ORIGINAL

No. 23-6734

23-1205, 23-1591, 23-1749
(USDC-SC 2:22-cv-03758-BHH)

IN THE
SUPREME COURT OF THE UNITED STATES

C. Holmes, MD,
Petitioner,

v.

Anne Milgram,
Administrator of DEA,
in official capacity and
individually,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower appellate court misapprehends appealability and/or overlooks the request and denial in the district court for certification of appeal and motion for stay pending appeal of denial of substantial rights incapable of vindication on appeal.

2. Whether denial of the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters, hereafter coerced R&R, impermissibly denies/diminishes substantial rights including but not limited to, judicial review through change in the standard of review with R&R and/or diminished time to file objections/appeal of R&R with potential loss of full, fair, and meaningful review if deemed untimely.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a
writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished opinion of the United States court of appeals appears at Appendix A to the petition.

The opinion of the United States district court appears at Appendix B to the petition.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254(1). Denial of petition for rehearing was filed January 23, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

FACTS

The petitioner respectfully submits Petition for a Writ of Certiorari. The following facts are pertinent to the petition herein. This matter involves arbitrary governmental acts and conflicting healthcare law causing harm to the petitioner, a practicing physician, and petitioner's established and prospective patients. The defendant failed to renew without just cause despite multiple routine renewals in the past with no interim change. The defendant failed to comply with statutory requirements for renewal despite evidence establishing timely receipt of renewal application and the usual and customary statutory payment per 21 C.F.R. 1301.13(e). Attempts to reach out to defendant to resolve the matter were ignored or rebuffed. This matter was timely filed in the district court with unambiguous non-consent to a magistrate.

The petitioner timely filed motion for hearing and disposition by the district court requesting the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters. This matter is wrongfully referred to a magistrate who denied the motions citing a local rule as authority. Timely amended verified complaint was filed. The district court overlooked the timely amended verified complaint and made no determination on the merits. As such, there is no factual basis in the record for the district court's orders. Timely appeal, certification of appeal, and motion for stay pending appeal were filed. Timely appeal to the court of appeals was refused per correspondence found at App. C which is challenged based on, including but not limited to, Constitutional Amendments I and V. Thereafter, appeal and

petition for rehearing were denied. Petition for Writ of Certiorari is timely filed.

INTRODUCTION

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 *2024*, what did we do to make sure we kept our democracy intact?" Emphasis supplied. 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. Accordingly, non-consensual Report & Recommendation (R&R) cannot pass

constitutional muster.

In the instant case, petitioner timely reserves, preserves, does not waive, and expressly requests fundamental fairness and substantial rights including but not limited to, meaningful opportunity to be heard at a meaningful time and full and fair trial by jury. There are examples of pro se filings subjected to a separate second-class system of so-called justice, where the Local Rules of Court, including Local Civil Rule 73.02(B), USDC-SC, are gleefully and cavalierly used as a trap for the unwary. Significantly and materially, there is an abundant body of law decisively declaring separate is never equal. The acknowledged systemic institutional biases against minorities and/or pro se litigants threaten our democracy and feed the appearance of the proverbial "rigged" system. In the pro se setting, this issue is of exceptional importance as it is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. The following inscription is found at the Four Corners of Law: Where the rule of law ends, tyranny begins. The Judge J. Waties Waring Judicial Center is named for the renowned crafter of divine dissents lying in repose in Charleston, who must be turning over in his grave at the historically persistent lawlessness of the Four Corners of Law where his name is prominently displayed. 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 extraordinary and unprecedented public health and affiliated economic emergencies ongoing and still unfolding.

To the extent pro se civil litigants are disproportionately affected, these

important public issues involving substantial rights are less likely to come before this Honorable Court, which supports review.

REASONS FOR GRANTING THE PETITION

1. Whether the lower appellate court misapprehends appealability and/or overlooks the request and denial in the district court for certification of appeal and motion for stay pending appeal of denial of substantial rights incapable of vindication on appeal.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. This Court should remand because the lower appellate court misapprehends appealability herein, overlooks the district court's failure to consider the timely served and filed amended complaint, and/or overlooks the request and denial in the district court for certification of appeal and motion for stay pending appeal of denial of substantial rights incapable of vindication on appeal. To the extent a district court could or would take advantage of the lower appellate court's lack of a formal record on appeal (ROA) in the court of appeals, any consent to magistrate R&R contained in that ROA is falsified. The record establishes coerced R&R, if not sham consent R&R. To the extent imprecise district court docketing could or would mislead a lower appellate court, the petitioner's request filed January 22, 2021, is timely for certification of appeal with stay pending resolution of the appeal of denial of substantial rights incapable of vindication on appeal. The lower appellate court decision overlooks or misapprehends that request.

The lower appellate court misapprehends petitioner's appeal based on 28 U.S.C. § 1292(b). It is respectfully submitted that under 28 U.S.C. § 1292(b), the order is appealable because certification by the district court is untenable, unreasonable, and/or futile when a basis for the appeal is that the overworked and underpaid district court judge is not a neutral decision-maker in the request for the substantial right of de novo determination by Article III Judicial Officer without Report & Recommendation (R&R) on dispositive matters, for the substantial right of judicial review which is not impermissibly diminished by R&R without consent, and/or other questions of exceptional importance. Accordingly, reversal or remand to the lower appellate court is respectfully requested.

The lower appellate court misapprehends the case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), which recognizes the collateral order doctrine. The collateral order doctrine states an appellate court will treat a prejudgment order as essentially "final" if it conclusively resolves an important issue independent of the merits of the case, and the order is effectively unreviewable on appeal due to the irreversible effects of the decision. *Id.* Specifically, the unpublished opinion herein overlooks the material fact that the petitioner petitions under the collateral order doctrine regarding the request for the substantial right of de novo determination by Article III Judicial Officer without R&R, for the substantial right of judicial review which is not impermissibly diminished by R&R without consent, and/or other questions of exceptional importance. In addition, these important questions involve substantial rights incapable of vindication on appeal which must be appealed immediately or be

waived. Further, this petition raises novel issues of great public importance which support jurisdiction and review. Moreover, the record herein is evidence in itself that the issues surrounding coerced R&R are capable of and have escaped multiple timely requests for lower appellate court review thereby establishing appealability. The record evidences arbitrary governmental acts as well as denial of meaningful right to petition the government for a redress which establishes appealability. Accordingly, the case of *Cohen, supra*, the collateral order doctrine, discretionary review, inherent authority, original, and/or other jurisdiction support appealability.

2. Whether denial of the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters, hereafter coerced R&R, impermissibly denies/diminishes substantial rights including but not limited to, judicial review through change in the standard of review with R&R and/or diminished time to file objections/appeal of R&R with potential loss of full, fair, and meaningful review if deemed untimely.

