

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE
CONFERENCE OF THE NAACP,

and

TAIWAN SCOTT, on behalf of himself and all
other similarly situated persons,

Plaintiffs,

v.

HENRY D. MCMASTER, in his official
capacity as Governor of South Carolina;
THOMAS C. ALEXANDER, in his official
capacity as President of the Senate; LUKE A.
RANKIN, in his official capacity as Chairman
of the Senate Judiciary Committee; JAMES H.
LUCAS, in his official capacity as Speaker of
the House of Representatives; CHRIS
MURPHY, in his official capacity as Chairman
of the House of Representatives Judiciary
Committee; WALLACE H. JORDAN, in his
official capacity as Chairman of the House of
Representatives Elections Law Subcommittee;
HOWARD KNAPP, in his official capacity as
interim Executive Director of the South
Carolina State Election Commission; JOHN
WELLS, Chair, JOANNE DAY, CLIFFORD
J. EDLER, LINDA MCCALL, and SCOTT
MOSELEY, in their official capacities as
members of the South Carolina Election
Commission,

Defendants.

Civil Action No. 3:21-cv-03302-JMC-TJH-
RMG

**MOTION FOR RECONSIDERATION
AND RENEWED MOTION TO
DISQUALIFY THE HONORABLE
RICHARD M. GERGEL**

Defendants James H. Lucas (in his official capacity as Speaker of the South Carolina House of Representatives) (“**Defendant Lucas**”), Chris Murphy (in his official capacity as Chairman of the South Carolina House of Representatives Judiciary Committee), and Wallace H. Jordan (in his

official capacity as Chairman of the South Carolina House of Representatives Redistricting Ad Hoc Committee) (collectively, the “**House Defendants**”), by and through undersigned counsel and pursuant to 28 U.S.C. § 455 and Federal Rules of Civil Procedure 59(e) and 60(b), hereby respectfully submit this Motion for Reconsideration and Renewed Motion to Disqualify the Honorable Richard M. Gergel (“**Motion**”), United States District Judge for the District of South Carolina (“**Judge Gergel**”), from further service on this Panel.

INTRODUCTION

The House Defendants filed their initial Motion to Disqualify Judge Gergel (“**Motion to Disqualify**”) on January 6, 2022. (ECF No. 90). Two business days later, and without the benefit of briefing by all parties,¹ Judge Gergel issued an Order denying the Motion to Disqualify (“**Order**”). (ECF No. 96). The House Defendants respectfully renew their motion and also seek reconsideration of the Order because the Court “failed to fully consider”² at least three important factors when it denied the Motion to Disqualify—at least two before it, and another that arose after the filing of the Motion to Disqualify.

First, Judge Gergel’s Order failed to fully consider the significance of the fact that Plaintiffs have prominently raised the issues of South Carolina’s history of redistricting and history of racial discrimination—histories in which Judge Gergel has been personally involved both before

¹ The House Defendants acknowledge that Plaintiffs’ counsel indicated to undersigned counsel prior to the filing and review of the Motion to Disqualify that they intended to oppose the same. However, Plaintiffs could have decided, after further consideration, that this alone was not sufficient and they would rather not risk abrogation of this issue in any forthcoming litigation on appeal. (See ECF No. 90 at 8 (citing *Sanders* Disqualification Order); see also ECF No. 90-4 (*Sanders* Disqualification Order)). In any event, Judge Gergel issued his Order without giving any of the other parties an opportunity to brief the issue.

² See *Washington v. Trident Med. Ctr., LLC*, No. 2:20-CV-00953-RMG-MGB, 2021 WL 398894, at *3 (D.S.C. Jan. 11, 2021), *report and recommendation adopted*, No. 2:20-CV-953-RMG, 2021 WL 287754 (D.S.C. Jan. 28, 2021).

and after his appointment to the bench. It should be noted that after the Motion to Disqualify was filed on January 6, 2022, Plaintiffs submitted several documents to the House Defendants that made clear their intentions to make the history of redistricting in prior cycles an issue in this case. Plaintiffs served their discovery requests on all Defendants on January 7, 2022, one day after Plaintiffs sent their draft Joint Rule 26(f) Report to the House Defendants.³ *See Ex. A* (Plaintiffs' First Request for Production of Documents to Defendants), *Ex. B* (Plaintiffs' First Set of Interrogatories to Defendants), and *Ex. C* (January 6, 2022 Draft Joint Rule 26(f) Report). As detailed herein, many of the Plaintiffs' discovery requests seek documents, materials, and information from prior redistricting cycles, including those in which Judge Gergel played a critical role as counsel advocating on behalf of various litigants who were opposing the redistricting plan then before the Court.

Second, Judge Gergel's Order specifically failed to address – which, respectfully, indicates that he failed to fully consider – the significance of the fact that he, prior to becoming a district judge, to borrow Judge Gergel's language from his January 10, 2022 Order, “vigorously deposed” Defendant Lucas in the prior redistricting matter of *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 622 (D.S.C. 2002). (*See* ECF No. 96 at 3 (noting that Judge Gergel was persuaded that his recusal was proper in *Backus* because he had “vigorously deposed and cross-examined” the House's two key witnesses⁴ in prior litigation)). Defendant Lucas is currently the Speaker of

³ Plaintiffs sent their draft Joint Rule 26(f) Report to the House Defendants at 9:20:26 PM EST, which was subsequent to the House Defendants' filing of the Motion to Disqualify.

⁴ One of the “key witnesses” mentioned in the Order was Bobby Harrell. It bears mentioning that there was no mention of Mr. Harrell being a potential witness in the Motion to Recuse filed in the *Backus* case, *see Ex. D* (*Backus* Motion to Recuse) nor did Judge Gergel mention his deposing of Mr. Harrell as a basis for disqualification in the *Backus* Disqualification Order, (*see* ECF No. 90-2, attached as *Ex. E*). Finally, while the House Defendants raised the issue of Judge Gergel's prior deposition of Defendant Lucas in their original Motion to Disqualify, the House Defendants did

the House, an indispensable party in this case, and, as evidenced by the parties' Rule 26(a)(1) Initial Disclosures, is anticipated to testify at trial as a key witness for the House Defendants.⁵

Third, Judge Gergel failed to fully consider the fact that a number of witnesses in this litigation will be identical to those in prior redistricting litigation in which he was involved as a lawyer.

Each of these facts (as well as other facts outlined in the House Defendants' initial Motion to Disqualify) independently mandate Judge Gergel's disqualification.

ARGUMENT

I. Judge Gergel Failed to Fully Consider the Fact that He Has Been Personally Involved in the Prior Litigation That Plaintiffs Place Directly at Issue in This Litigation

In the Order, Judge Gergel stated that “the present reapportionment challenge is plainly not the same matter as was litigated two decades or more ago.” (ECF No. 96 at 4-5). The House Defendants respectfully submit that this view misses the point. As an initial matter, the House Defendants reiterate that several of the allegations in Plaintiffs' Amended Complaint are strikingly similar to the allegations contained in the *Colleton County* Complaint. And, most notably, many of these allegations were asserted by Governor James H. Hodges, whom Judge Gergel represented

not raise any issues related to Judge Gergel's “vigorous” examination(s) (per Judge Gergel's January 10, 2022 Order) of former Speaker Harrell in the *Colleton County* litigation. In addition, when he was deposed by Judge Gergel in *Colleton County*, Mr. Harrell was the Chairman of the House Ways and Means Committee—not the Speaker of the House. *See id.* If Judge Gergel's deposition of Mr. Harrell mandated Judge Gergel's disqualification in *Backus*, his deposing the *current* Speaker of the House (Defendant Lucas) in that same litigation mandates his disqualification now.

⁵ Plaintiffs' Rule 26(a)(1) Initial Disclosures – which were also received one day *after* the filing of the Motion to Disqualify – specifically list Defendant Lucas as an individual likely to have discoverable information that Plaintiffs may use to support their claims in this action. *See Ex. F* at 3. Similarly, the House Defendants' Rule 26(a)(1) Initial Disclosures likewise list Defendant Lucas as an individual likely to have discoverable information that they may use to support their defenses. *See Ex. G* at 2.

in *Colleton County*. (See generally ECF No. 90 at 19-22).⁶ The House Defendants incorporate by reference the entire chart included in their initial Motion to Disqualify, which summarizes the striking similarities between these allegations, but specifically reiterate the most noteworthy similarities between the allegations in the *Colleton County* complaint and those here: (1) both complaints allege “malapportionment” of South Carolina’s existing state House districts and “racial gerrymandering” (ECF No. 90 at 20); (2) both allege that the plaintiffs’ right to vote was diluted as a result of “packing” or “cracking”/“fragmenting” Black voters (*id.* at 21); (3) both contain allegations regarding the subordination of traditional redistricting principles in the challenged districts at issue (*id.*); (4) both contain allegations of an unreasonably or unusually high BVAP in certain districts (*id.* at 22); and (5) both allege that Black voters demonstrate an overwhelming preference for Black Democratic candidates (*id.*).

Furthermore, in their initial draft Joint Rule 26(f) Report, Plaintiffs list the following “Subjects of Discovery”:

Plaintiffs anticipate that discovery is necessary on at least the following subjects: data considered and used in the redistricting process; the consideration and development of criteria used for drawing House maps; the process of drawing House maps, including any communications or directions provided to the mapmakers, draft maps developed or considered, data analyzed, and communications (including with external parties) about the redistricting process, draft maps, criteria, or South Carolina’s history of redistricting since passage of the Voting Rights Act; the process of receiving and incorporating public input during the redistricting process; South Carolina’s history of discrimination against Black

⁶ As the Amended Complaint makes clear, Plaintiffs seek more opportunity districts. (See ECF No. 84 at ¶ 77). They challenge districts that are over 55% BVAP or below 25% BVAP, without regard to other factors, such as community of interest or population shifts. They seek more Democratic seats, using race as a proxy for politics. While the Voting Rights Act and *Gingles* deal with majority-minority districts (>50% BVAP), Plaintiffs look to >40% BVAP districts, *see id.*, without citing any support for that threshold. A strikingly similar theory was advanced in *Colleton County*, primarily by Judge Gergel.

people and other minority groups,⁷ including but not limited to the redistricting context; any analysis prepared or considered during development of the plan or the redistricting process, including but not limited to any analysis of racially polarized voting, performance, compactness, jurisdiction or precinct splits, location of incumbents. In addition to these subjects, Plaintiffs require discovery on the subjects listed in their First Sets of Requests for Production, First Set of Interrogatories, and subpoenas, as well as future discovery requests. Plaintiffs also anticipate depositions to further develop the factual record for trial. Some of the information sought via discovery may also be addressed via stipulations between the Parties.

Ex. C at 4-5; *see also* ECF No. 84 at ¶ 3 (alleging South Carolina’s “shameful history and ongoing record of discrimination”); *id.* at ¶¶ 37-44 (section titled, “History of State Legislative Redistricting in South Carolina”); *id.* at ¶¶ 115, 132, 137 (mentioning a “shared history” of Black voters); *id.* at ¶ 172 (alleging “South Carolina’s well-documented history and ongoing record of

⁷ In addition to the fact that Judge Gergel has been directly and prominently involved in the history of redistricting in South Carolina as counsel for various litigants, he has also been a chronicler of South Carolina’s history of racial discrimination since taking the bench. Subsequent to his appointment to the district court, Judge Gergel authored a book that focused on incidents related to South Carolina’s history of discrimination. In addition, publicly available data in his financial disclosures indicate that the sales of that book might be considered significant to a reasonable outside observer, as Judge Gergel clearly profited from the sales. *See* Richard Gergel, *Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring* (2019); *see also* Financial Disclosures for J. Richard Mark Gergel, available at <https://www.courtlistener.com/person/1175/disclosure/18710/richard-mark-gergel/> (disclosing \$50,000.00 (2017), \$25,000.00 (2018), and \$25,000.00 (2019) in non-investment income from “Farrar, Straus and Giroux, book royalties”); *see also id.* (financial disclosures for 2020 and 2021 not yet disclosed). In addition, Judge Gergel has lectured at numerous events about this book. *See, e.g., id.* (2019 disclosures indicating that Judge Gergel was reimbursed by Farrar, Straus and Giroux (publisher) for speeches in New York City, Washington, D.C., Boston, and Charlottesville); *see also, e.g.,* <https://judicialstudies.duke.edu/2019/11/judge-richard-gergel-discusses-new-book-unexampled-courage/>; <https://bluebicyclebooks.com/2019/04/25/author-luncheon-with-judge-richard-gergel-unexampled-courage-fri-may-17-12-pm/>; <https://visitingmontgomery.com/convention-district/detail/clifford-virginia-durr-lecture-series/events>. The House Defendants respectfully submit that a reasonable observer could – and likely would – question whether Judge Gergel could remain impartial and unbiased in a matter that places under a microscope an issue from which he has written and lectured extensively—and from which he has personally profited.

discrimination against Black South Carolinians in redistricting, particularly state legislative redistricting, and other voting practices”).

Plaintiffs’ discovery requests are consistent with the “Subjects of Discovery” included by Plaintiffs in their initial draft of the Joint Rule 26(f) Report. On January 7, 2022 – the day *after* the filing of the Motion to Disqualify – Plaintiffs served their first sets of discovery requests on all Defendants. Notably, several of these discovery requests place the “history of redistricting” and “history of discrimination” squarely at issue. *See generally Ex. A and Ex. B.* Indeed, Plaintiffs’ very first Request for Production asks for:

All documents, communications, maps, memoranda, expert reports or analyses, Racially Polarized voting analyses, or other documents and communications related to South Carolina’s submission of state legislative maps in the *1990, 2000,* and 2010^[8] redistricting cycles for Preclearance review pursuant to Section 5 of the Voting Rights Act. This Request includes, but is not limited to, any correspondence with the U.S. Department of Justice for the *1990, 2000,* and 2010 redistricting cycles.

Ex. A at 10, Request No. 1 (emphasis added). This Request specifically includes documents, communications, and other materials from the 1990 and 2000 redistricting cycles, in which Judge Gergel was prominently involved as counsel advocating for certain litigants who were inextricably tethered to one side of the litigation.⁹ Moreover, Plaintiffs’ third Interrogatory specifically requests that the House Defendants “[i]dentify each of the Black candidates elected to serve in the South Carolina State House since January 1, 1980 to the present, including their names, positions, date

⁸ After being appointed to serve on the panel in *Backus*, Judge Gergel disqualified himself after a motion was filed seeking his disqualification.

⁹ In *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996) (1990 redistricting cycle), Judge Gergel represented a group of plaintiffs “who challenged the South Carolina House legislative reapportionment plan.” (ECF No. 96 at 3). In *Colleton County* (2000 redistricting cycle), Judge Gergel represented Governor Hodges “after the State failed to adopt a reapportionment plan.” *Id.* In both of these cases, the interests of Judge Gergel’s clients were adverse to those of the House Defendants.

of election, and the demographics of the district from which they were elected.” *Ex. B* at 9, Interrogatory No. 3.¹⁰ Of course, the demographics of a number of those districts were at issue in both *Smith* and *Colleton County*, which again, were cases involving Judge Gergel as a vigorous advocate for causes advanced by the Plaintiffs in this litigation. (See ECF No. 90 at 24 (House Defendants’ initial Motion to Disqualify noting that in addition to BVAP percentages, other statistical evidence in this case will be similar to that considered in *Colleton County*, such as population growth and shifts, population deviation between districts, Black voter preference percentages, and crossover percentages); see also *id.* (initial Motion to Disqualify noting that the House Districts at issue in this litigation are similar to those at issue in *Colleton County*, as at least three of the seven sets of Challenged Districts (i.e., Sumter, Horry/Dillon, and Richland Counties), which comprise at least 15 of the 28 currently-Challenged Districts, cover the same counties that were in dispute in *Colleton County*).

