

No. 19-7306

**In the
Supreme Court of the United States**

DMITRY PRONIN,

Petitioner,

v.

CHARLES WRIGHT, NEAL URCH, and L.
BLACKWELL,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

Anne R. Culbreath
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
arculbreath@wjlaw.net
(864) 672-6713

Counsel for Respondents

QUESTION PRESENTED

Though the Petitioner presented questions that reflect his dissatisfaction with the sound and correct rulings of the District Court, the Respondents assert that the only question before this court is whether Petitioner presented any question or argument that sets forth a compelling reason to grant his Petition for Writ of Certiorari.

The questions presented by the Petitioner:

1. “May an United States District Judge construe legal argument for a party in a civil rights lawsuit, an argument that the party itself never raised?”
2. “Did Honorable Henry M. Herlong construe such argument for Sheriff Charles Wright, Neal Urch and L. Blackwell?”
3. “Can circumstantial evidence create an issue of material fact barring summary judgment?”
4. “Did the U.S. Court of Appeals for the 4th Circuit impermissibly allow the District Court to asses credibility on a summary judgment motion, and to decide disputed facts?”

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INTRODUCTION

On November 15, 2016, the Petitioner, Dmitry Pronin, filed suit in the United States District Court for the District of South Carolina against Charles Wright, Neal Urch, and L. Blackwell. (Complaint, ECF No. 2-2). In his Complaint, Petitioner alleged causes of action under 42 U.S.C. § 1983, including claims for violations of the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, which allegedly occurred between June 27, 2016 and August 22, 2016. During that time, the Petitioner was temporarily housed at the Spartanburg County Detention Center (“Detention Center”) on a *Writ of Habeas Corpus Ad Testificandum* to testify as a witness in a separate federal matter. Per the *Writ*, he was to “remain in the custody of the U.S. Marshals Service during his hold while he was temporarily housed as a federal prison inmate at the Detention Center”. See Pronin v Bryant, 6:13-cv-03434-KFM, ECF No. 162, June 7, 2016 *Writ*, noting that Petitioner would remain in the custody of the U.S. Marshals Service and ECF No. 2-2.

From June 27, 2016 until August 22, 2016 the

Petitioner was held at the Detention Center on a *Writ of Habeas Corpus Ad Testificandum*. (Mot. Summ. J. Ex. A (Freeman Aff. at ¶ 2), ECF No. 174). Petitioner was weighed upon his arrival at the Spartanburg County Detention Center. On June 27, 2016, the date he arrived, he weighed 138 pounds. (Mot. Summ. J. Ex. B (White Aff. at ¶ 2), ECF No. 174). Petitioner filed numerous complaints regarding a variety of subjects while at the Detention Center. On July 6, 2016 he filed a “grievance” asserting that the facility provided food portions that were “way less than 2000 calories”, referenced the Eighth Amendment, and asserted that the “so-called food” would not be consumed “by a dog nor cat.” (Mot. Summ. J. Ex. C (Blackwell Aff. at ¶ 2), ECF No. 174). While the Petitioner bemoaned the food at the Detention Center, the grievance did not include any specific disputes, events, dates, or incidents nor did it assert Petitioner was negatively affected by any specific act, deprivation, or violation of any policy. Because there were no disputes that could actually be resolved, Respondent Blackwell marked it as “received.” The Petitioner had medical appointments scheduled for

