21-5209

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

C. Collie,
Petitioner,

v.

SCCLC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

C. Holmes
P.O. Box 187
Sullivans Island, SC 29482
843.883.3010
For Petitioner

QUESTIONS PRESENTED

1. Whether this Court should grant writ of certiorari where no other review is available with stay pending review to address the state court of last resort's unsupported, arbitrary, and/or capricious March 29, 2021, order, which grants punitive relief that was not requested without notice and without just cause while denying without comment counsel's timely reasonable request for opportunity to be heard, all at the behest of Disciplinary Counsel (DC) John Nichols who discussed the matter in the context of his prospective representation of the petitioner in this matter prior to his employment as head of the office of DC.

2. Whether the revised South Carolina Frivolous Proceedings Act (SCFPA), S.C. Code § 15-36-10, is unconstitutional on its face or as applied in violation of the First, Fifth, Eighth, and/or Fourteenth Amendments.

LIST OF PARTIES

C. Collie Holmes, Petitioner

SCCLC, South Carolina Commission on Lawyer Conduct, Respondent

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

SUPREME COURT

FEDERAL COURTS

STATE COURTS

CONSTITUTIONAL PROVISIONS

STATE STATUTORY PROVISIONS

OPINIONS BELOW

The orders on appeal in this matter are dated March 9, 2021. Petition for Rehearing was denied on March 29, 2021.

JURISDICTION

The Petition for Rehearing was denied by order filed March 29, 2021. This Court's jurisdiction rests on 28 U.S.C. Section 1257 and *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (review granted where no other appellate review was available).

CONSTITUTIONAL PROVISIONS AT ISSUE

Amendment I

Religion and Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment V

From the Bill of Rights

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII.

Excessive Punishments Strictly Prohibited

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV.

Rights Guaranteed:
Privileges and Immunity of Citizenship,
Due Process, and Equal Protection.

SECTION I. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTORY PROVISIONS AT ISSUE

SCFPA: S.C. Code Ann. § 15-36-10 through 15-36-50 (2005).

Revised SCFPA: S.C. Code Ann. § 15-36-10 (Supp. 2009).

FACTS

Petitioner is a practicing physician who retired from the practice of law with Legal Aid before medical school and has never had a client complaint. In 2002, the petitioner filed suit against Haynsworth as successor to the firm, which changed names over time, but is commonly known as Sinkler & Boyd. (Summons and Complaint April 2002; Amended Complaint 4-6-07) Dr. Holmes had hired a former classmate at the law firm who was elevated to Director of the South Carolina Department of Revenue. Thereafter, Attorney James Becker represented the claims against a hospital, which revoked without notice and without just cause, Dr. Holmes' ability to treat patients in the hospital at the behest of a large incision cataract surgeon who wanted to eliminate competition from modern small incision cataract surgery and fabricated a violation of a trivial bylaw provision as a pretext to protect his monopoly. Dr. Holmes, in her lawsuit against Haynsworth, alleged they committed legal malpractice when they lost a temporary injunction preserving the status quo because they held off on responding to a motion to dissolve the temporary injunction in federal court while demanding more money until the deadline to respond had passed, failing to timely appeal the loss of the temporary injunction, losing the federal lawsuit claims because a hospital cannot conspire with itself, and then drafting a State Court complaint advising filing the complaint pro se when the State law claims were declined by the Federal Court with directions for filing in the State Court. (Summons and Complaint April 2002; Amended Complaint 4-6-07) In consideration of the duty to mitigate and though compromised by Haynsworth, the State

Court case was resolved in petitioner's favor with admission that there was never any issue regarding patient care.