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 recent *McAdams* case provides, "There's no dispute that the magistrate judge could approve the class action and enter judgment only by consent of the parties. 28 U.S.C. § 636(c)." *McAdams v. Robinson*, 26 F.4th 149 (4th Cir. 2022). Given that the record herein reflects timely unambiguous non-consent to a magistrate, this appeal includes Fifth Amendment due process challenges, it includes challenges to the propriety of referring to a magistrate a substantive/dispositive matter despite express request for de novo determination by Article III Judicial Officer

without R&R on substantive/dispositive matters, it includes challenges to referral of substantive/dispositive matters to a magistrate without consent, and it asserts lack of statutory authority for magistrates under the facts regarding, including but not limited to, 28 U.S.C. § 636(b). Under similar circumstances, the Seventh Circuit found an appeal from a final judgment would provide a wholly inadequate remedy and held that magistrates have no power, under the Magistrates Act to decide motions to dismiss or motions for summary judgment, and district judges have no power to delegate such duties to magistrates. *TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972). For the reasons stated and for substantial justice affecting substantial rights, the petitioner respectfully requests reversal.

By way of introduction, the *Schor* case observed the following imprecisions under our carefully considered form of government:

As we explained in *INS v. Chadha*, 462 U.S. 919, 959, 103 S.Ct. 2764 2788, 77 L.Ed.2d 317 (1983):

"The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. . . . With all the obvious flaws of delay [and] untidiness . . ., we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."

Commodity Futures Trading Commission v. Schor Conticommodity Services, Inc v. Schor, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986).

Significantly and materially, the Framers of our cherished Constitution intended Article III's protections to benefit individual litigants:

The Framers also understood that a principal benefit of the separation of the judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures. Article III's salary and tenure provisions promote impartial adjudication by placing the judicial power of the United States "in a body of judges insulated from

majoritarian pressures and thus able to enforce [federal law] without fear of reprisal or public rebuke." *United States v. Raddatz*, 447 U.S. 667, 704, 100 S.Ct. 2406 2427, 65 L.Ed.2d 424 (1980).

The following Ninth Circuit case which parallels *McAdams, supra,* states:

Article III grants judges who wield the judicial power of the United States life tenure during good behavior and a guaranteed salary that may not be diminished. These protections are designed to ensure the independence and impartiality of the judicial officers authorized to decide the merits of a litigant's case. **The Supreme Court has held that litigants in federal court have a personal right, conferred by Article III, to insist upon adjudication of their claims by a judge who enjoys the salary and tenure protections afforded by Article III—protections that magistrate judges lack.** *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) ; see *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.* , 725 F.2d 537, 542 (9th Cir. 1984) (en banc). *Roell v. Withrow*, 538 U.S. 580, 590, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003)....

Barring unusual circumstances, the named plaintiffs will have as strong an interest as the absent class members in having their claims adjudicated by an independent and impartial decisionmaker.
Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071, 1078 (9th Cir. 2017) (emphasis supplied).

Accordingly, the petitioner requests the protections afforded by Article III which magistrate judges lack.

Historically, precedent required consent for appointment of a special master on substantive/dispositive matters:

In *Kimberly v. Arms*, 129 U.S. 512, 9 S.Ct. 355, 32 L.Ed. 764 (1889), the parties consented to the appointment of a special master "to hear the evidence and decide all the issues between" them. Id. at 516, 9 S.Ct. at 356. In concluding that the court had erred in failing to treat the master's findings of fact and law as presumptively correct, **the Court noted that "[i]t [was] not within the general province of a master to pass upon all issues**." Id. at 524, 9 S.Ct. at 359. **However, "when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues ..., the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent**." Id.
Wharton-Thomas v. U.S., 721 F.2d 922 (3rd Cir. 1983) (emphasis supplied).

The case of *Banks v. United States*, 614 F.2d 95, 97 (6th Cir.1980) found that "absent consent, the magistrate cannot conduct the trial itself. ... Except for prisoner's cases, the Federal Magistrate Act does not permit the magistrate to perform fact-finding on the merits of a case. That is the exclusive function of a district judge." *Id.* The cases of *Mathews v. Weber*, 423 U.S. 261 (1976), *United States v. Raddatz*, 447 U.S. 667 (1980), and *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), can be read as establishing that the decision making power must remain in the Article III district court when the parties have not consented to a determination by a non-Article III officer. *Wharton-Thomas v. U.S.*, 721 F.2d 922 (3rd Cir. 1983).

The Federal Magistrate Act caused concern among some members of Congress:

> Congress manifested concern as well as enthusiasm, however, in considering the Act. Several witnesses, including the Director of the Administrative Office and representatives of the Justice Department, expressed some fear that Congress might improperly delegate to magistrates duties reserved by the Constitution to Article III judges. Senate Hearings 107-128, 241n; House Hearings 123-128. [Fn. 5 - Some courts have manifested a like concern. See TPO, Inc. v. McMillen, 460 F.2d 348 (CA7 1972); Reed v. Board of Election Comm'rs, 459 F.2d 121 (CA1 1972). But cf. Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973).]
>
> The hearings and committee reports indicate that in § 636(b) Congress met this problem in two ways. First, Congress restricted the range of matters that may be referred to a magistrate to those where referral is "not inconsistent with the Constitution and laws of the United States. . . ." Second, Congress limited the magistrate's role in cases referred to him under § 636(b). The Act's sponsors made it quite clear that the magistrate acts "under the supervision of the district judges" when he accepts a referral, and that authority for making final decisions remains at all times with the district judge. Senate Report 12. "(A) district judge would retain ultimate responsibility for decision making in every instance in which a magistrate might exercise additional duties jurisdiction." House Hearings 73 (testimony of Sen. Tydings). See also id., at 127 (testimony of the Asst. Deputy

Atty. Gen. Finley).
Mathews v. Weber, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976) (emphasis supplied).

Notably in *Weber*, *supra*, the Supreme Court suggested that even certain social security appeals should be sent directly to the district judge due to issues of statutory interpretation that require separate treatment. *Id.* at fn. 6. Additionally, the *Weber* case states, "We express no opinion with respect to either the wisdom or the validity of automatic referral in other types of cases." *Id.* At 274. Under the facts, the Local Civil Rule 73.02 for automatic assignment/referral and the lack of order of reference is challenged. Specifically, under the facts, the lack of order of reference in essence denied the litigant the right to object at a meaningful time and denied the opportunity to appeal an order of reference. See attached correspondence denying petitioner's timely appeal which confirms issues that are capable of repetition, capable of evading judicial review, and incapable of vindication on appeal.