July 6, 2016 and July 7, 2016 to obtain base level labs and medications, but Petitioner refused to attend the appointments. (Mot. Summ. J. Ex. B (White Aff. at ¶ 4), ECF No. 174). On July 15, 2016 the Petitioner filed a medical request requesting medical examination. He believed he was undernourished and requested that he receive a can of Ensure in the pill line. He asserted in the medical request that he received Ensure before his tenure at the Detention Center. In the request he also remarked, “...in couple other county jails where I was considered underweight, even with bigger weight, like e.g., 143 pounds – 5 pounds more – at Baltimore Co. Det. Center, 2013 – 2014, and in Salem County Corr. In 2011...” [sic]. Summer Jolley responded to the medical request and advised “we will weigh you.” The request was considered resolved on July 18, 2016 (Mot. Summ. J. Ex. B (White Aff. at ¶ 5), ECF No. 174). On July 17, 2016 the Petitioner filed a medical grievance again requesting Ensure on the pill line. In his medical grievance, Petitioner admitted that he was “...6’1, and only 138 pounds at the intake[.]” (Mot. Summ. J. Ex. A (Freeman Aff. Ex. B (July 17, 2016 Grievance at

68), ECF No. 174). He again referenced the Eighth Amendment in his grievance and stated, “what kind of fake, fraud, illegal operation you running here?” *Id.* Ms. Jolley responded to the grievance on July 18, stating that the Detention Center would weigh him, and indeed, he was examined and weighed by the medical staff on July 19. (Mot. Summ. J. Ex. B (White Aff. at ¶¶ 6-8), ECF No. 174).

On July 18, 2016, nursing staff ordered weekly weights of Petitioner (*Id.* White Aff. at ¶ 7.) On July 19, 2016 Nurse Ebony Black examined and weighed the Petitioner. The Petitioner weighed 138 pounds. (*Id.* White Aff. at ¶ 8) Petitioner filed a grievance on the same date requesting Ensure. He also disagreed with nursing staff’s decision to monitor his weight on a weekly basis for four weeks. Carol Fernandez, a medical staff member, responded to the grievance and advised that the nurse practitioner would decide as to whether the Petitioner would receive an order for Ensure and the grievance was resolved on July 23, 2016. On August 9, 2016, Nurse Practitioner Barbee reviewed Petitioner’s recorded weights. Petitioner weighed 138 pounds on the date of his arrival, June 27, 2016, to the

Detention Center; he weighed 138 pounds on July 19, 2016; he weighed 140 pounds on July 26, 2016; and he weighed 141 pounds on August 2, 2016. As such, Nurse Practitioner Barbee determined that Petitioner had not lost weight while at the Detention Center. (*Id.* White Aff. at ¶ ¶ 10 - 11). The Detention Center utilizes a state licensed dietitian, Carole Mabry, to routinely analyze, review, and provide recommendations as to the Inmate Daily Menus. (Mot. Summ. J. Ex. E (Mabry Aff. at ¶ 5), ECF No. 174). Per Carole Mabry, the menus utilized during the time period of Petitioner's detention met the nutrition and caloric requirements and standards as established by the Institute of Medicine Dietary Reference Intakes and USDA Food Database. (*Id.* Mabry Aff. at ¶ ¶ 5-6).

Respondents filed their Motion for Summary Judgment and accompanying exhibits on September 9, 2018 pursuant to the Court's scheduling order. (ECF No. 174). On April 2, 2019, the District Court issued a Report and Recommendation granting Respondents' Motion for Summary Judgment. (ECF No. 193). The Report and

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Recommendation stated that “Plaintiff has not offered any evidence, other than his own conjecture or speculation, to show that he suffered any injury from the meals he was served at SCDC from June to August 2016.” (EFC No. 193) Further, the Report and Recommendation stated, “the evidence is undisputed that Plaintiff weighed 138 pounds when he arrived at SCDC and he gained at least three pounds while he was housed there.” (EFC No. 193). On May 3, 2019, Petitioner filed his Objections to the Report and Recommendation. (ECF No. 199).