Haynsworth falsely claimed they did not do business in Charleston County in order to wrongfully obtain transfer of venue in the legal malpractice case to Richland County in July of 2002. (Order for change of venue to Richland 7-22-02) Five years later, on April 6, 2007, the Richland County Circuit Court changed venue again and returned the case to Charleston County. (Order changing Venue to Charleston 4-6-07) The Defendants moved for Summary Judgment, which was denied. (Form 4 Order denying Summary Judgment; Order granting post-trial motions, 11-18-09 page 3) Defendants' own expert, Professor John Freeman, testified that defendants deviated from the standard of care when they threatened to prejudice the case in order to extract fees and stated further, "Let me be real clear on this. I-- I consider that would be unethical. I consider that would be a form of blackmail or extortion and criminal in South Carolina to do that." Transcript Excerpt, June 11, 2009, in Case No. 2007-CP-10-1444. The Court granted a directed verdict, ending the jury trial before a verdict could be rendered. (Order granting Directed Verdict 7-14-09) After the directed verdict, Haynsworth moved for sanctions against the petitioner and invoked the inapplicable revised S.C. Code 15-36-10, the South Carolina Frivolous Proceedings Sanctions Act (FPA). Plaintiff responded, based on governing case law, that the claims could not be considered frivolous when the Court had found that the record presented a genuine issue of material fact for trial by jury in denying Haynsworth's summary judgment, thereby precluding a finding the claims are frivolous and precluding sanctions. (Plaintiff's return to motion for sanctions 9-21-09) The same

judge who had denied summary judgment and ruled there was no intent found the action to be frivolous and granted $200,000.00 in sanctions as well as non-monetary sanctions under the inapplicable revised FPA. (Order granting Sanctions 11-18-09) petitioner appealed the directed verdict and the sanctions award, but was unsuccessful. That inapplicable revised FPA Haynsworth order was then wrongfully used to justify retroactive application of the inapplicable revised FPA in the case appended to the RTSC petition herein.

In 2011, the Appellate Court issued an opinion in *Southeastern Site Prep Llc v. Atl. Coast Builders*, 394 S.C. 97, 713 S.E.2d 650 (S.C. App., 2011), in which it held that the less burdensome 2005 revised FPSA "reasonable attorney" standard applied to actions which arose after July of 2005. The Haynsworth action arose prior to 2005 and was filed in 2002. Petitioner filed Rule 59(e) request for reconsideration (Motion for Reconsideration 7-2-15) and a Rule 60 motion to alter or amend. (Rule 60 motion 8-5-15). Neither has been decided.

Later on, Haynsworth mailed a so-called "verified" petition without verification to the petitioner on December 19, 2016, and attempted to file a petition for supplemental proceeding, however, the Charleston County website and docket show filing fees were not paid in full which is a fatal jurisdictional defect. S.C. Code § 14-11-310. petitioner filed a Motion to Dismiss the petition on December 30, 2016. A true copy of the order of reference filed 1-3-17 shows it is incomplete with a final order to follow. (Petition 1-3-17) On January 12, 2017, petitioner moved for sanctions against Haynsworth who, she alleged, had submitted false statements in the petition and demand letter. (Motion for

Sanctions 1-12-17) On February 1, 2017, petitioner also moved for the Court to alter or amend the incomplete order of reference because, including but not limited to, disposition on the pending Rule 60, SCRCP, motion to alter or amend the 2009 judgment is a condition precedent to supplemental proceeding. The referee/master then issued an ex parte order without notice to petitioner or meaningful opportunity to be heard on February 9, 2017, rejecting all of petitioner's previously filed and future motions, including the Rule 60, SCRCP, motion, citing to an unnamed, unspecified December 3, 2009, Order from a different case. That Order is directed to clerks of court regarding filing in the hospital matter. (Order 2-9-17) petitioner appealed the February 9, 2017, Order on the basis that, including but not limited to, it affected her substantial rights and the constitutionally protected right of self-representation and due process. Intervening new case law in *Brooks* supported the appeal. *Brooks v. CCCID and OID*, South Carolina Court of Appeals, decided February 15, 2017, App. Case No. 2014-002477 (Remittitur sent March 3, 2017). Despite the novel issues, the pending appeal, and exclusive appellate jurisdiction, the Respondent and the referee/master went on to require the petitioner to submit to hearings and discovery (Order of 3-10-17), and granted motions to quash attempts to depose the Respondents' witnesses. (Order 3-14-17) It also sanctioned her and held her in contempt when she tried to explain exclusive appellate jurisdiction vested while the appeal was pending. (Motion to compel and for sanctions 6-5-17; Order 6-21-17; Order 6-23-17) Jurisdiction was returned to the Circuit Court in November of 2017 by remittitur (Order and Remittitur 11-30-17) after the referee/master had sanctioned the petitioner another $2,500.00 in attorneys fees without jurisdiction to do so. (Transcript 6-16-17)

