ORIGINAL

No. 23-7043

23-1043
(USDC-SC 2:20-cv-00004-BHH)

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

C. Holmes, MD,

Petitioner,

v.

Blue Cross Blue Shield
of South Carolina, Inc., et al.,

Respondents.

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

PETITION FOR A 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 without consent including but not limited to, appeal by and through the conflicted district court judge, diminished standard of review with R&R, denial of full and fair judicial review, and/or diminished time to file objections/appeal of R&R with potential loss of full, fair, and meaningful review if deemed untimely by the conflicted overworked and underpaid district court judge.

3. Whether a reasonable person reasonably questions the neutrality of the overworked and underpaid district court judge on appeal of coerced Report & Recommendation (R&R) without consent after denial of a citizen's motion for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters.

4. Whether the record reflects lack of factual support for wrongful dismissal, abuse of discretion by the conflicted overworked and underpaid district court judge, and/or grounds for disqualification of the conflicted district court judge.

LIST OF PARTIES

The parties in the case are Blue Cross Blue Shield of South Carolina, Inc., Scott McCartha, Ms. Shipman, and J. Doe #1 Through J. Doe #X.

RELATED CASES

None

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TABLE OF AUTHORITIES

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 November 2, 2023, opinion of the United States court of appeals and all intermediate orders as well as all district court orders are appealed. 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 February 27, 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 appealing the November 2, 2023, order and all intermediate orders. The underlying case involves violations of state and Federal law, including S.C. Code § 38-59-20, *et seq.*, Improper Claim Practices. Defendants failed to even respond to multiple reasonable attempts to resolve repeated, ongoing wrongdoing. With no other recourse, the dispute was filed with the district court.

The following are facts pertinent to the petition herein. Petitioner timely filed motion for 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, which was wrongfully referred to a magistrate who denied the motion improperly relying on a local civil rule as authority and failing and refusing to address the merits. Timely appeal to the conflicted district court judge, certification of appeal, and motion for stay pending appeal were denied. Thereafter, timely appeal to the court of appeals and petition for rehearing were denied. Petition for Writ of Certiorari is timely filed.

REASONS FOR GRANTING THE WRIT

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, 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 to R&R. To the extent imprecise district court docketing could or would mislead a lower appellate court, the petitioner respectfully requests appeal herein with stay pending resolution of the appeal of denial of substantial rights incapable of vindication on appeal. The petition for writ of certiorari is respectfully submitted.

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 lower appellate court 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 reflects 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 without consent including but not limited to, appeal by and through the conflicted district court judge, diminished standard of review with R&R, denial of full and fair judicial review, and/or diminished time to file objection/appeal of R&R with potential loss of full, fair, and meaningful review if deemed untimely by the conflicted overworked and underpaid district court judge.

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 petitioner respectfully submits this petition for a writ of certiorari. The recent *McAdams* case states, "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 express 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 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. The petitioner's timely appeals herein confirm the issues are capable of repetition, capable of evading judicial review, and incapable of vindication on appeal: Important public issues have been misapprehended, overlooked, ignored, or rebuffed.

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 by the district court of appropriateness for referral to 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). Under these facts, the petitioner raises these serious questions herein.

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 (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 express non-consent to a magistrate. To the extent a 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, the conflicted district judge's neutrality is thereby seriously questioned, petitioner is prejudiced 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 anticipates a specific order of reference 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, 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 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, the burden of proof (BOP) is met on all four requirements for granting stay pending appeal of matters of great public importance and substantial Constitutional rights incapable of vindication after-the-fact on appeal which must be immediately appealed or be waived. *See Cohen 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).