On May 13, 2019, the District Court issued an Order adopting the Report and Recommendation granting Respondents’ Motion for Summary Judgment. (ECF No. 201). In the Order granting Respondents’ Motion for Summary Judgment, the District Court held that the Petitioner’s written Objections to the Report and Recommendation were not specific, were unrelated to dispositive portions of the Magistrate’s Report and Recommendation, or merely restated his claims. (ECF No. 201). However, the District Court was able to glean one specific objection, “Pronin objects to the magistrate judge’s

conclusion that there is no genuine issue of material fact regarding Pronin's alleged injury." (ECF No. 201). The District Court's Order held that Petitioner did not create a genuine issue of material fact regarding his alleged weight loss at SCDC and that Petitioner had not provided any evidence other than his own assertions that he weighed 165 pounds at his arrival to SCDC. (ECF No. 201). The Order also noted that Petitioner himself admitted he was underweight and weighed 138 upon arrival at SCDC in his July 17, 2016 grievance, where he stated, "I am underweg[t]sic] – 6'1, and only 138 pounds at the intake[.]" (ECF. No. 201); and (Mot. Summ. J. Ex. A (Freeman Aff. Ex. B (July 17, 2016 Grievance at 68), ECF No. 174). The District Court correctly concluded that there was no genuine issue of any material fact and granted Summary Judgment in favor of the Respondents.

Petitioner filed his Notice of Appeal in the Court of Appeals for the Fourth Circuit on May 28, 2019, and the Fourth Circuit received Petitioner's Informal Opening Brief on July 5, 2019. The Fourth Circuit filed an unpublished opinion on November 15, 2019. In the

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opinion, the Fourth Circuit reviewed the record and found no reversible error. The court affirmed the decision of the District Court.

REASONS TO DENY THE PETITION

Petitioner fails to present any compelling reason to grant his Petition for Writ of Certiorari. Petitioner has not argued that his case involves a conflicting decision of United States Courts of Appeal, a conflicting decision of a state court of last resort on a federal question, an important question of federal law conflicting with the decisions of the United States Supreme Court or that should be settled by the United States Supreme Court. He cannot make such arguments because they simply do not exist. Petitioner has set forth baseless arguments that simply highlight his dissatisfaction with the rulings of The United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit.

Petitioner's arguments certainly do not set forth any compelling reason for the United States Supreme Court to grant review. Further, the Petitioner's arguments set forth

in the Writ are also false and contrary to the prior rulings of the District Court. Petitioner argued that Judge Herlong construed a legal argument for Respondents. However, Judge Herlong never construed a legal argument for Respondents. Petitioner claimed that Judge Herlong only considered one piece of evidence and based his decision to grant summary judgment on that one piece of evidence. However, Judge Herlong issued a thorough opinion that considered all of the evidence, even Petitioner's circumstantial evidence that he claimed bars summary judgment. Petitioner also argued that the District Court assessed credibility and decided disputed facts. However, the District Court applied the facts correctly and did not assess witness credibility or decide disputed facts. Judge Herlong properly determined that Petitioner had not set forth any evidence to create a genuine issue of material fact. Petitioner's arguments, at a gracious best, simply argue that the lower Court committed an error consisting of erroneous factual findings or the misapplication of a properly stated rule of law. The Petitioner's Petition for Writ of Certiorari has not set forth any compelling reason

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for this court to grant review. Accordingly, Petitioner's Writ of Certiorari should be denied.

ARGUMENT

I. PETITIONER FAILS TO PRESENT ANY COMPELLING REASON TO GRANT HIS PETITION FOR WRIT OF CERTIORARI.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. U.S. Sup. Ct. R. 10. It will only be granted for compelling reasons. Id. Rule 10 lists examples indicating the character of the reasons the Court may consider before accepting a case for review. Id. These include: conflicting decisions of United States Courts of Appeal, conflicting decisions of state courts of last resort on a federal question, and an important question of federal law conflicting with the decisions of the United States Supreme Court or that should be settled by the United States Supreme Court. Sup. Ct. R. 10(a)-(c). A petition for a writ of certiorari is rarely granted when there is an allegedly erroneous application of the facts to a properly stated rule of law. Id. (emphasis added).

