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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 8, 2005

The Honorable John D. Hawkins
Senator, District No. 12
602 Gressette Building
Columbia, South Carolina 29202

Dear Senator Hawkins:

You have enclosed a copy of H.3683 relating to Spartanburg County School Board elections. You are concerned about "the legality of this legislation, as it currently reads that candidates will be treated differently."

Law / Analysis

H.3683 is proposed to amend Act 612 of 1984, relating to the Spartanburg County School Board elections. The purpose of such Bill, as stated in the title, is to authorize incumbent school board members to become candidates for reelection by submitting a one hundred dollar filing fee in lieu of obtaining the necessary signatures by petition. The Bill would amend Section 1(C) of Act 612 of 1984 as follows:

> (C) [t]o place the name of a candidate on the ballot, qualified electors of the school district must file with the Spartanburg County Election Commission, not less than sixty days before the date of the election, a petition which must contain the names of qualified electors a number equal to not less than three hundred, fifty qualified electors of the district which the candidate seeks to represent or five percent of the total number of electors of the district which the candidate seeks to represent, whichever is the lesser. *However, an incumbent member of the board of trustees who has met this petition requirement at least once previously and who has been in continuous service as a member of the board of trustees since the filing of the petition is not required to file another petition containing names of qualified electors but may submit his or her name and a candidate filing fee of one hundred dollars to the Spartanburg County Election Commission not less than sixty days before the date of the election.*

(emphasis added).

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Robert Hitt

Thus, the question you have raised in your letter is the constitutionality of the legislation's disparate treatment of incumbent candidates and non-incumbent candidates. This raises the issue concerning whether such disparity contravenes the Equal Protection Clause or other provisions of the Constitution. We are of the opinion that a court would likely conclude that it does.

Standard of Constitutionality

We begin our analysis of your question with reference to a number of generally applicable legal principles concerning the power of the General Assembly and the standard by which an act of the Legislature is to be adjudged unconstitutional. Our Supreme Court has previously noted that "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits ...." *Scroggie v. Scarborough*, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is "[p]resumed to have acted within ... [its] constitutional power." *State v. Solomon*, 245 S.C. 550, 572, 141 S.E.2d 818 (1965).

Moreover, our Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are expressly enumerated. *State ex rel. Thompson v. Seigler*, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. A statute will not be considered void unless its unconstitutionality is clear beyond a reasonable doubt. *Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539 (1937); *Townsend v. Richland Co.*, 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While we may comment upon an apparent conflict with the Constitution, we may not declare the Act void. Put another way, a statute "must continue to be followed until a court declares otherwise." *Op. S.C. Atty. Gen.*, June 11, 1997.

Sanctity of Elections

We note also that the United States Supreme Court has recognized that "voting is of the most fundamental significance under our election structure." *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In *Illinois Board*, the Court noted that "Restrictions on access to the ballot burden [the] fundamental ... 'right of individuals to associate for the advancement of political beliefs'...." *Id.* The Court has also stated that "[a]ll procedures used by a state as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969). Moreover, our own Supreme Court stated in *State ex rel. Abrams*, 270 S.C. 87, 240 S.E.2d 643 (1978) that "the right of suffrage is a constitutional right vested in those who possess the qualifications prescribed in the constitution, and such right cannot be denied or abridged by legislative enactment." The Court in *Abrams* went on to add that the right to vote is "a right which the legislature may regulate under its plenary powers to any extent not expressly or impliedly prohibited by the provisions of the Constitution."

Article I, § 5 of the South Carolina Constitution further provides that "[a]ll elections shall be free and open, and every inhabitant of this State possessing the qualifications provided in this Constitution *shall have an equal right* to elect officers *and be elected* to fill public *office*." (emphasis added). In *Cothran v. West Dunklin Public School District*, 189 S.C. 85, 200 S.E. 95 (1938), our Supreme Court construed this provision by noting that

> ... an election is free and equal within the meaning of the Constitution when it is public and open to all qualified electors alike; when every voter has the same right as any other voter ... when the regulation of the right to exercise the franchise does not deny the franchise itself or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

189 S.C. at 90.

Moreover, in *Lee v. Clark*, 224 S.C. 138, 77 S.E.2d 485 (1953), the Court reviewed a statute which provided that not less than three members of the Chesterfield County School Board must be women. The statute mandated that the three women candidates receiving the largest number of votes cast for women shall be elected and that the six other candidates receiving the highest number of votes cast, whether men or women, shall be elected. It was argued that the statute was unconstitutional as a violation of Art. I, § 10 of the State Constitution (now Art. I, § 5, referenced above) as well as Art. II, § 2 (now, Art. XVII, § 1A), which provides in part that "every qualified elector is eligible to any office to be voted for, unless disqualified by age as prescribed in this Constitution ...." It was also alleged that the statute "... denies the equality of rights and privileges guaranteed by the Constitution, in that it discriminates against men and give a preference to women in the election of school trustees." 77 S.E.2d at 487. The Court concluded that the Act gave preferential treatment to women, and thus was unconstitutional. In the Court's view,

> [t]he Act here goes much farther than requiring that a certain proportion of the board shall be women. It gives them a preferential status at the polls. The precise question presented is whether in respect to the required votes for election there may be a distinction. We think not. If by reason of their sex, women are, as argued by appellants, more intimately acquainted with the operation of the public schools and have a closer relation with the teachers and administrative problems, these are considerations which the voter may take into account in casting his ballot, but afford no justification for discrimination against male candidates for school trustee.

77 S.E.2d at 490. Thus, *Lee* held that a statute which gives certain candidates an advantage over others at the ballot box without a rational basis therefor, violates the Equal Protection Clause.