On April 19, 2019, the petitioner filed a motion requesting relief on several grounds from the Circuit Court, including but not limited to, denial of due process, self-representation, and constitutional rights. (petitioner's motion 4-19-19) The Court's response was to issue an Order entitled "Order Denying Filing." (Order 5-24-19) In a one paragraph Order, the Court cites to the *Doe v. Duncan* Order from December 2009 and quotes, "Clerks of Court in this state to refuse to accept further filings from Petitioner in actions related in any way to the revocation of her medical staff privileges at East Cooper Community Hospital." The terse Order is inadequate for meaningful judicial review and simply refuses to acknowledge anything that petitioner filed, thus denying the right to due process and self-representation yet again. petitioner timely appealed, challenging the consistent denials of her due process and self-representation rights throughout this case, as all orders in the underlying action have been appealed. The petitioner argues that the entire supplemental proceeding and all orders arising therefrom should be vacated. The Court should consider intervening new case law, including but not limited to, the *Brooks, supra,* case and *Southeastern Site Prep,* which ruled the 2005 revised FPSA is inapplicable to the instant case which was filed in 2002. *Id.*; *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 713 S.E.2d 650 (S.C.App. 2011).

Importantly, directed verdict in the *Haynsworth* case was granted to two of the three defendants on insufficient service. *Holmes v. Haynsworth PA,* 760 S.E.2d 399 (2014). After the individual defendants appeared, testified, and defended at trial, the trial judge granted directed verdict on the grounds of insufficient service. Former Chief

Justice, then Justice, Pleicones dissented arguing it was against controlling precedent and the well-settled rule of law:

As I understand the applicable law, however, these respondents waived their right to rely upon the belated service when they failed to raise the issue pursuant to Rule 12(h), SCRCP. See *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993). Failure to properly raise this issue under the rule also operates as a waiver of a statute of limitations defense. Id.; see also *Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct.App.2000)....Further, **I agree with appellant that the original version of the FCPSA and not the amended version applies here.** See 2005 S.C. Acts No. 27 § 16(3) 123 (revised FCPSA applies to causes of action arising on or after July 1, 2005). **Thus the trial court erred as a matter of law in awarding sanctions under the FCPSA.** *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997).
Holmes v. Haynsworth et al., 408 S.C. 620, 760 S.E.2d 399, 413 (S.C. 2014).

In addition, the dissent confirmed the revised FPSA with its reporting provisions is inapplicable. S.C. Code § 15-36-10(M). Accordingly, this Court should find the revised FPSA is unconstitutional on its face and as applied. *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 713 S.E.2d 650 (S.C.App. 2011).

INTRODUCTION

In February 2019, the Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in 2019, what did we do to make sure we kept our democracy intact?" Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of steadfast bravery and unremitting courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our state and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government.