Petitioner's Petition for Writ of Certiorari does not set forth any compelling reason for the United States Supreme

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Court to grant review. Petitioner's arguments center around Petitioner's dissatisfaction with the correct legal decisions of The District Court and the United States Court of Appeals. At best, Petitioner argues that alleged erroneous factual findings or misapplication of a properly stated rule of law should grant him review. However, The District Court did not make any erroneous factual findings and applied the law correctly. Further, Rule 10 clearly states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Petitioner's Petition for Writ of Certiorari should be denied.

Though the Respondents believe the Petitioner has set forth improper questions for a petition for writ of certiorari, they will address the Petitioner's arguments.

II. THE HONORABLE HENRY M. HERLONG DID NOT CONSTRUE AN ARGUMENT FOR RESPONDENTS AS PETITIONER ASSERTS.

Petitioner argued that his Petition for Writ of Certiorari should be granted because the Honorable Henry M. Herlong construed a legal argument for Respondents.

(Petr's Writ of Cert. pp. 5 & 9). Petitioner further argued that Judge Herlong granted summary judgment in favor of Respondents solely on the argument that he allegedly construed for Respondents. Id. Petitioner argued that Judge Herlong considered evidence that Respondents never "mentioned." Id. Petitioner alleged Judge Herlong construed an argument for Respondents by considering Petitioner's own grievance as evidence where he stated that he weighed 138 pounds at intake. Id. The grievance was submitted in support of Respondents' Motion for Summary Judgment. (Mot. Summ. J. Ex. A (Freeman Aff. Ex. B (July 17, 2016 Grievance at 68), ECF No. 174). The Petitioner's grievance was properly submitted as evidence and that evidence was properly considered by the District Court.

In Judge Herlong's Order granting Summary Judgment, Judge Herlong simply noted that Petitioner himself admitted he was underweight and weighed 138 upon arrival at SCDC. (ECF No. 201 p. 4). The grievance authored by Petitioner and cited by Judge Herlong stated,

“I am underwegt[sic] – 6’1, and only 138 pounds at the intake[.]” (ECF. No. 201 p. 4); and (Mot. Summ. J. Ex. A (Freeman Aff. Ex. B (July 17, 2016 Grievance at 68), ECF No. 174). Clearly, Judge Herlong did not “construe a legal argument” and simply referred to evidence properly before the court. Accordingly, Petitioner’s Petition for Writ of Certiorari should be denied.

Petitioner also argued that Judge Herlong based his opinion to grant Respondents’ Motion for Summary Judgment solely on this one piece of evidence. (Petr’s Writ of Cert. p. 9). This assertion is demonstrably false. United States Magistrate Judge, Kaymani D. West, held in the Report and Recommendation that Summary Judgment should be granted in favor of Respondents. (ECF 193). Petitioner made multiple objections to the report and recommendation; however, the court was only able to glean one coherent objection. (ECF 174 p. 4). “Pronin objects to the magistrate’s judge’s conclusion that there is no genuine issue of material fact regarding Pronin’s alleged injury. (ECF 201 citing Objs. 12, ECF No. 199). Accordingly, Judge Herlong held that Petitioner did not submit sufficient

evidence to create a genuine issue of material fact regarding his alleged weight loss at SCDC. (ECF 201).

Judge Herlong's Opinion and Order then set forth multiple reasons why Petitioner had not submitted any evidence to create a genuine issue of material fact. Id. First, Judge Herlong stated that Petitioner had not provided any evidence, apart from his own assertions, that he weighed 165 pounds upon his arrival to SCDC. (ECF 174 p. 4). Next, he indicated that even the Petitioner acknowledged that he weighed 138 pounds when he arrived at SCDC. Id. Further, Judge Herlong discussed that Petitioner only provided evidence in the form of medical documents regarding his weight six months before his arrival at SCDC and medical records from after his departure from SCDC. Id. Petitioner's argument is inaccurate, and the Respondents ask this Court to deny the Writ of Certiorari.

