

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE SUPREME COURT'S ORIGINAL JURISDICTION

South Carolina Republican Party,..... Petitioner,

v.

South Carolina Election Commission, The Honorable
Jeannette W. McBride, in her official capacity as Richland
County Clerk of Court; South Carolina Democratic Party;
Richland County Election Commission,.....

Respondents.

EMERGENCY PETITION FOR WRITS OF PROHIBITION AND INJUNCTION

The voters have spoken, all ballots have been counted, and electors in House District 75 have selected Kirkman Finlay as their new representative. In an apparent effort to undo those election results, the South Carolina Democratic Party went to the circuit court in Richland County and got an *ex parte* temporary restraining order that ordered the State Law Enforcement Division to seize “all votes cast in the November 6, 2012 general election for State House District 75” from the Richland County Election Commission so that the State Election Commission can recount the votes.

There are two core problems with this temporary restraining order: (1) the circuit court has no subject matter jurisdiction to issue any order involving an election for a legislative seat; and (2) even if the circuit court did have jurisdiction, there is no authority that permits the court to issue the relief it did. Therefore, the Court should enjoin the State Election Commission from recounting votes for the House District 75 race, and it

should direct the circuit court to cease exercising jurisdiction over any election-based dispute involving a seat for the House of Representatives.

ARGUMENT

I. The Judiciary lacks subject matter jurisdiction over protests involving elections for legislative seats.

The circuit court order that gives rise to this Petition attempts to dictate how an election protest should be resolved. For instance, on Page 6 of the order, the circuit court finds that based on certain factual allegations regarding voting machines, “the certification of election results . . . have been marred by unlawful election procedures and vote tabulation procedures” and that “[t]he declaration of the victor of HD-75 hangs in the balance.” (Amended TRO at 6 (copy attached).)

In similar instances where a losing candidate has challenged the functionality of a vote-recording machine and sought a recount, the Court has characterized the claim as “the contest of an election.” Smith v. Hendrix, 265 S.C. 417, 421, 219 S.E.2d 312, 313 (1975). However, the circuit court does not have subject matter jurisdiction over election protests involving legislative seats.

Subject matter jurisdiction is the power of a court to hear and decide cases. Hamilton v. Fulgham, 385 S.C. 632, 637, 686 S.E.2d 683, 685–86 (2009). Without subject matter jurisdiction, a court has no authority to act. See Coon v. Coon, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) (“A judgment of a court without subject-matter jurisdiction is void.”). A court’s jurisdiction is established by the South Carolina Constitution and the Code of Laws. See Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, 320 S.C. 113, 121, 463 S.E.2d 600, 605 (1995) (“Subject matter jurisdiction of a court depends upon the authority granted to the court by the constitution

and laws of the state.” (quoting Paschal v. Causey, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992))). Lack of subject matter cannot be waived, and the Court has a responsibility to take notice of jurisdictional defects. See Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994) (“Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court.”).

With respect to election-based disputes, the circuit court has subject matter jurisdiction in only one instance: an appeal from a local election commission’s decision regarding a protest of a municipal election. See S.C. Code Ann. § 5-15-140 (“Within ten days after notice of the decision of the municipal election commission, any party aggrieved thereby may appeal from such decision to the court of common pleas.”).

Otherwise, any election protest must be heard in the first instance by:

- a county election commission for county offices and less-than-county offices, id. § 7-17-30;
- political parties for primaries, id. § 7-17-560; or
- the State Election Commission for “federal officers, state officers, members of the State Senate and the State House of Representatives, and offices involving more than one county,” id. § 7-17-260.

Appeals from the State Election Commission are to the Supreme Court except for legislative seats, which are committed by both statute and the South Carolina Constitution solely to the respective chamber. See S.C. Const. art. III, § 11 (stating that “[e]ach house shall judge of the election returns and qualifications of its own members”); S.C. Code Ann. § 7-17-250 (“[W]hen a contest or protest concerns the election of a State Senator, appeals from decisions of the State Board shall be only to the Senate and when the election of a member of the House of Representatives is concerned, the appeal shall

be only to the House of Representatives.”). In short, the Judiciary has no authority to adjudicate election protests involving seats in the General Assembly.

This Court has consistently enforced this limitation on the Judiciary’s jurisdiction over disputes arising out of elections for legislative seats. See, e.g., Stone v. Leatherman, 343 S.C. 484, 485, 541 S.E.2d 241, 241 (2001) (dismissing an election protest for a seat in the South Carolina Senate for lack of subject matter jurisdiction because “all appeals from protests concerning elections of Senate members are to the Senate itself”); Scott v. Thornton, 234 S.C. 19, 20, 106 S.E.2d 446, 446–47 (1959) (dismissing challenge to results of an election for a Senate seat and holding that “[t]he objection to the jurisdiction of the court is well-taken and must be sustained in view of the foregoing constitutional provision and the former decisions of the court which have construed and applied it”); Anderson v. Blackwell, 168 S.C. 137, 139, 167 S.E. 30, 31 (1933) (“The merits of a contested election case in the Senate cannot be taken from the constitutional tribunal, and brought on for adjudication in a Court of either law or equity.”). The South Carolina Constitution, the State Election Code, and this unbroken line of cases make the circuit court’s absence of subject matter jurisdiction unmistakable here.¹