a. Petitioner's Success on the Merits

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference. The substantial rights at issue herein are granted by our cherished Constitution. It is respectfully submitted petitioner timely requested the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters. The clerk's "assignment" to a magistrate per Local Rule does not authorize referrals to and does not authorize impermissible delegation to a magistrate without consent for R&R on dispositive matters. Permission to appeal was wrongfully denied. Overworked and underpaid district court judges may not be neutral decision-makers in ruling on the request for permission to appeal rendering such requests

futile. Accordingly, success on the merits is predicted which supports stay pending appeal. *See Cohen 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). "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 III; U.S. Const. amend. I, IV, V, VII, and XIV; S.C. Const., Article I, sec. 9 and 10; S.C. Const., Article I, sec. 9 and 10.

b. Irreparable Harm

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference. Under these facts, denial of substantial rights akin to the right to a particular mode of trial must be immediately appealed or waived. Such orders on appeal are effectively unreviewable and incapable of vindication on appeal due to the irreversible effects of the decision. Current appeal of coerced R&R on dispositive matters irreparably denies and/or diminishes substantial rights and prevents a judgment

from which full and fair meaningful review might be taken by, including but not limited to, reduction in the amount of time to object/appeal R&R, futile appeal to a non-neutral district court decision-maker, diminished standard of review, and/or denial of the substantial right of full and fair meaningful review of the decision of a single conflicted individual who is overworked and underpaid in the district court. Further, the order adversely affects petitioner's family's and petitioner's individual and property rights causing irreparable harm and denying full and fair meaningful opportunity to be heard at a meaningful time which predicts success on the merits and which supports the petitioner's position. Accordingly, irreparable harm supports the appeal with stay pending appeal. "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., Article III; U.S. Const. amend. I, IV, V, VII, and XIV.

c. The Balance of Equities

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference. The balance of equities favors the petitioner who is disproportionately adversely affected as well as petitioner's family and petitioner's individual and property interests. Moreover, the balance of equities favors the petitioner, a small practitioner, regarding defendants' wrongdoing which disproportionately affects small practices, including the petitioner's. To the extent defendants' wrongdoing adversely affects the public health and the healthcare system, and the record reflects it does, the balance of equities favors the petitioner. Accordingly, the balance of equities and the totality of circumstances favor the petitioner. "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., Article III; U.S. Const. amend. I, IV, V, VII, and XIV.

d. Public Interest is Served

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference. Overlapping with the balance of equities above, to the extent defendants' wrongdoing adversely affects the public health and the healthcare system, and the record reflects it does, the balance of equities favors the petitioner. Moreover, the balance of equities favors the petitioner, a small practitioner, regarding defendants' wrongdoing which disproportionately affects small providers. The propriety of referral herein to the magistrate for disposition on the motion for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters is challenged. It is fair to say the district court judge is abundantly aware of the difference between an Article III Judicial Officer and a magistrate. Objection and denial of consent to magistrate R&R on dispositive matters is timely entered. 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 plaintiff'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)). Moreover, the district court's denial of the motions and denial of substantial rights undercuts appearance of a disinterested court.

Further, there is conflict with decisions of other courts and the U.S. Supreme Court. Specifically, petitioner respectfully appeals unauthorized, non-responsive, arbitrary, and/or capricious denial of substantial rights in the district court upon timely request for de novo determination by Article III Judicial Officer without R&R on dispositive matters. *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 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 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 (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 between 28 U.S.C. § 636(b)(1) and 28 U.S.C. § 636(b)(3) 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 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 dispositive matters rendering request for permission to appeal futile and/or conflicted.

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 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, e.g., by magistrate, favoritism/bias, retaliation and/or other unconstitutional factor which supports reversal. Ambiguity regarding impermissible delegation without consent is reversible error. Similarly, application of the improper legal standard and/or ambiguity regarding the proper legal standard is reversible error. To the extent there is ambiguity, and the record reflects there is, the rule of lenity supports petitioner's position.