From the Seventh Circuit, the *Flowers* case provides, "We start with the undoubted proposition that there is no constitutional provision, no specific statute, and no rule approved by the Supreme Court of the United States, or indeed by this court, which authorizes the assignment of cases by clerks of court to magistrates." *Flowers v. Crouch-Walker Corp.*, 507 F.2d 1378 (7th Cir. 1975). To the extent a Local Civil Rule (LCR) for automatic assignment of cases by clerks of court to magistrates is used herein and the record reflects that it is, petitioner challenges it. Under these facts, the record reflects there is no order of reference which is hereby challenged. To the extent there is no determination after

unambiguous non-consent by the district court of appropriateness for the magistrate and the record reflects there is none, that practice is challenged under the facts and does not comply with statutory and/or constitutional provisions. The First Circuit raised Article III considerations in the *Reed* case stating, "To the extent that *the court's blanket approval of the magistrate's order* purported to be a decision on the merits, particularly a final decision involving findings of fact without even notice and opportunity to be heard by a judge, it was what we have previously described as "a laying on of hands," *Rainha v. Cassidy*, 454 F.2d 207 (1st Cir., 1972), and an abnegation of judicial authority by the court entirely contrary to the provisions of Article III. *Reed v. Board of Election Comm'rs of City of Cambridge*, 459 F.2d 121 (1st Cir. 1972) (emphasis supplied). Further, in affirming reference to a special master "in accordance with the provisions of Fed.R.Civ.P. 53," the Second Circuit opined:

Questions have been raised, to be sure, about the use of magistrates in ultimate decision making such as ruling on a motion to dismiss or a motion for summary judgment. The Seventh Circuit, for example, has held that district courts have no power to delegate such duties to magistrates. *TPO, Inc. v. McMillen*, 460 F.2d 348 (1972). In addition, with specific reference to the provision of § 636(b) permitting a magistrate to be assigned to serve as a special master in an appropriate civil action under the Federal Rules of Civil Procedure, the Report of the Senate Committee on the Judiciary on S. 945, S.Rep.No.371, 25-27 (June 28, 1967), U.S.Code Cong. & Admin.News, p. 4252 points out that the "exception and not the rule" and the "exceptional circumstances" language of Rule 53(b) was very carefully incorporated by reference into the Federal Magistrates Act. The Senate Committee said that "These conditions which in essence reflect the rule laid down by the Supreme Court in *LaBuy v. Howes Leather Company* . . . protect against any abdication of the decisionmaking responsibility that is properly that of the district courts." Finally, we recently have had the guidance of *Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974), where the Court, incorporating the holding in *Holiday v. Johnston*, 313 U.S. 342, 352-54, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941), held that the Act did not change the requirements of 28 U.S.C. § 2243 that federal judges personally conduct habeas corpus evidentiary hearings. The Court there once again emphasized that in the Federal Magistrates

Act "Congress carefully circumscribed the permissible scope of assignment to only 'such additional duties as are not inconsistent with the Constitution and laws of the United States.' 28 U.S.C. § 636(b) (emphasis added)." 418 U.S. at 470, 94 S.Ct. at 2848.
CAB v. Carefree Travel, Inc., 513 F.2d 375, 381 (CA2 1975).

Accordingly, the Federal Magistrates Act incorporates the mandates of the "Constitution and laws of the United States." 28 U.S.C. § 636(b).

In the *Ingram case,* from the Sixth Circuit, Footnote 1 states: No order of reference appears in the appendix; it must have been made verbally. A formal order of reference should have been made to authorize the Magistrate to act, and so as to afford the litigants an opportunity to object to the reference. A Magistrate is not an Article III court. *Ingram v. Richardso*n, 471 F.2d 1268, fn. 1 (6th Cir. 1972). There is no order of reference in the instant case and petitioner is prejudiced thereby. But for wrongful referral, the outcome should and likely would be in petitioner's favor. The propriety of referral to a magistrate under the facts is challenged and purported statutory authority for the magistrate under the facts is challenged.

In *Raddatz*, the Supreme Court raised another concern which supports petitioner's position: Neither the statute nor its legislative history reveals any specific consideration of the situation where a district judge after reviewing the record in the process of making a de novo "determination" has doubts concerning the credibility findings of the magistrate. The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or

witnesses whose credibility is in question could well give rise to serious questions which we do not reach. *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). In this case, the petitioner's timely request for hearing was ignored or rebuffed.

Other concerns include the following:

We do not deny that there may be basis for concern about the wisdom of large scale delegation of adjudication to magistrates. Wholesale reference of cases even by consent does pose dangers to the district courts as now organized. As the practice continues and becomes more wide spread, it will tend to become routine. Pressure will naturally follow to increase the number of magistrates rather than encounter the slow and often frustrating process of securing congressional action to add the needed numbers of district judgeships, as well as the more probing inquiries by the attorney general and in the Senate confirmation and approval of nominees for federal district judgeships.

Overworked district judges are unlikely to oppose the addition of more magistrates and may in fact initiate such requests. The possibility of large scale dilutions of district courts to the point where magistrates would outnumber district judges is not inconceivable. Whether such a rearrangement of the federal system is desirable is, to say the least, highly debatable.
Wharton-Thomas v. U.S., 721 F.2d 922 (3rd Cir. 1983)

Moreover, this Honorable Court noted, "On these facts (in *Hill v. Jenkins*) the Seventh Circuit held that the district court erred in referring the case to a magistrate without the consent of the parties because the hearing before the magistrate was, for all intents and purposes, a civil trial." *Orpiano v. Johnson*, 687 F.2d 44 (4th Cir. 1982) (citing *Hill v .Jenkins,* 603 F.2d 1256 (7th Cir. 1979)). Further, a ruling on petitioner's specific objections to the magistrate's proposed factual findings in that case required a de novo determination by the district court. "The fact that Orpiano was acting pro se should have encouraged the district court to read his objections broadly rather than in the narrow manner in

which it did. Failure to review the evidence presented to the magistrate and failure even to have a transcript filed with the district court in that case was reversible error." *Orpiano v. Johnson*, 687 F.2d 44 (4th Cir. 1982).

Importantly, the following observation from the *Wimmer* case is noted:

> Between 1976 and 1979, a number of courts, however, had begun to delegate to magistrates **but always with the consent of the parties** the authority to conduct hearings, to hold trials with or without juries, and to make final determinations. *Marvel v. United States*, 719 F.2d 1507, 1511-12 (10th Cir.1983) (decided under the 1976 amendments); *Coolidge v. Schooner California*, 637 F.2d 1321, 1325 (9th Cir.) (1976 amendments), cert. denied, 451 U.S. 1020, 101 S.Ct. 3011, 69 L.Ed.2d 392 (1981); *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355 n. 3 (5th Cir.1980); *Muhich v. Allen*, 603 F.2d 1247, 1251 (7th Cir.1979); *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499, 507-08 (1st Cir.1975), cert. denied, 423 U.S. 1073, 96 S.Ct. 856, 47 L.Ed.2d 83 (1976). *Wimmer v. Cook*, 774 F.2d 68, 72 (4th Cir. 1985) (emphasis supplied).

