

December 4, 2024

The Honorable Thomas Alexander
President of the Senate
South Carolina Senate
213 Gressette Bldg.
Columbia, SC 29201
Via email to Senate Clerk

RE: Election Contest for State Senate District 29; 2024 General Election
Withdrawal of Protest Filed by Gerald Malloy

Dear President Alexander,

This letter is written to advise the Senate that on December 2, 2024, the State Board of Canvassers received the withdrawal by Senator Gerald Malloy of the election protest he had filed on November 19, 2024, challenging the results of the 2024 general election contest for South Carolina Senate District 29. A hearing of the protest had been scheduled to be heard the morning of December 3, 2024.

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State Senate District 29 (District 29) encompasses all or portions of five counties: Chesterfield, Darlington, Lee, Marlboro and Sumter. Two candidates were on the ballots for District 29 in the 2024 General Election: Gerald Malloy and JD Chaplin. The election-day tabulation of ballots cast in this contest indicated that Chaplin had won the election by a margin of one percent or less of the total votes cast. Consequently, a mandatory recount of the ballots cast in that contest was conducted by the counties encompassed by District 29.ⁱ

As noted in both the protest filed by Senator Malloy and his withdrawal, the results of the recount conducted by the Board of Voter Registration and Elections for Lee County (Lee BVRE) varied significantly from its original tabulation conducted the evening of November 5, 2024. Though the recount performed by the Lee BVRE and by the other counties involved did not change the result of the election contest, the discrepancy in the Lee BVRE recount tally immediately drew the attention of the State Election Commission (SEC). The SEC began investigating this discrepancy even before Mr. Malloy filed his protest. A report of the results of this investigation was released on November 26, 2024, after the protest was filed (the November 26 report).

However, with regards to this report, what Senator Malloy's withdrawal labels as "a remarkable feat of reverse engineering" is nothing more than the result of the SEC acting within the scope of its power and duty to conduct post-election reviews and audits of county

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boards of voter registration and elections.ⁱⁱ Given the nature of the Lee County discrepancy, it would have been remarkable if the SEC *did not* immediately begin to investigate what had happened there. A failure to do so would have been, if anything, more injurious to the public's perception of election integrity than the recount variance itself.

Further, given the resources available to the SEC, there was nothing remarkable about the analysis provided by the November 26 report. In the end it was just the subtraction of counting errors present in the election day and recount tabulations. In brief, what SEC staff found was that pre-election test ballot votes were erroneously included in the vote tabulation conducted on November 5th. That test ballot data was not present during the recount tabulation, but a batch of ballots cast during early voting had been tabulated twice during the recount. Once these errors were accounted for and removed from the election day tabulation and recount tabulation, the apparent discrepancy between the election day tabulation and recount tabulation was almost entirely reconciled.ⁱⁱⁱ

To conduct its review of the Lee County recount, the SEC used every means reasonably available to it. This was primarily by communicating with the Director for the Lee County BVRE and by reference to election records provided to the SEC by the Lee County BVRE. The data provided included records relating to individual ballots cast by voters in the District 29 contest. These records are often referred to as "cast vote records," or CVRs.

The South Carolina State Constitution provides that every voter in the State enjoys the right to a secret ballot^{iv}. CVRs can be a powerful analytical tool, but in South Carolina their public release also poses the real risk that the identity of individual voters and how they voted can be discovered. There is nothing in CVR data that by itself can identify a voter, but the CVR data can be cross referenced with other publicly available information to do so. Because of this risk, it has been SEC policy since 2020 that CVRs produced from the current voting system should not be made publicly available. This policy has received support in multiple opinions of the South Carolina Attorney General, and the SEC has successfully defended this policy in court. With regards to this policy, the SEC is determined that voters' ballot choices will remain secret, and no voter's identity or voting choices were identified while the SEC analyzed the CVRs that were reviewed.

The withdrawal notes that as part of its analysis SEC did not review event log data recorded by the election equipment used in Lee County to conduct the election contest for District 29. This is because the SEC focused on the best information source available to it: individual ballots cast during the election that included the votes cast in the District 29 contest. This was the record that mattered most and that was subject to retabulating during the mandatory recount.

That these ballots were available at all was due a deliberate choice by the General Assembly made in 2019 to adopt a voting system that used paper ballots to conduct elections. Before the 2020 general election, the State had been using a voting system that did not use paper ballots. The General Assembly's motivation for adopting a new voting system was in part specifically so that paper ballots would be used in South Carolina. This would help ensure election integrity and provide a distinct reviewable record of voter's choices. For this reason, those are the records the SEC sought and reviewed in order to assess the discrepancy in the Lee County recount. They are also the most relevant source of data, given what was at issue was a discrepancy between ballot tabulations conducted on election day and then again during a mandatory recount. Further, the SEC is confident that its report of November 26, 2024 is an accurate assessment and resolution of the cause of the discrepancy revealed during the mandatory recount. Finally, with regards to experts on voting systems, amongst the foremost experts on the voting system currently in use in South Carolina are the SEC staff working with it on a day-to-day basis and who are familiar with its features, capabilities, and how it is to be used by county BVREs when conducting elections.

In summary, during the investigation of the discrepancies in the recount conducted by the Lee BVRE, SEC staff identified errors committed during both the recount tabulation and the election day tabulation. SEC staff reviewed cast vote records to discover these errors, but in doing so did not identify particular voters or how they voted. Because CVRs can be used to identify individuals' vote choices when cross referenced with other publicly available information, the SEC refused to release the cast vote records reviewed to conduct its investigation. This refusal is consistent with South Carolina law and the SEC's already existing policy that was established to protect the right of every citizen to a secret ballot. Finally, the SEC issued the November 26, 2024, report in keeping with its administrative duty to conduct post-election investigations and to ensure public confidence in vote tabulations. The SEC is confident that its analysis of the Lee County recount discrepancy is correct.

The three largest concerns of the Commission during Senator Malloy's protest were to ensure fairness in the voting process, accuracy in the counting of votes, and to protect the secrecy of the ballot. While state law does not grant the SEC the authority to hold county election offices or their boards accountable, the SEC will be further investigating the processes and actions that led to the irregularities found in the report. Now that we know what happened, we need to find out why it happened. The SEC is committed to utilizing all available resources to work with Lee County to ensure that the county adheres to all election laws, policies, and procedures in the future.

With Senator Malloy’s withdrawal of his protest received and accepted by the State Board of Canvassers, the SEC considers that this matter is concluded.

For the Commission:



Howard M. Knapp
Executive Director

ⁱ S.C. Code § 7-17-280, “Mandatory recounts”. Note that the SEC sitting as the State Board of Canvassers ordered this recount on November 14, 2024; the final results of the recount as certified by each county, including Lee County, were received by the next morning, when the State Board performed its ministerial duty to approve the results as certified by the counties. S.C. Code § 7-17-240.

ⁱⁱ The State Election Commission is responsible for, among other duties, conducting “reviews, audits, or other postelection analysis of the county boards of voter registration and elections . . . to ensure those boards’ compliance with the requirements with applicable state or federal law or State Election Commission policies, procedures, or standardized processes with regard to the conduct of elections. . . .” (S.C. Code § 7-3-20(D)(3)).

ⁱⁱⁱ The report determined that once the recount errors were accounted for, the recount tabulation contained two additional votes for Malloy that were not present in the election day tabulation.

^{iv} S.C. CONST Art. II, §§ 1, 2.