

# State of South Carolina State Ethics Commission

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**RECEIVED**

JAN 28 2019

HOUSE ETHICS  
COMMITTEE

**C2019-006: IN THE MATTER OF NEAL COLLINS**

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**Complainant:** State Ethics Commission  
**Address:** 201 Executive Center Drive  
Suite 150  
Columbia, SC 29210  
**Telephone:** 803-253-4192

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**Respondent:** Neal Collins  
**Address:** P.O. Box 906  
Easley, SC 29641  
**Telephone:** 864-350-4175  
**Title:** Rep. Dist. No. 5, Pickens County  
**Email:** collins.neal@gmail.com

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This is in response to the South Carolina House Legislative Ethics Committee's (Committee) October 15, 2018 request that the South Carolina State Ethics Commission (Commission) reconsider its recommendation of probable cause in Complaint 2019-006: In the Matter of Neal Collins. As discussed herein, the Commission recommends to the Committee that probable cause does exist to find Representative Neal Collins (Respondent) violated § 8-13-1346 of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act).

## **BACKGROUND**

On July 24, 2018, pursuant to § 8-13-540(A)(3)(a), the Commission initiated and filed the above-referenced complaint upon receipt of information that Respondent used public resources to explicitly urge his constituents to vote in favor of a constitutional amendment in violation of § 8-13-1346. In accordance with § 8-13-540(A)(3)(b), the Commission notified Respondent and the Committee on July 24 and September 19, 2018, respectively.<sup>1</sup> On September 26, 2018, the

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<sup>1</sup> Section 8-13-540(A)(3)(b) requires the Commission to forward a copy of the complaint and a general statement of the law to a respondent "within ten days of the filing of the complaint." However, there is no timeline imposed on sending "a copy of the complaint to the appropriate ethics committee." In the future, the Commission's policy will be to send notice of a complaint to the Respondent and the Committee contemporaneously.

Commission recommended a finding of probable cause and submitted all relevant reports, evidence, and/or testimony considered by the Commission pursuant to § 8-13-540(B)(6).

On October 15, 2018, the Committee asked the Commission to reconsider its recommendation, asserting (1) that § 8-13-1346 allows Respondent to use public resources to influence the outcome of a ballot measure; and (2) in the alternative, that Respondent's conduct was permissible because his use of public resources was "incidental" under § 8-13-1346(B).<sup>2</sup> The Commission addresses these assertions below.

### LAW

Section 8-13-1346 provides:

- (A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.
- (B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.
- (C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot

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<sup>2</sup> Initially, the Committee's request opined that the Commission "lacks jurisdiction to initiate a complaint against a Member of the House of Representatives," stating "complaints against a Member of the House of Representatives must be received by or initiated by the Committee." However, this contention is squarely refuted by § 8-13-540(A)(3)(a), which provides, "[t]he commission, upon receipt of information, may initiate and file a complaint upon an affirmative vote of six or more members of the commission. The commission shall accept complaints referred by the ethics committees and verified complaints from individuals, whether personally or on behalf of an organization or governmental body."

The Committee's request also stated that each Commissioner agreed to defer "to the rulings and interpretations of the House and Senate Ethics Committees when dealing with cases involving their respective candidates and members" during his or her screening hearing. At this time, the Commission is not aware of any Committee opinions relevant to the issues discussed herein. Moreover, the Act recognizes that the Commission and the Committee are distinct and independent bodies. In that regard, the Committee is free to interpret the Act as it sees fit and is not required to follow the Commission's recommendation. To the contrary, the Act specifically anticipates instances where the Commission and the Committee may have differing interpretations of the law or differing conclusions drawn from the facts. See Section 8-13-540(D)(1) (granting the Committee the power to concur or non-concur with the Commission's recommendation). Ultimately, the power to determine probable cause belongs to the Committee alone. See Section 8-13-540(D)(2) (granting the Committee the power to dismiss a complaint following a probable cause recommendation by the Commission).

measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

Section 8-13-1300(2) provides:

“Ballot measure” means a referendum, proposition, or measure submitted to voters for their approval.

Section 8-13-1300(9) provides:

“Election” means:

- (a) a general, special, primary, or runoff election;
- (b) a convention or caucus of a political party held to nominate a candidate;  
or
- (c) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or the Constitution of this State.

Section 8-13-1300(25) provides:

“Person” means an individual, a proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, an estate, a company, committee, an association, a corporation, club, labor organization, or any other organization or group of persons acting in concert.

Section 8-13-100(17) provides, in relevant part:

“Governmental entity” means the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed.

## DISCUSSION

### **A. Section 8-13-1346 and Ballot Measures**

The Committee argues the Act’s ballot measure prohibition found in § 8-13-1346(C) is not applicable to individuals such as Respondent, but only to “governmental entities.” The Committee further argues that § 8-13-1346(A), which prohibits individual use of public resources, only applies to “elections,” and not “ballot measures.” In support of this argument, the Committee refers to a

2003 amendment deleting “ballot measure” from the definition of “election” in § 8-13-1300(9). See Act 76, Section 22 (eff June 26, 2003). The Commission disagrees.

Where a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998). However, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm’n, 273 S.C. 269, 255 S.E.2d 837 (1979). In addition, particular clauses within a statute should not be construed in isolation but should be read in conjunction and in light of the intended purpose of the statute. State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008), aff’d as modified, 386 S.C. 339, 688 S.E.2d 569 (2010). The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). A court will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended. Jones v. State Farm Mut. Auto Ins. Co., 364 S.C. 222, 612 S.E.2d 719 (Ct. App. 2005).

Here, the Commission does not believe the statutes in question are plain or unambiguous. First, although § 8-13-1346(A) refers only to “persons” and “elections” and § 8-13-1346(C) refers only to “governmental entities” and “ballot measures,” the Act’s definition of “election” is circular, meaning the definition contains the word itself, thereby providing no meaningful definition. Second, while the words “election” and “ballot measure” are separately defined and used throughout the Act, the above-referenced 2003 amendments also confusingly introduced the phrase “ballot measure election,” creating further ambiguity as to these terms and their import. See § 8-13-1309. Accordingly, the Commission does not believe the statutes in question are clear or definite and, therefore, they must be construed in a reasonable and practical manner consistent with the remainder of the Act.