Also, the *Wimmer, supra*, case noted the following:

> The circuit court held that under its construction of this language of the subsection, the power to conduct an evidentiary hearing in a habeas proceeding was not conferred on a magistrate. That decision of the circuit court was affirmed by the Supreme Court in *Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974). In its decision, however, the Supreme Court added this footnote: "We indicate no views as to the validity of investing such authority in a magistrate or other officer 'outside the pale of Article III of the Constitution.' " 418 U.S. at 467 n. 4, 94 S.Ct. at 2847 n. 4 (quoting *Wedding v. Wingo*, 413 F.2d at 1133 n. 1). *Wimmer v. Cook*, 774 F.2d 68, 71 (4th Cir. 1985).

Wimmer held when the reference to the magistrate is under § 636(b) there can be no jury trial and no final disposition either as a result of a jury verdict in a trial before the magistrate or by the magistrate himself; the constitutional provisions of Article III of the Constitution foreclose such power as well as the terms of the statute itself. See *Ford v. Estelle*, 740 F.2d 374, 379-80 (5th Cir.1984). *Wimmer v. Cook*, 774 F.2d 68, 74 (4th Cir. 1985).

Under the facts herein, petitioner objects including there is no referral by the district court despite timely unambiguous non-consent to a magistrate and a clerk's assignment/referral despite timely unambiguous non-consent to a magistrate is untenable, unsupportable, and unauthorized. To the extent a Local Civil Rule (LCR) provides for automatic assignment to a magistrate by clerks of court, to the extent a LCR for automatic assignment by clerks of court is being used for automatic referral, to the extent a LCR is ambiguous regarding referral to a magistrate, or to the extent the LCR is adversely impacting substantive consequences when consent is withheld including but not limited to, unreasonable delay herein, petitioner is prejudiced thereby and takes exception. Under the facts, the constitutional provisions of Article III of the Constitution foreclose such automatic assignment and/or automatic referral as well as the terms of the statute, § 636(b), itself which anticipate a specific order of reference in a case of timely unambiguous non-consent to a magistrate and a determination by the district court judge whether such a delegation is appropriate in that case. Under the facts, there is no compliance with the statutory requirements including no such determination of appropriateness, no order of reference, no authorization for automatic assignments to a magistrate by clerks of court given timely unambiguous non-consent to a magistrate, and no authorization for automatic referrals. Accordingly, under these facts, without statutory compliance, there is no statutory authorization and there is no lawful designation or jurisdiction for a magistrate.

Moreover, pursuant to the applicable legal standard, petitioner satisfies the

following four factors for administrative and lower court stay: (1) petitioner is likely to succeed on the merits, (2) petitioner is likely to suffer irreparable harm in the absence of relief, (3) the harm will outweigh any harm opposing parties will suffer if the stay is granted, and (4) the stay is in the public interest. See *Hilton v. Braunskil1*, 481 U.S. 770 (1987) (The four-part test for a stay: (1) whether the stay applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties; and (4) where the public interest lies.); *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter*, 555 U.S. 7, 20 (2008)). For the reasons stated herein and for good cause, petitioner has met the burden of proof on likelihood of success. Petitioner makes a clear showing of irreparable harm. "When the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied. *Merrill Lynch, Pierce, Fenner and Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir.1985)." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546 (4th Cir. 1994). The balance of equities also tips in the petitioner's favor. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010), *reissued in part*, 607 F.3d 355 (4th Cir. 2010), *overruling Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). Moreover, the balance of equities favors petitioner because of, including but not limited to, ongoing constitutional violations: "Precedent counsels that '*defendant* is in no way harmed by issuance

of a stay which prevents *it* from enforcing restrictions likely to be found unconstitutional.' " *Centro Tepeyac v. Montgomery County* , 722 F.3d 184, 191 (4th Cir. 2013) (emphasis supplied) (quoting *Giovani Carandola Ltd. v. Bason* , 303 F.3d 507, 521 (4th Cir. 2002)). "If anything, the system is improved by such an injunction *which is in the public interest.*" *Leaders of A Beautiful Struggle v. Balt. Police Dep't*, 979 F.3d 219 (4th Cir. 2020) (emphasis supplied) (quoting *Giovani Carandola Ltd. v. Bason* , 303 F.3d 507, 521 (4th Cir. 2002)). In addition, relief herein is in the public interest to preserve the status quo and to remedy defendant's wrongdoing which arbitrarily and capriciously diminishes "access to high-quality health care" and interferes with established and prospective doctor-patient relationships unrelated to professional competency and without just cause. *Planned Parenthood S. Atl v. Baker*, 941 F.3d 687 (4th Cir. 2019). Accordingly, petitioner has met the burden of proof on all four factors for administrative and lower court stay.

Moreover, petitioner respectfully appeals the lower court's failure to provide adequate explanation for meaningful review. *See, e.g., Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020) (remanded for lack of adequate explanation for meaningful review: "As indicated above, the district court's analysis ... was quite abbreviated, and the court disposed of the substance of the issue in a single sentence. See J.A. 252. We need more explanation to conduct meaningful appellate review of the court's disposition of the motion."). Coerced Report and Recommendation (R&R) despite timely unambiguous non-consent to a magistrate, denial of substantial rights including but not limited to, de novo determination by

Article III Judicial Officer without consent to magistrate R&R on substantive/dispositive matters, and/or retaliation such as unreasonable delay for asserting substantial rights akin to mode of trial must be raised or waived. Timely non-consent to a magistrate on substantive/dispositive matters was submitted with the complaint. As a practical matter, under the facts, the overworked and underpaid district court judge may not be a neutral decision-maker in the decision to deny the substantial right of de novo determination by Article III Judicial Officer without R&R on substantive/dispositive matters, thereby, signaling code for dispensing a separate second class system of so-called justice without consent. An abundant body of law has decisively determined separate is never equal. Moreover, R&R coerced by the referring district court judge may bias or predetermine the outcome by the magistrate with R&R then appealed to the conflicted district court judge thereby denying meaningful judicial review. Petitioner asserts lack of authorization/jurisdiction for, including but not limited to, automatic assignment/referral to a magistrate and/or R&R without consent on dispositive/substantive matters such as in this case. See 28 USC § 636 generally and 28 USC § 636(b). Specifically, petitioner asserts violations of 28 USC § 636 including 636(b) which provides the following protections for litigants who are the intended beneficiaries:

A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 USC § 636(b)(3).