As Plaintiffs’ discovery requests clearly indicate, Plaintiffs desire for South Carolina’s “history of redistricting” and “history of discrimination” to be front and center throughout this litigation. It is indisputable that Judge Gergel has been prominently involved in these histories,

¹⁰ While the House Defendants have only expounded upon two of Plaintiffs’ most noteworthy discovery requests, several of Plaintiffs’ other requests could very well place the facts and circumstances related to the 1990 and 2000 redistricting cycles at issue. See, e.g., *Ex. A* at 11-15, (Request Nos. 2, 4, 5, 6, 11, 16, and 21); see also *Ex. B* at 10-11, Interrogatory Nos. 8, 9, 10, 14, and 15; *Ex. A* at 5 (defining “Predecessor Maps” as “*any previous* South Carolina House of Representatives redistricting map in whole or in part that were considered, created, developed, and/or proposed by Defendants,” which would necessarily include maps related to the 1990, 2000 and 2010 redistricting cycles) (emphasis added); *Ex. B* at 6, Instruction No. 1 (“Each Interrogatory shall be construed according to its *most inclusive* meaning so that if information or a document is responsive to any reasonable interpretation of the Interrogatory, the information or document is responsive.” (emphasis added)). Although the House Defendants intend to object to the scope of several of these requests, they are included herein for the purpose of showing what information Plaintiffs have placed directly at issue.

both as an advocate in prior redistricting litigation and as an author and lecturer. And, the Court in this case may well be called upon to make decisions about not only the discoverability, but also the admissibility of evidence related to Plaintiffs' discovery requests. As such, there is notable discord between the circumstances of this case and Judge Gergel's statement that "the present reapportionment challenge is plainly not the same matter as was litigated two decades or more ago." (ECF No. 96 at 4-5). Notwithstanding the passage of time, a reasonable observer could certainly view this dissonance as creating the *appearance* of partiality, thus mandating disqualification. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

II. Judge Gergel Failed to Fully Consider the Fact that He Vigorously Deposed and Cross-Examined Defendant Lucas in Prior Redistricting Litigation

According to Judge Gergel's Order issued on January 10, 2022, he was disqualified in *Backus* because he had "vigorously deposed and cross examined" the House's "two key witnesses" in prior redistricting litigation. (See ECF No. 96 at 3). Yet, Judge Gergel has failed to apply the same reasoning here, despite the fact that he "vigorously deposed" Defendant Lucas in *Colleton County*. As noted above, one of the "key witnesses" mentioned by Judge Gergel in his Order was Bobby Harrell. When Mr. Harrell was deposed by Judge Gergel in *Colleton County*, Mr. Harrell was the Chairman of the House Ways and Means Committee—not the Speaker of the House. Mr. Harrell was, however, the Speaker of the House at the time of the *Backus* litigation. Thus, if Judge Gergel's "vigorous" deposition and cross-examination of Mr. Harrell in *Colleton County* mandated his disqualification in *Backus*, the same logic applies with equal force here. Put simply, the mere passage of time does not change the fact that in *Colleton County* Judge Gergel "vigorously deposed" the current Speaker of the House (Defendant Lucas), who will undoubtedly be a *key* witness at this trial. Accordingly, if Judge Gergel's prior deposing of witnesses mandated his disqualification in *Backus*, so too here. See Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral*

Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!, 90 Geo. L.J. 2087, 2141 (2002) (“Reasonable observers of the process of constitutional adjudication should agree that **consistency** in constitutional law is no vice and that abrupt departures on the part of Justices from previous positions without persuasive explanations are no virtue (and should be avoided).” (emphasis added)).¹¹

While the House Defendants have not been able to locate a transcript of Defendant Lucas’s prior deposition in *Colleton County*, 20 years later, Defendant Lucas still vividly recalls being vigorously and aggressively deposed by Judge Gergel in that case. *Ex. H* (Affidavit of James H. Lucas) at ¶ 6; *see also Ex. I* (Affidavit of Charles F. Reid) at ¶ 7. This is not surprising, as the interests of Governor Hodges – Judge Gergel’s client in that case – were adverse to those of Defendant Lucas. *Ex. I* at ¶ 7.¹²

III. Judge Gergel Failed to Fully Consider the Fact that a Number of Witnesses in this Litigation Will Be Identical to Those in Prior Redistricting Litigation

As noted in the House Defendants’ initial Motion to Disqualify, it is reasonably foreseeable that at least some number of witnesses in this litigation will be identical to those in prior redistricting litigation. For example, Congressman James Clyburn testified in *Colleton County* and,

¹¹ In his Order, while Judge Gergel criticized the House Defendants for failing to more fully describe the facts of *United States v. Jian-Yun Dong*, No. 2:11-CR-510 (D.S.C. 2012), he failed to apply the analysis of *United States v. Black*, 490 F. Supp. 2d 630 (E.D.N.C. 2007), which he found especially persuasive when he recused himself in *Dong*. As noted in the Motion to Disqualify, (ECF No. 90 at 28), Judge Gergel’s prior citation to *Black* is notable because, much like this case, the judge in *Black* found that a public appearance issue would arise if he were to hear a high-profile case involving the Speaker of the House when the judge had a history of representing litigants in reapportionment cases on the **opposite** side of the Speaker of the House. The facts of this case are much closer to the facts of *Black* than were the facts of *Dong* (as Judge Gergel’s citation of additional facts makes crystal clear), yet his Order fails to apply the rationale of *Black* to this case.

¹² While the House Defendants have not seen transcripts of Judge Gergel’s prior depositions of Messrs. Harrison and Harrell, Defendant Lucas is confident that Judge Gergel’s prior deposition of him was likely as vigorous as the depositions of Messrs. Harrison and Harrell. *Ex. I* at ¶ 6.

as the longest serving member in the state’s Congressional delegation, was identified as a witness in the *Backus* disqualification motion that resulted in Judge Gergel’s disqualification. (ECF No. 90 at 25). Here, Congressman Clyburn will almost certainly be a witness deposed or called at trial by one of the parties during any phase of this litigation that deals with the Congressional maps. Furthermore, other witnesses who testified in *Colleton County* and/or *Backus* will likely testify in this case, including at least one expert witness.

In his *Backus* disqualification order, Judge Gergel highlighted the commonality of witnesses as a reason for disqualification, acknowledging that a number of likely witnesses in *Backus* played key roles in the plans under consideration in *Colleton County* and were extensively deposed or cross-examined by Judge Gergel himself. (ECF No. 90-2 at 4, n.2) (“[A] reasonable person outside the judiciary might conclude that service of the former adversarial attorney in the 2002 reapportionment litigation in the present legislative reapportionment case on the three judge panel would create an *appearance* of partiality.”) (emphasis in original). Judge Gergel ultimately agreed that the extensive interactions between himself and the similar witnesses created a public appearance issue that required disqualification. *Id.* at 4. Yet, Judge Gergel’s Order indicates that he failed to fully consider the fact that the same issue that existed in *Backus* still exists today.

IV. The Motion to Disqualify Was Made For a Proper Purpose

In his Order, Judge Gergel, without citing any objective facts in support, noted that “§ 455 is not designed to be a sword with which litigants can pick and choose their judges.” (ECF No. 96 at 6 (citing *Bivens Gardens Office Building Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 913 (11th Cir. 1998)).¹³ This unfortunate and unnecessary comment – which, the House

¹³ The facts of this case bear no resemblance to the case cited in Judge Gergel’s Order dated January 10, 2022. Thus, any reference to and reliance on *Bivens* is, respectfully, misplaced. In *Bivens*, the plaintiffs’ attorneys were aware a full three months before the case went to trial that

Defendants respectfully submit cannot be characterized as “innocuous,” as Judge Gergel described his “attack”¹⁴ comment about the House and Senate – adds to the appearance issue here. The House Defendants did not file their Motion to Disqualify for any improper purpose. Indeed, the purpose behind that filing – as well as this filing – comports with the true spirit of § 455: ensuring that the public has the utmost confidence in the integrity and impartiality of the federal judiciary throughout this critically important process. (*See, e.g.*, ECF No. 90-2 at 5 (citing *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998), and recognizing “the need to preserve the public’s confidence in the integrity and impartiality of the judiciary”); *see also id.* (Judge Gergel noting that it was “particularly important that all participants and the public have confidence in the fairness of the judicial process”); *United States v. Alabama*, 828 F.2d 1532, 1546 (11th Cir. 1987) (“In a decision such as this one, a decision which will affect millions [of voters], public confidence in the judicial system demands” a suit free from any appearance of partiality)). As recognized by Chief Justice John Roberts in reference to a federal judge’s recusal obligations, “We are duty-bound to strive for 100% compliance because *public trust is essential*, not incidental, to our function. Individually, judges must be scrupulously attentive to both the letter and spirit of our

the Judge had employed the defendants’ counsel as a law clerk while the case was pending before him. 140 F. 3d at 913. In holding that the plaintiffs waived the recusal issue, the Court explained that the plaintiffs’ attorneys “recognized the recusal issue from the start of that three-month period[,] [y]et they made a strategic decision not to raise the issue until they saw how the trial came out.” *Id.* “In other words, they made a carefully thought out, coldly calculated, eyes open decision not to raise the issue and instead to gamble on winning anyway.” *Id.* In essence, the plaintiffs in *Bivens* tried to use recusal “as an insurance policy to be cashed in” after they lost at trial. *Id.*

¹⁴ We accept Judge Gergel’s explanation that his comment was indeed intended to be innocuous—however, a reasonable outside observer, understanding Judge Gergel’s history as an advocate in prior redistricting cases, could view this comment as an exhibition of a subconscious desire to attack the institutions and offices who have been on the other side of his clients in prior redistricting cases.

rules, as most are.” Chief Justice John Roberts, *2021 Year-End Report on the Federal Judiciary* 3-4 (Dec. 31, 2021), available at <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf> (emphasis added).

Notwithstanding Judge Gergel’s unsupported and unfortunate characterization of the House Defendants’ motives, the Motion to Disqualify was not about certain parties’ preferences regarding who should serve on the Panel. It was about the true “spirit” of § 455, which is to ensure public trust and confidence in the integrity and impartiality of the judiciary. After all, this case, which will affect millions of South Carolina citizens, is far too important for there to be any question – no matter how small – regarding whether any member of this Panel can remain impartial and unbiased throughout the entirety of this process. Unfortunately, Judge Gergel’s Order of January 10, 2022 adds to the appearance issue here. Accordingly, just as Judge Gergel’s disqualification was mandated in *Backus*, his disqualification is mandated here.

CONCLUSION

This case is far “too important to be decided under a cloud.” *Alabama*, 828 F.2d at 1546. Therefore, based on the foregoing (and the House Defendants’ initial Motion to Disqualify, which is incorporated by reference herein), the House Defendants respectfully request that this Motion be granted and that Judge Gergel disqualify himself.¹⁵

[SIGNATURE PAGE FOLLOWS]

¹⁵ Based on conversations with Plaintiffs’ counsel, while Plaintiffs’ counsel has not reviewed this Motion prior to its filings, undersigned counsel expects that Plaintiffs will oppose this Motion.

s/ William W. Wilkins

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January 18, 2022
Greenville, South Carolina

EXHIBIT A
(Plaintiffs' First Request for Production of
Documents to Defendants)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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THE SOUTH CAROLINA STATE
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JORDAN, in his official capacity as
Chairman of the House of Representatives
Elections Law Subcommittee; HOWARD
KNAPP, in his official capacity as interim
Executive Director of the South Carolina
State election Commission; JOHN WELLS,
Chair, JOANNE DAY, CLIFFORD J.
EDLER, LINDA MCCALL, AND SCOTT
MOSELEY, in their official capacities as
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Defendants.

Case No. 3-21-cv-03302-JMC-TJH-RMG

**PLAINTIFFS FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS TO
DEFENDANTS**

THREE-JUDGE PANEL

**PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF
DOCUMENTS TO DEFENDANTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure (“Rule”), Plaintiffs hereby request that Henry D. McMaster, in his official capacity as Governor of South Carolina; Thomas C. Alexander, in his official capacity as President of the Senate; Luke A. Rankin, in his official capacity as Chairman of the Senate Judiciary Committee; James H. Lucas, in his official

capacity as Speaker of the House of Representatives; Chris Murphy, in his official capacity as Chairman of the House of Representatives Judiciary Committee; Wallace H. Jordan, in his official capacity as Chairman of the House of Representatives Elections Law Subcommittee; Howard Knapp, in his official capacity as interim Executive Director of the South Carolina State Election Commission; and John Wells (Chair), Joanne Day, Clifford J Edler, Linda McCall, and Scott Moseley, in their official capacities as members of the South Carolina Election Commission (collectively, “Defendants”) produce the documents described herein for inspection and copying and deliver copies by electronic mail or other electronic means the requested documents to counsel for the Plaintiffs at a mutually agreed upon date. Though this is a joint request, each Defendant should separately conduct an independent review for responsive documents in their possession. Production can be made available to Plaintiffs on a rolling basis. Further, Defendants are requested to periodically update the production of the documentation requested herein, through the time of this case, pursuant to Rule 26.

DEFINITIONS

As used herein, the following terms have the following meanings:

1. “ALL,” “ANY,” and “EACH” shall each be construed as encompassing any and all.
2. “AND” and “OR” shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of the Request all responses that might otherwise be construed to be outside of its scope.
3. “CHALLENGED DISTRICTS” mean South Carolina House of Representative Districts 7, 8, 9, 11, 41, 43, 51, 54, 55, 57, 59, 60, 63, 67, 70, 72, 73, 74, 75, 76, 77, 78, 79, 90, 91, 93, 101, 105.
4. “COMMITTEES” refers to the 24-member South Carolina House of Representatives Judiciary Committee chaired by Representative Christopher J. Murphy; the 7-member South

Carolina House of Representatives Judiciary Redistricting Ad Hoc Committee chaired by Rep. Wallace H. Jordan, Jr.; the 22-member South Carolina Senate Judiciary Committee chaired by Senator Luke A. Rankin; and the 7-member South Carolina Senate Judiciary Redistricting Subcommittee chaired by Senator Rankin.

5. “COMMITTEES MEMBERS” refers to any person involved in the duties of the committees, purports to act on the Committees’ behalf or any person or entity acting or purporting to act on the Committees’ behalf or subject to the Committees’ control or is involved in the redistricting work of the committees related to H. 4493.
6. “COMMUNICATIONS” means the transmittal of information of any kind by and/or through any means, including, but not limited to, emails, email attachments, calendar invitations, PowerPoint presentations, written reports, letters, and the like.
7. “DISTRICTS BORDERING THE CHALLENGED DISTRICTS” mean South Carolina House of Representative Districts that border in whole or in part the Challenged Districts.
8. “DOCUMENT” or “DOCUMENTS” is defined to be synonymous in meaning and the same in scope as the term “document” as used in Rule 34 and the phrase “writings and recordings” as defined by Rule 1001 of the Federal Rules of Evidence, and includes without limitation any kind of written, typewritten, printed, graphic, or recorded material whatsoever, including without limitation notes, text messages, emails, electronic mail, public or private posts on Facebook, Instagram, or other social media platforms, public or private electronic messages sent via messaging applications or platforms including but not limited to Facebook Messenger, Signal, Slack, Parler or other such platforms, memoranda, letters, reports, studies, electronic mail messages, telegrams, publications, contracts, manuals, business plans, proposals, licenses, drawings, designs, data sheets, diaries, logs, specifications, brochures, product or service descriptions, periodicals, schematics, blueprints, recordings,

summaries, pamphlets, books, prospectuses, interoffice and intra office communications, offers, notations of any sort of conversations, working papers, applications, permits, surveys, indices, telephone calls, meeting minutes, databases, electronic files, software, transcriptions of recordings, computer tapes, diskettes, or other magnetic media, bank checks, vouchers, charge slips, invoices, expense account reports, hotel charges, receipts, freight bills, agreements, corporate resolutions, minutes, books, binders, accounts, photographs, and business records. This shall include all non-identical copies, no matter how prepared; all drafts prepared in connection with such documents, whether used or not; and any deleted or erased documents that may be retrieved from hard drives, floppy disks, electronic back-up files, or any other back-up systems, regardless of location, together with all attachments thereto or enclosures therewith, in your possession, custody or control or any of your attorneys, employees, agents, or representatives.

- a. DOCUMENT or DOCUMENTS shall include Electronically Stored Information. “ELECTRONICALLY STORED INFORMATION” means electronically stored data on magnetic or optical storage media (including but not limited to hard drives, backup tapes, Jaz and zip drives, floppy disks, CD-ROMs and DVD-ROMs) as an “active” file or files (readily readable by one or more computer applications or forensics software), any electronic files saved as a backup, any “deleted” but recoverable electronic files on said media; any electronic file fragments (files that have been deleted and partially overwritten with new data), and slack (data fragments stored randomly from random access memory [RAM] on a hard drive during the normal operation of a computer [file slack and/or RAM slack] or residual data left on the hard drive after new data has overwritten some but not all of previously stored data), text messages and emails located on any mainframe, server, desktop, or portable device, including cell phones.

9. “H. 4493” refers to House Bill 4493 as ratified by the South Carolina General Assembly on December 9, 2021, and signed by the Governor of South Carolina on December 10, 2021, and refers to the bill as a whole and/or to any provision thereof.
10. “MAP ROOM” refers the virtual and physical room and the process that Representative Jordan identified in public hearings, including during an October 4, 2021 hearing by the South Carolina House of Representative House Judiciary Redistricting Ad Hoc Committee.
11. “PERSON” means any natural person or any legal entity, including, but not limited to, any business or governmental entity or association.
12. “PREDECESSOR MAPS” means any previous South Carolina House of Representatives redistricting map in whole or in part that were considered, created, developed, and/or proposed by Defendants.
13. “RACIALLY POLARIZED” means that there is a consistent relationship between the race of the voter and the way in which the voter votes. It means that “black voters and white voters vote differently.” *Thornburg v. Gingles*, 478 U.S. 30, 53, n.21 (1986).
14. “RELATED TO,” “CONCERNING,” or “INCLUDING” shall be construed in the broadest sense to mean referring to, describing, reflecting, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, analyzing, constituting, and/or evidencing, in any manner, whether directly or indirectly, the subject matter of the Request.
15. “SECTION 5” or “PRECLEARANCE” refers to that part of the Voting Rights Act, 52 U.S.C. § 10304 and the related federal regulations, which formerly required the State of South Carolina to submit all of its voting related changes to the United States Department of Justice or to a three-judge federal district court in Washington, D.C. for review before those changes could take effect.

16. “THIRD PARTIES” refers to but is not limited to persons and entities who are political consultants, Republican and Democrat party officials, South Carolina state officials, lobbyists, members of the public, and legislative aides not in the employment of Defendants.
17. “VOTERS OF COLOR” means anyone who is Black, Hispanic/Latinx, Asian American, or is a member of a non-Black any other racial minority group, who is eligible or could be eligible to vote.
18. “VOTING RIGHTS ACT” or “VRA” refers to the Voting Rights Act, 52 U.S.C. § 10301 et seq.
19. “YOU,” “YOUR,” or “DEFENDANTS” refers to Defendants and includes any of Defendants’ agents, advisors, employees, representatives, officers, consultants, contractors, or any person or entity acting or purporting to act on Defendants’ behalf or subject to Defendants’ control.