Under the Committee’s interpretation, a “person” is only prohibited from using public resources to influence voters in an “election,” and not a “ballot measure.” Conversely, a “governmental entity” could use public resources to influence the outcome of an “election,” but not a “ballot measure.” The Commission believes such an interpretation leads to an absurd result. For instance, under the Committee’s interpretation, individual county council members or employees could use public resources to promote an upcoming bond referendum as long as the county council as an entity did not do so. Similarly, a county council could use public funds to influence voters to vote for its incumbents, but individual county council members or employees could not.

The Commission’s interpretation aligns more closely with that of the South Carolina Attorney General, who has opined that “a referendum is considered to be a special election.” S.C. Atty. Gen. Op., August 22, 1989. This interpretation comports with the spirit of the Act, which generally prohibits the use of public resources to influence matters to be decided by the voters unless such use is for informational purposes. See § 8-13-765; § 8-13-1346; SEC AO2018-003; SEC AO2018-004. The Commission further notes that, consistent with this interpretation, the Attorney General’s Office has criminally prosecuted individuals for use of public resources to

influence a ballot measure under § 8-13-1346 as recently as 2015. See State v. Thompson, 2015-GS-47-01 (2015); State v. Kovach, 2014-GS-08-01073 (2014). Moreover, in at least one instance, arguments similar to those made by the Committee were raised to, and rejected by, a circuit court. See Attachment A (Kovach Motion to Dismiss filed May 22, 2014); Attachment B (Kovach Supplemental Motion to Dismiss filed August 19, 2014); Attachment C (Kovach Order Denying Motions). Accordingly, the Commission interprets § 8-13-1346 to prohibit any use of public resources to influence the outcome of an election or ballot measure.

#### **B. Section 8-13-1346 and Incidental Use**

The Committee also asks the Commission to consider whether Respondent's use of public resources to influence the outcome of a ballot measure was "incidental" pursuant to § 8-13-1346(B). Although there is no explicit definition of "incidental," the term is used throughout the Act in ways that lead the Commission to conclude that "incidental" means occurring as a result of one's position and resulting in no additional public expense. See § 8-13-1300(11)(excluding any benefit that accrues to a public official "incidental to the public [official's] position or which accrues to the public [official] as a member of a profession, occupation, or large class" from the definition of economic interest); § 8-13-700(A)(providing that the prohibition against use of public office for financial gain does not extend "to the incidental use of public materials, personnel, or equipment, subject to or available for [a public official's] use that does not result in additional public expense"); § 8-13-715 (allowing a public official to accept a meal provided in conjunction with the a speaking engagement when "all participants are entitled to the same meal and the meal is incidental to the speaking engagement"); § 8-13-1348 (prohibiting the use of campaign funds for personal expenses unless incidental and used to defray expenses "incurred in connection" with the public office). In this case, the offending language in Respondent's newsletter cannot fairly be said to have occurred or naturally resulted from his being a public official, despite the fact that it most likely did not create any additional public expense. Accordingly, the Commission does not believe such use was incidental.

#### **CONCLUSION**

Upon further consideration of the above-mentioned issues, the Commission hereby recommends to the Committee that probable cause does exist to find Representative Neal Collins violated § 8-13-1346 when he used public resources to influence the outcome of a ballot measure. Pursuant to § 8-13-540(B)(6), attached hereto as Attachment D is a supplemental Memorandum of Interview in this matter.

# **Attachment A**

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF GENERAL SESSIONS  
 ) NINTH JUDICIAL CIRCUIT  
COUNTY OF BERKELEY )  
 ) INDICTMENT NUMBER: 14-GS-08-0266

STATE OF SOUTH CAROLINA, )

versus )

AMY KOVACH, )

Defendant. )

MOTION TO DISMISS

MARY P. BRONK  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

14 MAY 22 AM 11:40

KMPM  
FILED

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through undersigned counsel, hereby moves this Court to dismiss the above captioned Indictment.

Exhibit 1. The Indictment states as follows:

That Amy Kovach did, in Berkeley County, on or about the period between August 1, 2012 and November 6, 2012, use and authorize the use of public funds, property, or time to influence the outcome of an election to wit:

While employed as Communications Director by the Berkeley County School District, Amy Kovach did use public funds to pay for the creation of a campaign video and the production of other campaign material, did draft and disseminate speeches during her public employment intended to persuade the voting public, and did perform various other acts using public resources and time, all of which promoted and support a ycs vote as to the school board referendum held on November 6, 2012, and all of which was in violation of 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

The grounds for this motion are as follows: (1) the Ethics Act provisions at S.C. Code § 8-13-1346 which prohibits the use of public funds, property or time to influence a ballot measure are not applicable to individual persons; and, (2) the conduct was permissible under S.C. Code § 8-13-1346.

## I. Background.

This matter involves the 2012 Berkeley County School District Board efforts to promote and approve the passage of a \$198 million bond referendum to build new and/or improve existing public school facilities in Berkeley County. Mrs. Kovach was and is the Director, Communications and Community Relations for Berkeley County School District (hereinafter "BCSD").

On January 10, 2012, the BCSD held a Board meeting at which time Dr. Rodney Thompson, BCSD Superintendent (hereinafter "Thompson"), Mr. Archie Franchini, BCSD Assistant Superintendent (hereinafter "Franchini"), and the BCSD CFO Brantley Thomas (hereinafter "Thomas") outlined an action plan for new schools and improvements to support the growing Berkeley County student population and help improve student test performance.

Exhibit 2. Franchini recommended approval of a bond referendum in the amount of \$250 million to be presented to the Berkeley County voters in November, 2012, and the Board motion was made and passed (6-3) to approve the recommendation.

On April 24, 2012, the BCSD held a Board meeting at which time a BCSD Growth and Building Plan was presented by Franchini and reviewed by the Board. Exhibit 3. The Board minutes note with approval as follows:

The time line at present for this plan calls for preparations for top priority projects in June 2012; a Board resolution and ballot preparation for a bond referendum in August 2012 and a public vote on the building project in November 2012.

