ALAN WILSON
ATTORNEY GENERAL

May 16, 2012

The Honorable Tom Young, Jr.
Member, House of Representatives
Post Office Box 651
Aiken, South Carolina 29802

Dear Representative Young:

You have asked whether those persons who were disqualified as candidates as a result of the recent Supreme Court decision in *Anderson v. South Carolina Election Commission,* Op. No. 27120 (May 2, 2012) may offer as petition candidates in the general election. It is our opinion that they may.

**Law / Analysis**

In *Anderson*, the Supreme Court recently issued an opinion in its original jurisdiction concluding that S.C. Code Ann. § 8-13-1356 (Supp. 2011), which provides that "[a] candidate must file a statement of economic interests for the preceding calendar year at the same time and with the same official with whom the candidate files a declaration of candidacy or petition for nomination" is mandatory and must be followed to the letter. In its Opinion, the Court ruled as follows:

[w]e hold the unambiguous language and expression of legislative intent of § 8-13-1356(B) and (E) require an individual to file an SEI at the same time and with the same official with whom an SIC is filed, and prohibit political party officials from accepting an SIC which is not accompanied by an SEI. Accordingly, the names of any non-exempt individuals who did not file with the appropriate political party an SEI simultaneously with an SIC were improperly placed on the party primary ballots and must be removed.

Upon Petition for Rehearing, the Court stated that "[a]s to the request for clarification, the parties' contention that our opinion holds § 8-13-1356 is satisfied if an individual, when filing a Statement of Intention of Candidacy (SIC) provides the political party with a paper copy of a Statement of Economic Interest (SEI), whether previously electronically filed or not, is correct. However, we reject the parties' contention that our opinion allows compliance with the statute in any other fashion."

Section 7-11-10 provides for the methods for nominating candidates to the general election ballot in South Carolina. Such provision states:

**§ 7-11-10. Methods of nominating candidates.**

> Nominations for candidates for the offices to be voted on in a general or special election may be by political party primary, by political party convention or by petition; *provided,* no person who was defeated as a candidate for nomination to an office in a party primary or party convention shall have his name placed on the ballot for the ensuing general or special election, except that this proviso shall not prevent a defeated candidate from later becoming his party's nominee for that office in that election if the candidate first selected as the party's nominee dies, resigns, is disqualified, or otherwise ceases to become the party's nominee for such office before the election is held.

Section 7-11-70 *et seq.* provides for a candidate's nomination "for any office in this State" by petition. Further, § 7-13-351 establishes the time restrictions to which petition candidates must adhere. There is, then, no question that nomination of a candidate for the general election by petition is a separate method of nomination to the general election ballot.

The statutes authorizing nomination by petition do not prohibit such candidacy where a person was deemed not to possess the requisite qualifications for nomination by a political party by primary in instances which such disqualification was based upon the failure to comply with §§ 8-13-1356. This was the situation addressed in the *Anderson* decision. Indeed, we are unaware of any statute which expressly prohibits such Petition candidacy in these circumstances. Nor do we believe South Carolina's "sore-loser" statute prohibits the nomination by petition of a person who had to meet the qualifications to be placed on the ballot for nomination by a political party through the primary method. Section 7-11-210, which constitutes the "sore-loser" provision, states as follows:

**§ 7-11-210. Notice of candidacy and pledge.**

> Every candidate for selection as a nominee of any political party for any state office, United States Senator, member of Congress, or solicitor, to be voted for in any party primary election or political party convention, shall file with and place in the possession of the treasurer of the state committee by twelve o'clock noon on March thirtieth a notice or pledge in the following form, the blanks being properly filled in and the notice or pledge signed by the candidate: "I hereby file my notice as a candidate for the nomination as _____ in the primary election or convention to be held on _____. I affiliate with the _____ Party, and I hereby pledge myself to abide by the results of the primary or convention. I shall not authorize my name to be placed on the general election ballot by petition and will not offer or campaign as a write-in candidate for this office or any other office for which the party has a nominee. I authorize the issuance of an injunction upon ex parte application by the party chairman, as provided by law, should I violate this pledge by offering or campaigning in the ensuing general election for election to this office or any other office for which a nominee has been elected in the party primary election, unless the nominee for the office has become deceased or otherwise disqualified for election in the ensuing general election. I hereby affirm that I meet, or will meet by the time of the general or special election, or as otherwise required by law, the qualifications for this office".

> Every candidate for selection in a primary election as the nominee of any political party for member of the Senate, member of the House of Representatives, and all county and township offices shall file with and place in the possession of the county chairman or other officer as may be named by the county committee of the county in which they reside by twelve o'clock noon on March thirtieth a like notice and pledge.
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> The notice of candidacy required by this section to be filed by a candidate in a primary must be signed personally by the candidate, and the signature of the candidate must be signed in the presence of the county chairman or other officer as may be named by the county committee with whom the candidate is filing, or a candidate must have his signature on the notice of the candidacy acknowledged and certified by any officer authorized to administer an oath. Any notice of candidacy of any candidate signed by an agent in behalf of a candidate shall not be valid.
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> In the event that a person who was defeated as a candidate for nomination to an office in a party's primary election shall thereafter offer or campaign as a candidate against any nominee for election to any office in the ensuing general election, the state chairman of the party which held the primary (if the office involved is one voted for in the general election by the electors of more than one county), or the county chairman of the party which held the primary (in the case of all other offices), shall forthwith institute an action in a court of competent jurisdiction for an order enjoining the person from so offering or campaigning in the general election, and the court is hereby empowered upon proof of these facts to issue an order.