Both state and Federal constitutions were deliberately crafted to foreclose those abuses here. The framers did not need computers, tablets, or cell phones to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses. The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch or government official shall have absolute authority over a citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review. Important issues and denial of substantial rights herein are of exceptional importance and are capable of repetition, capable of evading judicial review, and incapable of adequate remedy on review supporting stay. As set forth more fully below, it is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of cell phones, tablets, computers, and uncertain times. Judge J. Waties Waring, the renowned crafter of divine dissents lying in repose in Charleston, is turning over in his grave at the historically persistent lawlessness of the Four Corners of Law.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Threshold Matter of Stay

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Without being disagreeable, there is disagreement. This matter presents a novel question of law regarding the South Carolina Frivolous Proceedings Act (FPA) and its retroactive application herein which supports request for stay. Specifically, the order on appeal retroactively applies the inapplicable FPA because the claim filed in 2002 on which it is based arose prior to the effective date of the revised FPA and petitioner asserts prejudice including, but not limited to, laches. Pursuant to the case of *Southeastern Site Prep*, the prior FPA is applicable to civil proceedings which arose before the effective date of the revised FPA. *See Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011). The revised FPA statute 15-36-10 is inapplicable and does not authorize or provide jurisdiction for the order on appeal. See In re *Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) (the First Amendment provides limits). See *Timbs v. Indiana,* 586 U.S. __, 139 S. Ct. 682 (2019) (excessive punishments are strictly prohibited under the Eighth Amendment). For the reasons that follow, petitioner respectfully submits the burden of proof (BOP) has been met on all four requirements for granting stay pending appeal.

a. Petitioner's Success on the Merits

Substantial rights at issue herein are granted by our cherished Constitution. As set forth below, the order on appeal errs. As a matter of law, failure to comply with Rule 413, SCACR, is reversible error. Moreover, there is no evidence in the record to support the March 29, 2021, order. Prejudicial error occurred because, but for the denial of substantial rights, the outcome should and would be different in petitioner's favor. Accordingly, success on the merits is predicted which supports stay pending appeal.

b. Irreparable Harm

The substantial rights of notice and opportunity to be heard are respectfully requested. The petitioner retired from the practice of law with Legal Aid before medical school and has never had a client complaint. No other review for the March 29, 2021, order is available. In violation of the party presentation rule, the order on appeal grants punitive relief which was not requested. As per beloved Justice Ginsburg in her majority opinion, may she rest in peace, the role of the court is to be a neutral arbiter of matters the parties present. *Greenlaw v. United States*, 128 S. Ct. 2559, 171 L.Ed.2d 399, 554 U.S. 237, 243, 8 Cal. Daily Op. Serv. 7716, 21 Fla. L. Weekly Fed. S 421, 76 USLW 4533, 2008 Daily Journal D.A.R. 9297 (2008). There was no notice and no just cause and counsel of record's timely reasonable request for opportunity to be heard was denied without comment. Petitioner is a practicing physician who will suffer irreparable harm without stay pending review during the ongoing and oncoming extraordinary and unprecedented public health and affiliated economic emergencies still unfolding. For

professional reasons including, but not limited to, adverse impact on patients, and because there is no harm to any client or the public, the prejudicial effect supports stay. There is no other avenue of appeal. The order is otherwise unreviewable and incapable of adequate remedy on review due to irreparable harm. Accordingly, irreparable harm supports stay pending appeal.

c. The Balance of Equities

The balance of equities favor the physician in these uncertain times of ongoing and oncoming extraordinary and unprecedented public health and affiliated economic emergencies still unfolding. As set forth herein, for professional reasons including, but not limited to, adverse impact on patients, and because there is no harm to any client or the public, the balance of equities supports stay. The petitioner is disproportionately affected with no notice, no just cause, and no meaningful opportunity to be heard. Moreover, the order on appeal should be stricken as excessive, unduly burdensome, cruel, and/or unusual. The other side has unclean hands and is in violation of the South Carolina Appellate Court Rules including, but not limited to, Rule 413, SCACR, and Rules 220 and 268, which provide that unpublished orders, as in this case, for example, from 2009, have no precedential value and should not be cited in any other case. The record reflects laches with prejudice which supports petitioner's request for stay and suggests the other side will not be adversely affected. There is no allegation any clients or members of the public will be harmed. Accordingly, the equities on balance support stay pending appeal.