Amy Kovach, Director of Communications, continued the report to provide an overview of the YES4Schools Campaign Plan. The mission of this plan is to successfully pursue an estimated \$250 Million Bond Referendum to construct new and renovate existing facilities to accommodate student population growth in the district.



Id.

On June 29 and 30, 2012, the BCSD held a Board and upper BCSD management workshop which included a "Navigating a Bond Referendum" guest speaker prepared and presented by an outside consultant, Herman Gaither (retired Beaufort County Superintendent). Exhibit 4. Excerpts from the minutes of the workshop include the following guidance:

EVERY referendum is difficult but winnable. They are all winnable. (p. 1)

Board must strut their perspective and uphold the referendum. (p. 1)

We WILL win ... focus on winning. (p. 1)

People are going to do what you expect them to do with a focus on winning. (p. 2)

District Office will use the month of July to get the information ready. (p. 2)

In August...bring in the captains, and staff and cascade ready to go. Campaign team is in full swing. (p. 2)

Have a go to person ... the person who will funnel all the information. In BCSD, Amy Kovach. (p. 3)

Do everything you can to WIN. Rotary Club, speakers bureau, do everything to win. (p. 3)

Convince the voters to how we will move the debt forward. (p. 4)

When you go to the realtors...talk about property values. (p. 5)

When you go to the Chamber... talk about the ability to recruit new business and gain membership. (p. 5)

Get children ready. (p. 5)

Messaging: improving schools, improve test scores, create better schools. (p. 5)

Share radio, tv or consulting with a generic Yes 4 Schools. (p. 5)

Educate, Educate... Superintendent and DO staff get an opportunity to be at all schools. (p. 6)

Press announcements and campaign launch. One per week. (p. 6)

There has to be someone who wakes up every day and says we have to get this done today. (p. 6)

Find a group that was supportive and tie together an announcement. (p. 6)

Friday night gatherings are a good place to get messaging. (p. 6)

Direct mail, robocall and paid media gets it done physically. (p. 6)

On July 24, 2012, the BCSD held a Board meeting at which time a BCSD Bond Referendum was discussed by the Board. Exhibit 5. A BCSD Board resolution to go forward with the Bond Referendum was approved. The BCSD Board minutes note, in part, as follows:

Discussion followed with Mr. Obie asking how is the fund raising progressing and why are we waiting until September 5<sup>th</sup> to start the campaign. Amy Kovach explained that \$52,000 has been raised by the Campaign Committee and the Bond Referendum committee has been meeting. She provided a brief outline for the campaign.... The district is hoping that citizens will step up and vote "Yes" if this is a priority for them because we have shown that it is a priority of the district. Other board members expressed hope that the citizens will support our referendum.

Id.

The Referendum was not formally put on the ballot until August 15, 2012; therefore, even if the statute alleged to be applicable applies, any actions prior to that date would not fall under the statute since there was no potential ballot (or election) for Mrs. Kovach to arguably attempt to influence the outcome of until and/or prior to that date.

On August 28, 2012, the BCSD held a Board meeting at which time a BCSD Bond Referendum was discussed by the Board. Exhibit 6. The BCSD Board minutes note, in part, as follows:

School Improvement Campaign Update

Amy Kovach provided a detailed powerpoint presentation to review the status of the School Improvement Referendum scheduled for the November 6, 2012 election. The update included a timeline for events leading up to the November 6 election day, fund raising efforts, and the extensive plan in place to get the message out to all stakeholders so the Campaign can be successful. The district plans to build 5 new schools and renovate 29 schools with the \$198 Million School Improvement Referendum Funds.

Id.

On September 25, 2012, the BCSD held a Board meeting at which time a BCSD Bond Referendum Campaign was discussed by the Board. Exhibit 7. The BCSD Board minutes note, in part, as follows:

School Improvement Campaign Update

Laura Varn, Campaign Volunteer, provided a power point update of the School Improvement Referendum Campaign that included information on what voters have told the committee, a strategic overview, campaign organization, campaign activities and campaign materials. The Campaign's kick off day will be October 4, 2012, 1:30 p.m. at Stratford High School.

Id.

Throughout the process, the BCSD Board members were repeatedly updated and kept apprised as to the activities of its officials and employees (including Mrs. Kovach) with respect to the 2012 Bond Referendum – through emails, letter correspondence, memoranda, presentations, etc....

On November 6, 2012, the Bond Referendum ballot measure passed with 60% of the electorate voting in favor of the measure.

On March 12, 2013, the BCSD held a Board meeting at which time a resolution was passed that Mrs. Kovach, Mr. Thompson and Mr. Franchini acted in good faith and within the scope of their employment in connection with the school improvement referendum:

"Section 59-17-110 of the South Carolina Code of Laws requires that if any employee of the District is prosecuted in any action, civil or criminal, "by reason of any act done or omitted in good faith in the scope of his employment" it is the duty of the District, when requested, to appear and defend the action. Even though no civil or criminal action has been initiated against any of our employees at the time, based on the advice of the Board's attorneys, we believe as a Board it is our legal obligation to provide those employees involved in this investigation with legal representation at this juncture as they have requested. The Board has reason to believe that its employees' acts or omissions in connection with the school improvement referendum were in good faith and in the scope of their employment. Under these circumstances, it is the District's statutory obligation to provide legal representation for its employees. The District will continue to cooperate with the investigation, will make future public statements concerning this matter as is appropriate to do so, and appreciates the public's patience and understanding of the need for confidentiality while the investigation takes its course."

## II. The Ethics Act Ballot Measure Prohibitions Are Not Applicable To Individuals.

The Ethics Act, at S.C. Code § 8-13-1346, which is entitled "Use of public funds, property, or time to influence election prohibited; exceptions," provides as follows:

(A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.

(B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

(emphasis added)

As noted in the Florence County School District case below, Section 8-13-1346(C) is the provision applied in this matter and for which Mrs. Kovach stands indicted. It provides in part that "a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure".