INSTRUCTIONS

1. The responsive documents should be produced in the manner prescribed by the Rules and in accordance with the ESI Protocols in the Parties’ forthcoming joint Rule 26(f) Report.
2. Per the Parties’ agreement regarding discovery, You must submit objections to these Requests within five business days and substantive responses within ten days.
3. If any part of the request is objected to, the reason for the objection should be stated with particularity. If an objection is made to part of any item or category set forth in a request, that part should be specified.
4. Each request for production and subparagraphs or subdivisions thereof shall be construed independently, and no request shall be construed as creating a limitation upon any other request.

5. The documents produced in response to these requests are all responsive documents in your possession, custody, or control, or known to be available to you, regardless of whether such documents are possessed directly by you or your agents, advisors, employees, representatives, attorneys, consultants, successors-in-interest, or other persons or entities acting on your behalf or subject to your control, and whether they are maintained at any of your locations, offices, archives, or in any other location (including back-up tapes or electronic mail) or with any persons related in any way to you.
6. Any reference in these document requests to an individual includes any and all agents, advisors, employees, representatives, attorneys, successors-in-interest, and all other persons or entities acting on his, her, or its behalf or under his, her, or its control.
7. Any reference in these document requests to any corporation, partnership, association, governmental entity or agency, or other entity includes the present and former officers, executives, partners, directors, trustees, employees, agents, representatives, attorneys, accountants and all other persons acting or purporting to act on behalf of such corporation, partnership, association, agency, or entity and any of their parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors, and/or successors-in-interest.
8. Where a request calls for information that is not available to you in the form requested, but is available in another form or can be obtained, in whole or in part, from other data in your possession or control, you must so state and either supply the information requested in the form in which it is available, or supply the data from which the information requested can be obtained.
9. In addition to the responsive document, you shall produce all non-identical copies, including all drafts, of each responsive document.

10. If any requested document is not or cannot be produced in full, you shall produce it to extent possible, indicating what document or portion of such document is not or cannot be produced and the reason why it is not or cannot be produced.
11. Each document produced must include all attachments and enclosures.
12. Documents attached to each other shall not be separated.
13. Documents not otherwise responsive to a request for production shall be produced if such documents refer to, concern, or explain the documents called for by any request for production and constitute routing slips, transmittal memoranda or letters, comments, evaluations, or similar documents.
14. In accordance with Rule 34(b), all documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the requests and identify the name of the person from whose files the documents were produced.
15. Each request shall be responded to separately. Nevertheless, a document that is responsive to more than one request may be produced for one request and incorporated by reference in another response, provided that the relevant, corresponding portion is so labeled or marked.
16. If any requested document or other document potentially relevant to this action is subject to destruction under any document retention or destruction program, the document(s) should be exempted from any scheduled destruction and should not be destroyed until the conclusion of this lawsuit or unless otherwise permitted by the Court. Any reference in these document requests to an individual includes any and all agents, advisors, employees, representatives, attorneys, successors-in-interest, and all other persons or entities acting on his, her, or its behalf or under his, her, or its control.
17. No part of a document request shall be left unanswered because an objection is interposed to another part of the document request. If you object to any document request or sub-part

thereof, state with specificity your objection and all grounds therefore. Any ground not stated will be waived.

18. If you contend that it would be unduly burdensome to obtain and provide all of the documents called for in response to any request, then in response to each such request you shall:

- a. produce all documents and information available to you without undertaking what you contend to be an unreasonable burden; and
- b. set forth the particular grounds on which you contend that additional efforts to obtain such documents and information would be unduly burdensome.

19. If any document is withheld, in whole or in part, under any claim of privilege, including without limitation, the work-product doctrine, attorney-client privilege, deliberative process privilege, or investigative or law enforcement privilege, your answer should provide the following information in a single log:

- a. the type of document;
- b. the date of the document;
- c. the names of its author(s) or preparer(s) and an identification by employment and title of each such person;
- d. the name of each person who was sent or furnished with, received, viewed, or has had custody of the document or a copy thereof together with an identification of each such person;
- e. its title and reference, if any;
- f. a description of the document sufficient to identify it without revealing the information for which privilege is claimed;
- g. the type of privilege asserted;

- h. a description of the subject matter of the document in sufficient detail to allow the Court to adjudicate the validity of the claim for privilege; and
 - i. the paragraph of this request to which the document relates.
- 20. Any requests propounded in the disjunctive shall be read as if propounded in the conjunctive and vice versa. Any request propounded in the singular shall be read as if propounded in the plural and vice versa. Any request propounded in the present tense shall also be read as if propounded in the past tense and vice versa.
- 21. These document requests cover the period from January 1, 2021 to the present, unless otherwise indicated in the request itself. The document requests set forth below encompass all documents and information concerning this period, even though dated, prepared, generated, or received prior to this period.
- 22. These document requests are continuing in nature. Pursuant to Rule 26(e), you are under a continuing duty to supplement the production with documents obtained subsequent to the preparation and service of a response to each Request. Supplemental responses shall be served and additional documents shall be made available promptly upon discovery of such information.

DOCUMENTS REQUESTED

REQUEST FOR PRODUCTION NO. 1:

All documents, communications, maps, memoranda, expert reports or analyses, Racially Polarized voting analyses, or other documents and communications related to South Carolina's submission of state legislative maps in the 1990, 2000, and 2010 redistricting cycles for Preclearance review pursuant to Section 5 of the Voting Rights Act. This Request includes, but is not limited to, any correspondence with the U.S. Department of Justice for the 1990, 2000, and 2010 redistricting cycles.

REQUEST FOR PRODUCTION NO. 2:

All documents and communications concerning the districts adopted in H. 4493 and Predecessor Maps, including but not limited to all communications with and documents or data provided to, considered, or relied upon by persons who drew, reviewed, approved, or adopted the determination to draw districts as reflected in H. 4493 and Predecessor Maps.

REQUEST FOR PRODUCTION NO. 3:

All maps, draft maps, memoranda, reports, analyses, correspondence, or other documents concerning the drawing of the districts adopted in H. 4493 and Predecessor Maps. This Request includes, but is not limited to, documents concerning the racial polarization in the South Carolina electorate, state legislative districts, the role of race in drawing districts, and correspondence between or among you, individuals on the committee, any map drawers, experts, legislators, members of the South Carolina Legislature, or anyone else concerning the drawing of the districts or any draft maps of the districts considered but not adopted.

REQUEST FOR PRODUCTION NO. 4:

All documents and communications sufficient to show any and all criteria used in drawing and approving the district lines, contours, limits, or boundaries included in the districts adopted in H. 4493 or the Predecessor Maps.

REQUEST FOR PRODUCTION NO. 5:

All transcripts, minutes, notes, or other documents concerning any meetings of Committees and any in connection with or in furtherance the adoption of H. 4493 or the Predecessor Maps.

REQUEST FOR PRODUCTION NO. 6:

All documents and communications provided to or relied upon by (a) any expert who Defendants intend to call to testify in this matter; or (b) any consultant, advisory, or other individual who provided advice or consultation concerning, or participated in the drawing, evaluation, or analysis of, the districts adopted in H. 4493 or Predecessor Maps.

REQUEST FOR PRODUCTION NO. 7:

An electronic copy in .csv or other machine-readable tabular file format (such as .txt) of precinct-level counts of voter registration data broken down by race and ethnicity—as well as voter turnout data broken down by race and ethnicity—for every general and primary election in every year between 2008 and 2020, using the same categories as are in the South Carolina voter file. *See* Voter History Statistics for Recent SC Elections, <https://www.scvotes.gov/data/voter-history.html>.

REQUEST FOR PRODUCTION NO. 8:

An electronic copy in .shp or other machine-readable file format (such as .gpkg) of precinct shapefiles from the time of every general and primary election between 2008 and 2020.

REQUEST FOR PRODUCTION NO. 9:

An electronic copy in .csv or other machine-readable tabular file format (such as .txt) of South Carolina’s statewide voter registration database, at the time of every general and primary election between 2008 and 2020, that includes the following information about each and every active and inactive registered voter in the State of South Carolina:

- Unique voter identification number
- Status (e.g., Active, Inactive)
- Race and/or ethnicity
- Date of registration
- County of residence
- Residence address

- Census Block IDs in 2020 and 2010
- State House District
 - Vote History, including, for each election from January 1, 2008 through the present, The date of the election
 - The type of election (e.g., federal Democratic or Republican primary, federal general, federal special, state primary, state general, state special, local primary, local general, local special, etc.)
 - Whether the voter cast a ballot in the election.
 - The party identification of the voter.

REQUEST FOR PRODUCTION NO. 10:

All documents and any data in .csv or other machine-readable tabular file format (such as .txt) detailing the specific communities of interest—including geographic identifiers of those communities of interest that line up with Census IDs, such as 2020 and/or 2010 Census Blocks—relied upon by Defendants and any other member of the South Carolina Assembly, including the member’s staff or employees, related to H. 4493, predecessor maps, and/or redistricting in South Carolina.

REQUEST FOR PRODUCTION NO. 11:

All documents and communications concerning the rationale(s) or purpose(s) behind the Challenged Districts and Districts Bordering the Challenged Districts adopted in H. 4493 and any Predecessor Maps.

REQUEST FOR PRODUCTION NO. 12:

All documents and communications concerning statements support of or opposition to H. 4493 and any Predecessor Maps, including in support of or opposition to any proposed amendments.

REQUEST FOR PRODUCTION NO. 13:

All documents and communications concerning the impact or potential impact of H. 4493 and any Predecessor Maps on voters of color.

REQUEST FOR PRODUCTION NO. 14:

All documents and communications concerning any survey results, databases, estimates, or statistics regarding racial or ethnic group affiliation or identification among South Carolina voters in the Challenged Districts and Districts Bordering the Challenged Districts.

REQUEST FOR PRODUCTION NO. 15:

All documents and communications concerning any survey results, databases, estimates, or statistics regarding racial or ethnic group affiliation or identification regarding partisan or political affiliation among South Carolina voters.

REQUEST FOR PRODUCTION NO. 16:

All documents and communications concerning any concerns, complaints, or comments about the procedure and transparency of the Committees redistricting process used in the considerations and deliberations about H. 4493 and any Predecessor Maps.

REQUEST FOR PRODUCTION NO. 17:

All documents and communications between You and other individuals, including members of the South Carolina General Assembly and their staff or employees, and organizations and third parties related to H. 4493, Predecessor Maps, and redistricting in South Carolina.

REQUEST FOR PRODUCTION NO. 18:

All documents and communications between You and other individuals, including members of the South Carolina General Assembly and their staff or employees, concerning the Map Room.

REQUEST FOR PRODUCTION NO. 19:

All documents and communications between You and third parties concerning the Map Room.

REQUEST FOR PRODUCTION NO. 20:

All documents and communications concerning the Map Room and redistricting in South Carolina.

REQUEST FOR PRODUCTION NO. 21:

All documents and communications concerning oral and written testimony, public comments, and other documents submitted before, during, or after any South Carolina legislative hearing, any Committee meetings, and any House or Senate floor review of H. 4493 and Predecessor Maps.

[SIGNATURE ON FOLLOWING PAGE]

Dated: January 7, 2021

Respectfully Submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2021, a true and correct copy of the foregoing was served on all counsel of record by electronic mail.

/s/ Christopher Bryant
Christopher Bryant

EXHIBIT B
(Plaintiffs' First Set of Interrogatories to Defendants)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE
CONFERENCE OF THE NAACP, and

TAIWAN SCOTT, on behalf of himself and
all other similarly situated persons,

Plaintiffs,

vs.

HENRY D. MCMASTER, in his official
capacity as Governor of South Carolina;
THOMAS C. ALEXANDER, in his official
capacity as President of the Senate; LUKE A.
RANKIN, in his official capacity as
Chairman of the Senate Judiciary Committee;
JAMES H. LUCAS, in his official capacity
as Speaker of the House of Representatives;
CHRIS MURPHY, in his official capacity as
Chairman of the House of Representatives
Judiciary Committee; WALLACE H.
JORDAN, in his official capacity as
Chairman of the House of Representatives
Elections Law Subcommittee; HOWARD
KNAPP, in his official capacity as interim
Executive Director of the South Carolina
State election Commission; JOHN WELLS,
Chair, JOANNE DAY, CLIFFORD J.
EDLER, LINDA MCCALL, AND SCOTT
MOSELEY, in their official capacities as
members of the South Carolina Election
Commission,

Defendants.

Case No. 3-21-cv-03302-JMC-TJH-RMG

**PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO DEFENDANTS**

THREE-JUDGE PANEL

PLAINTIFFS FIRST SET OF INTERROGATORIES TO DEFENDANTS

Pursuant to Rule 33 of the Federal Rules of Civil Procedure (“Rule”), Plaintiffs by and through their undersigned counsel, serve the First Set of Interrogatories to Henry D. McMaster, in his official capacity as Governor of South Carolina; Thomas C. Alexander, in his official capacity as President of the Senate; Luke A. Rankin, in his official capacity as Chairman of the

Senate Judiciary Committee; James H. Lucas, in his official capacity as Speaker of the House of Representatives; Chris Murphy, in his official capacity as Chairman of the House of Representatives Judiciary Committee; Wallace H. Jordan, in his official capacity as Chairman of the House of Representatives Elections Law Subcommittee; Howard Knapp, in his official capacity as interim Executive Director of the South Carolina State Election Commission; and John Wells (Chair), Joanne Day, Clifford J Edler, Linda McCall, and Scott Moseley, in their official capacities as members of the South Carolina Election Commission (collectively, “Defendants”) (collectively, “Defendants”) and hereby request that Defendants answer by electronic mail or other electronic means on a mutually agreed upon date. Though this is a joint request, each Defendant should separately conduct an independent investigation and provide their own individual responses.

DEFINITIONS

As used herein, the following terms have the following meanings:

1. “ALL,” “ANY,” and “EACH” shall each be construed as encompassing any and all.
2. “AND” and “OR” shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of the Request all responses that might otherwise be construed to be outside of its scope.
3. “CHALLENGED DISTRICTS” mean South Carolina House of Representative Districts 7, 8, 9, 11, 41, 43, 51, 54, 55, 57, 59, 60, 63, 67, 70, 72, 73, 74, 75, 76, 77, 78, 79, 90, 91, 93, 101, 105.
4. “CRACKED” means to split Black communities into different districts to prevent them from exercising greater political power.

5. “COMMUNICATIONS” means the transmittal of information of any kind by and/or through any means, including, but not limited to, emails, email attachments, calendar invitations, PowerPoint presentations, written reports, letters, and the like.
6. “DEFENDANTS,” “YOU,” or “YOUR” refers to Defendants and include any of Defendants’ agents, advisors, employees, representatives, officers, consultants, contractors, or any person or entity acting or purporting to act on Defendants’ behalf or subject to Defendants’ control.
7. “DESCRIBE” means to provide all knowledge or information about the subject and to set forth fully and unambiguously every fact that relates to the answer called for by the Interrogatory of which you have knowledge and to identify each individual or entity with knowledge or information that relates to your answer, and when used in reference to a factual or legal contention, to describe the full factual and legal basis for the contention, and to identify any and all persons that you believe have knowledge about each such fact or document.
8. “DISTRICTS BORDERING THE CHALLENGED DISTRICTS” mean South Carolina House of Representative Districts that border in whole or in part the Challenged Districts.
9. “DOCUMENT” or “DOCUMENTS” is defined to be synonymous in meaning and the same in scope as the term “document” as used in Rule 34 and the phrase “writings and recordings” as defined by Rule 1001 of the Federal Rules of Evidence, and includes without limitation any kind of written, typewritten, printed, graphic, or recorded material whatsoever, including without limitation notes, text messages, emails, electronic mail, public or private posts on Facebook, Instagram, or other social media platforms, public or private electronic messages sent via messaging applications or platforms including but not limited to Facebook Messenger, Signal, Slack, Parler or other such platforms, memoranda, letters, reports,

studies, electronic mail messages, telegrams, publications, contracts, manuals, business plans, proposals, licenses, drawings, designs, data sheets, diaries, logs, specifications, brochures, product or service descriptions, periodicals, schematics, blueprints, recordings, summaries, pamphlets, books, prospectuses, interoffice and intra office communications, offers, notations of any sort of conversations, working papers, applications, permits, surveys, indices, telephone calls, meeting minutes, databases, electronic files, software, transcriptions of recordings, computer tapes, diskettes, or other magnetic media, bank checks, vouchers, charge slips, invoices, expense account reports, hotel charges, receipts, freight bills, agreements, corporate resolutions, minutes, books, binders, accounts, photographs, and business records. This shall include all non-identical copies, no matter how prepared; all drafts prepared in connection with such documents, whether used or not; and any deleted or erased documents that may be retrieved from hard drives, floppy disks, electronic back-up files, or any other back-up systems, regardless of location, together with all attachments thereto or enclosures therewith, in your possession, custody or control or any of your attorneys, employees, agents, or representatives.

a. Document shall include “ELECTRONICALLY STORED INFORMATION.”

Electronically Stored Information means electronically stored data on magnetic or optical storage media (including but not limited to hard drives, backup tapes, Jaz and zip drives, floppy disks, CD-ROMs and DVD-ROMs) as an “active” file or files (readily readable by one or more computer applications or forensics software), any electronic files saved as a backup, any “deleted” but recoverable electronic files on said media; any electronic file fragments (files that have been deleted and partially overwritten with new data), and slack (data fragments stored randomly from random access memory [RAM] on a hard drive during the normal operation of a computer [file slack and/or RAM slack])

or residual data left on the hard drive after new data has overwritten some but not all of previously stored data), text messages and emails located on any mainframe, server, desktop, or portable device, including cell phones.