Also:

"If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. **Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.** 28 USC § 636(c)(2)(emphasis supplied).

The record establishes the reference herein is without consent, it is coerced, and it lacks statutory authorization. Reliance on the local rule cited and on 28 USC § 636(b)(1)(B) is misplaced. The local civil rule cited applies to assignment, not referrals for disposition on substantive/dispositive matters without consent which diminishes/denies constitutional and statutory mandates and protections of substantial rights including but not limited to, diminished time to object to R&R with loss of appeal rights if untimely and/or less burdensome standard of review. To the extent there is ambiguity, the rule of lenity supports petitioner's position.

Further, it is respectfully submitted under these facts, coerced R&R without consent on substantive/dispositive matters cannot pass constitutional muster. See *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot "resolve the case finally" "unless all parties to the action have consented to the magistrate judge's authority." The Seventh Circuit remanded: A petitioner's consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires

an Article III judge. **The lesson we draw is that something as important as the choice between a state court and a federal court, or between an Article I and an Article III judge, cannot be resolved against a party without bringing the party into the case through formal service of process** (emphasis supplied)). In the instant action, neither party consented. Even assuming, though denying, authorization/jurisdiction for R&R, there is clear error of material fact and law. *Brown v. Felsen*, 442 U.S. 127,131 (1979).

Further, there is conflict with decisions of other courts and the U.S. Supreme Court which calls for review herein. Specifically, petitioner respectfully appeals unauthorized, non-responsive, arbitrary, and/or capricious denial of substantial rights. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). There is no consent, much less express, voluntary consent to coerced R&R on dispositive/substantive matters. Jurisdiction cannot be waived. 28 U.S.C. § 636(b)(3). Further, without consent, there is no jurisdiction for magistrate R&R on dispositive/substantive matters herein. To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or wrongful R&R without consent, the interpretation and/or application of the statute and/or the Local Rule 73.02 (B)(2)(d), D.S.C. cited, cannot pass constitutional muster.

The framers of the constitution intended litigants to be the beneficiaries of the substantial right to an Article III Judicial Officer. Conflict is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. The substantial right of de novo determination by an Article III Judicial Officer without R&R on dispositive/substantive matters is not forfeited nor voluntarily and

expressly waived but is timely reserved and not waived. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). It is respectfully submitted that overworked and underpaid district court judges may not be neutral decision-makers in the request for de novo determination by an Article III Judicial Officer without R&R on substantive/dispositive matters.

Pursuant to 28 U.S.C. § 636(b)(3), a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely express request for de novo determination by an Article III Judicial Officer without R&R on dispositive/substantive matters is inconsistent with the Constitution and laws of the United States. "The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion. *O' Donoghue v. United States*, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933). A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995) (citing Ex Parte *United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)). "De novo review of a magistrate judge's determinations by an Article III judge is

not only required by statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980)." *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992) (unpublished). The record suggests predetermined outcome, impermissible delegation, undue influence, favoritism/bias, and/or other unconstitutional factor. Ambiguity regarding impermissible delegation without consent is reversible error. Similarly, lack of neutral decision-maker, application of the improper/diminished legal standard of review with coerced R&R, and/or ambiguity regarding the proper legal standard is reversible error. To the extent there is ambiguity, the rule of lenity supports petitioner's position.

The propriety of referring dispositive/substantive matters to a magistrate under the facts is challenged. As a threshold matter, the magistrate would have no authority over the district court judge to enforce non-consent to a magistrate and the Local Rule cited and relied upon does not authorize such referral for disposition without consent. Further, by wrongful referral to a magistrate, the district court judge thereby signals, biases, or predetermines adverse substantive consequences including unreasonable delay herein, by refusal to grant the meritorious and protected substantial right of de novo determination by an Article III Judicial Officer without R&R on dispositive/substantive matters. Coerced R&R on substantive/dispositive matters prejudices the case for a second class system of so-called justice dispensed by a non-Article III Judge with diminished standard of review on appeal, diminished appeal rights, and/or diminished time to appeal/object to the R&R without consent with loss of appeal rights if untimely.

The wrongful referral to a magistrate smacks of retaliation for requesting a substantial right akin to the right to a particular mode of trial. The record reflects no party has given consent. The magistrate has no authority and no jurisdiction without consent on dispositive/substantive matters. But for coerced R&R herein, the outcome should and would be different in the petitioner's favor. The petitioner asserts prejudicial error and requests administrative stay pending a determination on the merits.

In addition, the unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz,* (4th Cir., filed August 13, 2019). From that case, "core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995)." *Id.*, p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017). Moreover, the 9th Circuit has ruled that without the party's consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.3d 994 (9th Cir. 2019). See *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot "resolve the case finally" "unless all parties to the action have consented to the magistrate judge's authority."). To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation and/or coerced R&R on dispositive/substantive matters, the interpretation and/or application of the statute and/or local rule cannot pass constitutional muster. Coerced R&R jeopardizes/impairs litigants' substantial rights. To the extent a substantial right,

including full and fair, meaningful review, is diminished for pro se litigants by coerced R&R, magistrate R&R on dispositive/substantive matters without consent cannot pass constitutional muster. Without Constitutional and statutory authority, the magistrate order is a nullity lacking jurisdiction. Jurisdiction can be raised at any time and jurisdiction cannot be waived. The substantial right of de novo determination without R&R under these facts by an Article III Judicial Officer on dispositive/substantive matters is respectfully requested. Accordingly, there is conflict with decisions of other courts and the U. S. Supreme Court which supports petitioner's position. This issue is of exceptional importance, it is capable of being and has been repeated, it is capable of evading and has evaded judicial review, and it is incapable of vindication on appeal.

An expedited administrative stay pending appeal should and would materially advance the ultimate termination of the litigation. Under these facts, the issue involves "coerced R&R on dispositive/substantive matters" and/or denial of substantial rights which are closely related to the right to a particular mode of trial, a well-established substantial right. To the extent substantial rights could be waived and/or vindication on appeal is insufficient, the order must be immediately appealed with stay which is hereby requested. C*ohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). In sum, petitioner respectfully submits the burden of proof (BOP) has been met on all four requirements for granting administrative stay pending appeal, including wrongful referral without consent for coerced R&R on dispositive/substantive matters to the same magistrate who recommended

summary dismissal before service Report & Recommendation (R&R) based on affirmative defense, if any, required to be raised or waived by defendant. See USDC-SC 2:20-cv-01748.