Note the words "governmental entity". This section does not state that a "person" may not use funds, property or time to influence a ballot measure. In contrast, S.C. Code § 8-13-1346(A) specifically provides that "A person may not use or authorize the use of public funds, property or time to influence the outcome of an election".

While a person may not use public funds, property or time to influence the outcome of an election per Section 8-13-1346(A), the legislature has clearly differentiated the two prohibitions. Section 8-13-1346(A) only applies to "persons", whereas Section 8-13-1346(C) only applies to "governmental entities". The plain meaning of the statute must be acknowledged. Likewise, the rule of lenity must be used to interpret an ambiguous criminal statute in favor of a putative defendant. United States v. Wilson, 10 F.3d 734 (10<sup>th</sup> Cir. 1993) (rule of lenity applies where statute is ambiguous and courts must construe statute favorably to the criminal defendant).

Furthermore, the word "election" is defined in the Ethics Act, and the definition does not include a "ballot measure". Thus, Section 8-13-1346(A) only applies to "elections" and not ballot measures.

The criminal catch-all provision of the Ethics Act is S.C. Code § 8-13-1520. It states that a "person" who violates the Ethics statute is guilty of a misdemeanor.

However, a "person" cannot violate Section 8-13-1346(C), because it specifically and only states that a "governmental entity" cannot use public funds to influence the outcome of a ballot measure, and does not reference a "person".

**III. The Conduct was permissible under S.C. Code § 8-13-1346.**

The Conduct was permissible and not a violation of The Ethics Act. S.C. Code § 8-13-1346, which is entitled "Use of public funds, property, or time to influence election prohibited; exceptions," provides in pertinent part as follows:

(B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity....

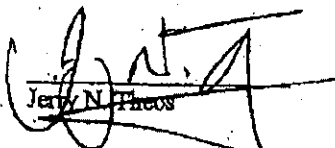
Under Section 8-13-1346(B), the BCSD was clearly allowed incidental use of time and materials for preparing newsletters which related to the 2012 Bond Referendum. The word "newsletters" has not been defined in the Ethics statute, and should be given a broad construction which would encompass all of Mrs. Kovach's conduct. Clearly, the 2012 Bond Referendum was an activity which needed to be reported by BCSD, a "public body" with "public officials".

Under Section 8-13-1346(C), the BCSD was clearly allowed to expend public resources to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning the 2012 ballot measure. The 2012 Bond Referendum was a ballot measure which affected the BCSD governmental entity. The BCSD conduct involved preparing informational materials, conducting public meetings, and/or responding to news media or citizens' inquiries concerning the 2012 ballot measure.

VII. Conclusion.

Based upon the foregoing, Mrs. Kovach hereby respectfully moves and urges this Court to dismiss the Indictment in this case.

Respectfully submitted,



Jerry N. Theos

URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, P.A.  
17 1/2 Broad Street  
Charleston, South Carolina 29401

Charleston, South Carolina  
May 21<sup>st</sup> 2014

# **Attachment B**



Kwm

STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF GENERAL SESSIONS  
COUNTY OF BERKELEY 14 13:19 NINTH JUDICIAL CIRCUIT  
INDICTMENT NUMBER: 14-GS-08-0266

STATE OF SOUTH CAROLINA  
BERKELEY COUNTY, S.C.

versus ) SUPPLEMENTAL  
AMY KOVACH, ) MOTION TO DISMISS  
Defendant. )

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, submits the following to supplement her Motion to Dismiss filed May 22, 2014. For the reasons stated below and in her initial Motion, the Court should dismiss this case.

Defendant refers the Court to the statement of facts set forth in her initial Motion, which are adopted herein. She also refers the Court to the grounds for dismissal stated in her initial Motion: (1) the Ethics Act provisions at S.C. Code § 8-13-1346 that prohibit the use of public funds, property or time to influence a ballot measure are not applicable to individual persons like Mrs. Kovach but only to governmental entities. and (2) her conduct was permissible under S.C. Code § 8-13-1346 because she was merely providing information and reporting activities about the ballot measure, which is explicitly permitted under the statute. In addition to these grounds, this case should be dismissed for the following reasons.

1. The Indictment charges conduct that is not criminal.

Section 8-13-1346 of the South Carolina Code states:

(A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.



(B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

The indictment alleges first, copying the language of § 8-13-1346(A), that Mrs. Kovach did "use and authorize the use of public funds, property, or time to influence the outcome of an election . . . ." "Election" as used in this statute is defined as:

- (a) a general, special, primary, or runoff election;
- (b) a convention or caucus of a political party held to nominate a candidate; or
- (c) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or the Constitution of this State.

S.C. Code Ann. § 8-13-1300(9).

The indictment then goes on to allege that the conduct constituting a violation of § 8-13-1346(A) was, "to wit," improper involvement in a "school bond referendum." There is no indication in § 8-13-1300(9) that a school bond referendum is a type of election. Indeed, a "referendum" is defined elsewhere in the Ethics Act as a type of "ballot measure," not as an "election." See S.C. Code Ann. § 8-13-1300(2) ("Ballot measure" means a referendum, proposition, or measure submitted to voters for their approval."). Indeed, the definition of "election" was amended in 1995 to include a "ballot measure" as a type of "election," but was amended again in 2003 to remove it. Compare 1995 S.C. H.B. 4070, § 36 with 2003 S.C. H.B. 3206, § 21. This legislative history specifically shows that a "ballot measure" is not a type of

"election." Section 8-13-1346(A) does not prohibit a "person" from doing anything in support of a ballot measure. Nor does any other provision of the statute.