The propriety of referring a motion for de novo determination by an Article III Judicial Officer without R&R on dispositive matters to a magistrate is challenged. As a threshold matter, the magistrate would have no authority over the district court judge and the Local Rules cited do not authorize such referral for disposition by a magistrate. Further, by wrongful referral, the district court judge thereby predetermines the outcome of denial by refusing to grant the meritorious and protected substantial right of an Article III Judicial Officer on dispositive matters, prejudicing and/or signaling the matter 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 the R&R without consent. Petitioner respectfully asserts an abundant body of law decisively determning separate is never equal. 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 alleged wrongful referral to a magistrate results

in the predetermined outcome of denial with the appeal of the magistrate's denial to the district court judge who predetermined that outcome. The appeal of that predetermined outcome herein was followed by the district court judge's lack of adequate explanation for meaningful review. See, e.g., *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020)(lack of adequate explanation for meaningful review). Predetermined outcome and/or lack of de novo determination, such as, e.g., wrongful referral and/or impermissible delegation, is corroborated further by a pattern and practice herein of the district court judge citing little, if any, case law on the merits. Petitioner asserts prejudicial error and requests reversal.

In even-handedness, transparency, and fundamental fairness, a neutral decision-maker should decide the appeal of the magistrate's denial, not the district court judge who referred to the magistrate, thereby predetermining the outcome of denial. By analogy, occasionally, a recently appointed appellate court judge will find him or herself in the position of potentially reviewing a decision that he or she made while in the court below. In these cases, the Judge or Justice will recuse him or herself from reviewing his or her own decision. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Rule 3(E)(1), CJC, Rule 501, SCACR*. Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978). In the *Rice* case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be unbecoming for a judge to sit in

a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but a reasonable person has a reasonable basis to question the impartiality of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge." *Id.* at 1117. The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial. *Id.* at 1116. This oft-cited case is well stated, sound, and universally accepted as logical and fair. "There is ancther way to look at the case, however: as one in which the losing litigant appeals from a ruling by Judge X to an appellate panel that includes Judge X; and it is considered improper--indeed is an express ground for recusal, see 28 U.S.C. Sec. 47--in modern American law for a judge to sit on the appeal from his own case. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Ríce v. McKenzíe*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, .890 F.2d 947 (7th Cir. 1989) (emphasis supplied). The district court judge who allegedly wrongfully referred, thereby predetermining the outcome, is not a neutral decision-maker on appeal of that magistrate's denial of the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters. Accordingly, petitioner respectfully requests reversal.

Predetermined outcome and/or lack of de novo determination is corroborated by a pattern and practice of inadequate explanation for meaningful

review and by adopting R&R's citing little, if any, case law on the merits. See, e.g., *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020). Specifically, the district court opinion is based on error of material fact and law and fails to provide adequate explanation for meaningful review, fails to address the merits, and/or fails to cite supporting case law. The record reflects consent to magistrate R&R on dispositive matters has not been given. The magistrate has no authority and no jurisdiction without consent on dispositive/substantive matters. But for clear error herein, the outcome should and would be different in petitioner's favor.

In addition, the recent 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." 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)). 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 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 judicial review, is diminished for pro se litigants by coerced R&R, and the record reflects that it is, magistrate R&R on dispositive 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 by an Article III Judicial Officer without R&R under these facts 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 and reversal. 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. 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 issues must be immediately appealed with stay pending appeal which is 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). For the reasons stated, petitioner respectfully submits the burden of proof (BOP) is met on all four factors for granting stay.

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. To the extent there is a pattern and now practice of this magistrate's overreaching attempts to 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 non-consent to this 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)). Moreover, case law supports the petitioner's private right of action granted in, including but not limited to, the ACA as a member of a protected class 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.* and other. See *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 848 (D.S.C. 2015).

In sum, the factual contentions have evidentiary support and/or, as specifically identified including but not limited to, defendants' misrepresentations, wire fraud, breach of confidentiality, unequal pay for equal work, and/or other wrongdoing will likely have evidentiary support after a reasonable opportunity for further investigation or discovery including but not limited to, discovery of information secreted/hidden by defendant. It is respectfully submitted all requirements are met for stay including but not limited to, a meritorious case, a lack of claim of unfair legal prejudice by the other side, a lack of unfair prejudice to the other side, and extraordinary circumstances as well as appropriateness to accomplish substantial justice. Accordingly, reversal is respectfully requested.