Cases in other jurisdictions have concluded that statutes which favor incumbent candidates over challengers are unconstitutional. For example, in *Gould v. Grubb*, 122 Cal. Reptr. 377, 536 P.2d 1337 (1975), the Court held that a charter provision which gave incumbents priority ballot

listing violated the Equal Protection Clauses of the State and Federal Constitutions. The Court reasoned as follows:

> [t]he 'incumbent first' ballot provision at issue here establishes two classifications of candidates for public office: incumbents seeking reelection and nonincumbent candidates. The salient constitutional issue, of course, is whether by according disparate treatment to these two classes of candidates, the city has denied nonincumbent candidates, or their supporters, the equal protection of the law. ... As our numerous recent decisions establish, a court must determine at the threshold of any 'equal protection' analysis the 'level of scrutiny' or 'standard of review' which is appropriate to the case at hand .... [case citations omitted]. The classification scheme at issue here directly to the electoral process, and in recent years both this court and the United States Supreme Court have had frequent occasion to reiterate that the 'fundamental' nature of the right to vote and the importance of preserving the integrity of the franchise require the judiciary give close scrutiny to laws imposing unequal burdens or granting unequal advantages in this realm .... To be sure, not every classification established by an 'election law' need be subjected to this 'strict' judicial scrutiny; innumerable election provisions detailing the mechanisms of the election process may have only minimal, if any, effect on the fundamental right to vote, and classifications of this nature may properly be judged under the 'rational basis' equal protection standard. (See *McDonald v. Board of Election* (1964) 394 U.S. 802, 806-809, 86 S.Ct. 1404, 22 L.Ed.2d 739; cf. *Bullock v. Carter*, (1971) 405 U.S. 134, 142-143, 92 S.Ct. 849, 31 L.Ed.2d 92.)
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> The provision at issue in this case, however, cannot properly be placed in this latter category because its classification scheme imposes a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process. (See *Bullock v. Carter, supra*, 405 U.S. 134, 143, 92 S.Ct. 849.) In light of the trial court's finding that candidates in the top ballot position receive a substantial number of votes simply by virtue of their ballot position, a statute, ordinance or election practice which reserves such an advantage for a particular class of candidates inevitably dilutes the weight of the vote of all those electors who cast their ballots for a candidate who is not included within the favored class. (See Scott, California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents (1972) 45 *So. Cal. L. Rev.* 365, 383-386.) Indeed, in a close race, it is quite possible that a candidate with fewer 'conscious' supporters than an opponent will win an election simply because his high position on the ballot affords him the advantage of receiving the vote of unconcerned and uniformed voters. (Id. at p. 376.) In such an instance, the challenged provision effectively undermines the fundamental democratic electoral tenet of majority rule.

536 P.2d at 1342-1343,

The voters could thus be denied the opportunity of having a free and unfettered choice at the School Board ballot box. The obvious purpose of Art. I, § 5 of the South Carolina Constitution is to provide a free and equal election.

Similarly, a court could conclude that the legislation violates the Equal Protection Clause as arbitrary and irrational. While it is unclear as to whether a court would apply the "strict scrutiny" standard or the much more relaxed "rational basis" test,[1] it is our opinion that the legislation is constitutionally suspect under either test. As our Supreme Court has stated, where a "fundamental right" is not involved

> ... this Court applies the "rational relationship" test .... The scope of review should be limited "in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." [*Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001)]. Under this analysis, [A] ... classification is justified if
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> > "(1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis."

Hendrix v. Taylor, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003), quoting *Curtis*, 345 S.C. at 574, 549 S.E.2d at 599-600.

In this instance, candidates for the same office are not being treated alike under similar circumstances and conditions. We are aware of no reasonable basis upon which the disparate treatment between incumbent candidates and non-incumbent may be made.

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[1] *See, Fulani, supra.* It could be argued that a fundamental right is involved here – the sanctity of the election process and the right to vote for the candidate of one's choice as well as the right of political association. If a court were to hold that a fundamental right was involved, obviously, the reason for the disparity between incumbents and non-incumbents would be required to be compelling and the statute would need to be narrowly tailored to meet that compelling interest. *Fulani, supra.* In our opinion, no such compelling interest or narrow tailoring can be shown. *See, McCarthy v. Kirkpatrick*, 420 F.Supp. 366 (W.D.Mo. 1976) [statutory scheme under which independent candidates were required to file petitions 188 days before the election, whereas candidates of parties were not nominated until August and candidates in new political parties did not have to file petitions until July 31, denied equal protection; in addition, independent presidential candidate was denied equal protection by fact that candidates of parties could have their names appear on the ballot whereas independent candidates were required to have the names of their presidential electors appear on the ballot.]

Conclusion

While only a court could determine that H.3683, if enacted, is unconstitutional, it is our opinion that the legislation is constitutionally suspect. If enacted, the statute would, of course, be given the presumption of constitutionality. However, if challenged in court, the court could well conclude that the statute violates Art. I, § 5 of the State Constitution as well as the Equal Protection Clause of the State and Federal Constitutions. Moreover, a number of decisions, referenced above, conclude that ballot restrictions implicate First Amendment rights protecting political association. In our opinion, the legislation favors incumbents over non-incumbents without a rational basis therefor. Furthermore, as it was recognized in *Smith v. Bd. of Education Commrs. For The City of Chicago*, 587 F.Supp. 1136, 1151 (N.D. Ill. 1984), "[i]t is clearly in the interest of a free society to promote, rather than chill, political challenge." A court could conclude that such a provision "chills" the candidacy of non-incumbents by putting them at a disadvantage to incumbents who would pay a simple filing fee in lieu of being put to the task of obtaining the necessary names on a petition in order to run for the Spartanburg County school board.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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