Significantly and materially, the amended complaint makes a clear showing of irreparable harm to the practicing physician petitioner. The plain language of the complaint establishes that the physician in this case requires preservation of the status quo regarding ability to practice one's profession without unreasonable interference, to maintain established physician-patient relationships, to meet on-going operating expenses, and/or to earn support for one's family. Defendant violates Constitutional and statutory law including but not limited to, 21 C.F.R. 1301.13(e) and/or 31 U.S.C. § 5103, by arbitrarily and capriciously failing and refusing to accept the usual and customary 21 C.F.R. 1301.13(e) payment or legal tender for renewal of license fees. The request for escrow establishes timely proffer of payment for the renewal fee. Petitioner respectfully requested order for escrow of $888.00 for the renewal fee pending resolution. See *Pashby v. Delia* , 709 F.3d 307, 332 (4th Cir. 2013) (The district court retains the discretion to set the bond amount as it sees fit or waive the security requirement.); *Accident, Injury & Rehab., PC v. Azar*, 336 F.Supp.3d 599 (D. S.C. 2018). Failure to exercise that discretion herein is an abuse of discretion. Petitioner's complaint establishes defendant's unreasonable interference with the physician's ability to practice medicine including but not limited to, continuity of care for established and prospective patients. After diligently completing four years of college, four years of demanding medical school, one year of intensive internship, three years of

rigorous residency training, and multiple routine renewals without change in the interim, defendant's refusal, without just cause, to accept the usual and customary statutory payment/legal tender for renewal fees is unreasonable and disproportionately adversely impacts the physician's patients, the physician's practice, and the physician petitioner. Defendant's wrongdoing is in direct conflict with and violates rules and regulations by and between other healthcare agencies/departments which unreasonably interferes with the physician's ability to practice medicine and disproportionately adversely impacts the petitioner and small provider herein and the M.D.'s patients. Moreover, addressing defendant's violations of Constitutional and statutory law is in the public interest regarding patients' access to their established physicians, including the petitioner, and patients' access to their physicians of choice. Pursuant to 21 C.F.R. 1301.13(e), defendant has accepted the same timely payment of fees for multiple routine renewals in the past. Further, the record reflects evidence, including timely Return Receipt, of abundant efforts which were made to address this matter with defendant in the greater Washington, DC, area office, the regional office in Atlanta as well as the Columbia, SC, office to no avail. Petitioner's reasonable efforts to reach out to defendant were rebuffed or ignored, leaving no other alternative. Defendant cannot in good faith deny receiving timely payment and renewal application as documented in the Return Receipt. Defendant has unclean hands. "The motion for a preliminary injunction shall be set for hearing at the earliest possible time." *Granny Goose Foods, Inc v. Brotherhood of Teamsters Auto Truck Drivers Local No 70 of Alameda County 8212 1566*, 415 U.S. 423, 443, 94 S.Ct.

1113, 39 L.Ed.2d 435 (1974) (emphasis supplied). "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). U.S. Const., generally and Article III; U.S. Const. amend. I, V, VI, VIII.

The lower court errs and elevates form over substance. The complaint provides written certification of notice to defendant timely submitted including copy of RRR. The undersigned asserts the timely amended verified complaint makes a clear showing of irreparable harm, however, the distirct court failed and refused to consider the timely amended verified complaint: Because the district court's order is based on the original complaint which is superseded by the timely amended verified complaint, the district court order is reversible as a matter of law due to lack of support in the record. As such, the district court order is unsupported and unsustainable and should be vacated which is respectfully requested. The plain language of the complaint establishes that the practicing physician herein requests preservation of the status quo including ability to practice one's profession without unreasonable interference in order to meet ongoing operating expenses and to earn support for one's family. The copy of the

Return Receipt is attached. Defendant cannot in good faith deny receiving timely application with the usual and customary statutory payment. But for failure to timely grant the meritorious 14-day TRO, the matter should and likely would be resolved. By analogy, the forum state limits ex parte TROs to those "rare occasions when no adverse interest exists or when exigent circumstances dictate that action be taken prematurely." See *Thornton v. Alford*, 274 S.C. 1, 3, 260 S.E.2d 179, 180 (1979). In the instant case, the defendant has minimal or no adverse interest, is protected by proffer of escrow, and the disproportionately adverse impact on a small practitioner constitutes exigent circumstances. Notably, "precedent counsels that '*defendant* is in no way harmed by issuance of a preliminary injunction which prevents the *defendant* from enforcing restrictions likely to be *found in violation of constitutional and/or statutory law*.' " See *Centro Tepeyac v. Montgomery County* , 722 F.3d 184, 191 (4th Cir. 2013) (emphasis supplied) (quoting *Giovani Carandola Ltd. v. Bason* , 303 F.3d 507, 521 (4th Cir. 2002)) ("If anything, the system is improved by such an injunction."); *Leaders of A Beautiful Struggle v. Balt. Police Dep't*, 979 F.3d 219 (4th Cir. 2020). The petitioner's proffer of escrow in the amount of the renewal fee is one of several reasons why notice is not required wherein defendant's interest is protected and there is minimal, if any, adverse impact on defendant. Moreover, analogous to the district court's discretion to waive security or bond, there is good cause for waiver herein under the facts. "See *Pashby v. Delia* , 709 F.3d 307, 332 (4th Cir. 2013) ('[T]he district court retains the discretion to set the bond amount as it sees fit or waive the security requirement.'..." *Accident, Injury & Rehab., PC v. Azar*, 336

F.Supp.3d 599 (D. S.C. 2018). To the extent there is ambiguity, the rule of lenity supports the petitioner's position. Importantly, a recent case provides: The law is well-settled that when making a determination based on the pleadings, a court is bound "to accept without question the truth of the petitioner's allegations. *Denton*, 504 U.S. *25*, 32." *Thomas v. United States*, 4:22-2638-JD-TER, 3 (D.S.C. Aug. 17, 2022). In addition, the *Denton* case provides further support stating, "(A) complaint may not be dismissed....simply because the court finds the petitioner's allegations unlikely." *Denton v. Hernandez*, 504 U.S. 25,32 (1992). It is respectfully submitted there is precedent wherein the district court overruled the same magistrate's overreaching attempts at a finding of frivolity in the prior case of USDC-SC 2:20-cv-01748. In that case, the same magistrate made a frivolous finding of frivolity while recommending summary dismissal before service based on affirmative defense, if any, required to be raised or waived by defendant which is material to review herein. To the extent there is a pattern and now practice of this magistrate's overreaching attempts to delay/dismiss nonfrivolous claims and to deny full and fair consideration on the merits, the case of *Cooter & Gell* is pertinent and provides further support for petitioner's timely Notice of Non-Consent to the Magistrate. *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)).