Petitioner cited multiple cases in an attempt to support his position that Judge Herlong violated legal precedent by allegedly making an argument for Respondents. (Petr's Writ of Cert. p. 5). As discussed above, Judge Herlong did not introduce evidence or make an argument on behalf of

the Respondents. Therefore, the cases that Petitioner cites are irrelevant and moot. Further, the cases that Petitioner cites do not support his attempted argument. All of the cases Petitioner cites in his brief¹ are cases that discuss the liberal pleading standards afforded to *pro se* litigants. The cases discuss that the liberal pleading standards afforded to *pro se* litigants do not require the courts to make arguments on behalf of *pro se* litigants. Petitioner has not provided any precedent that supports his factually and legally inaccurate position.

Petitioner's argument that Judge Herlong construed an argument for the Respondents is false as evidenced by Judge Herlong's Order and the evidence produced by Respondents in support of their Motion for Summary Judgment. Petitioner makes a false argument that Judge Herlong construed an argument for Respondents and fails to provide any precedent to support his position. Most

¹ Small v. Endicott, 988 F.2d 411 (7th Cir. 1993); Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985); House v. Aiken County Nat'l Bank, 956 F.Supp. 1284, 1290 (D.S.C. 1995); Weller v. Department of Social Services, 901 F.2d 387 (4th Cir. 1990); Small v. Endicott, 998 F.2d 411 (7th Cir. 1993); and Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

importantly, Petitioner has failed to show a compelling reason for the United States Supreme Court to grant review. Accordingly, the United States Supreme Court should deny Petitioner's Petition for Writ of Certiorari.

**III. PETITIONER'S ARGUMENT THAT
CIRCUMSTANTIAL EVIDENCE CAN CREATE AN
ISSUE OF MATERIAL FACT BARRING SUMMARY
JUDGMENT IS NOT A PROPER REASON TO
GRANT PETITIONER'S PETITION FOR WRIT OF
CERTIORARI.**

Petitioner alleged that he provided multiple Federal Bureau of Prisons medical records and his first-hand accounts of violations that occurred at SCDC. (Petr's Writ of Cert. p. 6). Petitioner admitted that most of his evidence is circumstantial. *Id.* Petitioner stated that circumstantial evidence can create an issue of material fact barring summary judgment. *Id.* citing Simms v. Hardesty, 303 F. Supp. 2d 656, 667 (D. Md. 2003), *aff'd*, 104 Fed. Appx. 853 (4th Cir. 2004). Petitioner correctly noted that Simms does not have precedential value because it is an unpublished opinion. (Petr's Writ of Cert. p. 6). Petitioner further argued that "Summary Judgment was improper where defendant's material one piece of evidence recited by Hon.

Henry M. Herlong did not meet the burden of negating plaintiff's allegation of severe undernourishment and abnormal weight loss while in SCSD..." (Petr's Writ of Cert. p. 7).

Judge Herlong addressed and analyzed all of the evidence, including the "evidence" that Petitioner claimed was enough to bar summary judgment. From Judge Herlong's Order (ECF 201), "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Ballinger v. N.C. Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987) (internal quotation marks and citation omitted). Judge Herlong addressed Petitioner's own assertions that he weighed 165 pounds at intake. Judge Herlong addressed the medical records Petitioner submitted, and further noted that said records did not reflect Petitioner's weight immediately before or after his arrival at the Detention Center. Judge Herlong held that Petitioner's evidence did not support his allegation that he lost 27 pounds during his confinement.

Judge Herlong considered all evidence submitted by Petitioner and held that the evidence did not create a genuine issue of material fact and correctly concluded that Petitioner's mere allegations did not create a question of material fact.