In effect, the Indictment charges that Mrs. Kovach was improperly involved in an election when she acted in support of a ballot measure, but an election and a ballot measure are separate and distinct under the Ethics Act, and her alleged conduct as to the latter is not prohibited of any person.<sup>1</sup> Quite simply, the indictment charges conduct that is not criminal. It therefore is defective and this case must be dismissed. See Hooks v. State, 353 S.C. 48, 51, 577 S.E.2d 211, 213 (2003) (holding that the omission of an element necessary to make conduct criminal renders an indictment defective; "We judge the sufficiency of an indictment against whether it contains the necessary elements of the offense to be charged and whether it sufficiently appraises the defendant of what he must be prepared to meet."); State v. Marshall, 273 S.C. 552, 554, 257 S.E.2d 740, 742 (1979) (stating that the absence of a material allegation in an indictment renders the indictment "fatally defective"); see also State v. Patterson, 261 S.C. 362, 366, 200 S.E.2d 68, 70 (1973) (holding that an indictment was defective where the statute failed to give a person of ordinary intelligence fair notice that his conduct is prohibited). Only a "governmental entity" is prohibited from conduct intended to influence a ballot measure. See S.C. Code Ann. § 8-13-1346(C). Mrs. Kovach is not a governmental entity.

Nor can the "Penalties" provisions of the Ethics Act amend S.C. Code Ann. § 8-13-1346(C) to make it apply to persons and not just governmental entities. These provisions state that a "person" who violates the Ethics Code is guilty of a misdemeanor. However, a "person"

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<sup>1</sup> That the Indictment charges Mrs. Kovach—indisputably a "person"—with conduct only prohibited of a governmental entity was a point made in her initial Motion.

cannot violate § 8-13-1346(C) because that statute specifically and only prohibits a "governmental entity" from using public funds to influence the outcome of a ballot measure, and does not reference a "person".

In sum, only a forced construction of the Ethics Code that cobbles together bits and pieces from distinct provisions can permit this case to proceed. The Court must dismiss this case, or it must conclude either that: (1) Mrs. Kovach is a governmental entity; (2) a bond referendum is a type of election even though the statutory definition clearly states it is not; or, (3) the Penalties provisions amend the substantive statute, expanding § 8-13-1346(C) to make it apply not just to governmental entities, but also to persons. The Court may not entertain such forced constructions of any statute, much less a criminal one. As the Supreme Court of South Carolina has stated time and time again:

When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (internal citations omitted) (citing Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980); First South Savings Bank, Inc. v. Gold Coast Assoc., 301 S.C. 158, 390 S.E.2d 486 (Cl.App.1990)).

To the extent there is any ambiguity (Mrs. Kovach contends there is not), the rule of lenity requires that such ambiguity be interpreted in her favor. In Berry v. State, the Supreme Court of South Carolina addressed a challenge to a statute enhancing a criminal sentence. The enhancement applied to a defendant with a prior conviction "relating to" specified drugs. The

defendant in Berry had a prior conviction for possession of drug paraphernalia. The Court held that the enhancement was inapplicable, because “[t]o construe a paraphernalia conviction as ‘relating to’ drugs would be contrary to unambiguously expressed legislative intent and additionally violate the rule of lenity long established in our jurisprudence.” Berry v. State, 381 S.C. 630, 634, 675 S.E.2d 425, 426 (2009); see also, e.g., Liparota v. United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089 (1985) (“Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.”).

Berry is applicable here: interpreting the Ethics Code to make Mrs. Kovach's conduct criminal violates the legislature's clear intent in enacting the Code, and to the extent there is any ambiguity, for example by reading the penalty provision as amending the substantive statute, it would violate the rule of lenity to interpret the ambiguity against Mrs. Kovach.

**2. Mrs. Kovach's conduct was either the permitted reporting of information related to a ballot measure, or S.C. Code Ann. § 8-13-1346 is unconstitutionally vague.**

In her initial Motion to Dismiss, Mrs. Kovach argued that the conduct the State alleges was criminal—using public funds to pay for a video and other materials concerning the bond referendum, drafting speeches about the referendum, and performing “various other acts” in support of the bond referendum—is not criminal under the statute. The statute at subsection (B) permits “the incidental use of time and materials” for preparation of a “newsletter” reporting activities of a governmental body, and “newsletter” is undefined. The statute also, at subsection (C), permits the expenditure of public resources “to prepare informational materials, conduct public meetings, or respond to news media or citizens’ inquiries concerning a ballot measure affecting that governmental entity.” Apparently, the State contends that Mrs. Kovach’s conduct

crossed the line from the permitted acts of communication, to prohibited acts of communication. To the extent her actions may be considered criminal under these provisions of the statute (Mrs. Kovach contends first that they cannot), the line drawn by the statute is too vague to be enforceable—these “informational exceptions” to what would otherwise be criminal conduct are unconstitutionally vague in violation of the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution.

A criminal statute is unconstitutionally vague on its face if it (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages arbitrary or discriminatory enforcement. City of Chi. v. Morales, 527 U.S. 41, 56 (1999). A criminal statute is unconstitutionally vague as applied if it does not give the defendant sufficient notice that her actions were prohibited. See Chapman v. United States, 500 U.S. 453, 467-68 (1991). Although a defendant whose conduct was clearly proscribed by a statute generally cannot complain the statute is vague as applied to others, a facial challenge is more readily available to such a defendant when, as is the case here, the statute infringes expressive conduct. See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982). Section 8-13-1346 is unconstitutionally vague as applied to Mrs. Kovach's conduct, and also on its face.

As explained in her initial Motion, Mrs. Kovach did nothing more than report information to the BCSD board and the public, which is expressly permitted by the statute. She cannot fairly be charged with notice that these acts were criminal, and certainly not with constitutionally sufficient notice. The statute therefore is unconstitutionally vague as applied to her actions.

It is unconstitutionally vague on its face because it allows reporting, and even the expenditure of public resources in support of the reporting, but fails to draw any intelligible line between what types of reporting are permitted and what types are prohibited. As explained above and in her initial Motion, subsection (A), despite being quoted by the State in the Indictment, is not pertinent because there is no "election" at issue. Subsection (B) permits the preparation of a "newsletter reporting" activities of a public body, but does not define "newsletter." The term itself is antiquated and therefore confusing, harkening to the days when a secretary would distribute mimeographed copies of memoranda. Subsection (C) is even less clear about what is excepted from criminal conduct (by a "governmental entity" no less), stating that it is permissible to expend public resources to prepare "informational materials" and do other acts concerning a ballot measure that affects that governmental entity. "Informational materials," like "newsletters," are not defined. Quite simply, the statute fails to provide a person of ordinary intelligence fair notice of what is prohibited and what is permitted, and therefore it is unconstitutionally vague on its face. See Morales, 527 U.S. at 56.