3. Whether a reasonable person reasonably questions the neutrality of the overworked and underpaid district court judge on appeal of coerced Report & Recommendation (R&R) without consent after denial of a citizen's motion for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters.

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 framers of the constitution intended litigants to be the beneficiaries of the substantial right of 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 dispositive/substantive matters without consent. Further, by wrongful referral to a magistrate, the district court judge thereby signals, biases, or predetermines adverse substantive consequences 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, appeal to the conflicted overworked and underpaid district court judge, diminished appeal rights, diminished legal standard on appeal, and/or diminished time to appeal/object to the R&R without consent with loss of appeal

rights if the conflicted district court judge deems the appeal/objection 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 reversal.

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.

4. Whether the record reflects lack of factual support for wrongful dismissal, abuse of discretion by the conflicted overworked and underpaid district court judge, and/or grounds for disqualification of the conflicted district court judge.

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 district court's reliance on an inapplicable local rule, the outcome should and would be in petitioner's favor. The record reflects the district court erroneously relied on rule L.C.R. 73.02(B)(2)(d) (D.S.C.) (42 U.S.C § 1983 prisoner petitions). L.C.R. 73.02(B)(2)(d) (D.S.C.) is inapplicable because there is no prisoner petition. Despite multiple timely notices of the error, the district court repeats the same offense in willful neglect, at best. To the extent the lower court is telegraphing pejorative code, serial offenses are pertinent to review. The petitioner is

prejudiced thereby and respectfully requests reversal.

Moreover, the Rules of Decision Act (RDA) is a law created by Congress in 1789 that states, in the absence of a federal law, Constitutional provision, or treaty, the courts should apply state law where it applies. It is one of the foundations of the Erie doctrine. The Erie doctrine is based on a U.S. Supreme Court case, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The doctrine states that the federal courts, when confronted with the issue of whether to apply federal or state law in a lawsuit, must apply state law on issues of substantive law. Further, because "the chronological length of the limitation period is interrelated with provisions regarding tolling, revival (*pertinent to the instant case*), and questions of application," federal courts must "borrow [] the state's tolling rules-including any equitable tolling doctrines." *Smith v. City of Chicago Heights*, 951 F.2d 834, 839-40 (7th Cir. 1992) (emphasis supplied). *See also Wade v. Danek Medical, Inc.*, 182 F.3d 281, 289 (4th Cir. 1999) (applying same principle in diversity case, finding that "in any case in which a state statute of limitations applies-whether because it is `**borrowed' in a federal question action** or because it applies under *Erie* in a diversity action-the state's accompanying rule regarding equitable tolling should also apply."). *Peoples v. Rogers*, C/A NO. 8:10-24-CMC-BHH (D.S.C. Feb. 1, 2010) (stating federal courts also borrow a state's equitable tolling doctrines) (emphasis supplied): That case documents the need for uniformity in the District of South Carolina where the District Court reversed then Magistrate Hendricks on essentially the same or similar grounds. Under these facts and where there is an absence of a federal law, it is respectfully

submitted forum law regarding filing a motion to restore with its savings provision is substantive law to be applied herein. Because the lower court opinion abridges a "substantive right," it exceeds the authorization of the Rules Enabling Act and must be reversed. *Semtek Int,l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

The need for uniformity is also documented in the following excerpt from the NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK on voluntary dismissals under North Carolina's Rule 41(a) savings provision:

> C. Actions Under 42 U.S.C. § 1983. Although actions under § 1983 involve federal question jurisdiction, North Carolina's savings provision may nevertheless apply to supplemental jurisdiction actions where the federal question involves a claim under § 1983. See, e.g., *Leardini v. Charlotte-Mecklenburg Board of Educ.*, 2011 WL 1234743 (W.D.N.C. 2011) (unpublished) (discussing *Board of Regents of the Univ. of the State of New York v. Tomanio*, 446 U.S. 478, 483–84 (1980), and declining to grant summary judgment against defendant refiling § 1983 and state law claims after voluntary dismissal in federal court). Actions under 42 U.S.C. § 1983 and other civil rights statutes are a complex area of litigation; parties are strongly encouraged to seek the advice of counsel well-versed in federal jurisdiction before determining the impact of voluntary dismissal of such an action.
> NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK, UNC School of Government (November 2014), p. 19.