10. “DRAFT” means any written or oral action by natural person or any legal entity that contributed to the creation of any document or communication.
11. “H. 4493” refers to House Bill 4493 as ratified by the South Carolina legislature on December 9, 2021, and signed by the Governor of South Carolina on December 10, 2021, and refers to the bill as a whole and/or to any provision thereof.
12. “IDENTIFY” (a) when used in reference to a natural person, means that person’s full name, last known address, home and business telephone numbers, present occupation or business affiliation, and present or last known place of employment, and job title or role; (b) when used in reference to a person other than a natural person, means that person’s full name, a description of the nature of the person, and the person’s last known address, telephone number, and principal place of business; and (c) when used in reference to a document, requires you either (1) to state (i) the date of the document; (ii) title; (iii) author(s), addressee(s), and recipient(s); (iv) present location and custodian of the document; Bates numbers (if any); (vi) type of document (e.g., letter, memorandum, or chart); and (vii) general subject matter, (2) or to attach an accurate copy of the document to your answer, appropriately labeled to correspond to the respective Interrogatory
13. “MAP ROOM” refers the virtual and physical room and the process that Representative Jordan identified in public hearings, including during an October 4, 2021 hearing by the South Carolina House of Representative House Judiciary Redistricting Ad Hoc Committee.

14. “PACKED” means to place Black voters into the same district in greater numbers than necessary to elect candidates of choice to prevent them from exercising greater political power in surrounding districts.
15. “PERSON” means any natural person or any legal entity, including, but not limited to, any business or governmental entity or association.
16. “POLITICALLY COHESIVE” means that a significant proportion of the minority group supports the same candidate.
17. “PREDECESSOR MAPS” means the previous South Carolina House of Representatives redistricting maps in whole or in part that were considered, created, developed, and/or proposed by Defendants.
18. “RACIALLY POLARIZED” means that there is a consistent relationship between the race of the voter and the way in which the voter votes. It means that “black voters and white voters vote differently.” *Thornburg v. Gingles*, 478 U.S. 30, 53, n.21 (1986).
19. “TRADITIONAL REDISTRICTING PRINCIPLES” means the definition as defined in <https://redistricting.schouse.gov/docs/2021%20Redistricting%20Guidelines.pdf>.

INSTRUCTIONS

1. Each Interrogatory shall be construed according to its most inclusive meaning so that if information or a document is responsive to any reasonable interpretation of the Interrogatory, the information or document is responsive.
2. Per the Parties’ agreement regarding discovery, You must submit objections to these Interrogatories within five business days and substantive responses within ten days.
3. If You object to any part of an Interrogatory and refuse to answer that part, identify that portion to which You object and answer the remaining portion of the Interrogatory.
4. If You object to the scope or time period of an Interrogatory and refuse to answer for

that scope or time period, please state Your objection and answer the request for the scope or time period You believe is appropriate.

5. If You object to any Interrogatory as vague or unclear, assume a reasonable meaning, state what the assumed meaning is, and respond to the Interrogatory according to the assumed meaning.
6. If You object to any Interrogatory as overbroad, provide a response that narrows the Interrogatory in a way that eliminates the purported over-breadth, state the extent to which your response has narrowed the Interrogatory, and respond to the narrowed Interrogatory.
7. If You withhold the answer to any part of any Interrogatory on the claim of privilege, state the specific factual and legal basis for doing so and answer any part of the Interrogatory that is not alleged to be objectionable. Such information should be supplied in sufficient detail to permit the Plaintiffs to assess the applicability of the privilege claimed.
8. These Interrogatories are continuing in nature, and You shall revise or supplement Your responses whenever you obtain different or additional relevant knowledge, information, or belief, from the time of your initial response through to the end of trial.
9. If You are unable to respond to any of the Interrogatories fully and completely, after exercising due diligence to obtain the information necessary to provide a full and complete response, so state, and answer each such Interrogatory to the fullest extent possible, specifying the extent of Your knowledge and Your inability to answer the remainder, and setting forth whatever information or knowledge you may have concerning the unanswered portions thereof and efforts you made to obtain the requested information. If You have no information responsive to an Interrogatory, then

You shall so state.

10. The Interrogatories cover the period from January 1, 2021 to the present, unless otherwise indicated in the request itself. The document requests set forth below encompass all documents and information concerning this period, even though dated, prepared, generated, or received prior to this period.
11. Responsive documents should be produced in the manner prescribed by the Rules and in accordance with the ESI Protocols in the Parties' forthcoming joint Rule 26(f) Report.
12. If a responsive communication, document, or tangible thing has been prepared in copies that are not identical, or if additional copies have been made that are no longer identical, or if original identical copies are no longer identical by reason of subsequent notations on the front or back of pages thereto, each non-identical copy is a separate communication, document, or tangible thing and shall be produced.
13. Produce any password-protected documents with any applicable passwords.

INTERROGATORIES

INTERROGATORY NO. 1.

Identify all persons in your office(s) involved in any evaluation, compilation, collection of data, estimate, report, study, or analysis concerning voting patterns, habits, behavior, demographic trends, or practices by race or ethnicity in South Carolina, created or dated from January 1, 2021 to the present.

INTERROGATORY NO. 2.

Identify each person, other than a person intended to be called as an expert witness at trial, having discoverable information that tends to refute or support any position that You have taken or intend to take in this action, and state the subject matter of the information possessed by

that person.

INTERROGATORY NO. 3.

Identify each of the Black candidates elected to serve in the South Carolina State House since January 1, 1980 to the present, including their names, positions, date of election, and the demographics of the district from which they were elected.

INTERROGATORY NO. 4.

Do you contend that white voters in the Challenged Districts do not vote sufficiently as a bloc to enable them usually (not incidentally) to defeat the Black-preferred candidates? If the answer is yes, explain the answer in detail and identify all elections, candidates, facts, witnesses, documents, and evidence that support the answer. If the answer is no, explain the answer and identify all of the elections, candidates, facts, witnesses, documents, and evidence that support the answer.

INTERROGATORY NO. 5.

Do You contend that the Black population in the Challenged Districts is not politically cohesive? If the answer is yes, explain the answer and identify all of the elections, candidates, facts, witnesses, documents, and evidence that support the answer. If the answer is no, explain the answer and identify all of the elections, candidates, facts, witnesses, documents, and evidence that support the answer.

INTERROGATORY NO. 6.

Do You contend that South Carolina does not have a significant governmental interest in eradicating the effects of past and ongoing racial discrimination against Black voters in South Carolina? If the answer is yes, please specifically explain and identify the evidence or legal basis, if any, upon which you rely to support your contention. If the answer is no, please specifically explain and identify the evidence or legal basis, if any, upon which you rely to support your contention.

INTERROGATORY NO. 7.

Do You contend that the Challenged Districts are not unlawfully packed or cracked? If the answer is no, please specifically explain and identify the evidence or legal basis, if any, upon which you rely to support your contention.

INTERROGATORY NO. 8.

Please provide the name and, if known, the address and telephone number of each individual involved and their role in considering, creating, developing, drafting, and proposing the maps adopted in H. 4493 and all Predecessor Maps.

INTERROGATORY NO. 9.

Please identify the name, title, and if known, address of each person who shared with You any South Carolina House of Representative amendment to maps adopted in H. 4493 or any Predecessor Maps.

INTERROGATORY NO. 10.

Describe the process through which You incorporated public comments received in written or through public or private hearings into the maps adopted by H. 4493 and Predecessor Maps.

INTERROGATORY NO. 11.

Describe the process that You used to consider, propose, and review draft maps adopted in H. 4493 and Predecessor Maps through the Map Room.

INTERROGATORY NO. 12.

Describe the process for how information and proposed maps and amendments to maps adopted in H. 4493 and Predecessor Maps were conveyed to You in the Map Room.

INTERROGATORY NO. 13.

Describe how the information You conveyed to individuals in the Map Room was stored.

INTERROGATORY NO. 14.

Describe the process through which You resolved any conflicts among requirements and guidelines for districts adopted in H. 4493 and Predecessor Maps.

INTERROGATORY NO. 15.

Describe the process through which You answered questions that were raised in writing, public hearings, or private meetings by members of the public or South Carolina General Assembly members for districts adopted in H. 4493 and Predecessor Maps.

INTERROGATORY NO. 16.

Identify and explain any instances where You deviated from published guidelines/criteria or traditional redistricting principles, including but not limited to any other guidelines/criteria Defendants considered.

INTERROGATORY NO. 17.

Identify any racially polarized voting analysis conducted by You and any persons who conducted it.

INTERROGATORY NO. 18.

Identify the name, title, and professional address of each person consulted by You in answering these Interrogatories, specifying on which Interrogatory or Interrogatories such person was consulted.

INTERROGATORY NO. 19.

Describe why You should succeed on the defenses asserted in your Answer(s) or Motion(s) to Dismiss.

Dated: January 7, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2021, a true and correct copy of the foregoing was served on all counsel of record by electronic mail.

/s/ Christopher Bryant
Christopher Bryant

EXHIBIT C
(January 6, 2022 Draft Joint Rule 26(f) Report)

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE
CONFERENCE OF THE NAACP, and

Taiwan Scott, on behalf of himself and all
other similarly situated persons,

Plaintiffs,

v.

HENRY D. MCMASTER, in his official
capacity as Governor of South Carolina;
THOMAS C. ALEXANDER, in his official
capacity as President of the Senate; LUKE A.
RANKIN, in his official capacity as
Chairman of the Senate Judiciary Committee;
JAMES H. LUCAS, in his official capacity as
Speaker of the House of Representatives;
CHRIS MURPHY, in his official capacity as
Chairman of the House of Representatives
Judiciary Committee; WALLACE H.
JORDAN, in his official capacity as
Chairman of the House of Representatives
Elections Law Subcommittee; HOWARD
KNAPP, in his official capacity as interim
Executive Director of the South Carolina
State Election Commission; JOHN WELLS,
Chair, JOANNE DAY, CLIFFORD J.
EDLER, LINDA MCCALL, and SCOTT
MOSELEY, in their official capacities as
members of the South Carolina Election
Commission,

Defendants.

**Case No. 3-21-cv-03302-JMC-
TJH-RMG**

**PARTIES' JOINT RULE 26(f)
REPORT
THREE-JUDGE PANEL**

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Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and Local Rule 26.03, the following counsel conducted a Rule 26(f) meeting by telephone on December 30, 2021:

Christopher J. Bryant Somil B. Trivedi John S. Cusick John A. Freedman	Counsel for Plaintiffs
Thomas Limehouse Grayson Lambert	Counsel for Defendant Henry McMaster
Mark C. Moore Jennifer J. Hollingsworth Andrew A. Mathias	Counsel for Defendants James Lucas, Chris Murphy, Wallace Jordan
Robert E. Tyson Jr. John M. Gore	Counsel for Defendant Thomas Alexander
Jane Trinkley M. Elizabeth Crum	Counsel for Defendants Howard Knapp, John Wells, Joanne Day, Clifford Edler. Linda McCall, and Scott Moseley

The Parties hereby submit this joint report and proposed discovery plan concerning matters set forth in Federal Rule of Civil Procedure 26(f), all of which were addressed during the Parties' telephone conference.

**I. NATURE AND BASIS OF CLAIMS AND DEFENSE & LOCAL RULE 26.03
SHORT STATEMENT OF THE FACTS**

A. Plaintiffs

Plaintiffs South Carolina State Conference of the NAACP and Taiwan Scott (collectively, "Plaintiffs") challenge the constitutionality of South Carolina's recently enacted House Bill 4493 ("H. 4493"), which sets the district lines for the South Carolina House of Representatives following the 2020 decennial Census.

Plaintiffs are challenging 28 specific House Districts—Nos. 7, 8, 9, 11, 41, 43, 51, 54, 55, 57, 59, 60, 63, 67, 70, 72, 73, 74, 75, 76, 77, 78, 79, 90, 91, 93, 101, 105 (the "Challenged Districts")—as unconstitutional racial gerrymandering because they use race as a predominant factor in a manner not narrowly tailored to comply with Section 2 of the VRA or any other

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compelling government interest. This claim is brought for violations of the Fourteenth Amendment under 42 U.S.C. § 1983 for injunctive and declaratory relief.

Plaintiffs also allege that the Challenged Districts are a product of intentional racial discrimination because the creation of Challenged Districts was motivated, at least in part, by a discriminatory purpose. This claim is brought for violations of the Fourteenth and Fifteenth Amendments under 42 U.S.C. § 1983 for injunctive and declaratory relief.

Finally, Plaintiffs challenge the Defendants prolonged delay and failure (to date) to adopt a plan governing U.S. Congressional districts. The continued delay in adopting a Congressional map infringes on Plaintiffs' First Amendment rights to association because it restricts their and their members' ability to assess candidate positions and qualifications, advocate for their preferred candidates, and associate with like-minded voters. This claim is brought for violations of the First and Fourteenth Amendments under 42 U.S.C. § 1983 for injunctive and declaratory relief.

II. POSSIBILITIES FOR PROMPTLY SETTLING OR RESOLVING THE CASE

The Parties agree that complete settlement is unlikely at this time. The Parties also agree that mediation or other forms of alternative dispute resolution are not likely to be helpful.

III. PROPOSED SCHEDULE

The Parties have agreed to the following proposed schedule (except where noted):

Deadline or Event	Agreed Dates
Exchange of Initial Disclosures	January 7, 2022
Plaintiffs' Expert Disclosures	January 7, 2022
Defendants' Expert Disclosures	January 12, 2022
Plaintiffs' Expert Reports Due	January 24, 2022
Defendants' Expert Reports Due	February 1, 2022
Rebuttal Expert Reports Due	February 7, 2022
Fact and Expert Discovery Deadline	February 11, 2022

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Pre-trial Disclosures (joint pre-trial report, exhibit lists, witness lists, dispositive motions, motions in limine, stipulations)	February 18, 2022 [Plaintiffs' Preference – this date provides more time to prepare objections and oppositions to motions] February 21, 2022 [Defendants' Preference – this date provides more time to prepare dispositive motions and motions in limine]
Objections to Witness and Exhibit lists, oppositions to in limine motions	February 24, 2022
Final Pre-Trial Conference	February 28, 2022
Trial begins	February 28, 2022
Proposed Findings of Fact and Conclusions of Law	7 calendar days after conclusion of trial

IV. DISCOVERY PLAN

The Parties propose this discovery plan:

1. Initial Disclosures: The Parties agree that initial disclosures in accordance with Rule 26(a)(1) and Local Rule 26.03 should be made in this case. The Parties have agreed to exchange initial disclosures on January 7, 2022.

2. Subjects of Discovery: Plaintiffs anticipate that discovery will be needed on at least the following subjects: data considered and used in the redistricting process; the consideration and development of criteria used for drawing House maps; the process of drawing House maps, including any communications or directions provided to the mapmakers, draft maps developed or considered, data analyzed, and communications (including with external parties) about the redistricting process, draft maps, criteria, or South Carolina's history of redistricting since passage of the Voting Rights Act; the process of receiving and incorporating public input during the redistricting process; South Carolina's history of discrimination against Black people and other minority groups, including but not limited to the redistricting context; any analysis prepared or considered during development of the plan or the redistricting process, including but

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not limited to any analysis of racially polarized voting, performance, compactness, jurisdiction or precinct splits, location of incumbents.

In addition to these subjects, Plaintiffs require discovery on the subjects listed in their First Sets of Requests for Production, First Set of Interrogatories, and subpoenas, as well as future discovery requests. Plaintiffs also anticipate depositions to further develop the factual record for trial. Some of the information sought via discovery may also be addressed via stipulations between the Parties.

[DEFENDANTS' STATEMENT OF SUBJECTS OF DISCOVERY]

3. Electronic Discovery: The Parties expect that discovery will involve collection and production of electronically stored information ("ESI"): (1) Disclosure or production of electronically stored information will generally be limited to data reasonably available to the Parties in the ordinary course of business; (2) the Parties do not anticipate seeking data beyond what is reasonably available in the ordinary course of business; (3) the Parties agree to produce electronically stored information in accordance with the "Production of ESI Protocols" attached to this report as Exhibit A; (4) the Parties represent that they have taken reasonable measures to preserve potentially discoverable data from alteration or destruction; (5) the Parties will comply with Federal Rule of Civil Procedure 26(b)(5)(B) regarding the inadvertent production of privileged information; and (6) the Parties do not at this moment anticipate that any other problems will arise in connection with electronic or computer-based discovery. The Parties have agreed to

4. Timing of Discovery: The Parties agree that discovery in this matter should be conducted in an expedited manner, with a fact and expert discovery deadline of February 11,

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2022. To facilitate expedited discovery in this matter, [the Parties agree/Plaintiffs propose] the following modifications to the standard Rules of Civil Procedure and Local Rules:

a. Expedited Objection and Response Deadlines: Any objections to discovery shall be served within 5 business days of receipt of the discovery request. Substantive responses shall be provided within 10 days of receipt of the discovery request.

b. Condensed and Expedited Briefing: Unless otherwise permitted or ordered by the Court, the Plaintiffs and House Defendants agree to limit motions concerning discovery in this matter (including, but not limited to, motions to compel or motions for protective orders) to 5 pages, excluding the caption and signature pages. Opposition briefs shall be of the same length and filed within 48 hours.

c. Deadline to Serve Written Discovery: Consistent with the foregoing and Local Rule 16.02(D)(1), written discovery requests shall be served no later than January 27, 2022.

5. Forms of Discovery: The Parties anticipate all forms of written discovery and depositions may be appropriate as provided by the Federal Rules of Civil Procedure. Plaintiffs anticipate that certain materials produced will be in the form of electronic or computer-based media, including data, spreadsheets, databases of voter information, and electronically-stored documents and emails.