It also is so standardless that it authorizes or encourages arbitrary or discriminatory enforcement, id., and this can be seen from the way it has been enforced in this case compared to elsewhere. First, there is precedent in which activities similar to Mrs. Kovach's were not criminally prosecuted and instead were referred to the State Ethics Commission. In 2008, a Consent Order was executed and filed by the State Ethics Commission and the Florence County School District (hereinafter the "FCSD") regarding 2007 conduct by the FCSD to distribute flyers in support of the "VOTE YES November 6<sup>th</sup>" ballot measure, a bond referendum to fund school improvements. See Exhibit 1 (Consent Order). FCSD Superintendent Larry Jackson

personally approved a request to distribute the pro-Vote flyers among the district's schools. The Association of Parents and Teachers distributed the flyers to students in eighteen (18) FCSD elementary and middle schools. The flyers clearly stated "VOTE YES November 6<sup>th</sup>". The FCSD also sent emails and "telephone blasts" from the district offices to its staff. See Exhibit 2 (Post and Courier Article Excerpts).

There were no criminal prosecutions in the Florence County matter. Rather, the State Ethics Commission issued a public reprimand against the FCSD governmental agency. It was agreed that FCSD was a "governmental entity" as defined by S.C. Code § 8-13-100(17). The Consent Order noted that S.C. Code § 8-13-1346(C) provided as follows:

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

Thus, the State Ethics Commission deemed it appropriate to only find that a "governmental entity," to wit, the FCSD, had violated Section 8-13-1346(C), and not any individuals. The State Ethics Commission's sanction was exceedingly mild: It simply ordered that FCSD "be more diligent in complying with the Campaign Practices of the Ethics Reform Act" and further ordered that the FCSD pay the Commission an administrative fee of \$50.00. Clearly, the State Ethics Commission felt this result was appropriate for the FCSD and its officials and employees for activities similar to the conduct of Mrs. Kovach and that of the BCSD school officials and other employees. The FCSD Consent Order clearly demonstrates that



any criminal prosecution of BCSD officials and employees and, in particular, Mrs. Kovach would be excessive and unwarranted. It is arbitrary enforcement of a standardless statute.

Second, the Dorchester County School District Two (the "DCSD2") also held a bond referendum in 2012. DCSD officials engaged in activities similar to the conduct of Mrs. Kovach and other BCSD officials and employees, and BCSD employees helped DCSD2 employees draft pro-referendum materials. In fact, there was at least one joint pro-referendum presentation by both BCSD and DCSD2 school participants. See Exhibit 3. Appropriately, there has been no investigation or prosecution of the DCSD2's activities by SLED or the Attorney General's office. Like in the DCSD2 matter, no criminal charges should be pursued against Mrs. Kovach in this BCSD matter.

In at least one strikingly similar case in Alabama, there was no criminal prosecution. In Alabama Libertarian Party v. City of Birmingham, Alabama, 694 F.Supp. 814 (N.D. Ala. 1988), the plaintiffs were seeking redress due to the city's alleged unconstitutional use of tax funds for advertising to influence elections regarding, among other things, a bond issue. The Alabama statute in question, Alabama Code Section 17-1-7, provided in part as follows:

(c) No person in the employment of the state of Alabama, whether classified or unclassified, shall use any state funds, property or time, for any political activities. Any person who is in the employment of the state of Alabama must be on approved leave to engage in such political action or such person must be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for said officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates the provisions of this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced or both, as provided by section 13A-10-63.

The court in the case noted as follows:

Defendants contend that § 17-1-7 is a penal statute and that it therefore fails to provide a remedy to plaintiffs. Plaintiffs allege that they approached both the District Attorney and the State Attorney General concerning enforcement of this statute. Both declined. Plaintiffs also complained to the State of Alabama Ethics Commission about the alleged violations and it too declined to prosecute.

Id. at 822 (emphasis added).

As noted above, the Attorney General's office and SLED have not conducted criminal investigations and prosecutions involving similar conduct by actors similarly situated to Mrs. Kovach. This is so in spite of the fact that the Attorney General's office was provided with and asked to consider a CD containing hundreds of emails that other BCSD staff and employees disseminated using District resources. The Attorney General's office refused.

3. Mrs. Kovach lacked the mens rea necessary to violate Section § 8-13-1346.

Although the legislature may declare an act criminal regardless of the actor's mental state, "[c]riminal liability is normally based upon the concurrence of two factors, an evil meaning mind [and] an evil doing hand." State v. Jefferies, 316 S.C. 13, 17, 446 S.E.2d 427, 430 (1994).

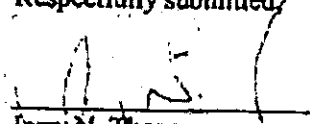
Here, the statute states no specific criminal intent, and therefore the State must prove an "evil meaning mind" and "an evil doing hand." There is no evidence of this here. There is no evidence that Mrs. Kovach received any personal gain or benefit as a result of her conduct or activities. Indeed, the BCSD passed a resolution on March 12, 2013, stating that Mrs. Kovach acted in good faith. See Exhibit 4. Furthermore, the BCSD engaged retired state circuit court Judge A. Victor Rawl, Sr. to conduct an independent investigation and render an impartial and objective opinion regarding whether Mrs. Kovach at all times pertinent to this matter (1) acted in good faith, and (2) acted within the scope of her employment. Judge Rawl concluded as follows: "I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course

and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District". See Exhibit 5. The evidence is overwhelming that all acts by Mrs. Kovach regarding the Bond Referendum were performed in good faith and solely for the purpose of benefitting the students of the Berkeley County School District and for no other reason. There was thus no *mens rea* that would support the prosecution of Mrs. Kovach.

#### CONCLUSION

For the reasons stated above and in her initial Motion to Dismiss, Mrs. Kovach respectfully moves and urges this Court to dismiss this case.