Ambiguity in determining the impact of voluntary dismissal and/or deadlines for filing a motion to restore is a denial of procedural and/or substantive due process. The petitioner is prejudiced thereby. The rule of lenity supports petitioner's position. Uniformity in the District of South Carolina supports review and supports a writ of certiorari.

Rule 41(a)(1)(A)(i), Fed. R. Civ. P. (FRCP), provides for voluntary dismissal without prejudice before answer and before motion for summary judgment as in this case. *McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir.1985). It is fair to say the unambiguous plain language of the statute or rule specifies voluntary

dismissal "without prejudice." Rule 41(a)(1)(A)(i), FRCP. The timely motion to restore in this case has not been addressed and is currently pending. The distinction between the timely motion to restore without prejudice and a motion to reopen matters. There are different considerations and/or legal standards. But for this clear error of material fact and law, the petitioner's timely motion to restore should and would be granted. Accordingly, a writ of certiorari is respectfully requested.

Similarly, the record reflects the motion to restore with abeyance was filed on July 11, 2022, within the year after the July 21, 2021, Rule 41(a)(1)(A)(i), FRCP, voluntary dismissal without prejudice: Not "more than one year later" (ECF 100) as relied upon in clear error by the district court. In *Commercial Space Management Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1078 (9th Cir. 1999), the United States Court of Appeal for the Ninth Circuit held that "it is beyond debate that a dismissal under Rule 41(a)(1) is effective on filing, no court order is required, the parties are left as though no action had been brought, the defendants can't complain, and the district court lacks jurisdiction." But for reliance on clear error of material fact, the petitioner's timely motion to restore should and would be granted. Accordingly, clear error of material fact and law support review.

In addition, the district court's reliance on a non-existent court order of dismissal dated July 28, 2021, is clear error. Significantly and materially, there is no court order of dismissal. Rule 41(a)(1)(A)(i), FRCP, notice of voluntary dismissal without prejudice was timely filed on July 21, 2021. The Civil Docket

sheet shows the case was dismissed on July 21, 2021. The motion to restore was timely filed within one year on July 11, 2022. But for error of material fact and law, the outcome should and would be in petitioner's favor. Accordingly, petitioner requests review.

There are federal cases that apply substantive state law. *Erie R. Co. v. Tompkins,* 304 U.S. 6 (1938). For purposes of *Erie*, the state's statute of limitations and the state's equitable tolling doctrine are substantive law. *Id.* Federal courts must abide by a state's tolling rules, which are integrally related to statutes of limitations. *Board of Regents of the Univ. of the State of New York v. Tomanio*, 446 U.S. 478, 483–84 (1980); Rules of Decision Act (federal courts, when confronted with the issue of whether to apply federal or state law in a lawsuit, must apply state law on issues of substantive law). Under the facts and in the absence of federal law regarding Rule 41(a)(1)(A)(i), FRCP, voluntary dismissal without prejudice, the forum state's motion to restore and savings provision are substantive law to be applied herein. Under these facts, there are different considerations for motion to restore as opposed to motion to reopen a case closed by court order which is not applicable to the instant case. The lower court's failure to address the motion to restore is clear error. But for failure to address the motion to restore, the outcome should and would be in petitioner's favor. Accordingly, review is respectfully requested.