6. Limitations on Discovery: Except as noted below, the Parties at this time do not seek any restrictions on discovery beyond the limitations set forth in this agreement or the Federal Rules of Civil Procedure; however, the Parties agree to confer in good faith as needed regarding any proposed limitations on discovery.

a. The Parties agree that each party will issue no more than twenty-five (25) interrogatories to each Defendant or to each Plaintiffs.

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b. The Parties agree, to the extent practicable, that they will coordinate depositions among the Parties so that each deponent need only appear once.

c. [The Parties agree/the Plaintiffs propose] that each side (Plaintiffs collectively and Defendants collectively) take no more than 15 depositions, including Rule 30(b)(6) and expert witness depositions, unless expert disclosures or discovery reveal the necessity for additional depositions

V. OTHER LOCAL RULE 26.03 QUERIES

1. Fact Witnesses: The Parties will identify the names of individuals likely to have discoverable information in the Rule 26(a)(1) initial disclosures and will disclose trial witnesses in accordance with the schedule proposed above.

2. Expert Witnesses: The Parties will provide Rule 26(a)(2) expert disclosures in accordance with the schedule proposed above.

3. Claims and Defenses:

Fourteenth Amendment -- racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. *See, e.g., Cooper v. Harris*, 137 S.Ct. 1455 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017); *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993).

Fourteenth Amendment -- intentional discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment and 42 U.S.C. § 1983. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *NC State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

First Amendment -- infringement of right of association in violation of the First and Fourteenth Amendments and 42 U.S.C. § 1983. *See, e.g., Nat'l Ass'n for Advancement of Colored*

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People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 460 (1958); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986); *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 401 (4th Cir. 2019).

4. Scheduling: Scheduling is addressed in the proposed schedule above.

5. Other Special Circumstances:

Various counsel have trial and other commitments prior to trial in this matter. All counsel who will participate in trial are available starting February 28, 2022.

The Parties agree that all proceedings, including but not limited to depositions and trial, will be conducted remotely if necessary to protect individuals from COVID-19; the Parties will work together and with the Court in this regard.

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Dated: January __, 2022

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* Motion for admission *Pro Hac Vice*
forthcoming

** Admitted *Pro Hac Vice*

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Counsel for Senate Defendants

**Pro hac vice* application forthcoming

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Exhibit A: PRODUCTION OF ESI PROTOCOLS

A. Format

The parties will produce ESI in a litigation database ready format including single page images, searchable text files, native files and Relativity database load files. Images should be bates numbered single-page, black and white, TIFF Group IV, 300 DPI TIFF images with the exception of spreadsheet type files, source code, audio, and video files, and other file types that cannot be rendered into a usable printed form, which shall be produced in native format. If an original document contains color and the color is necessary to review a document, it should also be produced in native format or as single-page, 300 DPI JPG images with JPG compression and a high quality setting as to not degrade the original image. TIFFs/JPGs will show any and all text and images which would be visible to the reader using the native software that created the document. Document level text file should be provided containing original extracted text or OCR text when original text is not available or when document contains redactions. Each document will be produced in its entirety, with attachments and enclosures. Documents not otherwise responsive will be produced if attached to a responsive document.

If a document is produced in native, a single page bates stamped image slip-sheet stating the document has been produced in native format will also be provided. Each native file should be named according to the Bates number it has been assigned, and should be linked directly to its corresponding record in the load file using the NATIVELINK field. To the extent that either party believes that specific documents or classes of documents, not already identified within this protocol, should be produced in native format, the parties agree to meet and confer in good faith.

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B. De-Duplication

Each party shall remove exact duplicate documents based on MD5 or SHA-1 hash values, at the family level. Attachments should not be eliminated as duplicates for purposes of production, unless the parent email and all attachments are also duplicates. Parties agree that an email that includes content in the BCC or other blind copy field shall not be treated as a duplicate of an email that does not include content in the content in those fields, even if all remaining content in the email is identical. Removal of near-duplicate documents and email thread suppression is not acceptable. De-duplication will be done across the entire collection (global de-duplication) and the Custodian field will list each Custodian, separated by a semi-colon, who was a source of that document. Should the custodian metadata field produced become outdated due to rolling productions, an overlay file providing all the custodians for the affected documents will be produced prior to substantial completion of the document production.

C. Metadata

All ESI will be produced with a delimited, database load file that contains the metadata fields listed in Table 1, attached hereto. The metadata produced should have the correct encoding to enable preservation of the documents' original language.

D. Compressed Files Types

Compressed file types (*i.e.*, .ZIP, .RAR, .CAB, .7Z) should be decompressed so that the lowest level document or file is extracted.

E. Structured Data

To the extent a response to discovery requires production of electronic information stored in a database, the parties will discuss methods of production best providing all relevant information, including but not limited to duplication of databases or limited access for the purpose of generating reports. Parties will consider whether all relevant information may be provided by

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querying the database for discoverable information and generating a report in a reasonably usable and exportable electronic file. A document reference sheet shall be provided to describe the purpose of the database and meaning of all tables and column headers produced.

F. Encryption

To maximize the security of information in transit, any media on which documents are produced may be encrypted. In such cases, the producing party shall transmit the encryption key or password to the receiving party, under separate cover, contemporaneously with sending the encrypted media.

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Table 1 -- Metadata Fields

Field Name	Example/Format	Field Description
ProdBegBates	ABC0000001 (Unique ID)	The Document ID associated with the first page of a document.
ProdEndBates	ABC0000003 (Unique ID)	The Document ID associated with the last page of a document.
ProdBegAttach	ABC0000001 (Unique ID Parent-Child Relationships)	The Document ID associated with the first page of the parent document.
ProdEndAttach	ABC0000008 (Unique ID Parent-Child Relationships)	The Document ID associated with the last page of the last attachment.
Production_Volume	PROD001	Production volume name.
Document Category	Email, Edoc, Attach	The record type of a document.
Custodian	Smith, Joe	Custodian of document.
All Custodians	Smith, Joe; Brown, Jane	All of the custodians of a document from which the document originated, separated by semicolons
Sort Date	MM/DD/YYYY HH:MM	The date taken from the Email Sent Date, Email Received Date, or Last Modified Date (in order of precedence), repeated for a parent document and all children items to allow for date sorting.
Sent Date/Time	MM/DD/YYYY HH:MM	The date on which an email message was sent.
Received Date/Time	MM/DD/YYYY HH:MM	The date and time at which an email message was received.
Created Date/Time	MM/DD/YYYY HH:MM	The date and time at which a file was created.
Last Modified Date/Time	MM/DD/YYYY HH:MM	The date and time at which changes to a file were last saved.
Meeting Start Date/Time	MM/DD/YYYY HH:MM	The date and time at which a meeting item in Outlook or Lotus Notes started.
Meeting End Date/Time	MM/DD/YYYY HH:MM	The date and time at which a meeting item in Outlook or Lotus Notes ended.
Logical Path	i.e. /JsmithPC/Users/Jsmith/Desktop i.e. /JSmith.pst/Inbox	Data's original source full folder path
Author	jsmith	The name of the original composer of document or the sender of an email message.
Last Saved By	jsmith	The internal value indicating the last user to save a file.

Email From	Joe Smith <jsmith@email.com>	The name (when available) and email address of the sender of an email message.
Email To	Joe Smith <jsmith@email.com>; tjones@email.com	The name(s) (when available) and email address(es) of the recipient(s) of an email message.
Email Cc	Joe Smith <jsmith@email.com>; tjones@email.com	The name(s) (when available) and email address(es) of the Carbon Copy recipient(s) of an email message.
Email Bcc	Joe Smith <jsmith@email.com>; tjones@email.com	The name(s) (when available) and email address(es) of the Blind Carbon Copy recipient(s) of an email message.
Email Subject		The subject of the email message.
Message Class	Message, Appointment, Contact, Task, etc.	An The type of item from an email client (e.g., email, contact, calendar, etc.).
Email Message ID	0E5698D558B22879524F433@abc.email.net	The message number created by an email application and extracted from the email's metadata.
Importance	Normal, Low, High	The notation created for email messages indicating a higher level of importance than other email messages added by the email originator.
Delivery Receipt		The yes/no indicator of whether a delivery receipt was requested for an email.
Attachment Count	Numeric	The number of files attached to a parent file.
Attachment List		The attachment file names of all child items in a family group, delimited by semicolon. This is present only on parent items.
File Extension		The three (or more) character extension of the file that represents the file type to the Windows Operating System (e.g., PDF, DOC, TXT, etc.).
File Name	Document Name.docx	The original name of the file.
File Type	Adobe Portable Document Format, MS Word 97, Outlook Message File	The description of the file type to the Windows Operating System. For example, Adobe Portable Document Format, Microsoft Word 97 – 2003 Document, or Microsoft Office Word Open XML Format.

File Size	Numeric	The decimal number indicating the size in bytes of a file.
MD5 Hash		The identifier of an electronic record that can be used for deduplication and authentication generated using the MD5 hash algorithm.
Conversation Family	The relational field for conversation threads. This is a 44-character string of numbers and letters that is created in the initial email.	The relational field for conversation threads. This is a 44-character string of numbers and letters that is created in the initial email.
Production Has Redactions		The yes/no indicator of whether a documents contains a redaction.
Production Slip Sheet		Indicates presence of an image slips sheet and the slip sheet type.
Production Branding		Confidentiality brand.
File Path	.\NATIVES\ABC000001.doc	Path to a native copy of a document.
Text Precedence	.\TEXT\ABC000001.txt	Path to the full extracted text of the document.

EXHIBIT D
(*Backus* Motion to Recuse)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

VANDROTH BACKUS, WILLIE)
HARRISON BROWN, CHARLESANN)
BUTTONE, BOOKER MANIGAULT,)
EDWARD MCKNIGHT, MOSES MIMS, JR,)
ROOSEVELT WALLACE, and WILLIAM)
G. WILDER, on behalf of themselves and all)
other similarly situated persons,)

Plaintiffs,)

v.)

Civil Action No.
2:11-cv-03120-RMG-HFF-MBS

THE STATE OF SOUTH CAROLINA,)
NIMRATA “NIKKI” R. HALEY, in her)
capacity as Governor, KEN ARD, in his)
capacity as Lieutenant Governor, GLENN F.)
MCCONNELL, in his capacity as President)
Pro Tempore of the Senate and Chairman of)
the Senate Judiciary Committee, ROBERT W.)
HARRELL, Jr., in his capacity as Speaker of)
the House of Representatives, JAMES H.)
HARRISON, in his capacity as Chairman of)
the House of Representatives’ Judiciary)
Committee, ALAN D. CLEMMONS, in his)
capacity as Chairman of the House of)
Representatives’ Elections Law)
Subcommittee, MARCI ANDINO, in her)
capacity as Executive Director of the Election)
Commission, JOHN H. HUDGENS, III,)
Chairman, CYNTHIA M. BENSCH,)
MARILYN BOWERS, PAMELLA B.)
PINSON, and THOMAS WARING, in their)
capacity as Commissioners of the Elections)
Commission,)

Defendants.)

**DEFENDANTS’ MOTION TO RECUSE THE
HONORABLE RICHARD MARK GERGEL
AND MEMORANDUM IN SUPPORT**

Public confidence in the outcome of these proceedings, involving the legality of redistricting plans affecting millions of South Carolinians, is of utmost importance. For this reason, Defendants Glenn F. McConnell, in his capacity as President *Pro Tempore* of the Senate, Robert W. Harrell, Jr., in his capacity as Speaker of the House of Representatives James H. Harrison, in his capacity as Chairman of the House of Representatives’ Judiciary Committee, and Alan D. Clemmons, in his capacity as Chairman of the House of Representatives’ Elections Law Subcommittee, jointly move to recuse the Honorable Richard Mark Gergel. Recusal is required under 28 U.S.C. § 455 due to the direct relationship between this case and the most recent South Carolina redistricting case, *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), in which Judge Gergel participated as lead counsel for one of the parties.¹

Defendants wish to call the Court’s attention to the fact—which is not apparent on the face of the Complaint—that the *Colleton County* litigation will be central to their defense against Plaintiffs’ claims.² That fact, coupled with Judge Gergel’s service as lead counsel for Governor James H. Hodges in *Colleton County*, implicates two of the mandatory grounds for recusal under 28 U.S.C. § 455(b), regarding a judge’s personal knowledge of relevant facts and a judge’s prior service “as lawyer in the matter in controversy.” The concerns reflected in those provisions are,

¹ Undersigned counsel certifies that he has consulted with counsel for Plaintiffs as required by Local Rule 7.02. Counsel for Plaintiffs does not consent to the granting of this motion.

² Defendants bring this motion now, before filing their responsive pleadings or taking any other action in this case, in order to make the Court aware of the grounds for recusal “at the earliest moment.” *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990) (quotation marks omitted). Although the centrality of the *Colleton County* litigation will become even clearer after the responsive pleadings are completed and filed, Defendants thought it most appropriate to raise the recusal issue now, before the scheduling conference to be held on December 13. Defendants will have no objection if Judge Gergel deems it appropriate to conduct the scheduling conference with the recusal issue unresolved. But Defendants would not want either the Court or Plaintiffs to be surprised by a recusal motion filed after the conference.

if anything, accentuated by the fact that Plaintiffs’ claims in this case depend on many of the identical factual and legal arguments that were advanced—against some of the same Defendants—by Judge Gergel as an attorney in *Colleton County*. And the propriety of recusal is reinforced by the fact that, to Defendants’ knowledge, Judge Gergel is the only United States District Judge in South Carolina, in either active or senior status, as to whom there is a ground for disqualification, meaning that the case easily can be reassigned.

Most important, these factors also warrant recusal under the expansive, “catch-all” provision of § 455(a). The inquiry under this provision is not whether the judge actually harbors any bias. Instead, this provision avoids even the *appearance* of impropriety, disqualifying a judge whenever his impartiality “might reasonably be questioned” by an observer outside the judicial system. Given that this high-profile litigation will resolve a matter of significant public concern, this case is “too important to be decided under a cloud.” *United States v. Alabama*, 828 F.2d 1532, 1546 (11th Cir. 1987) (per curiam).³ “In a decision such as this one, a decision which will affect millions [of voters], public confidence in the judicial system demands” a suit free from any appearance of partiality. *Id.*

BACKGROUND

During the 2000 redistricting cycle, the Republican-controlled House and Senate passed redistricting plans for the General Assembly and Congress, but Governor Hodges, a Democrat, vetoed them. Impasse suits were filed, and the United States District Court for the District of South Carolina was required to draw redistricting plans for the General Assembly and Congress.

³ *Superseded by statute on other grounds*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 29, *as recognized in Lussier v. Dugger*, 904 F.2d 661, 664 (11th Cir. 1990).

See Colleton County Council v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002). The principal litigants in the case were the Senate and the House (which advocated for the plans they had passed) and the Governor (who advocated for competing plans). Judge Gergel, who at that time was in private practice, served as lead counsel for the Governor.

In March 2002, the court issued an order setting forth the remedial redistricting plans. *Id.* Then, in 2003, the General Assembly enacted legislation, S. 591, Act 55 of 2003, that made limited changes to the court-ordered plans for the state House and Senate. *See, e.g.*, 2003 Senate Preclearance Submission Cover Letter at 2 (“This Senate redistricting plan is largely based on an interim redistricting plan ordered by” the court in *Colleton County*.) (attached as Exhibit A); *see also* 2003 House Preclearance Submission Cover Letter at 3 (attached as Exhibit B). The *Colleton County* plan for Congress, and the 2003 legislative plans for the General Assembly, remained in place through the 2010 elections.

In mid-2011, the General Assembly enacted redistricting legislation for Congress and the state House and Senate in the wake of the 2010 Census. The House and Senate sought and obtained administrative preclearance of the new plans from the United States Department of Justice under Section 5 of the Voting Rights Act.

In November 2011, Plaintiffs filed the complaint in the present case, alleging that the 2011 redistricting plans for the General Assembly and Congress violate the Constitution and the Voting Rights Act. The case was docketed and assigned to Judge Gergel.

Beyond the basic fact that both cases concern redistricting plans for the General Assembly and Congress, the present case and the *Colleton County* case are closely connected:

- The central issues in both cases concern the requirements of the Voting Rights Act and the constitutional prohibition against racial gerrymandering.

- In particular, “the number and composition of majority-minority districts in each proposed plan accounted for the lion’s share of the evidence in every phase” of the *Colleton County* case. 201 F. Supp. 2d at 631.
- Similarly, Plaintiffs’ challenge in this case focuses on the composition of majority-minority or near-majority districts in the enacted plans, as well as the effect of those districts on the composition of other districts.
- The specific districts at issue in the two cases are analogous as well.
 - For example, the Sixth Congressional District, which has been represented by Congressman James Clyburn since 1993, was the majority-minority congressional district under the *Colleton County* court’s plan and is the majority-minority congressional district under the plan challenged here.
 - Similarly, the *Colleton County* court’s plan for the South Carolina Senate had nine majority-minority districts: 19, 21, 30, 32, 36, 39, 40, 42, and 45. The nine majority-minority districts under the challenged Senate Plan (eight of which appear to be challenged by Plaintiffs here) are the same.
 - The Senate districts that “generated the greatest amount of discussion” in the *Colleton County* case were Districts 30, 32, and 36. 201 F. Supp. 2d at 661. Judge Gergel on behalf of Governor Hodges advocated drawing each of these districts with black voting-age population (“BVAP”) several percentage points lower than in the plan advocated by the Senate, while drawing a neighboring minority-black district with a BVAP nearly ten percentage points higher. *Id.* Districts 30, 32 and 36 are among those now being challenged as allegedly having “artificially high black VAP percentages” that result in lower BVAP percentages for neighboring minority-black districts. Am. Compl. ¶¶ 75, 79-80. Another district now being challenged on the same ground, District 40, was drawn by the court with a majority BVAP—consistent with the Senate’s proposal but contrary to the Governor’s proposal of a minority-black district. 201 F. Supp. 2d at 660, 662.
 - The *Colleton County* court’s plan for the South Carolina House had 29 majority-minority districts. The current House plan has 30, of which 17 are challenged by Plaintiffs. Twelve of these were majority-minority districts under *Colleton County*.
- The parties in this case may seek to depose and/or call to testify at trial several of the witnesses who were deposed and/or called to testify at trial in the *Colleton County* case.
 - For example, the *Colleton County* court, in explaining why it drew a congressional district with 53.75% BVAP, stated: “Congressman James Clyburn testified that a BVAP of 53% or above would be sufficient to allow the minority constituency a fair opportunity to elect a non-incumbent black candidate of choice in the district.” 201 F. Supp. 2d at 666. Plaintiffs in this case claim that the challenged plan, in which Congressman Clyburn’s district has a BVAP of 55.18%, is unlawfully gerrymandered and “packed” because black voters “have

demonstrated an overwhelming ability to elect a candidate of choice in” the *Colleton County* court’s district. Am. Compl. ¶ 77.