**IV. THE U.S. COURT OF APPEALS FOR THE
FOURTH CIRCUIT AND THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF SOUTH
CAROLINA DID NOT IMPROPERLY ASSESS
CREDIBILITY AND DECIDE DISPUTED FACTS ON
SUMMARY JUDGMENT.**

Petitioner argued that the United States Court of Appeals for the Fourth Circuit "decided an important Federal question in a way that conflicts with relevant decision [sic] of this Honorable Court..." (Petr's Writ of Cert. p. 7). Petitioner stated, "the court is not supposed to decided disputed facts or assess credibility on a summary judgment motion." (Petr's Writ of Cert. p. 7). Petitioner cites a myriad of cases to support his proposition².

² "Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 111 S.Ct. 2419 (1991); Anderson v. liberty Lobby, Inc. 477 U.S. 242, 255, 106 S.Ct. 2505 (1986); Wilson v. Williams, 997 F.2d 348, 350-51 (7th Cir. 1993); Gray v. Spillman, 925 F.2d 90, 95 (4th Cir. 1991); Titran v. Ackman, 843 F. 2d 145, 147 (7th Cir. 1990). (Petr's Writ of Cert. pp. 7-8)

Petitioner further argued that the South Carolina District Court deviated from accepted summary judgment procedure by weighing evidence and assessing credibility on summary judgment, which if not overturned, would undercut Supreme Court precedent “such as Masson v. New Yorker Magazine, Inc. 501 U.S. 496, 520, 111 S.Ct. 2419 (1991) and Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 255, S.Ct. 2505 (1986).” (Petr’s Writ of Cert. p. 9).

First, Petitioner’s argument stems from his dissatisfaction of Judge Herlong’s correct and legal analysis at the summary judgment stage. Again, Petitioner argued that Judge Herlong allegedly “decided disputed facts” and “assessed credibility”. Petitioner stated, “The U.S. District Court for the District of South Carolina, by giving the one defendants’ piece of evidence (the grievance) more weight than all Pronin’s direct and circumstantial evidence, impermissibly assessed credibility, and decided disputed facts on summary judgment motion.” (Petr’s Writ of Cert. p. 7). As discussed above, this argument is false. It seems that Petitioner believes that all he needed to do in order to overcome summary judgment is claim that some

fact is in dispute. However, as Judge Herlong held, that is not the appropriate standard. “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Ballinger v. N.C. Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987) (internal quotation marks and citation omitted). The Supreme Court has held that the summary judgment standard does not mean that any factual dispute will defeat the motion. Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202.

Judge Herlong did not assess credibility or decide disputed facts. Herlong simply stated the obvious: “Although Pronin disputes Defendant’s records that he weighed 138 pounds upon his arrival to SCDC, he has failed to provide any evidence, apart from his own assertions, that he weighed 165 pounds upon his arrival to SCDC.” (ECF No. 201 p. 4). In light of all of the evidence that Judge Herlong considered, Petitioner’s weight of 138 pounds was not even a disputed fact. Petitioner failed to

provide any evidence which created a genuine issue of a material fact. Judge Herlong properly held that there was no genuine issue of material fact as to Petitioner's alleged weight loss. Judge Herlong came to this conclusion without improperly assessing credibility or deciding disputed facts.

The case law that Petitioner cited in support of his argument does not render any proper issue for The United States Supreme Court. Petitioner relied heavily on Anderson v. Liberty Lobby, Inc., however, the United States Supreme Court in Anderson reiterated that there must be a genuine dispute regarding material facts. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Further, this Court also held that a party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Though the Petitioner set forth many "mere allegations," he failed to set forth any genuine issue of material fact. The lower courts correctly determined the Respondents were entitled to Summary Judgment. Accordingly, Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petitioner has failed to assert any compelling reason for this Court to grant his Writ of Certiorari. The Respondents therefore humbly request that this Court deny his Petition for Writ of Certiorari.

Respectfully submitted,

s/ Anne R. Culbreath
Anne R. Culbreath (Federal Bar #07266)
WILLSON JONES CARTER & BAXLEY, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
(864) 672-3711 (Phone)
(864) 373-7055 (Fax)
arculbreath@wjlaw.net
Attorney for Respondents

February 14, 2020
Greenville, South Carolina