Respectfully submitted,

  
Jerry N. Theos  
URICCHIO, HOWE, KRELL, JACOBSON,  
TOROREK, THEOS & KEITH, P.A.  
17 1/2 Broad Street  
Charleston, South Carolina 29401

Charleston, South Carolina  
August 13, 2014

# **Attachment C**

Kwm

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS  
 COUNTY OF BERKELEY ) AMHERST FOR THE NINTH JUDICIAL CIRCUIT  
 INDICTMENT NO. 2014-GS-08-00266  
 STATE OF SOUTH CAROLINA )  
 VALLEY COUNTY, S.C. )  
 vs. ) ORDER DENYING DEFENDANT'S  
 ) MOTION TO DISMISS OR QUASH  
 ) THE INDICTMENT  
 AMY KOVACH, )  
 )  
 Defendants. )

This matter comes before the Court upon Defendants' Motion to Dismiss or Quash the Indictment. Having thoroughly considered the briefs and arguments presented at a hearing on this matter on October 28, 2014, the Court denies the Motion for the following reasons.

1.

Defendant first contends that she cannot be convicted of a violation of South Carolina Code Ann. § 8-13-1346, which states: "A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election." Defendant contends that the Berkeley County bond referendum in November 2012, a "ballot measure" as defined in South Carolina Code Ann. § 8-13-1300(9), is not an "election" pursuant to § 8-13-1346 because "ballot measure" was removed from the definition of "election" by a 2003 amendment.

The cardinal rule of statutory construction is that the plain language of the statute controls and is the best evidence of legislative intent. State v. Hercheck, 403 S.C. 597, 743 S.E.2d 798 (2013). Under South Carolina Code Ann. § 8-13-1300(9), an

C. Waters - AG Office  
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"election" is defined in relevant part as "a general, special, primary, or runoff election." Thus, the word election is used to define itself.

The American College Dictionary p. 442 (3rd ed. 1997), defines an "election", in part, as "the act or power of electing", and "the right or ability to make a choice". Further, the word "elect" is defined, in part, "to pick out; select," and "to decide, esp. by preference". Obviously, the plain and ordinary meaning of the general word "election" includes votes to approve a bond or not, as such votes are undoubtedly "a choice", "picking out" or "selecting", or "deciding, especially by preference". As such, a bond referendum like the one at issue in the present case clearly falls under the statutory definition of election. See, e.g. State v. Estridge, 320 S.C. 288, 291, 465 S.E.2d 91, 93 (Ct. App. 1995) (referencing dictionary definition in determining legislative intent).

Similarly, Black's Law Dictionary p. 516-17 (6th ed. 1996) defines "election", in part, as "the act or choosing or selecting one or more from a greater number of persons, *things, courses, or rights*". Further definitions therein include "the choice of an alternative", and "an *expression of choice* by voters of a public body politic, or as a means by which a choice is made by the electors" (emphases added). Under Black's definition, an "election" can include "a choice of persons to fill public office *or the decision of a particular public question or public policy*" (emphasis added). A bond referendum is a choice among "courses", a "choice of an alternative", an "expression of choice by voters", and most importantly, a "decision on a particular public question or public policy". The Court finds that the general statutory word "election" includes the bond referendum at issue here.

While the preceding argument is alone enough to settle the issue, other principles of statutory construction also lead to a conclusion that a bond referendum is included in the term "election". One principle of statutory construction is that when construing a statute, terms are not viewed in isolation, but rather in the context of the entire statute and its intended purpose. Jackson v. Charleston County School District, 316 S.C. 177, 447 S.E.2d 859 (1994). Another principle is that courts will not construe a statute in a way that leads to an absurd result or renders provisions in it meaningless. State v. Mimms, 410 S.C. 32, 763 S.E.2d 46 (Ct. App. 2014).

Here, to exclude a ballot measure or bond referendum from the definition of "election" would lead to an absurd result in portions of statutes being a nullity. First, South Carolina Code § 8-13-1309 is the statute that sets the reporting requirements and deadlines for ballot measure committees, and such public reporting requirements are a core function of the 1991 Ethics Act. That statute in no less than *four* places refers to a "ballot measure election" in setting the deadlines for the significant reporting and recordkeeping requirements. If the statutory term "election" could not include a ballot measure, as Defendant argues, then this provision would be inherently inconsistent and absurd, and a core function of the Ethics Act as it relates to committees would fail. If anything, the use of "ballot measure election" confirms - like the Black's Law Dictionary - that the word "election" is a general term referring to a choice by voters between persons for a position in some instances (an "elective office"), and between policy options in other instances (a "ballot measure").

Second, the statute under which Defendant was charged also highlights the illogicality of this argument. Section § 8-13-1346(A) provides that "a person may not use or authorize the use of public funds, property, or time to influence the outcome of an election," but it follows with subsection (C)'s exception:

This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

If subsection (A)'s use of "election" did not apply to ballot measures, as argued by Defendant, then subsection (C) would be a complete nullity - there would be no reason to expressly provide that subsection (A) did not prevent governmental entities from responding to informational requests in ballot measures, since ballot measures were not subject to subsection (A)'s prohibition anyway. Again, statutes will not be construed in a manner that renders any part absurd or a nullity.

Defendant also argues that she is not subject to subsection (C)'s prohibition because she is not a "governmental entity". "Governmental entity" is defined in subsection § 8- 13-100(17) as "the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed." As is inherent within its own definition, governmental entities can only act through their respective public officers and employees. Indeed, the whole Title of which these Ethics Act provisions are a part, Title 8, is called "Public Officers and Employees". Section 8- 13-1520 provides that any "person" who violates the Ethics Act is guilty of a misdemeanor, and if in the appropriate



instance a public officer or employee causes her agency to violate § 8-13-1346, then that "person" has committed a crime. Indeed, subsection (C) independently provides a mechanism for criminal liability for Defendant regardless of interpretation of subsection (A). To conclude otherwise would create the absurd result of making § 8-13-1346 a complete nullity, as public officials and employees could spend public funds in blatant advocacy during ballot measures affecting their funding, and could do so with impunity because people but not ballot measures are covered under section (A), and ballot measures but not people are covered under subsection (C). Such a result is completely inconsistent with the purposes of the Ethics Act and the 2003 Amendments.