d. Public Interest is Served

Overlapping with the balance of equities above, the public interest is served by allowing a meaningful opportunity to respond with a full and fair determination on the merits thereby promoting the integrity of the judicial system. It has been noted that the litmus test for the viability of a state court is legal malpractice. Former Chief Justice Toal at every opportunity uses a bullhorn to promote and advertise her first employer, Haynsworth, for launching her career stating, "and the rest is history." The argument in the attached state court cert petition by the former President of the Bar illustrates a common thread: Manifest conflict of interest with a retired former Chief Justice acting as trial judge authorizing excessive and/or unreasonable fees for her former employer, Haynsworth. To the extent the March 10, 2021, filing herein indicates direct or indirect impermissible ex parte contact with legal malpractice defendant Haynsworth's Manton Grier by and through Disciplinary Counsel to gain unfair advantage in pending litigation, that filing should be stricken or disregarded. Despite representations to the contrary in the March 10, 2021, filing, Manton Grier's name is nowhere to be found in the caption of Case No. 2019-000880. In the March 10, 2021, filing, the current Disciplinary Counsel, in knee-jerk fashion, threw his predecessor under the bus while admitting she thoroughly investigated the same issue in 2017. The Clerk of Court determined the filing did not involve any hospital when filing. In the March 10, 2021, filing, the other side opened the door by referencing pending litigation which involves unconscionable bad faith debt collection practices by none other than Haynsworth with introduction of false affidavits

and altered evidence to fabricate a statute of limitations and/or other defense. See attached affidavit. The record reflects untrustworthy officers of the court and Haynsworth repeatedly exploit the unconstitutional SC FPA to gain unfair advantage in pending litigation to the extreme prejudice of the unwary, the poor, and the powerless. There is nothing equitable about propping up a bad faith debt collector.

Across the street from Judge J. Waites Waring's Courthouse is the state court for Charleston County. The Charleston County Judicial Center bears the inscription: Where the rule of law ends, tyranny begins. Petitioner asserts the Constitutional right to be heard in defense against false charges by government officials and respectfully requests full and fair trial by jury which is denied pursuant to the revised SC FPA. Accordingly, the public interest is served by stay pending appeal.

For the foregoing reasons and for substantial justice affecting substantial rights, petitioner respectfully requests this Court grant stay pending resolution.

II. This case presents a novel question of law

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The Court should exercise its discretion to grant a writ of certiorari because this case involves an open and novel question regarding a matter of first impression. Specifically, the order is reversible as a matter of law because the state court with no other available appellate review impermissibly retroactively applied the revised FPA to a matter which arose prior to the effective date of the revised FPA, S.C. Code § 15-36-10, and granted punitive relief

against a represented party, not that party's attorney, with no notice and no just cause while denying without comment counsel's reasonable timely request for opportunity to be heard. See *Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011). Moreover, as set forth below, the revised FPA is unconstitutional on its face and/or as applied. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 110 S.Ct. 2447, 110 L.Ed.2d 359, 58 USLW 4763 (1990)(the lack of any legal requirement other than the talismanic recitation of "'*frivolous*' will foreclose meaningful review of sanctions" (emphasis supplied)).

Prejudicial error occurred because but for denial of due process including, but not limited to, impermissible retroactive application of the revised SCFPA to a matter which arose prior to its effective date, the outcome should and would be in petitioner's favor. Accordingly, novel questions of law with no other avenue of appeal invite review and the petitioner respectfully submits this Court should grant certiorari and reverse the South Carolina Supreme Court March 29, 2021, order as unsupported by law and/or the record. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See U.S. Const., Article I, sec. 9 and 10; U.S.

Const., Article III; U.S. Const. amend. I, IV, V, VII, and XIV.