The case of *Board of Regents of the Univ of the State of New York et al. v. Tomanio,* 64 L.Ed.2d 440, 100 S.Ct. 1790, 446 U.S. 478 (1980), provides guidance. In that case, respondent's action was barred by the New York statute of

limitations. The federal courts were obligated not only to apply the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations:

(a) Under 42 U.S.C. § 1988, federal courts are instructed to refer to state statutes when federal law provides no rule of decision for actions brought under § 1983, and § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States." Since Congress did not establish a statute of limitations or a body of tolling rules applicable to federal-court actions under § 1983, the analogous state statute of limitations and the coordinate tolling rules are binding rules of law in most cases. This "borrowing" of the state statute of limitations includes rules of tolling unless they are "inconsistent" with federal law. *Id.*, pp. 483-486.

(b) New York's tolling rule is not "inconsistent" with the policies of deterrence and compensation underlying § 1983. Neither of these policies are significantly affected by New York's rule since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years. And there is no need for nationwide uniformity so as to warrant displacement of state statutes of limitations for civil rights actions. Nor are policies of federalism undermined by adoption of the New York rule. When Congress establishes a remedy (such as § 1983) separate and independent from other remedies that might also be available, a state rule which does not allow a plaintiff to litigate such alternative claims in succession, without risk of a time bar, is not "inconsistent." *Id.*, pp. 486-492.

Board of Regents of the Univ. of the State of New York v. Tomanio, 446 U.S. 478, 483–84 (1980).

See also *Wade v. Danek Medical, Inc.*, 182 F.3d 281, 289 (4th Cir.1999) (“It is also true, however, that we apply the equitable tolling rules of the forum state.”). Rule 41(a)(1)(A)(i), Fed. R. Civ. P. (FRCP), provides for petitioner’s voluntary dismissal of "an action anytime before an answer or motion for summary judgment has been served. “Accord *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel, 2 F.3d 544* (4th Cir.1993) (petitioner's right to voluntary dismissal under Rule 41(a)(1),

Fed.R.Civ.P., is unconditional even where court has already considered evidence)." *Morrison*, Matter of, 468 S.E.2d 651, 321 S.C. 370 (S.C. 1996). Petitioner timely filed motion to restore, NOT motion to reopen, within the year. Under law of the forum, a case may be dismissed voluntarily without prejudice under Rule 41(a)(1)(A), SCRCP, and as per the 1994 notes to Rule 40(j), SCRCP, Rule 41(a), SCRCP, voluntary dismissal without prejudice is treated as the equivalent of Rule 40(j), SCRCP, with a savings provision to toll the SOL which requires filing the motion to restore within one year of the dismissal. See *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 779 S.E.2d 826 (S.C. App. 2015) citing *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (S.C. 2003). State substantive law of the forum allows restoration of the case under the facts. For example, the ACA (Affordable Care Act) claims incorporate state procedural law, such as state statutes of limitations (SOL) and incorporate state substantive law regarding tolling. It is respectfully submitted that state substantive law of the forum applies to restoration within one year under these facts. By analogy, the case of *North American v. Boston Medical*, 906 A.2d 1042, 170 Md. App. 128 (Md. App. 2006), states, "The principle underlying these cases is that a dismissal on a procedural ground is not a determination of the case by the court." Further, it states:

> Although the Court of Appeals declined to review our opinion, the U.S. Supreme Court granted certiorari and reversed and remanded. See *Semtek International, Inc. v. Lockheed Martin Corp*, 531 U.S. 497, 500, 121 S.Ct. 1021 (2001). The Supreme Court held that the claim-preclusive effect of a federal court's dismissal on state statute of limitations grounds in a diversity action is governed by a federal rule that **incorporates the claim-preclusion law applied by the state courts in the state in which the federal court sits.** See id. at 509, 121 S.Ct. 1021.
> *North American v. Boston Medical*, 906 A.2d 1042, 170 Md. App. 128 (Md. App. 2006) (emphasis supplied).

