.2d 704 (2012) (petition for reh'g by way of clarification denied), and Defendant Gunn should be decertified as the Republican nominee for the November 6, 2012 General Election for Berkeley County Council District 3. Plaintiff filed his Complaint on August 10, 2012. Defendant South Carolina State Election Commission (Marci Andino, as Executive Director, and Chris Whitmire, as Director of Public Information and Training)(SEC) was served by mail on August 13, received the complaint on August 15, 2012, and filed a Motion to Dismiss on August 16, 2012. I held a hearing on August 17, 2012.

Plaintiff and Defendant Gunn were both seeking the Republican Party nomination to Berkeley County Council District 3. Plaintiff did not file his Complaint in this lawsuit until August 10, 2012. Plaintiff knew as early as May 4, 2012, the date the political parties had to certify the names of candidates for the primary election ballots pursuant to Anderson that Defendant Gunn would be on the Republican primary election ballot. Plaintiff knew as early as June 12, 2012, that Defendant Gunn had won the primary election and was the presumptive Republican Party nominee to appear on the November 6, 2012 General Election. As a matter of law, the deadline for the Berkeley County Republican Party to certify the names of the candidates to the Berkeley County Election Commission (BCEC) for inclusion on the General Election ballot was noon on August 15, 2012. S.C. Code Ann. § 7-13-350 (Supp. 2011). By law, SEC is responsible for the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), as set forth in the United States Code, Title 42, Section 1973ff, et seq. By law, the BCEC is responsible for transmitting UOCAVA absentee ballots not later than September 22, 2012. The absentee ballots, including all candidates for political office have to be included on the ballot.

The doctrine of laches “applies where Plaintiff’s lack of diligence, defined as an inexcusable or unreasonable delay in filing suit, prejudices Defendants.” See Castello v. United States, 365 U.S. 265, 282 (1961); White v. Daniel, 909 F.2d 99, 102 (4th. Cir. 1990); Smith v. State of South Carolina Election Commission, C.A. No. 3:12-CV-1543-CHH-CMC-JMC (D.S.C. June 18, 2012) (finding that the equitable doctrine of laches weighs against plaintiffs who sought to be included on the ballot for the June 12, 2012 primary election but were removed following Anderson because filing the action on June 11, 2012 constituted unreasonable delay when the plaintiffs knew or should have known the matters complained of no later than May 4, 2012).

I find Plaintiff has unreasonably delayed in bringing this lawsuit when he knew or should have known he may have a cause of action over four (4) months ago. I further find that because the deadline for the political parties to certify the names of candidates to the BCEC passed on August 15, 2012, the Defendants will be prejudiced by the relief Plaintiff requests. Therefore, I grant the SEC's Motion to Dismiss based on laches. See Sasser v. South Carolina Democratic Party, 277 S.C. 67, 282 S.E.2d 602 (1981) (holding that "by the very nature of the election system, contests of a primary election must be settled in time for the electorate to exercise their voting franchise at the general election set by law. As a general rule, courts have held that they are without power to grant substantial relief once the time passes for the name of a contestant to be certified for the election of officers to be placed on the official ballot."). Plaintiff's Complaint is hereby dismissed with prejudice.

AND IT IS SO ORDERED.


The Honorable J.C. Nicholson, Jr.
Active/Retired Circuit Court Judge

Charleston, South Carolina

August 17, 2012

JCN

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-08-2329

Robert O. Call, Jr., Appellant-Plaintiff,

v.

Berkeley County Republican Party (Timothy Callanan, as Chairman);
South Carolina Republican Party (Matt Moore, as Executive Director, and
Chad Connolly, as Chairman); Berkeley County Election Commission;
South Carolina Election Commission (Marci Andino, as Executive
Director, and Chris Whitmire as Director of Public Information and
Training); Timothy Callanan and Kenneth Gunn, Defendants,

Appellate Case No. 2012-212872

PROOF OF SERVICE

I certify that I have served the attached Response of Appellant to Respondent South Carolina State Election Commission's Motion to Dismiss Appeal as Moot on the below-named parties, at the addresses given, by depositing a copy of it in the United States Mail, postage prepaid, on this day of May 3, 2013.

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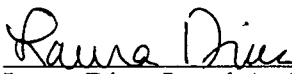
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May 3, 2013
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