III. The South Carolina Supreme Court erred in its opinion.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. For the reasons that follow, the South Carolina Supreme Court's reasoning and interpretation of the law and factual record, if any, are fundamentally flawed.

A. As a matter of law, failure to comply with Rule 413, SCACR, is reversible error.

Specifically, failure to follow Rule 413, SCACR, Rules for Lawyer Disciplinary Enforcement, is a violation of due process and reversible as a matter of law. Rule 413, SCACR. The attached copy of filing dated March 10, 2021, corroborates failure to follow Rule 413, SCACR. Accordingly, the South Carolina Supreme Court March 29, 2021, order is reversible as a matter of law.

B. There is no evidence in the record to support the March 29, 2021, order.

Because Rule 413, SCACR, was not followed regarding alleged greivance, there is no evidence in the record to support the March 29, 2021, order. Purportedly based on the revised SC FPA, which petitioner asserts herein is unconstitutional, the other side has introduced no evidence supporting the March 29, 2021, order, and there has been no

evidentiary hearing which is hereby requested. The South Carolina Supreme Court erred in its March 29, 2021, opinion. Accordingly, writ of certiorari is respectfully requested.

IV. The revised SCFPA, S.C. Code § 15-36-10, is unconstitutional on its face and/or as applied.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. But for the unconstitutional retroactive application of the revised SCFPA, S.C. Code § 15-36-10, we would not be here. Petitioner is a practicing physician who retired from the practice of law with Legal Aid before medical school and has never had a client complaint.

The instant case includes challenge to the constitutionality of the revised SCFPA, S.C. Code § 15-36-10, on its face and as applied. Petitioner challenges the February 9, 2017, order pursuant to the inapplicable revised SCFPA, copy appended to the other side's RTSC petition. That order states there was a hearing; however, there was no notice and no opportunity to be heard. That ex parte February 9, 2017, order, which expressly relies on an unpublished, unspecified, unnamed South Carolina Supreme Court, December 3, 2009, order without case number, without caption, and without citation, is a result of RPC-Prohibited Advocate Witness Caskey's impermissible ex parte contact. Rule 3.7, RPC (Rules of Professional Conduct), Rule 407, SCACR. Prohibited Advocate-Witness Caskey, who is a necessary witness to material facts, deviously and deviantly devised a plan to prevent the other side from objecting to her wrongdoing. The record reflects there is no South Carolina Supreme Court December 3, 2009, order in that case. As per the

Advance Sheets, the record reflects there is no South Carolina Supreme Court December 3, 2009, order in any other case. Any unspecified, unpublished December 3, 2009, order from another case is untrustworthy hearsay and inadmissible. Rules 220(a) and 268(d)(2), SCACR (unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved).

In *Mizell v. Glover, infra,* the South Carolina Supreme Court stated: " We find persuasive the jurisprudence developed by the Fourth Circuit and other federal courts which have recognized that judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial. See *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993); *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275 (11th Cir. 2001); *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994); *Blue Cross and Blue Shield v. Philip Morris, Inc.*, 141 F.Supp.2d 320 (E.D.N.Y.2001).[8] In *Nipper*, the Fourth Circuit held that judicial findings constitute hearsay and do not fall within any of the exceptions to the hearsay rule, including the exception for public records, Rule 803(8), FRE. *Nipper.* The Fourth Circuit made clear that its holding was firmly rooted in the common law. Id. (Citing 5 John H. Wigmore, Wigmore on Evidence § 1671a (James H. Chadbourn rev.1974) (citations omitted))." *Mizell v. Glover*, 351 S.C. 392, 57 S.E.2d 176 (S.C. 2002). "The federal courts addressing this issue point to the great weight and obvious prejudicial effect that credibility assessments of witnesses by judges have on subsequent juries. See *Philip Morris*, 141 F.Supp.2d 320 (denying admission of a judge's statement regarding credibility of expert witness for impeachment of that expert at a subsequent trial). Although *Philip Morris* involved the credibility assessment of a judge and not the