The purpose of an administrative stay pending appeal is to preserve the relative positions of the parties until a trial on the merits can be held. As such, it is

customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is not required to prove his case in full. The element of "balancing the harm" is an important if not dispositive factor. See *Hughes Network Sys. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994). "'*Defendant is* in no way harmed by issuance of a preliminary injunction which prevents *it* from enforcing restrictions likely to be found *in violation of Constitutional and/or statutory law.* If anything, the system is improved by such an injunction.' *Carandola*, 147 F.Supp.2d at 395." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) (emphasis supplied). See *Planned Parenthood South Atlantic v. Kerr*, 27 F.4th 945 (4th Cir. 2022) ("The individual petitioner had demonstrated that she was likely to succeed on her Medicaid Act claim since the free-choice-of-provider provision conferred a private right enforceable under 42 U.S.C. 1983 and South Carolina had violated that provision by terminating Planned Parenthood's Medicaid provider agreement."). The individual petitioner herein has demonstrated a likelihood of success on the merits including but not limited to, the claim of unfair discrimination provided under the ACA to the petitioner as a member of a protected class for intentional and/or disparate impact discrimination based on 42 U.S.C. 6101, *et seq.*, in violation of Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, *et seq.,* and defendant has violated that provision by arbitrary and capricious failure and refusal despite notice to comply with 21 C.F.R. 1301.13(e), 31 U.S.C. § 5103, and/or other constitutional and statutory laws. See *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 848 (D.S.C. 2015). The *Direx* case supports

petitioner's position herein and provides "(t)he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.' *Samson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 951-52, 39 L.Ed.2d 166 (1974) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S.Ct. 948, 954-55, 3 L.Ed.2d 988 (1959))." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4th Cir. 1992). By analogy, the *Phelps* case is a copyright infringement case which applied a presumption of irreparable harm. "*Phelps and Asso., LLC, v. Galloway,* 492 F.3d 532 (4th Cir. 2007)." That case provides support for petitioner's position by supporting a presumption of irreparable harm after diligently completing four years of college, four years of demanding medical school, one year of intensive internship, three years of rigorous residency training in order to obtain the license and after multiple essentially routine renewals with no changes in the interim. In addition, that case further supports the physician's position because the Fourth Circuit remanded for reconsideration of equitable relief. Defendant's refusal herein, without just cause, to comply with 21 C.F.R. 1301.13(e) and 31 U.S.C. § 5103, and/or to accept the usual and customary 21 C.F.R. 1301.13(e) payment for renewal fees without interim change is unreasonable and disproportionately adversely impacts the plaintiff, a practicing small provider, at a time when physician shortages abound with predictions of increased shortages.

The record reflects petitioner has met the burden of proof on all four requirements for equitable/injunctive relief which overlaps with requirements set forth above. The lower court must examine the merits of the underlying case only

to the extent necessary to determine whether the petitioner has made a sufficient prima facie showing of entitlement to relief. *Synthes USA v. Davis*, 2017 WL 5972705, at *3. The law is well-settled that when making a determination based on the pleadings, as in this case, a lower court is bound "to accept without question the truth of the petitioner's allegations. *Denton*, 504 U.S. *25*, 32." *Thomas v. United States*, 4:22-2638-JD-TER, 3 (D.S.C. Aug. 17, 2022). In the instant matter, the petitioner has met the burden of proof on the following four factors:

(1) petitioner is likely to succeed on the merits,
(2) petitioner is likely to suffer irreparable harm in the absence of relief,
(3) there is minimal, if any, legal prejudice or adverse impact on defendant and the balance of equities tips in the petitioner's favor, and
(4) there is no disservice to and/or there is benefit to the public interest. *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter v. Nat. Ref. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Defendant's arbitrary and capricious failure to comply with 21 C.F.R. § 1301.13(e) and 31 U.S.C. § 5103 as well as failure to accept the usual and customary 21 C.F.R. § 1301.13(e) payment for renewal fees without interim change is unreasonable and disproportionately adversely impacts the physician's established and prospective patients, the physician's practice, and the physician herein. Defendant willfully neglected, without just cause, to comply with 21 C.F.R.

§ 1301.13(e) and 31 U.S.C. § 5103 and/or to accept the usual and customary payment/legal tender for renewal fees causing irreparable harm to the petitioner and petitioner's practice and unreasonably interfering with the petitioner's ability to practice petitioner's profession, to meet on-going operating expenses, and to earn support for one's family as well as unreasonable interference with established and prospective doctor-patient relationships, with patients' access to continuity of care, and with patients' access to their physician of choice. If anything, it benefits the public interest because "the system is improved by such *relief*." *Giovani Carandola Ltd. v. Bason* , 303 F.3d 507, 521 (4th Cir. 2002) (emphasis supplied). Moreover, resolving defendant's violations of conflicting statutes and regulations by and between differing healthcare agencies serves the public interest and/or promotes high quality, cost-effective, individualized, compassionate healthcare in the public interest.

The record reflects the petitioner makes a clear showing of the likelihood of success on the merits, although certainty of success is not required. See *Accident, Injury & Rehab., PC v. Azar*, 336 F. Supp. 3d 599, 604-05 (D.S.C. 2018); *Nutramax Labs., Inc. v. Pure Supplements Ltd.*, No. 0:17-CV-01260-JMC, 2017 WL 2772485, at *4 (D.S.C. June 27, 2017). The element of "balancing the harm" is the most important factor. *Hughes Network Sys. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994). In addition, the balance of the equities favors petitioner because petitioner has established an ongoing constitutional violation. By contrast, "precedent counsels that '*defendant* is in no way harmed by issuance of a preliminary injunction which prevents *it* from enforcing restrictions likely to be

found unconstitutional.' " See *Centro Tepeyac v. Montgomery County* , 722 F.3d 184, 191 (4th Cir. 2013) (quoting *Giovani Carandola Ltd. v. Bason* , 303 F.3d 507, 521 (4th Cir. 2002)) (emphasis supplied) ("If anything, the system is improved by such an injunction."). *Leaders of A Beautiful Struggle v. Balt. Police Dep't*, 979 F.3d 219 (4th Cir. 2020).