- Similarly, the incumbents in seven of the nine majority-minority Senate districts and thirteen of the thirty majority-minority House districts, several of whom testified at deposition and/or trial in the *Colleton County* case, remain the same.
- Senator Glenn McConnell, President *Pro Tempore* of the South Carolina Senate, was one of the principal litigants in the *Colleton County* case and testified at both deposition and trial. Senator McConnell remains President *Pro Tempore* (and also remains Chairman of the Senate Judiciary Committee and Redistricting Subcommittee), and he is a principal defendant in this case.
- Representative James H. Harrison, Chairman of the House Judiciary Committee, also testified at both deposition and trial in the *Colleton County* case. Representative Harrison remains Chairman of the House Judiciary Committee, and is a defendant in this case.

Moreover, many of the same charges made by the Governor against the General

Assembly’s plans in *Colleton County* are raised by Plaintiffs in their Amended Complaint here:

<i>Colleton County</i>	<i>Backus</i>
<p>“The Governor charges . . . that H.3003’s version of the House plan was intentionally drafted to ‘racially polarize’ the state. . . . The effect, the Governor charges, was the intentional ‘bleaching’ of Republican districts at the expense of existing minority influence districts.” 201 F. Supp. 2d at 651 (emphasis added).</p>	<p>“Defendants’ Redistricting Plan packs black voters into a few districts making them ‘blacker’ while also ‘bleaching out’ all of the surrounding election districts.” Am. Compl. ¶ 42 (emphasis added).</p>
<p>The Governor alleges that “[b]y increasing the BVAP in current majority-minority districts, the Senate Republicans . . . make the adjoining ‘superwhite’ districts Republican strongholds.” 201 F. Supp. 2d at 659 (emphasis added).</p>	<p>“These discriminatory redistricting schemes also result in a diminution in the political power of black voters whose influence is diluted by packing them into election districts in concentrations that exceed what is necessary and lawful to give them an equal opportunity to participate in the political process.” Am. Compl. ¶ 2 (emphasis added).</p>

<i>Colleton County</i>	<i>Backus</i>
”[T]he resulting ‘ racial apartheid ’ of the House redistricting plan could have been avoided.” Governor’s Veto Letter at 3, Exhibit A of <i>Colleton County</i> Governor’s Trial Brief For House Redistricting Case (emphasis added) (attached as Exhibit C).	“These redistricting laws create a system of electoral apartheid by segregating voters into election districts” Am. Compl. ¶ 42 (emphasis added).
“The Governor, for his part, charges that the Senate plan is racially and politically gerrymandered for the purpose of ‘ bleaching ’ Republican-held districts and rendering them ‘safe’ Republican districts.” 201 F. Supp. 2d at 659 (emphasis added).	“Since black voters continue to overwhelmingly prefer Democratic candidates in South Carolina, Republican leaders in the General Assembly sought to make the Democratic Party the ‘black party’ by packing as many black voters as possible into a few election districts .” Am. Compl. ¶ 41 (emphasis added).
“Governor Hodges vetoed H.3003 because the election districts drawn by the Republican majority in the General Assembly failed to adhere to traditional districting principles and racially polarized the State’s electorate.” <i>Colleton County</i> Governor’s Trial Brief For House at 2 (emphasis added) (attached as Exhibit C).	“These race-based redistricting schemes also abandon traditional redistricting principles like drawing compact districts, keeping political subdivisions intact, and keeping communities of interest intact.” Am. Compl. ¶ 3 (emphasis added).

In addition to involving the same issues, the analogous districts, potentially the same witnesses, and many of the same arguments, the *Colleton County* case is itself part of the redistricting history that is relevant here. One round of redistricting and related litigation commonly is relevant to the legislative and judicial proceedings in the next cycle. For example, witnesses often are asked about the testimony that they gave in past redistricting litigation.

The relevance of prior redistricting litigation is illustrated by the *Colleton County* opinion itself, which repeatedly referenced earlier cases:

- In determining what traditional redistricting principles it should apply, the court “look[ed] to the historical redistricting policies of the state.” *Colleton County*, 201 F. Supp. 2d at 628. As part of that analysis, the court examined the degree to which maintaining county boundaries had been a principle emphasized by the courts that drew impasse plans in 1982 and 1992. *Id.* at 647-48.

- In deciding whether portions of two counties were part of the “core” of a district, the court looked to the reasons why other portions of those counties had been removed from the district by the court that drew the impasse plan in 1992. *Id.* at 667.
- In assessing whether reductions in the BVAP of certain majority-minority districts were retrogressive under Section 5, the court determined that the “well-documented use of racial gerrymandering during the 1990s round of redistricting to maximize black representation” could “require us to ‘clean up’ cores of existing majority-minority districts” and could “explain, at least in part, why the court, operating under its currently known constraints, cannot constitutionally achieve the existing BVAP in a fairly-drawn district.” *Id.* at 644 (citing *Smith v. Beasley*, 946 F. Supp. 1174, 1185 (D.S.C. 1996)); *id.* at 646.

Prior redistricting, especially by the *Colleton County* court in the last cycle, likewise was relevant in the redistricting process leading up to this lawsuit. For example, legislators and legislative staff relied on *Colleton County* as they decided how redistricting plans should be drawn in 2011:

- The 2011 Redistricting Guidelines adopted by the Senate Judiciary Committee’s bipartisan Redistricting Subcommittee state that they “are drawn in part [from] the 2002 opinion of the three-judge court in *Colleton County Council v. McConnell*.” See 2011 Senate Preclearance Submission Exhibit 4 (attached as Exhibit E); 2011 Senate Preclearance Submission Cover Letter (attached as Exhibit D).
- Discussion of the Sixth Congressional District during public meetings of the Senate Judiciary Committee and Redistricting Subcommittee included repeated comparisons between potential new configurations and the existing district, with emphasis on the fact that the existing district had been drawn by the court in *Colleton County*. See Senate Redistricting Subcommittee Hearing (June 21, 2011) at 5, 14-15, 17 (attached as Exhibit F); Senate Judiciary Committee Hearing (June 21, 2011) at 12, 18, 33 (attached as Exhibit G).
- In discussing Senate District 17 at a public meeting of the Senate Judiciary Committee’s Redistricting Subcommittee, the Subcommittee’s Chief Counsel emphasized the *Colleton County* court’s finding that Senate District 17 “ha[d] been a historically nonperforming district when it was a minority-majority district.” Redistricting Subcommittee Hearing (June 8, 2011) at 35 (attached as Exhibit H).

And when the Senate sought preclearance of its 2011 redistricting plan, it relied on *Colleton County* to prove that the plans complied with Section 5 of the Voting Rights Act. For example, the Section 5 Submission for the Senate plan argued,

- “[T]he 2011 Plan achieves nearly the same BVAP as the current benchmark and the plan drawn by the court in *Colleton County*.” 2011 Senate Preclearance Submission Cover Letter at 7 (Exhibit D).⁴
- “As the *Colleton County* court found, reduction of BVAP due to underpopulation in District 36 is appropriate even if the white incumbent is likely to continue winning re-election.” *Id.*
- “In District 40, the 2011 Plan achieves roughly the same BVAP as the plan drawn by the court in *Colleton County* and the subsequent plan precleared by the Attorney General.” *Id.*
- “The current situation in District 7 is effectively the same as the situation ten years ago when the three-judge court [in *Colleton County*] adopted an impasse plan and the Attorney General precleared a subsequently enacted plan.” *Id.* at 8.
- “Section 5 does not require that District 17 be maintained at the same non-performing level under the 2011 Plan” because *inter alia* District 17 “was not presented as performing in either the [*Colleton County*] court’s opinion or the preclearance submission.” *Id.*

Similarly, *Colleton County* will be central to the General Assembly’s defense in the present case, as Defendants’ December 19 responsive pleading will demonstrate. For example, Defendants will argue that Plaintiffs’ claims of vote-dilution under Section 2 and purposeful discrimination under the Fourteenth Amendment, based on alleged “packing” of majority-minority districts, are directly refuted by the fact that the challenged Senate Plan has the same number of majority-minority districts as the *Colleton County* plan, with a *lower* average BVAP. In addition, Defendants will argue that Plaintiffs’ claims regarding the potential for so-called “crossover” districts, *see* Am. Compl. ¶¶ 79-80, conflicts with the *Colleton County* court’s determination of the BVAP needed for black voters to elect their candidates of choice. 201 F. Supp. 2d at 643 (“find[ing] that in order to give minority voters an equal opportunity to elect a minority candidate of choice as well as an equal opportunity to elect a white candidate of

⁴ As noted above, the benchmark plan for purposes of preclearance was the 2003 enacted plan, which closely resembled the *Colleton County* plan. *See supra* p. 3.

choice in a primary election in South Carolina, *a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement*”

(emphasis added)). A likely issue here, therefore, is whether the evidence that supported the *Colleton County* finding differs from other evidence that may be presented in this case.

Another highly relevant aspect of the *Colleton County* case is reflected in the court’s discussion of how minority-black districts can reflect a gerrymander for *white* Democrats:

Because of the high level of racial polarization in the voting process in South Carolina, “influence districts” allow the Democratic Party the opportunity to gain control of the General Assembly. It is, therefore, an inherently politically based policy. With the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a white Democrat can usually defeat a black Democrat in the primary election and then use the black vote to defeat any Republican challenger in the general election. Although the Governor asserts that a draw based on “traditional districting principles” will naturally lead to the creation of such districts, he does not advance a claim that this court can or should consider race to intentionally draw such “influence districts.”

Id. at 643 n.22. Defendants will argue here that the essence of Plaintiffs’ claims is the erroneous notion that the Constitution and the Voting Rights Act mandate the very same “inherently politically based policy.” Defendants also will argue that “a draw based on ‘traditional districting principles’” in *Colleton County* did *not* result in the creation of “influence” districts—and, moreover, resulted in nine majority-minority districts with an average BVAP *higher* than the analogous districts in the challenged Senate plan. This bears directly on Plaintiffs’ claim that the challenged plan’s inclusion of majority-minority districts, and its alleged failure to include “crossover” districts, reflects the subordination of traditional redistricting principles. Am. Compl. ¶ 81.

Given the extensive and significant interplay between *Colleton County* and this case, Judge Gergel’s role as former lead counsel for the Governor in *Colleton County* means that he has personal knowledge of material facts that might be disputed here. For the reasons explained

above, the allegations, theories, arguments, witness testimony, and documentary evidence presented in the *Colleton County* case, as well as the court’s findings, conclusions, reasoning, and remedial redistricting plans, all are at least potentially relevant in this case. Judge Gergel also may be aware of non-public facts that bear on these matters, such as deposition testimony and other discovery material never filed in court. In addition, Judge Gergel likely gained knowledge of facts through preparation of witnesses and consultation with sympathetic members of the General Assembly, some of whom might testify in this case.

Judge Gergel, if he remains in the case, will be asked to decide issues identical or closely analogous to those that he previously litigated, against some of the same adverse parties, in South Carolina’s most recent statewide redistricting case. It therefore is reasonably possible that facts learned in Judge Gergel’s prior role as lead counsel will be material to the outcome.

ARGUMENT

Judge Gergel should disqualify himself from participating in the present case due to the direct relationship between this case and *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), a suit he previously litigated as lead counsel for one of the parties.

Congress enacted 28 U.S.C. § 455 “to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety.” *Alabama*, 828 F.2d at 1541. Consistent with this goal, § 455(b) contains “a number of bright line rules for disqualification.” *Id.* These bright-line rules involve “certain situations where the potential for conflicts of interest are readily apparent.” *Id.* For example, a judge must be disqualified “[w]here he has ... personal knowledge of disputed evidentiary facts concerning the proceeding,” 28 U.S.C. § 455(b)(1), and where “he served as lawyer in the matter in controversy,” *id.* § 455(b)(2).

Moreover, § 455(a) contains a “catchall” recusal provision.” *Liteky v. United States*, 510 U.S. 540, 548 (1994). Pursuant to this provision, a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). This broadly sweeping language “expands the protection of § 455(b).” *Liteky*, 510 U.S. at 552. “Obviously, it is possible for facts to indicate that a judge *might* be biased such that recusal is required under § 455(a) even though none of those facts indicate actual bias necessitating recusal under § 455(b).” *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998).

Significantly, “[t]he goal of section 455(a) is to avoid even the appearance of partiality.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (quotation marks omitted). “The critical question presented by this statute,” then, “is not whether the judge is impartial in fact.” *DeTemple*, 162 F.3d at 286 (quotation marks omitted). “It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances.” *Id.*

In applying this statute, the court “must keep in mind that the hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system.” *Id.* at 287. “Judges, accustomed to the process of dispassionate decision making and keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would.” *Id.* And especially because the concerns underlying § 455 have “constitutional dimensions,” *Liljeberg*, 486 U.S. at 865 n.12, “the benefit of the doubt is . . . to be resolved in favor of recusal,” *Alabama*, 828 F.2d at 1540.

Here, Judge Gergel litigated in private practice the same issues that arise in this case. That, by itself, does not require recusal. *See, e.g., Wessman v. Boston Sch. Comm.*, 979 F. Supp.

915, 916 (D. Mass. 1997) (holding a judge is not disqualified from participating in a civil rights case merely because she was a civil rights attorney prior to appointment).

Recusal is required here because there is a “direct relationship,” *Wessman*, 979 F. Supp. at 918, between the earlier *Colleton County* case and the present case. A “direct relationship” exists because 1) “the litigation may involve disputed facts with which [he] may have personal knowledge by virtue of [his] prior representation,” *Wessman*, 979 F. Supp. 918; and 2) Defendants rely on the *Colleton County* case to support their defense in the present case, *e.g., id.*; *see also In re Rodgers*, 537 F.2d 1196, 1198 (4th Cir. 1976) (per curiam). This direct relationship implicates Congress’s concerns about judges having “personal knowledge of disputed evidentiary facts,” 28 U.S.C. § 455(b)(1), or “serv[ing] as a lawyer in the matter in controversy,” *id.* § 455(b)(2), and also implicates Congress’s concerns about the appearance of partiality, *see id.* § 455(a). As a consequence, it is well-established that when such a direct relationship exists, recusal is required. *See, e.g., Alabama*, 828 F.2d at 1545-46; *Rodgers*, 537 F.2d at 1197-98; *Wessman*, 979 F. Supp. at 918.

For example, the *Wessman* case involved a white high school student challenging the constitutionality of the policy governing admissions to certain schools in the Boston public school system. *See Wessman v. Boston Sch. Comm.*, 996 F. Supp. 120, 121 (D. Mass. 1998) (Tauro, J.). Judge Nancy Gertner granted the plaintiff’s motion to recuse due to her representation of a civil rights group in a prior desegregation case involving the same school system. She concluded that recusal was necessary because there was a “direct relationship between the earlier case and the *Wessman* matter.” *Wessman*, 979 F. Supp. at 918. That relationship was evidenced by the possibility that the defendants would rely on the prior case to support their defense of the admissions policy. *See, e.g., id.* (“the City ‘may’ argue that the

current admissions policy is justified by the ‘remediation of the lingering effects of discrimination,’” which was a “key issue” in the prior case). This direct relationship between the two cases, Judge Gertner explained, mandated recusal: “[T]he litigation may involve disputed facts with which I may have personal knowledge by virtue of my prior representation.” *Id.*

Similarly, in another civil rights case, a trial judge previously had represented a client in an earlier, related case. *Alabama*, 828 F.2d at 1545. Due to the relationship between the two cases, the judge had personal knowledge of alleged racially discriminatory employment practices that were relevant to the case over which he presided. *Id.* Because such personal knowledge had the potential to “vitiate[] the carefully constructed rules of procedure and evidence that ensure deliberate, unbiased fact finding,” the Eleventh Circuit concluded recusal was required. *Id.* at 1546.

And in *Rodgers*, the Fourth Circuit concluded that the “connection between the Judge’s prior professional associations and the case before him” required recusal. *DeTemple*, 162 F.3d at 284 (discussing *Rodgers*, 537 F.2d at 1198). In particular, the defendants in *Rodgers* planned to “prove that the conduct for which they have been indicted was no more culpable than the conduct of the client represented by the judge’s former law partner.” *Rodgers*, 537 F.2d at 1198.⁵ *Cf. DeTemple*, 162 F.3d at 284 (recusal unwarranted because the prior matter involving the judge “played no role in either the defense or the prosecution of” the present case).

