ALAN WILSON
ATTORNEY GENERAL

June 14, 2012

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

Dear Ms. Andino:

You have requested a formal opinion on the following situation:

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

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

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

Law / Analysis

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

> **§ 7-17-600. No candidate shall be declared nominated in first primary without majority vote.**
>
> No candidate shall be declared nominated in a first primary election unless he received a majority of the votes cast for the office for which he was a candidate. The question of a majority vote shall be determined by the number of votes cast for any particular office and not by the whole number of votes cast in the primary.

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

> **§ 7-17-610. What constitutes majority vote.**
>
> It is the intent of the South Carolina General Assembly that the following method be used in determining what candidates have received a majority vote for a particular office and are thereby entitled to be nominated on the first ballot according to the terms of §§ 7-17-600 and 7-13-50.
>
> (1) If a candidate for a single office is to be selected, and there is more than one person seeking nomination, the majority shall be ascertained by dividing the total vote cast for all candidates by two. Any excess of the sum so ascertained shall be a majority, and the candidate who obtains a majority shall be declared the nominee.
>
> (2) If nominees for two or more offices (constituting a group) are to be selected, and there are more persons seeking nomination than there are offices, the majority shall be ascertained by dividing the total vote cast for all candidates by the number of positions to be filled, and by dividing the result by two. Any excess of the sum so ascertained shall be a majority, and the candidates who obtain a majority shall be declared the nominees in the first primary. If more candidates obtain a majority than there are positions to be filled, those having the highest vote (equal to the number of positions to be filled) shall be declared the nominees.

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

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

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

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

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

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

We concluded:

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

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

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

(emphasis added).

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

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

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

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

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

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

Conclusion

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

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

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

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

Sincerely,

Robert D. Cook
Deputy Attorney General

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