

William W. Wilkins
Member
Admitted in SC

October 30, 2014

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais St.
Columbia, SC 29201

***Re: State Election Commission's decision to allow substitute nominee in
House District 114***

Dear Mr. Shearouse:

Enclosed is a Notice of Appeal and **Petition for Emergency Review**, in which Mary Tinkler asks the Supreme Court to overturn the decision of the Election Commission. If the decision is not overturned prior to Tuesday, November 4, 2014, the citizens in House District 114 will not be allowed to vote for their House Representative in the general election, despite clear statutory language to the contrary.

Also enclosed is a \$100 filing fee for the Notice of Appeal and a \$25 filing fee for the Petition for Expedited Review, a Proof of Service, and a Verification from Appellant Mary Tinkler.

Very truly yours,



William W. Wilkins

Cc: Butch Bowers
Marci Andino, Executive Director of S.C. Election Commission

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Appeal from the State Election Commission

Case No.

In re: General Election for House District 114

Of whom

Mary Tinkler is theAppellant,

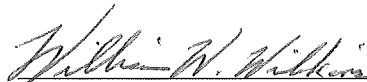
and

The South Carolina Republican Party and
the South Carolina Election Commission are theRespondents.

NOTICE OF APPEAL

Mary Tinkler appeals from the October 30, 2014 oral decision of the South Carolina State Election Commission ordering a special election for House District 114. Because this decision affects the rights of voters in the upcoming November 4, 2014 election, this appeal from an oral decision is necessary. The Commission stated it would issue a written decision within 24-hours, and the Appellant will file that Order with this Court as soon as it is received.

Respectfully submitted,



William W. Wilkins
NEXSEN PRUET, LLC
55 E. Camperdown Way, Suite 400
Greenville, South Carolina 29601
Phone: (803) 771-8900, Fax (803) 253-8277

Attorney for Mary Tinkler

October 30, 2014

Other Counsel of Record:

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1419 Pendleton Street
Columbia, SC 29201

THE STATE OF SOUTH CAROLINA

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and

The South Carolina Republican Party and
the South Carolina Election Commission are theRespondents.

**PETITION FOR EMERGENCY REVIEW
AND IMMEDIATE STAY**

Appellant Mary Tinkler has appealed from the State Election Commission's decision to delay the general election and re-open the filing period to allow the Republican Party to replace former Speaker Robert Harrell as its party's nominee. The Commission's decision ignores the plain and unambiguous language of section 7-11-55 of the South Carolina Code, which prohibits a political party from substituting its candidate at this late date.

Accordingly, Ms. Tinkler urges this Court to overturn the Commission's decision and issue an immediate stay, thereby allowing the general election to move forward on November 4, 2014.¹

I. Factual Background

Mr. Harrell was nominated in a primary by the Republican Party. His opponents in the upcoming general election were Mary Tinkler, the Democratic Party's nominee, and Sue Edward, the Green Party nominee. At the time of Mr. Harrell's nomination, it was public knowledge that he was under investigation by a grand jury for misuse of campaign funds. He was indicted in September 2014.

On Tuesday, October 28, 2014 – one week prior to the date of the general election – Mr. Harrell filed an affidavit with the Commission requesting that his name be removed from the ballot “on the legitimate non-political ground of family crises and substantial business conflict.” (See Attachment A)

After Mr. Harrell's affidavit was filed on October 28, the Commission noticed the public that a hearing would be held on October 30 to address “Candidate's withdrawal – House of Representatives District 114.” The notice also stated that “[i]tems may be added as necessary.”

¹ There are two legitimate candidates on the ballot – Ms. Tinkler for the Democratic Party and Ms. Sue Edward for the Green Party. If the election is allowed to be held on November 4, and this Court affirms the Election Commission's decision, that election can be set aside. But if the election is not allowed to be held, and this Court ultimately reverses the Commission, irreparable harm would occur to Appellant and the other viable candidate. *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990) (citations omitted) (explaining that purpose of a stay/supersedeas is “to preserve the status quo pending the determination of the appeal . . . , and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him”). See Rule 241, SCACR.

I. Section 7-11-55

Section 7-11-55 bars the Election commission from the action it took and the Republican Party from substituting a candidate now that Mr. Harrell is no longer seeking the office. Section 7-11-55 reads as follows:

Substitution of candidates where nominee selected by primary election.

If a party nominee dies, becomes disqualified after his nomination, or resigns his candidacy for a legitimate nonpolitical reason as defined in Section 7-11-50 and was selected through a party primary election, the vacancy must be filled in a special primary election to be conducted as provided in this section. The filing period for this special primary election opens the second Tuesday after the death, disqualification, or approval of the resignation for one week. The special primary election then must be conducted on the second Tuesday immediately following the close of the filing period. A runoff, if necessary, must be held two weeks after the first primary. The nomination must be certified not less than two weeks before the date of the general election. *If the nomination is certified two weeks or more **before the date of the general election**, that office is to be filled at the general election.*

*If the nomination is certified less than two weeks **before the date of the general election**, that office must not be filled at the general election but must be filled in a special election to be held on the second Tuesday in the month following the election, provided that the date of the special election to be conducted after the general election may be combined with other necessary elections scheduled to occur within a twenty-eight day period in the manner authorized by § 7-13-190(D).*

The procedures for resigning a candidacy under this section for legitimate nonpolitical reasons are the same as provided in § 7-11-50.