Under the facts, the lower court should be reversed based on clear error of material fact, clear misapprehension with error of law, clear error in overlooking significant evidence, and/or clear error with overreaching attempts to delay/dismiss nonfrivolous claims and deny full and fair consideration on the merits. See *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013). In an immigration case and by analogy, *Pillay* articulated these caveats: No overreaching attempts to dismiss nonfrivolous claims and deny full and fair consideration on the merits *See Neitzke v. Williams,* 490 U.S. 319, 328 (1989) ('When a complaint raises an arguable question of law, which the court ultimately finds is correctly resolved against the petitioner,' the complaint may fail to state a claim but is not frivolous.). Because there is an arguable basis in governing law herein, there is no frivolity. *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)). Petitioner asserts ongoing constitutional violations and violations of constitutional and statutory law because defendant, despite timely notice and without just cause, refused timely payment in the usual and customary form of a personal check made payable to defendant as required

by 21 C.F.R. § 1301.13(e) and defendant wrongfully refused to comply with 31 U.S.C. § 5103 as well. The petitioner's causes of action include but are not limited to, these three:

(1) denial of procedural due process - These factors determine whether a procedural due process violation has occurred and the undersigned asserts that it has: a) the private interest that will be affected by the official action. The petitioner herein has a private interest, individual interest, and property interest that affects the petitioner's practice, petitioner's patients, and financial stability; b) the risk of an erroneous deprivation of such interest through the procedures used - The risk of erroneous deprivation of the private interests is great: After diligently completing four years of college, four years of demanding medical school, one year of intensive internship, three years of rigorous residency training, and multiple routine renewals, defendant's refusal, without just cause, to comply with 21 C.F.R. § 1301.13(e) and/or 31 U.S.C. § 5103 and refusal to accept the timely usual and customary authorized payment/legal tender for renewal fees is unreasonable and disproportionately adversely impacts the physician herein. Defendant's wrongdoing triggers monetary and non-monetary penalties as well as adverse impacts including, for example, on state licensing. Defendant's wrongdoing violates rules and regulations by and between differing healthcare agencies/departments which unreasonably interferes with the physician's ability to practice medicine and disproportionately adversely impacts the petitioner's patients, the petitioner's practice, and the petitioner; and c) the probable value, if any, of additional or substitute procedural safeguards – There is minimal, if any,

administrative or financial burden to defendant herein, the defendant is protected by proffer of escrow, and the petitioner seeks to preserve the status quo pending resolution. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

(2) ultra vires – Petitioner asserts the actions taken by defendant exceed the scope of power given to defendant under the law including but not limited to, violations of 21 C.F.R. § 1301.13(e) and 31 U.S.C. § 5103 as well as deprivation of, including but not limited to, substantial rights as well as individual and property interests. Defendant acted ultra vires in violation of including but not limited to, 21 C.F.R. § 1301.13(e) and 31 U.S.C. § 5103 by exceeding its authority including rulemaking authority in violating 21 C.F.R. § 1301.13(e) and 31 U.S.C. § 5103 and/or promulgating without required compliance certain changes. Defendant's wrongdoing includes imposing additional requirements without just cause, without due process, and/or without authority. *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199 (4th Cir. 2020).

(3) violation of the Administrative Procedures Act (APA) - The petitioner claims violations of the APA and implementing rules. Petitioner has pled a colorable claim, including but not limited to, raising a federal question based on the APA and its application with likelihood of success on the merits though certainty of success is not required. See *Accident, Injury & Rehab., PC v. Azar*, 336 F. Supp. 3d 599, 604-05 (D.S.C. 2018).

Specifically, petitioner alleges likelihood of success on one or more claims and is irreparably harmed by defendant's wrongful refusal to comply with 21 C.F.R.

§ 1301.13(e) and 31 U.S.C. § 5103. Petitioner submitted timely payment in the usual and customary authorized form of a personal check made payable to the Drug Enforcement Administration for the full amount ($888.00) pursuant to 21 C.F.R. § 1301.13(e). The Return Receipt establishes the renewal application with payment was timely received. Without just cause, defendant wrongfully refused timely 21 C.F.R. § 1301.13(e) payment. The complaint herein is timely filed. State license renewal may be adversely affected without just cause. Defendant's wrongdoing threatens the petitioner's practice and adversely affects employment opportunities. A recent case, *Planned Parenthood S. Atl v. Baker*, 941 F.3d 687 (4th Cir. 2019), supports petitioner's claims and establishes irreparable harm where failure to renew herein is not based on professional competency, where patients' access to continuity of care is diminished or denied, and where defendant's wrongdoing adversely affects existing and prospective doctor-patient relationships. *Planned Parenthood S. Atl v. Baker*, 941 F.3d 687 (4th Cir. 2019); *Planned Parenthood South Atlantic v. Kerr*, 27 F.4th 945 (4th Cir. 2022). In addition, that case supports the petitioner's private right of action granted in, including but not limited to, the ACA to the petitioner as a member of a protected class for intentional and/or disparate impact discrimination based on 42 U.S.C. 6101, *et seq.*, in violation of Section 1557 of the Patient Protection and Affordable Care Act 42 U.S.C. § 18001, *et seq.* and other. See *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 848 (D.S.C. 2015). Petitioner asserts a cause of action for intentional and/or disparate discrimination based on 42 U.S.C. 6101, *et seq.*, in violation of Section 1557 of the Patient Protection and Affordable Care Act, 42

U.S.C. § 18001, *et seq.*, toward a member of a protected class. Section 1557 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18001, *et seq.*, provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination including on the grounds prohibited toward a minority and/or age discrimination including the Age Discrimination Act of 1975 (ADA) under any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Affordable Care Act or its amendments. "The court is mindful of the procedural status of this case, and that Defendants have not yet had an opportunity to respond to the motion for TRO. However, upon the strength of the representations made by Allen, the court is satisfied that Allen has established that he is likely to suffer irreparable harm as a result of the Defendants' actions." *Graham Allen Enters., LLC v. Nine Line Apparel, Inc.* (D. S.C. 2017). See *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1992).

The petitioner asserts the burden of proof on the balance of equities has been met. Specifically, the balance of equities tips in the petitioner's favor including the following:

i) The petitioner herein has a private interest, individual interest, and property interest and defendant's wrongdoing adversely affects the petitioner's interests, practice, and financial stability; ii) The risk of erroneous deprivation of this private interest is great. After diligently completing four years of college, four years of demanding medical school, one year of intensive internship, three years of

rigorous residency training, and multiple renewals, defendant's refusal, without just cause, to accept the usual and customary payment/legal tender for renewal fees in violation of 21 C.F.R. § 1301.13(e) and 31 U.S.C. § 5103 is unreasonable and disproportionately adversely impacts the physician herein. Defendant's wrongdoing triggers monetary and non-monetary penalties and adverse impacts. Defendant's wrongdoing violates conflicting rules and regulations by and between differing healthcare agencies/departments and unreasonably interferes with the physician's ability to practice medicine and disproportionately adversely impacts the petitioner's patients, the petitioner's practice, and the petitioner; and iii) There is minimal, if any, administrative or financial burden to defendant herein, petitioner's proffer of escrow for the full fee of $888.00 protects the defendant's interest, and the petitioner seeks to preserve the status quo pending appeal. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Accordingly, as set forth herein, the burden of proof on all four requirements has been met.

CONCLUSION

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

Respectfully submitted,

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