Because the circuit court’s order improperly addressed a matter beyond its subject matter jurisdiction, the Court should issue a Writ of Prohibition directing the circuit court to cease exercising jurisdiction over issues involving elections for legislative seats. Such

¹ The plaintiffs in the case pending before the circuit court did not even plead that subject matter jurisdiction was proper before that tribunal. This glaring omission from the plaintiffs’ pleading is required to invoke a court’s jurisdiction, and it is required by Rule 8(a), SCRCP. Nor is there any inherent right to protest an election that could excuse a plaintiff from honoring pleading requirements and constitutionally-drawn jurisdictional boundaries. See Butler v. Town of Edgefield, 328 S.C. 238, 247, 493 S.E.2d 838, 843 (1997) (“The ability to contest elections is a privilege bestowed by state law.”).

a writ enables this Court, in its supervisory capacity over the State Judiciary, to “prevent an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal.” New S. Life Ins. Co. v. Lindsay, 258 S.C. 198, 200, 187 S.E.2d 794, 796 (1972) (quoting Berry v. Lindsay, 256 S.C. 282, 287, 182 S.E.2d 78, 81 (1971)).

The Court certainly has authority to issue such an extraordinary writ. See S.C. Const. art. V, § 5 (“The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs.”). And it has not hesitated to do so previously. See, e.g., New S. Life Ins. Co., 258 S.C. at 205, 187 S.E.2d at 799 (issuing writ of prohibition regarding case pending before the Richland County Court); Woodworth v. Gallman, 195 S.C. 157, 164–65, 10 S.E.2d 316, 319 (1940) (issuing writ of prohibition regarding case pending in circuit court); State ex rel. Zimmerman v. Gibbes, 171 S.C. 209, 215–16, 172 S.E. 130, 133 (1933) (issuing writ of prohibition regarding case pending in circuit court); Ex Parte Wingate, 166 S.C. 440, 445, 165 S.E. 176, 178 (1932) (issuing writ of prohibition regarding case pending before the Civil and Criminal Court of Charleston).

Accordingly, because the circuit court lacks subject matter jurisdiction over any election protest involving a legislative seat, the Court should grant this Petition and issue a Writ of Prohibition prohibiting the circuit court from continuing to exercise jurisdiction over any protest regarding the House District 75 race.

II. The circuit court’s order improperly directs the State Election Commission to take actions contrary to South Carolina’s election laws.

Even if the circuit court had subject matter jurisdiction over a protest involving an election for a seat in the House of Representatives, this Court should issue a Writ of

Injunction prohibiting the State Election Commission from following the circuit court's ruling because it directs the state agency to take actions it is not authorized to take under the State Election Code. In particular:

- The circuit court ordered the State Election Commission to recount all ballots cast in the House District 75 race. (Amended TRO at 8.) Any such recount would be contrary to the State Election Code, which specifically sets forth when recounts are to occur: when the margin of victory is “not more than one percent of the total votes which were cast for such office.” S.C. Code Ann. § 7-17-280. That is not the case here, as Mr. Finlay defeated his opponent by a margin greater than this.
- Even if a recount were permissible here, the Election Code directs the Richland County Election Commission—“the committee or board charged by law with canvassing such votes”—to conduct the recount of votes for House District 75, not the State Election Commission. *Id.* The job of counting votes is prescribed by statute to county election commissions, not to the state agency. *Id.* § 7-17-20. Because state agencies are only allowed to exercise authority bestowed on them by statute, the State Election Commission lacks the power to conduct any such recount.

At bottom, there is no authority for any entity other than county election commissions to count ballots, and there is no authority for the Richland County Election Commission to recount ballots for the House District 75 race in this case. Mr. Finlay won, and he won by a margin wide enough to avoid (A) wasting public resources recounting electronically-recorded ballots at the behest of his defeated opponent and (B) eroding public confidence in South Carolina's elections by dragging out the certification process.

If the State Election Commission was allowed to follow the circuit court's unlawful directive and exercise power that the General Assembly has not vested in the agency, neither of these considerations could be remedied in the normal course of an appeal. *See, e.g., Smith v. Hendrix*, 265 S.C. 417, 421, 219 S.E.2d 312, 314 (1975) (“It is self-evident that protracted election disputes produce an instability in government

inimical to the public welfare.”). Further, this matter is of urgent importance, as the circuit court has set an expedited schedule for the improper recounting of votes, making time of the essence. As a result, the Court should issue a Writ of Injunction prohibiting the agency from engaging in any such recount in House District 75.

CONCLUSION

The South Carolina Constitution and the State Election Code outline a process that must be followed if a candidate wishes to protest the results of an election for a legislative seat. That process does not vest the circuit court with subject matter jurisdiction over any part of the process. And even if it did, the State Election Commission cannot usurp functions that are vested by statute in county agencies.

Accordingly, the Petitioner respectfully submits that the Court should grant this Petition and issue (1) a Writ of Prohibition to the Richland County Clerk of Court prohibiting the circuit court from continuing to exercise subject matter jurisdiction over an election protest involving a legislative seat, and (2) a Writ of Injunction enjoining the State Election Commission from participating in any recount of votes for the House District 75 election.

Respectfully submitted,

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November 13, 12

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PROOF OF SERVICE

I do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified by mailing and/or hand-delivering a copy of the same to the following address(es):

PLEADING: Emergency Petition for Writs of Prohibition and Injunction

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Columbia, South Carolina
November 13, 12