Where the party nominee was unopposed, each political party registered with the State Election Commission has the privilege of nominating a candidate for the office involved through a special primary election in the same manner and under the same procedures stipulated by this section.

(emphasis added).

The foregoing section refers to two different procedures for substituting a candidate, depending on *when* the candidate dies, is disqualified, or resigns for a nonpolitical reason: (1) if the substitute nominee is certified more than two weeks before the election date, then the new nominee will be considered at the general election; and (2) if the new nominee is certified less than two weeks *before* the election date, a special election will take place. Under the circumstances here, **there is no statutory provision, nor is there authority from any source to allow for a substitute nominee to be certified *after* the general election.** The Republican Party simply does not have time to certify a new nominee *before* the general election (which is less than a week away), and as a result, the party cannot substitute its nominee. Furthermore, even if a substitute nominee is certified less than two weeks before the general election, the statutory timeframes set forth in section 7-11-55 require the special general election to be held by December 9 (the second Tuesday after the November 4 general election). Aside from the fact that the Commission has violated the law, it is now impossible for the Republican Party to open its filing and then conduct a special primary election, **before** participating in a special general election by December 9.

Contrary to its public agenda notice,² after meeting in executive session, the Election Commission orally announced that it would not accept Mr. Harrell's affidavit because he was

² According to the public notice, the only item on the Commission's agenda was "candidate withdrawal." It did not contemplate the issue of candidate disqualification or the re-opening of the filing period. The Freedom of Information Act prohibits the Election Commission for taking action not on its agenda during a special meeting. *See Lambries v. Saluda County Council*, 409 S.C. 1, 15, 760 S.E.2d 785, 792 (2014) ("[A] 'special' meeting is a meeting called for a special purpose and at which nothing can be done beyond the objects specified for the call.").

disqualified to seek public office based on his plea agreement.³ Astoundingly, the Commission then announced that the filing period for candidates to file on the Republican ticket would be re-opened on November 4 and closed on November 11, 2014. It further ordered that voters would not be allowed to vote for the Democratic and Green Party candidates. The Commission grossly misinterpreted section 7-11-55. While this code section allows for the re-opening of a filing date under narrow circumstances, it clearly provides that a substitute nominee **must be certified before the date of the general election**. There is no authority from any source that allows the Election Commission to do what it did.

III. The equities and public policy dictate that there should be no substitution and special election.

Finally, both equity and public policy weigh in favor of allowing the long ago scheduled general election to be held on November 4. The Republican Party nominated a candidate it knew was under investigation for campaign finance violations and abuse of his office. Absentee voting has already begun. The opposing candidates have conducted their campaigns, including spending substantial sums of money, with the understanding that Mr. Harrell was the Republican nominee and that he could voluntarily withdraw within 30 days of the election pursuant to section 7-13-390. To require them to suspend their campaigns and mount another campaign against an opponent yet to be named and participate in a special general election some time in the future is not equitable. Furthermore, in the absence of a clear legislative intent, an interpretation of the statute that would allow such a result violates a public policy in favor of conducting elections in a fair manner that respects the rights of candidates and voters, including the many voters who have already cast their ballots in this

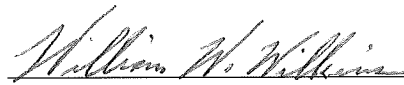
³ This is so even though Mr. Harrell had never asked that his name be withdrawn because he was disqualified.

election. What the Election Commission did undermines the integrity of our election process and is directly contrary to the application of the rule of law.

IV. Conclusion

Based on the foregoing, Ms. Tinkler respectfully requests this Court to review this matter on an emergency basis and issue an immediate stay of the Commission decision and allow the election to proceed on November 4.

Respectfully submitted,



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Attorney for Mary Tinkler

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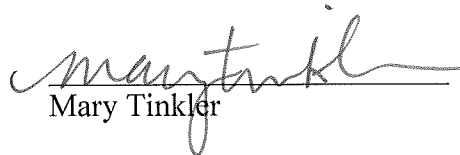
Mary Tinkler is theAppellant,

and

The South Carolina Republican Party and
the South Carolina Election Commission are theRespondents.


VERIFICATION

Personally appeared before me, the undersigned, who being duly sworn, deposes and states under oath that she is the Appellant in the above referenced action and that she has read the contents of the foregoing PETITION FOR EMERGENCY REVIEW AND IMMEDIATE STAY and that the matters contained therein are true to the best of her knowledge.


Mary Tinkler

October 30, 2014

Sworn to before me this 30th
day of October, 2014


Notary Public for South Carolina
My Commission expires: July 28, 2019

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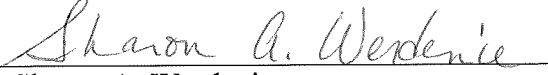
The South Carolina Republican Party and
the South Carolina Election Commission are theRespondents.

PROOF OF SERVICE

I hereby certify that a copy of *Appellant's Notice of Appeal and Petition for Emergency Review and Immediate Stay* has been served upon the South Carolina State Election Commission and counsel for the Respondents by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 30th day of October 2014 to the addresses shown below:

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Attorney for Respondents

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