2.

Defendant next argues that S.C. Code Ann. § 8-13-1346 is unconstitutionally vague. "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)). "The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies." Huber v. S.C. State Bd. of Physical Therapy Exam'rs, 316 S.C. 24, 26, 446 S.E.2d 433, 435 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. Toussaint v. State Bd. of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991). "[O]ne to whose conduct the law clearly applies does not have standing to challenge it for

vagueness as applied to the conduct of others." In re Amir X.S., 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)). State v. Green, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012). Additionally, "[w]hen the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." State v. Gaster, 349 S.C. 545, 549-50, 564 S.E.2d 87, 89-90 (2002). "This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution." State v. White, 348 S.C. 532, 536-37, 560 S.E.2d 420, 422 (2002).

Section 8-13-1346 is straightforward and easy to understand – it allows the objective providing of data and information relevant to a ballot measure which may be solely in the possession of the agency at issue, but precludes advocacy for or against a particular measure. While "influence the outcome of an election" is not specifically defined in the statute, "influence the outcome of an elective office" is. South Carolina Code § 8-13-1300(31) defines the term as "expressly advocating the election or defeat of a clearly identified candidate using words including or substantially similar to 'vote for', 'elect', 'cast your ballot for', 'Smith for Governor', 'vote against', 'defeat', or 'reject,'" and "communicating campaign slogans or individual words that, taken in context, have no other reasonable meaning other than to urge the election or defeat of a clearly identified candidate".

The State must show Defendant crossed the line from mere information into advocacy. However, this is a trial issue, not one for a motion to dismiss. If the State's evidence fails to show that Defendant crossed the line from mere communication of information into express advocacy, then the appropriate remedy is directed verdict or jury verdict at the appropriate time under the appropriate standards.

In our criminal justice system, the government has broad discretion regarding whom to prosecute, and if a prosecutor has probable cause to believe a defendant committed an offense defined by statute, the decision whether or not to prosecute generally rests entirely in his discretion. Wayte v. United States, 470 U.S. 598, 607 (1985); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Geer, supra. The constitutional balance of power between the administrative and judicial branches of government requires a presumption of regularity in prosecutorial decisions, and the courts must presume prosecutors have properly discharged their official duties. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872, 885 (2000); Geer, supra; see also United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926). To defeat this presumption, a criminal defendant must present "clear evidence to the contrary." Armstrong, 517 U.S. at 465 (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 [1926]); Khanu, 664 F.Supp.2d at 31. The reason for establishing and protecting these high burdens are important: Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the

Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." Id., at 607, 105 S.Ct., at 1530. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." Armstrong, 517 U.S. at 465.

Ultimately, again these are issues more appropriate for trial. The State provided sufficient evidence to the Grand Jury that it indicted her.

3.

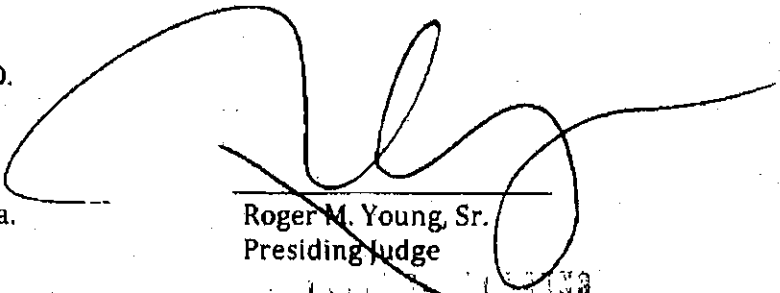
Lastly, Defendant contends that she lacks the *mens rea* necessary to violate section 8-13-1346. Again, this is a trial issue, and if the State's evidence fails to show that Defendant acted criminally, then the appropriate remedy is directed verdict or jury verdict at the appropriate time under the appropriate standards. "[A] trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court." Id. (citing State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977); Ex Parte State, 263 S.C. 363, 210 S.E.2d 600 (1974)). While a Defendant may object to an indictment for facially apparent defects under S.C. Code Ann. § 17-19-90, an indictment is properly drawn if "it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Ham, 259 S.C. 118, 191 S.E.2d 13 (1972); S.C. Code Ann. §

17-12-20. Title 17, Chapter 19 provides no other means for the dismissal of an indictment. Here, there are no facial defects, and any claims that the State failed to show any applicable *mens rea* is a question that only arises once the State has presented its proof before a jury at trial. The current claim is premature.

Therefore, the Defendant's Motion to Dismiss or Quash the Indictment is denied.

AND IT IS SO ORDERED.

W/3 2014  
Moncks Corner, South Carolina.



Roger M. Young, Sr.  
Presiding Judge

APR 11 2014  
CIRCUIT COURT  
OF SC #2134

# **Attachment D**

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**STATE ETHICS COMMISSION**

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**SUPPLEMENTAL MEMORANDUM OF INTERVIEW**

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**NAME:** Charles F. Reid, Clerk House of Representatives

**REPORT BY:** JAMES T. BAGNALL

**ADDRESS:** PO Box 11867  
Columbia, SC 29211

**PHONE:** O-803-734-2403

**DATE OF INTERVIEW:** 1/7/2019

**IN ATTENDANCE:**

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On January 7, 2019 I contacted Mr. Reid about an Ethics Commission Complaint filed against Representative Collins.

During the interview, Mr. Reid provided the following information:

- Mr. Reid stated no campaign related documents can be printed by Legislative Council Services staff per state law.
- Mr. Reid said the House does not have a policy or procedure for members regarding correspondence to constituents. Mr. Reid said the House Members are responsible for the content of documents they draft. The House does not have a designated staff person to review letters produced by House Members.
- Mr. Reid said there may be times when the staff at the Word Processing Center (WPC) are typing a letter for a House Member and the WPC staff person may question the content of a letter. The WPC staff person may recommend the House Member have the document reviewed by the House Legal Department.