Here, there is a “direct relationship” between the *Colleton County* case and the present case. As explained above, these cases involve many of the same witnesses, same factual issues,

⁵ The defendants in *Rodgers* were charged with using unlawful means to secure the passage of a bill in the state legislature. They alleged that another company—represented by the judge’s law partner when the judge was still in private practice—had engaged in the same conduct. *Rodgers*, 537 F.2d at 1197-98.

and same allegations. Legislators and legislative staff relied on the court’s findings in *Colleton County* to determine how plans should be drawn in the present redistricting cycle. And when Defendants sought preclearance of the redistricting plans, they relied on *Colleton County* to establish that the plans complied with Section 5 of the Voting Rights Act. Most importantly, Defendants in this case will rely on the *Colleton County* case to support their defense, just as the defendants in *Wessman* and *Rodgers* relied on aspects of the prior matters at issue there.

Due to the direct relationship between *Colleton County* and this case, Judge Gergel has personal knowledge of material facts that may be at issue in this case. As explained above, the allegations, theories, arguments, witness testimony, and documentary evidence presented in the *Colleton County* case all are at least potentially relevant in this case. The potentially overlapping material facts relate to, for example, the identity and priority of traditional redistricting principles, the location and nature of historical district “cores” and communities of interest, and the effect of various circumstances on the ability of minority voters to elect their candidates of choice. Judge Gergel also may be aware of non-public facts that bear on these matters, such as discovery never filed in court and knowledge acquired through consultation with experts and members of the General Assembly, some of whom might testify in the present case.

Because such personal knowledge has the potential to “vitiate[] the carefully constructed rules of procedure and evidence that ensure deliberate, unbiased fact finding,” *Alabama*, 828 F.2d at 1546, recusal is required under § 455(b)(1). Moreover, it creates an appearance of partiality requiring recusal under § 455(a). And this need for recusal under § 455(a) is only heightened by the fact that Judge Gergel acquired his personal knowledge of the facts by acting as lead counsel for a party making many of the same arguments in a closely related case. *Cf.* 28 U.S.C. § 455(b)(2).

Additional factors militate in favor of recusal as well. “As Justice (then Judge) Breyer, noted in another § 455(a) case, ‘other things being equal, the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality.’” *DeTemple*, 162 F.3d at 287 (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 971 (1st Cir. 1989)). In *DeTemple*, the Fourth Circuit concluded that in a small town in West Virginia that has “fewer than 300 lawyers and one federal district judge,” “[i]t is far more likely . . . than it would be in a metropolitan area, that a judge, prior to his appointment, might represent a party with some tangential connection to a case subsequently assigned to him.” *Id.* Because such a connection is common and unavoidable under these circumstances, it is unlikely to create an appearance of partiality. *See id.*

Under the circumstances here, by contrast, a judge’s service as an attorney and then judge in directly related cases is extremely unusual and easily avoidable. Because litigation over statewide redistricting plans is infrequent, it is rare for an attorney in one such case to be a sitting United States District Judge at the time the next one is filed. Also, cases involving statewide redistricting plans traditionally are filed in the Columbia Division and not the Charleston Division, where Judge Gergel sits. *E.g.*, *Colleton County*, 201 F. Supp. 2d at 618; *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996); *Burton v. Sheheen*, 793 F. Supp 1329 (D.S.C. 1992); *SC State Conference of Branches of NAACP v. Riley*, 533 F. Supp. 1178 (D.S.C. 1982). It therefore is unlikely that the circumstances requiring recusal here will arise again. Importantly, because Judge Gergel is one of fourteen active and senior federal district judges in South Carolina, five of whom are resident judges of the Charleston Division, this case can be reassigned without difficulty. The fact that the “potentially biasing circumstance[s]” are far from “common” and are “easily avoidable” means that, “other things being equal,” it is *more* likely

that the “circumstance[s] will appear to a knowledgeable observer as a sign of partiality.”
DeTemple, 162 F.3d at 287 (quoting *In re Allied-Signal Inc.*, 891 F.2d at 971).

Litigation over the legality of statewide redistricting plans may occur only once per decade, affecting millions of South Carolinians. Moreover, “[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). As a consequence, “public confidence in the judicial system” may be undermined if such a case is “decided under a cloud.” *Alabama*, 828 F.2d at 1546. It is therefore particularly important here that any doubt “be resolved in favor of recusal,” *id.* at 1540, so that any appearance of partiality can scrupulously be avoided.

CONCLUSION

For the foregoing reasons, Defendants’ recusal motion should be **GRANTED**.

(Signature Page Follows)

Respectfully submitted,

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December 9, 2011
Greenville, South Carolina

EXHIBIT E
(*Backus* Disqualification Order)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Vandroth Backus, et. al.,)	
)	
Plaintiffs,)	
)	Civil Action No. 2:11-cv-3120-RMG-HFF-MBS
vs.)	
)	
The State of South Carolina, et.)	
al.,)	ORDER
)	
Defendants.)	
)	
)	

This matter comes before the Court, pursuant to 28 U.S.C. § 455, on Defendants’ motion to recuse the undersigned as one of the three judges assigned to hear the pending challenge to the South Carolina State House, State Senate and Congressional reapportionment plans. (Dkt. No. 30). Responses to the motion to recuse have been filed by the Plaintiffs and the State Election Commission defendants. (Dkt. No. 34, 35). Defendants assert that there is a close factual and legal relationship between the present reapportionment litigation and the last round of legislative reapportionment that ended nearly a decade ago. *Colleton County Council v. McConnell*, 201 F. Supp.2d 618 (D.S.C. 2002). Defendants accurately note the undersigned served as lead counsel for Governor James Hodges, a named defendant in that 2002 litigation.¹ Defendants assert that the undersigned has “personal knowledge of material facts that might be disputed here” and “also

¹ The undersigned also served as lead counsel for a group of plaintiffs of all partisan persuasions who successfully challenged the State House reapportionment plan in *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996).

may be aware of non-public facts that bear on these matters” (Dkt. No. 30 at 10, 11).

Defendants do not, however, identify the specific “material facts” or “non-public facts” that form the basis of their assertions.

Any motion for recusal under § 455 must be evaluated under two different standards. First, the court must determine whether there exist facts which make disqualification mandatory, such as personal bias or prejudice, personal knowledge of disputed evidentiary facts, financial interests or familial relationship to a party or counsel. 28 U.S.C. § 455(b)(1) - (5). Second, a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” § 455(a). This provision provides an objective standard and lacks a scienter requirement or any showing of actual bias. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 (1988). The question in a potential § 455(a) recusal is whether “a reasonable well informed observer” outside the judiciary “might reasonably question [the judge’s] impartiality on the basis of all of the circumstances.” *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998).

The undersigned is unpersuaded that the present litigation contains “disputed evidentiary facts” in which he has “personal knowledge.” While it is certainly true that the undersigned has acquired considerable exposure to previous legislative redistricting plans and the underlying evidence offered at trial in the 1996 and 2002 litigation, such information is summarized in the comprehensive court orders issued in those two cases and will be reviewed carefully by all judges sitting in this present litigation. The undersigned simply acquired the information in the course of the earlier litigation from others and has no first hand evidence that would constitute “personal knowledge”. § 405(b)(1). Moreover, as indicated above, Defendants have not identified the

alleged “disputed evidentiary facts” or “non-public information” relating to the present legislative reapportionment plan that they assert is possessed by the undersigned.

The undersigned is also comfortable that he has no personal bias or prejudice that would prevent him from sitting on this case. It is well settled that prior litigation experience in the same area of law and/or involving similar issues does not form the basis to mandate the recusal of a judge. *Wessman by Wessman v. Boston School Committee*, 979 F. Supp. 915, 917 (D. Mass. 1997) (“[R]epresentation of civil rights plaintiffs—without more—does not create a reasonable doubt about one’s impartiality in future civil rights cases.”). Indeed, in both *Smith* and *Colleton County* reapportionment litigation, the late Senior United States District Judge Matthew Perry sat on the three judge panels following a legendary career as a civil rights attorney and lead counsel in the South Carolina legislative reapportionment litigation which led to the establishment of single member districts for the State House and State Senate.

The undersigned recognizes, however, that the question of § 455(a) recusal is broader than the issues of personal bias or the possession of personal knowledge of disputed evidentiary facts and involves the potential *appearance* of partiality and public confidence in the integrity and fairness of the judicial process. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 860. When Congress revised the disqualification statute in 1974, it abolished the preexisting standard known as the “duty to sit”, which created a presumption against disqualification in close cases. In its stead, Congress established an objective standard for addressing recusal motions, mandating disqualification where the judge’s “impartiality might reasonably be questioned.” § 455(a); *United States v. DeTemple*, 162 F.3d at 286. This standard anticipates evaluation from the standpoint of “a reasonable well informed observer” outside the judiciary with knowledge of

all of the facts and circumstances. *Id.* In passing upon a recusal motion, the court must weigh the risk of parties utilizing the recusal motion for strategic advantage against the need to preserve the public's confidence in the integrity and impartiality of the judiciary. *Id.* at 287.

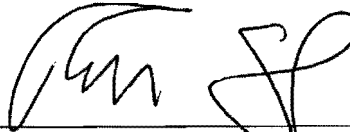
While the undersigned views each legislative redistricting challenge as distinct and separate and based upon the specific reapportionment plans presented to the court, Defendants' motion reflects an alternative view that the various South Carolina legislative reapportionment cases are closely linked, with similar legal and factual disputes, overlapping witnesses and common disputed legislative districts. If one were to take this latter view, the fact that a lead attorney (and for some parties an adversarial attorney) in the allegedly related litigation was now one of the members of the three judge panel might create an appearance of partiality and lessen the public's confidence in the independence and integrity of the judiciary. The undersigned is also aware that state legislative reapportionment cases constitute some of the most sensitive and intrusive litigation involving federal judicial review of state political and legislative processes, making it particularly important that all participants and the public have confidence in the fairness of the judicial process.

The undersigned finds that a reasonable well informed observer might view his prior involvement in the 2002 reapportionment litigation as lead counsel for one of the parties as creating, under the particular circumstances present here, an appearance of partiality that on balance suggests the need to recuse.² Therefore, Defendants' motion to recuse on the basis of

² According to Defendants' memorandum, a number of the likely witnesses in defense of the present reapportionment plan played a key role in the proposed legislative plan under consideration in the *Colleton County* case and were extensively deposed and cross examined by the undersigned in the course of the 2002 litigation. While that prior representation nearly a decade ago would have no impact on the undersigned's personal view of this case, a reasonable

§ 455(a) (Dkt. No. 30) is hereby granted.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Judge

December 14, 2011
Charleston, South Carolina

person outside the judiciary might conclude that service of the former adversarial attorney in the 2002 reapportionment litigation in the present legislative reapportionment case on the three judge panel would create an *appearance* of partiality. Under the standards of § 455(a), recusal under these highly unusual circumstances would appear to be the better course.

EXHIBIT F
(Plaintiffs' Rule 26(a)(1) Initial Disclosures)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE
CONFERENCE OF THE NAACP, and

Taiwan Scott, on behalf of himself and all
other similarly situated persons,

Plaintiffs,

v.

HENRY D. MCMASTER, in his official
capacity as Governor of South Carolina;
THOMAS C. ALEXANDER, in his official
capacity as President of the Senate; LUKE A.
RANKIN, in his official capacity as
Chairman of the Senate Judiciary Committee;
JAMES H. LUCAS, in his official capacity as
Speaker of the House of Representatives;
CHRIS MURPHY, in his official capacity as
Chairman of the House of Representatives
Judiciary Committee; WALLACE H.
JORDAN, in his official capacity as
Chairman of the House of Representatives
Elections Law Subcommittee; HOWARD
KNAPP, in his official capacity as interim
Executive Director of the South Carolina
State Election Commission; JOHN WELLS,
Chair, JOANNE DAY, CLIFFORD J.
EDLER, LINDA MCCALL, and SCOTT
MOSELEY, in their official capacities as
members of the South Carolina Election
Commission,

Defendants.

**Case No. 3-21-cv-03302-JMC-
TJH-RMG**

**PLAINTIFFS' INITIAL
DISCLOSURES PURSUANT TO
FED. R. CIV. P. 26(a)(1) AND
LOCAL RULE 26.03 (A)(1), (4)**

THREE-JUDGE PANEL

PLAINTIFFS' INITIAL DISCLOSURES UNDER FRCP RULE 26(a)(1)

Pursuant to Rule 26(a)(1) of the Federal Rule of Civil Procedure, Plaintiffs the South Carolina State Conference of the NAACP (“SC NAACP”) and Taiwan Scott (collectively, “Plaintiffs”) hereby provide the following Initial Disclosures based upon information reasonably available to Plaintiffs at this time. Plaintiffs hereby reserve the right to amend and/or supplement their Initial Disclosures based on new information obtained in discovery or otherwise in the course of this action.

RESERVATION OF RIGHTS

These Initial Disclosures are not intended to, and do not, constitute admissions as to the relevance or admissibility of the information disclosed, and are made without any waiver of attorney-client privilege, work product protection, or any other applicable privilege, protection, or immunity.

A. Individuals

Based on upon information currently available to Plaintiffs, the following individuals are likely to have discoverable information that Plaintiffs may use to support their claims or defenses, not including information used solely for impeachment.

1. Individuals and subchapters identified as Plaintiffs in this action and individuals and subchapters affiliated with Plaintiffs SC NAACP and Taiwan Scott who have general knowledge or information regarding (i) South Carolina’s redistricting process and the state’s history of redistricting; and (ii) South Carolina’s voting population, including voting patterns and demographics, including, and who may be contacted through Plaintiffs’ undersigned counsel:
 - a. Executive leadership of the South Carolina State Conference of the NAACP, including Brenda Murphy, President; and
 - b. Taiwan Scott.
2. Individuals identified as Defendants in this action, including:

- a. Henry D. McMaster, in his official capacity as Governor of South Carolina;
 - b. Thomas C. Alexander, in his official capacity as Chairman of the Senate Judiciary Committee;
 - c. Luke A. Rankin, in his official capacity as Chairman of the Senate Judiciary Committee;
 - d. Representative James H. Lucas, in his official capacity as Speaker of the South Carolina House of Representatives;
 - e. Chris Murphy, in his official capacity as Chairman of the South Carolina House of Representatives Judiciary Committee;
 - f. Representative Wallace H. Jordon, in his official capacity as Chairman of the South Carolina House of Representatives Elections Law Subcommittee;
 - g. Howard Knapp, in his official capacity as interim Executive Director of the South Carolina State Election Commission;
 - h. John Wells in his official capacity as a member of the South Carolina State Election Commission;
 - i. Joanne Day in her official capacity as a member of the South Carolina State Election Commission;
 - j. Clifford J. Edler in his official capacity as member of the South Carolina State Election Commission;
 - k. Linda McCall in her official capacity as a member of the South Carolina State Election Commission; and
 - l. Scott Moseley in his official capacity as member of the South Carolina State Election Commission.
3. Members of the South Carolina State House of Representatives, 223 Blatt Building, 1105 Pendleton Street, Columbia, SC 29201, who may have information regarding the South Carolina redistricting process and the South Carolina voting population, including, but not limited to:
- a. Representative Justin T. Bamberg;
 - b. Representative Beth E. Bernstein;
 - c. Representative Wendy C. Brawley;

- d. Representative Neal A. Collins;
 - e. Representative Jason Elliot;
 - f. Representative Jerry N. Govan, Jr.;
 - g. Representative John Richard C. King;
 - h. Representative Patricia Moore Henegan; and
 - i. Representative Wm. Weston J. Newton.
4. Staff members for the South Carolina State House of Representatives, including but not limited to, staff members for the Judiciary Committee, Elections Law Subcommittee, and House Redistricting Ad Hoc Committee who may have information regarding: (i) the 2020 South Carolina redistricting process; (ii) South Carolina's history of redistricting; (iii) the district map drawn for the South Carolina State House of Representatives; and (iv) South Carolina's voting population.
 5. Third-party organizations focused on redistricting, including their members, employees, and agents, who may have information regarding the redistricting process in South Carolina, including, but not limited to:
 - a. Adam Kincaid, Executive Director, the National Republican Redistricting Trust, 1750 Tysons Boulevard, Suite 1500, McLean, VA, 22102, (703) 245-8020;
 - b. Lynn Teague, Vice President for Issues and Action, League of Women Voters of South Carolina, PO Box 845, Columbia, SC 29202, (803) 556-9802; and
 - c. Frank Rainwater, Executive Director, South Carolina Revenue and Fiscal Affairs Office, 100 Assembly Street, Rembert Dennis Building, Suite 421, Columbia, SC 29201, (803) 734-3793.
 6. Expert witnesses, who have information regarding the manner in which the House district map was drawn and the voting population within each drawn district, to be identified pursuant to the Court's Scheduling Order regarding expert discovery.
 7. Any other witnesses identified by any party in this litigation in initial disclosures or in any other discovery responses.

Plaintiffs reserve the right to seek discovery from, and relating to, other persons that may subsequently become known as persons likely to have discoverable information. Plaintiffs

further reserve the right to modify the foregoing list and to identify and call as witnesses additional persons if, during the course of their investigation and discovery relating to this case, Plaintiffs learn that such additional persons have knowledge or information that Plaintiffs may use to support their claims, defenses, and proposed remedies.