assessment of a jury, the jury's factual finding introduced in this case is hearsay nonetheless, and we believe, is equally prejudicial. *See U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275 (11th Cir. 2001) (finding petitioners were prejudiced by the admission of a previous judge's factual opinion into a subsequent trial because appellees relied on the opinion throughout the trial and advised the jury during closing argument to use the opinion to make their own credibility determinations)." *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002). The reliance on hearsay pursuant to unconstitutional retroactive application of the revised SCFPA in the form of a court order from an unspecified, unnamed, unpublished December 3, 2009, order without case number, without caption, and without citation is contrary to state and Federal constitutional due process safeguards. Unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. Rules 220 and 268(d)(2), SCACR. Prohibited conflicted Advocate-Witness Caskey and Haynsworth knew or should have known unpublished orders are not to be relied on in any other case.

The other side herein provided a copy of an unpublished, unrelated *John Doe* order dated December 2, 2009. Despite the fact the Haynsworth SCFPA order was then stayed on appeal, that *John Doe* order relies on footnote 2 with no citation, source, or authority for that footnote, which is lifted from the Haynsworth order then stayed on appeal, thereby concealing Haynsworth as the source. But for the unconstitutional retroactive application of the revised SCFPA, there would be no *John Doe* order because that order was issued as a result of the inapplicable revised SCFPA provision for reporting to the appellate courts and to ODC, which should have been stayed pending the appeal. See the revised SC Code § 15-36-10 (G)(3)(H) and (G)(3)(M). The appellate court then effectively

decided the Haynsworth appeal, not on briefs, but by issuing the *John Doe* order without consideration of the merits or the record on appeal, which had not yet been filed, thereby denying meaningful, objective appellate review. That *John Doe* order was then used to prevent petitioner from pursuing appeal of that very Haynsworth order. Haynsworth unilaterally drafted its own legal malpractice order which does not reflect the proceedings or the facts. Trial transcript available on request. Accordingly, this Court should find the revised SCFPA is unconstitutional on its face and/or as applied because the reporting provisions effectively thwart/prevent meaningful, objective appellate review. *See Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011) (the claims arose prior to the effective date of the revised SCFPA). *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 110 S.Ct. 2447, 110 L.Ed.2d 359, 58 USLW 4763 (1990)(the lack of any legal requirement other than the talismanic recitation of "'*frivolous*' will foreclose meaningful review." (emphasis supplied)).

Advocate-Witness Caskey, who is a necessary witness to material facts, used the inapplicable revised SCFPA to benefit private parties by depriving the plaintiff of individual, property, and constitutional rights including, but not limited to, meaningful opportunity to be heard:

Referee/master: "We're here for supplemental proceedings....to determine what assets, if any, are available to satisfy the judgment." Transcript of March 10, 2017, hearing, p. 4, line 12.

Referee/master: "Would you like me to put you under oath and have you testify as to your assets? That's really what we're here for. Would you like me to do that?" Transcript of March 10, 2017, hearing, p. 16, lines 9-12.

Petitioner: "Yes, I have the information that you requested for me to bring. I'm happy to do that." Transcript of March 10, 2017, hearing, p. 16, lines 13-15.

Referee/master: "If I have to sit here and listen to your testimony of what your assets are, they're going to disappear in the courtroom at the time. Okay? That's what I'm going to do. All right?" Transcript of March 10, 2017, hearing, p. 23, lines 7-11.