Under the holding in the *Semtek* case, the lower court opinion "abridges a 'substantive right *grounded in state law*' and thus exceeds the authorization of the Rules Enabling Act." *Semtek Int'l. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500 (2001). Accordingly, good cause supports review.

The opinion is based on error of material fact and law because the order relies on the false claim there is a motion to reopen (*sic*) with "no reason whatsoever to justify ... reopening (*sic*)." The opinion (ECF 100) clearly errs in claiming the motion is a motion to reopen (*sic*) with "no reason whatsoever to justify reopening(*sic*)." Initially, the motion is NOT a motion to reopen filed more than one year after dismissal. The Civil Docket sheet indicates ECF 98 was altered without authorization and without notice. The attached copy confirms it is a motion to restore after Rule 41(a)(1)(A)(i), FRCP, voluntary dismissal without prejudice. The record reflects the motion to restore has not been addressed, it is currently pending, and it provides justification based on multiple questions of exceptional public importance. Denial of motion to restore abridges substantial rights grounded in state substantive law. The Motion to Restore has different considerations than a Motion to Reopen a court-ordered dismissal. The record reflects there is no order of dismissal by the court, there is no motion to reopen, and the other side has not claimed legal prejudice, if any. The opinion erroneously relies on the July 28, 2021, order as an order of dismissal. It is not. Accordingly, the opinion is based on clear error which supports review. *McCall- Bey v. Franzen*, 777 F.2d 1178 (7th Cir.1985). See *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 779 S.E.2d 826 (S.C. App. 2015) citing *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d

26 (S.C. 2003).

It is respectfully submitted a discerning review of the cited case, *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 284 (4th Cir. 2016), confirms the lower court opinion abridges a "substantive right" of the forum state and, therefore, exceeds the authorization of the Rules Enabling Act. *Semtek Int'l. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500 (2001). Compliance with federal law in the absence of federal statutes addressing Rule 41(a)(1)(A)(i), FRCP, voluntary dismissal requires application of the substantive law of the forum state. See *Wade v. Danek Medical, Inc.*, 182 F.3d 281, 289 (4th Cir.1999) ("It is also true, however, that we apply the equitable tolling rules of the forum state."). Significantly and materially, the footnote on page 2 of the November 2, 2023, appellate opinion overlooks or misapprehends that the savings provision of the forum state is applicable under these facts. Rule 41(a)(1)(A)(i), Fed. R. Civ. P., provides for plaintiff's voluntary dismissal of "an action anytime before an answer or motion for summary judgment has been served. Accord *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 2 F.3d 544 (4th Cir.1993) (petitioner's right to voluntary dismissal under Rule 41(a)(1), Fed.R.Civ.P., is unconditional....)." *Morrison*, Matter of, 468 S.E.2d 651, 321 S.C. 370 (S.C. 1996). See *Maxwell v. Genez*, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003). But for clear error, petitioner's timely motion to restore should and would be granted. The petitioner is prejudiced thereby. Accordingly, a writ of certiorari is respectfully requested.

Further, it is respectfully submitted the cited case of *McFarland v. Wells Fargo Bank NA*, 810 F3d 273 (4th Cir. 2016) is distinguished under the facts. The

citation from that case is not complete and includes the following:

> That policy (*questions of fact regarding unconscionable contract claims preclude resolution by summary judgment*) is driven by a practical concern that unconscionability claims are context-specific, so that evidence of procedural unconscionability may in some cases also inform the substantive unconscionability analysis. Whatever its merits, that guidance is a matter of state civil procedure, not substantive law, and does not bind a federal court sitting in diversity. Federal courts apply federal rules of procedure.
> *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 283-84 (4th Cir. 2016) (citations omitted) (emphasis supplied).