B. Documents

Based on information reasonably available, Plaintiffs identify the following documents, electronically stored information, or other tangible things, all of which are maintained by them, are already in possession of the parties, or are publicly available, that Plaintiffs may use to support their claims, defenses, and proposed remedies, unless such use is solely for impeachment:

1. Data and analyses relating to South Carolina's demographics, voter registration, elections, voting patterns, and the 2020 South Carolina redistricting process;
2. Memoranda, minutes, newspaper articles, public statements, legislation introduced, and/or legislative hearing/committee transcripts and/or videos, redistricting criteria, and other documents related to the 2020 South Carolina redistricting process;
3. Public testimony, correspondence, and other documents regarding the 2020 South Carolina redistricting process;
4. Expert and fact witness material, to be identified pursuant to the Court's Scheduling Order regarding expert discovery;
5. SC NAACP organizational mission statement; and
6. All documents disclosed by any Plaintiff, Defendant, or other party in this action.

These Initial Disclosures do not constitute an admission as to the existence, relevance, or admissibility of the identified materials, or a waiver of any attorney-client or work product privilege, or other applicable privilege or immunity.

Plaintiffs continue to search for additional documents, electronically-stored information,

or other tangible things that they may use to support their claims, defenses, and/or proposed remedies, and expressly reserve the right to supplement these Initial Disclosures with such additional documents, electronically-stored information, or other tangible things. In addition to the above-described documents, electronically-stored information, or other tangible things, Plaintiffs may also rely upon other publicly-available documents, electronically-stored information, or other tangible things, and/or electronically stored information, or other tangible things produced by third parties in this or other litigations.

C. Computation of Damages

Plaintiffs do not seek damages.

D. Insurance Agreements

This component is inapplicable to Plaintiffs.

E. Local Rule 26.03(A)(1): A Short Statement of the Facts of the Case

The best statement of the facts of this case, pending discovery in this action, is contained in Plaintiff's Amended Complaint (ECF No. 84).

F. Local Rule 26.03(A)(4): A Summary of the Claims or Defenses with Statutory and/or Case Citations Support the Same

The best summary of Plaintiffs' claims with statutory and/or case citations is contained in Plaintiffs' Amended Complaint (ECF No. 84).

Dated: January 7, 2022

Respectfully submitted,

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Attorneys for Plaintiffs

* Motion for admission *Pro Hac Vice*
forthcoming
** Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2022, a true and correct copy of the foregoing was served on all counsel of record by electronic mail.

/s/ Christopher Bryant
Christopher Bryant

EXHIBIT G
(House Defendants' Rule 26(a)(1) Initial Disclosures)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE
CONFERENCE OF THE NAACP,

and

TAIWAN SCOTT, on behalf of himself and all
other similarly situated persons,

Plaintiffs,

v.

HENRY D. MCMASTER, in his official
capacity as Governor of South Carolina;
THOMAS C. ALEXANDER, in his official
capacity as President of the Senate; LUKE A.
RANKIN, in his official capacity as Chairman
of the Senate Judiciary Committee; JAMES H.
LUCAS, in his official capacity as Speaker of
the House of Representatives; CHRIS
MURPHY, in his official capacity as Chairman
of the House of Representatives Judiciary
Committee; WALLACE H. JORDAN, in his
official capacity as Chairman of the House of
Representatives Elections Law Subcommittee;
HOWARD KNAPP, in his official capacity as
interim Executive Director of the South
Carolina State Election Commission; JOHN
WELLS, Chair, JOANNE DAY, CLIFFORD
J. EDLER, LINDA MCCALL, and SCOTT
MOSELEY, in their official capacities as
members of the South Carolina Election
Commission,

Defendants.

Civil Action No. 3:21-cv-03302-JMC-TJH-
RMG

THREE-JUDGE PANEL

**INITIAL RULE 26(a)(1) DISCLOSURES
OF HOUSE DEFENDANTS JAMES H.
LUCAS, CHRIS MURPHY, AND
WALLACE H. JORDAN**

Defendants James H. Lucas (in his official capacity as Speaker of the South Carolina House of Representatives), Chris Murphy (in his official capacity as Chairman of the South Carolina House of Representatives Judiciary Committee), and Wallace H. Jordan (in his official capacity as

Chairman of the South Carolina House of Representatives Redistricting Ad Hoc Committee) (collectively, the “**House Defendants**”), by and through undersigned counsel make the following disclosures pursuant to Fed. R. Civ. P. 26(a)(1). These disclosures are made based on the information presently available to the House Defendants and are subject to modification or supplementation as more information becomes available.

The responses set forth below are made without waiving: (1) the right to object to the use of any responses for any purpose, in this action or any other actions, on the grounds of privilege, relevance, or any other appropriate grounds; (2) the right to object to any other request involving or relative to the subject matter of the responses herein; and (3) the right to revise, correct, supplement, or clarify any of the responses below, at any time. The House Defendants specifically reserve the right to supplement these responses herein, in accordance with the Federal Rules of Civil Procedure, and has reached an agreement to that effect with Plaintiffs’ Counsel.

Fed. R. Civ. P. 26(a)(1)(A)(i): The name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment:

RESPONSE: The House Defendants hereby disclose this list of persons believed likely to have discoverable information that the House Defendants may use to support their claims or defenses (unless solely for impeachment) based on House Defendants’ knowledge to date:

1. **James H. Lucas, Speaker of the South Carolina House of Representatives (“House”)**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.
2. **Chris Murphy, Chairman of the South Carolina House of Representatives Judiciary Committee (“Judiciary Committee”)**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>.

Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.

- 3. Wallace H. Jordan, Chairman of the House of Representatives Redistricting Ad Hoc Committee (“Ad Hoc Committee”)**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.
- 4. Justin T. Bamberg, Member of the Ad Hoc Committee**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.
- 5. Beth E. Bernstein, Member of the Ad Hoc Committee**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.
- 6. Neal A. Collins, Member of the Ad Hoc Committee**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.
- 7. Jason Elliot, Member of the Ad Hoc Committee**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.
- 8. Patricia Moore “Pat” Henegan, Member of the Ad Hoc Committee**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.
- 9. Wm. Weston J. Newton, Member of the Ad Hoc Committee**, contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information

regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.

10. Members of the South Carolina General Assembly, names and contact information for all House Members available at <https://www.scstatehouse.gov/member.php?chamber=H>. Subject to the legislative, attorney-client, and work-product privileges Members may have information regarding the Plans adopted by the South Carolina General Assembly, or any other plans considered by the General Assembly.

11. Any party or any witness called by a party. House Defendants reserve the right to use information provided by any opposing party or witness called by an opposing party. House Defendants also reserve the right to use information provided by any another defendant or witness called by another defendant.

Fed R. Civ. P. 26(a)(1)(A)(ii): A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment:

RESPONSE: Subject to an appropriate protective order, the House Defendants identify the following documents reasonably believed to be in their possession, custody, or control relevant to disputed facts alleged in the pleading that may be used to support their claims or defenses:

1. House Defendants may use any and all material accessible through the South Carolina House of Representatives Redistricting 2021 website, <https://redistricting.schouse.gov/>, as well as archived versions of this website from prior redistricting cycles, to support their defenses. These materials include but are not limited to:
 - a. 2021 Guidelines and Criteria for Congressional and Legislative Redistricting, adopted August 3, 2021.
 - b. Ad Hoc Committee Draft Plan for House Districts.
 - c. H. 4493 as passed by the Ad Hoc Committee on November 16, 2021.
 - d. H. 4493 as passed by the Judiciary Committee on November 16, 2021.
 - e. Act No. 117 as passed by the Full House of Representatives and signed into law by Governor McMaster.
 - f. Public submissions relevant to the House Redistricting process.

- g. Oral testimony received from the public at Ad Hoc Committee meetings, available in video recordings and transcripts.
 - h. Written testimony received from the public through redistricting@schouse.gov.
 - i. Written testimony received by mail or in person at Ad Hoc Committee meetings.
 - j. Ad Hoc Committee meetings, Judiciary Committee meetings, and full House sessions pertaining to H. 4493.
2. House Defendants may use any and all statistical data and reports posted on the House Redistricting website (or archived versions of that website) as well as data made available by the United State Census Bureau and the South Carolina Election Commission.
 3. Maps of existing and previous South Carolina House Districts.
 4. House Defendants may use parts of the public record in *Backus v. South Carolina*, 857 F. Supp. 2d 553, 557 (D.S.C.), *aff'd*, 568 U.S. 801 (2012), *Colleton County v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), and other prior litigation.
 5. House Defendants may use any plans, databases, reports, calculations, analyses, or other materials generated from the data sets listed above.
 6. Publically available statements, news articles, press releases, social media, websites and similar media regarding the redistricting process and the House Districts.

House Defendants' investigation into the allegations of the Amended Complaint is ongoing. Accordingly, House Defendants reserve the right to supplement this response as necessary during the course of discovery and further proceedings in this case. In the event their investigation reveals additional documents in support of their claims or defenses, they will timely produce these documents to Plaintiffs in accordance with the applicable rules and discovery deadlines in this action. House Defendants further reserve the right to identify any other documents identified in Plaintiffs' initial disclosure statement or produced by Plaintiffs during discovery.

Fed R. Civ. P. 26(a)(1)(A)(iii): A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered:

RESPONSE: Not applicable.

Fed R. Civ. P. 26(a)(1)(A)(iv): For inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment:

RESPONSE: Not applicable.

1. Statement Regarding Electronic Discovery and Production of Documents

Pursuant to Fed. R. Civ. P. 26(a)(1)(A)(ii) and 26(b)(2)(B), the House Defendants state that documents may exist in a variety of locations and formats and are maintained consistent with the data retention policies of the South Carolina House of Representative and South Carolina Legislative Services Agency. The House Defendants have no reasonable means of searching across all available documents, many of which are not reasonably accessible such that collection and searching of them would entail undue burden and cost. Furthermore, it would be unduly burdensome to try to search for information in the documents from the digital custodial data of each of the individuals who might have discoverable evidence related to the Plaintiffs' allegations, particularly given the unknown likelihood of finding potentially relevant data, the likelihood of searching through largely duplicative data, and the associated costs of processing and reviewing such a large amount of data. The House Defendants will take reasonable steps to respond to Plaintiffs' discovery requests by searching reasonably accessible custodial data of persons most likely to have relevant information in the time periods when they are most likely to have relevant information.

2. Supplementation

These initial disclosures of the House Defendants are made without prejudice to the right to change or supplement the responses, the right to assert privileges or objections with respect to any requests for discovery, and the right to introduce at trial additional evidence and documents as warranted by the development of the facts underlying this lawsuit.

s/ William W. Wilkins

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*Attorneys for James H. Lucas, Chris Murphy, and
Wallace H. Jordan*

January 10, 2022
Greenville, South Carolina

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing **Initial Rule 26(a)(1) Disclosures** were served via email on counsel of record on January 10, 2022.

s/ Hamilton B. Barber
Hamilton B. Barber

EXHIBIT H
(Affidavit of James H. Lucas)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE
CONFERENCE OF THE NAACP,

and

TAIWAN SCOTT, on behalf of himself and all
other similarly situated persons,

Plaintiffs,

v.

HENRY D. MCMASTER, in his official
capacity as Governor of South Carolina;
THOMAS C. ALEXANDER, in his official
capacity as President of the Senate; LUKE A.
RANKIN, in his official capacity as Chairman
of the Senate Judiciary Committee; JAMES H.
LUCAS, in his official capacity as Speaker of
the House of Representatives; CHRIS
MURPHY, in his official capacity as Chairman
of the House of Representatives Judiciary
Committee; WALLACE H. JORDAN, in his
official capacity as Chairman of the House of
Representatives Elections Law Subcommittee;
HOWARD KNAPP, in his official capacity as
interim Executive Director of the South
Carolina State Election Commission; JOHN
WELLS, Chair, JOANNE DAY, CLIFFORD
J. EDLER, LINDA MCCALL, and SCOTT
MOSELEY, in their official capacities as
members of the South Carolina Election
Commission,

Defendants.

Civil Action No. 3:21-cv-03302-JMC-TJH-
RMG

AFFIDAVIT OF JAMES H. LUCAS

PERSONALLY APPEARED BEFORE ME, James H. Lucas, who after first being duly
sworn, deposes and states as follows:

1. I am above the age of eighteen (18) and I submit this affidavit based upon my personal knowledge.

2. I am currently the Speaker of the South Carolina House of Representatives, a defendant in this case. I was elected Speaker of the House on December 2, 2014.

3. As the current Speaker of the House, I am a named defendant in this case and expect be one of the House Defendants' witnesses in this litigation including at trial.

4. Prior to being elected Speaker of the House, I was involved in previous redistricting litigation, including the redistricting cycles that led to the cases of *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002) and *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C.), *aff'd*, 568 U.S. 801 (2012).

5. The Honorable Richard M. Gergel ("Judge Gergel"), who I understand is currently one of the judges on the Three-Judge Panel assigned to hear this case, was lead counsel for then-Governor James H. Hodges in *Colleton County*.

6. As lead counsel for Governor Hodges in *Colleton County*, Judge Gergel deposed me in my capacity as a witness in the *Colleton County* litigation. Some 20 years later, I still have a vivid recollection of that deposition. I remember Judge Gergel's style and his deposition of me was indeed vigorous and comprehensive.

FURTHER AFFIANT SAYETH NAUGHT.

James H. Lucas
James H. Lucas

SWORN AND SUBSCRIBED TO BEFORE
ME THIS 18th day of January, 2022.

Robert M. Rubin
Notary Public, State of South Carolina
My Commission Expires: 1-16-25

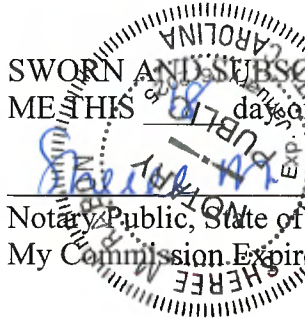


EXHIBIT I
(Affidavit of Charles F. Reid)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

THE SOUTH CAROLINA STATE
CONFERENCE OF THE NAACP,

and

TAIWAN SCOTT, on behalf of himself and all
other similarly situated persons,

Plaintiffs,

v.

HENRY D. MCMASTER, in his official
capacity as Governor of South Carolina;
THOMAS C. ALEXANDER, in his official
capacity as President of the Senate; LUKE A.
RANKIN, in his official capacity as Chairman
of the Senate Judiciary Committee; JAMES H.
LUCAS, in his official capacity as Speaker of
the House of Representatives; CHRIS
MURPHY, in his official capacity as Chairman
of the House of Representatives Judiciary
Committee; WALLACE H. JORDAN, in his
official capacity as Chairman of the House of
Representatives Elections Law Subcommittee;
HOWARD KNAPP, in his official capacity as
interim Executive Director of the South
Carolina State Election Commission; JOHN
WELLS, Chair, JOANNE DAY, CLIFFORD
J. EDLER, LINDA MCCALL, and SCOTT
MOSELEY, in their official capacities as
members of the South Carolina Election
Commission,

Defendants.

Civil Action No. 3:21-cv-03302-JMC-TJH-
RMG

AFFIDAVIT OF CHARLES F. REID

PERSONALLY APPEARED BEFORE ME, Charles F. Reid, who after first being duly
sworn, deposes and states as follows:

CR
1/18/2022

1. I am above the age of eighteen (18) and I submit this affidavit based upon my personal knowledge and recollection.

2. I currently serve as the Clerk of the South Carolina House of Representatives, a named defendant in this case. I was most recently elected Clerk of the House on January 14, 2020, after returning to the House from a stint in the private sector. Prior to that time, I also served as Clerk of the House from November 30, 2004, to March 31, 2019. I was Counsel to the Speaker of the House from 1995 until 2001 and returned to that role in 2004. From 2001 until 2004, I was engaged in the private practice of law with the former McNair Law Firm, which is now known as Burr & Forman, LLP.

3. As the current Clerk of the House, I am familiar with this litigation and am aware that the current Speaker of the House, James H. Lucas, is a defendant in this litigation and will be key witness as well.

4. I was involved as outside counsel to the House during the litigation of *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002) and was also involved tangentially as Clerk during the litigation of *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C.), *aff'd*, 568 U.S. 801 (2012).

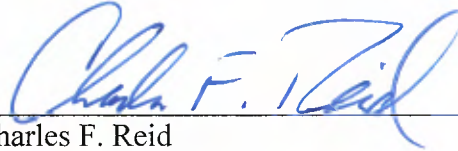
5. I recall that the the Honorable Richard M. Gergel ("Judge Gergel"), one of the three judges currently assigned to the Three-Judge Panel to preside over this case, was lead counsel for then-Governor James H. Hodges in the *Colleton County* litigation.

6. I recall Judge Gergel as lead counsel taking every deposition on behalf of Governor Hodges. My recollection of Judge Gergel's examinations of deponents is that they were all vigorous and, in some instances, zealous to the point of aggressive.

Handwritten signature and date: 1/18/2022

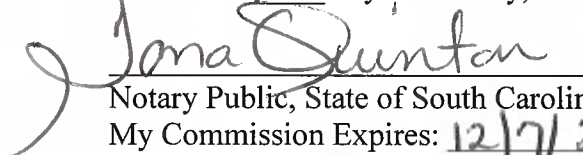
7. I recall that Judge Gergel personally deposed Speaker Lucas (who was then a sitting member of the House) in the *Colleton County* litigation. Based upon my opinion and recollection, Judge Gergel's examination of Speaker Lucas can be characterized as aggressive. His vigorous examination was not shocking at the time given the fact that his and Governor Hodges' interests were strongly in opposition to the interests of the House of Representatives in that action.

FURTHER AFFIANT SAYETH NAUGHT.



Charles F. Reid

SWORN AND SUBSCRIBED TO BEFORE
ME THIS 18th day of January, 2022.



Notary Public, State of South Carolina
My Commission Expires: 12/7/2027