Unable to file because petitioner's filings were returned multiple times due to the ex parte February 9, 2017, order, the petitioner timely appeared, offered the requested information, and requested to be heard but was denied. Haynsworth and Advocate-Witness Caskey used the unpublished *John Doe* order pursuant to the inapplicable revised SCFPA, to prejudice, to deny meaningful opportunity to be heard, to deny full and fair record for review, to thwart and/or prevent meaningful, objective appellate review, and to wrongfully/unconscionably confiscate unearned filing fees and $2500. See S.C. Code § 37-5-108 (unconscionability) and S.C. Code § 37-2-413(1) (salaried employee of the creditor not entitled to attorney's fees). Significantly and materially, that ex parte February 9, 2017, order was used to strike and confiscate the filing fee for the petitioner's timely Rule 60 (b), SCRCP, Motion then pending before the trial judge, which prevented RPC-Prohibited Conflicted Advocate-Witness Caskey from moving the case forward. Important public issues support review herein.

In addition, the revised SCFPA's "reasonable attorney standard" is not fair notice to the public at large or to parties. The First Amendment doctrine of overbreadth is an exception to this Court's normal rule regarding the standards for facial challenges. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 796 (1984). The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413

U. S. 601, 615 (1973), suffices to invalidate all enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression," id., at 613. See also *New York v. Ferber*, 458 U. S. 747, 769, n. 24 (1982); *Dombrowski v. Pfister*, 380 U. S. 479, 491, and n. 7, 497 (1965).

The Court has provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech--especially when the overbroad statute imposes monetary civil sanctions. See *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 634 (1980); *Bates v. State Bar of Ariz.*, 433 U. S. 350, 380 (1977); *NAACP v. Button*, 371 U. S. 415, 433 (1963). Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through litigation, will choose simply to abstain from protected speech for fear of financial loss--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

As this Court noted in *Broadrick*, however, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law--particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." 413 U. S., at 615. For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or

especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," the Court has insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the doctrine of overbreadth invalidation. *Id.* at 613.

The revised SCFPA, S.C. Code § 15-36-10, is not applicable to the hospital case appended to the RTSC (rule to show cause) petition as stated in its dissent by Former Chief Justice Pleicones (then Justice) and is not applicable to the March 29, 2021, order on appeal herein. The revised SCFPA, S.C. Code § 15-36-10 does not authorize sanctions against a represented party, the petitioner, whose counsel of record certified the claims are not frivolous. See *In re Ruffin*, 363 S. C. 347, 610 S. E. 2d 803 (2005) (Court found lawyer did not violate Rule 3.1 in filing a meritless complaint because there was no clear and convincing evidence of the misconduct; the lawyer relied on the advice of his attorney). Former Chief Justice Pleicones' dissent in that appended case also confirms the claims are not frivolous which establishes that a reasonable lawyer who happens to be a jurist ruled the claims are not frivolous. In the last paragraph and last footnote 23, that dissent points out the majority agreed with petitioner's counsel and never ruled the case was frivolous. Under these facts, the revised FPA does not authorize sanctions against a represented party and does not authorize the March 29, 2021, order.

Moreover, in the Haynsworth case, under the prior applicable SCFPA, S.C. Code § 15-36-10 to 50, Judge Hughston's denial of defendants' motion for summary judgment on the legal malpractice claims precludes sanctions because the claims arose prior to the

effective date of the revised SCFPA. *See Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011). Under the prior applicable SCFPA, S.C. Code § 15-36-10 to 50, Judge Hughston's denial of defendants' motion for summary judgment on legal malpractice claims precludes a finding the malpractice claims are frivolous because Judge Hughston found there are genuine issues of material fact which have never been determined on the merits. Moreover, Judge Hughston wrote, "Given my opportunities to observe and hear Dr. Holmes, I have no doubt she is sincere in her beliefs about this case," and he found there is no "intent to harm," which precludes sanctions under the applicable SCFPA, S.C. Code § 15-36-10 to 50, then in effect and precludes sanctions under Rule 11, SCRCP. But for the unconstitutional retroactive application of the revised SCFPA, we would not be here. This Court is respectfully requested to exercise its jurisdiction to grant review.

CONCLUSION

WHEREFORE petitioner respectfully requests this Court grant petition for writ of certiorari.

Respectfully submitted,

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