That case is distinguished on the basis of federal question jurisdiction herein. While it is true that Federal courts apply federal rules of procedure, it is also true that Federal courts apply federal rules of procedure with exceptions. The Rules of Decision Act (RDA) provides that federal courts, when confronted with the issue of whether to apply federal or state law in a lawsuit, must apply state law on issues of substantive law. It is well established that tolling provisions are considered substantive. The state procedural rules herein are considered substantive: South Carolina's savings provision tolls the statute of limitations for a period of one year after an action is dismissed voluntarily without prejudice. Under law of the forum, a case may be dismissed voluntarily without prejudice under Rule 41(a)(1)(A), SCRCP; per the 1994 notes to Rule 40(j), SCRCP, Rule 41(a)(1)(A), SCRCP, voluntary dismissal without prejudice is treated as the equivalent of Rule 40(j) which allows for motion to restore within one year. See *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 779 S.E.2d 826 (S.C. App. 2015) citing *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (S.C. 2003). Accordingly, review is requested.

It is respectfully submitted these are substantive rights found in forum state law to be applied herein. In this case, the savings provision in Rule 40(j), SCRCP,

and by extension Rule 41(a)(1)(A), SCRCP, provide for motion to restore to be granted if filed within one year. Failure of the district court to provide adequate explanation is abuse of discretion and/or arbitrary and capricious. Failure of the lower court to provide adequate explanation denies substantial rights including meaningful review. Accordingly, the rule of lenity supports review.

Ambiguity regarding motion to restore as opposed to motion to reopen is a prejudicial denial of due process with application of the improper standard. To the extent there is ambiguity, and the record reflects there is, the rule of lenity supports petitioner's position.

Without being disagreeable, there is disagreement. Significantly and materially, the petitioner disputes the record on appeal (ROA) and objects to unauthorized alteration of the Civil Docket including but not limited to, that alteration noted in ECF No. 102 dated 09/14/22 but Modified on 11/02/22. The petitioner respectfully motions to correct the ROA including but not limited to, the Civil Docket Entry No. ECF 98 which is wrongfully modified without authorization or notation. Specifically, Entry No. ECF 98 is NOT a motion to reopen: It is a motion to restore. In defendants' ECF No. 104 filed 10/06/22, defendants' Footnote 1 memorializes Civil Docket Entry No. 98 quoting the title, "Motion to Stay and Motion to Restore Case." The defendants' Footnote 1 in ECF No. 104 corroborates unauthorized and unnoticed alteration of petitioner's Civil Docket Entry No. 98 from motion to restore to motion to reopen documenting clear error of material fact and law while corroborating the merits of the petitioner's motion to restore. The lower court's reliance on a non-existent motion to reopen is clear

error. The lower court has not addressed timely motion to restore. But for the lower court's reliance on clear error of material fact, the petitioner's timely motion to restore should and would be granted. Accordingly, the petitioner requests correction of the ROA to reflect motion to RESTORE for ECF 98 and ECF 102 and requests reversal of the district court based on clear error. "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 petitioner respectfully makes motion for leave to amend the complaint to, including but not limited to, conform to previously unavailable evidence and evidentiary support for allegations of defendant's secreted or hidden wrongdoing. Specifically, new evidence supports leave to amend including but not limited to, previously unavailable medical journal reporting of unequal pay and alleged discrimination based on gender in reimbursements by insurance companies, including the corporate defendant. To the extent the unequal treatment is based on discrimination, the claims herein for violations of, including but not limited to, the ACA (Affordable Care Act) and its incorporated anti-discrimination laws

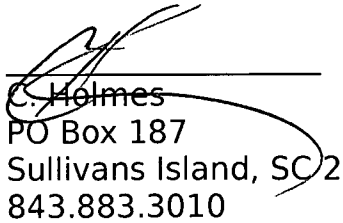
deserve discovery. Accordingly, the undersigned respectfully requests reversal of the district court orders, requests correction of the ROA regarding motion to restore in the Civil Docket for this case, and requests leave to amend the complaint based on previously unavailable evidence supporting allegations of wrongdoing.

For the reasons stated and for substantial justice affecting substantial rights, the undersigned respectfully requests review.

CONCLUSION

WHEREFORE petitioner prays for a writ of certiorari.

Respectfully submitted,



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