See also, § 7-11-10 ["no person who was defeated as a candidate for nomination to an office in a party primary or party convention shall have his name placed on the ballot for the ensuing general or special election ... ."]

The "sore-loser" statute has been upheld as constitutional in *South Carolina Green Party v. South Carolina State Election Commission*, 612 F.3d 752 (4th Cir. 2010). There, the Court concluded that "the burden of the sore-loser statute placed on the Green Party's association rights is not severe." 612 F.3d at 757. In addition, the Fourth Circuit found that "South Carolina's sore-loser statute advances several state regulatory interest that are important," including furthering the state's interest in ensuring orderly, fair and efficient procedures for the election of public officials. 612 F.3d at 759. Moreover, the Court found that the "sore-loser" statute becomes applicable only after a candidate for a political party's nomination as the party's nominee only after the candidate has lost in the primary. In the words of the Court:

> [t]he plain language of Section 7-11-50 refutes the Plaintiffs' argument. That statutory language addresses the circumstances in which a "party nominee" may be "disqualified" from representing a "party" after a "nomination." *Because, the Election Commission applied the sore-loser statute after Platt's loss in the Democratic primary, thereby preventing him from appearing on the general election ballot* as the Green Party nominee, he was "disqualified" as a "party nominee" after his "nomination" within the meaning of Section 7-11-50. (emphasis added).

*Id*, at 758. See also, *Florence County Democratic Party v. Johnson*, 281 S.C. 218, 222, 314 S.E.2d 335, 338 (1984) ["As stated above, the restriction on offering or campaigning in a general election for an office for which there is a party nominee *after a candidate is defeated* in the primary election is a reasonable restriction necessary to preserve the integrity of the electoral process." (emphasis added)].

The circumstances in which the "sore-loser" statute would come into play – i.e. after a candidate has been defeated in a Party's primary – are very different from those here, involving potential candidates having been declared *ineligible to even run in the primary for the party's nomination* who then seek nomination through the petition method. The *Anderson* decision is quite clear in its ruling that "the names of any non-exempt individuals who did not file with the appropriate political party an SEI simultaneously with an SIC *were improperly placed on the party primary ballots and must be removed.*" (emphasis added).

It is well recognized that the "[p]rovisions of election laws governing the requirements of candidates are mandatory ..." and thus must be followed. 29 C.J.S., *Elections*, § 236. Therefore, as the Supreme Court stated in *Anderson*, those who did not file as candidates pursuant to the requirements of 8-13-1356(B) and (E) "were improperly placed on the party primary ballots and must be removed." Accordingly, these persons were not "candidates" for the purposes of § 7-11-210's "sore-loser" provision. Moreover, it is clear that the petition method of nomination is entirely separate from the primary method, as the Court in *Toporek v. S.C. Election Comm.*, 362 F.Supp. 613 (D.S.C. 1973) found unconstitutional the previous statutory requirement that petition candidates must file for office as the day of the primary. Thus, 7-11-210 is inapplicable here.

**Conclusion**

Accordingly, it is our opinion that state law does not prohibit those candidates who were removed from the ballot pursuant to the *Anderson* decision now to offer as petition candidates. *Anderson* dealt with the situation where candidates failed to meet the requirements of § 8-13-1356 requiring the simultaneous filing of a Statement of Economic Interest with a Statement of Intention of Candidacy at the time of filing for the party primary. While *Anderson* has language which refers to the "general election ballot," the issue involved was whether the candidates who did not comply with § 8-13-1356 could remain on the "primary election ballot." Thus, we believe the Court's ruling only addresses those persons' right to be on the general election ballot by way of the primary, and does not speak to petition candidates. We are thus unaware of any statute which prohibits these individuals from now offering as petition candidates pursuant to the requirements of state law.

South Carolina's "sore-loser" statute, § 7-11-210, which prohibits defeated candidates for a political party's nomination in a "party primary election or political party convention" from being placed on the general election or special election ballot by petition, is, in our opinion, inapplicable here. See also § 7-11-10. The persons removed from the ballot in *Anderson* were never proper "candidates" and were never "defeated" as candidates for purposes of the "sore-loser" statute.

In addition, as the *Toporek* case indicates, there must be the avoidance of impairing the right of persons to seek office and the right of citizens to vote for the candidate of their choice. As the Fourth

Circuit emphasized in *Cromer v. State*, 917 F.2d 819, 822 (4th Cir. 1990) the requirements of access to the ballot of petition candidates invoke "voter interests ... [which are] basic associational rights secured against state action by the first and fourteenth amendments, and any restrictions on ballot access by candidates necessarily burdens the rights of their voters to some extent."

The Court emphasized in *Cromer* that any ballot access restriction will require an assessment of the "'character and magnitude of the asserted injury to the rights'" sought to be vindicated; an assessment of the "'precise interests put forward by the state as justification for the burden imposed by its rule'"; an evaluation of the extent to which the state's asserted interests make it necessary to burden the voters' rights in the way chosen. The constitutionality of the challenged restriction is then made on the basis of a necessarily hard evaluative judgment of the relative weight of state interests and voters' rights. *Cromer*, 917 F.2d at 823, citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Thus, we see no conflict between the *Anderson* decision's disqualification of certain candidates for the primary, based upon § 8-13-1356, and those same persons' right to seek to become petition candidates. The restrictions upon ballot access must be applied as narrowly as possible to protect First Amendment rights of association.

Sincerely,

Robert D. Cook
Deputy Attorney General

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