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 TO DISQUALIFY THE HONORABLE RICHARD M. GERGEL BY 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 and pursuant to 28 U.S.C. § 455, hereby respectfully submit this Motion to Disqualify ("**Motion**") the Honorable Richard M. Gergel, United States District Judge for the District of South Carolina ("**Judge Gergel**"), from further service on this Panel.

BRIEF INTRODUCTION

For over 230 years, the law has required judges to disqualify themselves from hearing and deciding cases under certain circumstances. The current disqualification statute, which now applies to all federal judges without exception, is written in clear and concise language. It unequivocally ***requires*** federal judges to ***disqualify*** themselves in any proceeding in which the judge's impartiality might ***reasonably*** be questioned. 28 U.S.C. § 455(a). As the United States Supreme Court has held, "[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) (emphasis added) (quoting *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)). Thus, the "critical question presented by [Section 455(a)] 'is ***not*** whether the judge is impartial in fact. 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***.'" *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998) (emphasis added) (quoting *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 41 (4th Cir. 1995); *Aiken Cnty. v. BSP Division of Envirotech Corp.*, 866 F.2d 661, 679 (4th Cir. 1989)). Furthermore, in his 2021 Year-End Report, United States Supreme Court Chief Justice John G. Roberts, Jr., emphasized judicial ethics and stated the following regarding "recusal obligations" of the federal bench: "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 rules . . . ." 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.

RELEVANT FACTUAL BACKGROUND

A. *Procedural History*

On October 12, 2021, the South Carolina State Conference of the NAACP and Taiwan Scott, on behalf of himself and all other similarly situated persons (collectively, the "**Plaintiffs**"), filed their Complaint in this Court alleging three causes of action: (1) congressional malapportionment in violation of Article I, § 2 of the United States Constitution; (2) legislative malapportionment in violation of the Fourteenth Amendment of the United States Constitution; and (3) deprivation of the freedom of association in violation of the First and Fourteenth Amendments of the United States Constitution. ECF No. 1. The following timeline of events occurred thereafter:

- On October 15, 2021, Plaintiffs filed a Motion for a Three-Judge Panel, pursuant to 28 U.S.C. § 2284(a). ECF No. 17.
- The House Defendants filed a Response in Opposition to Plaintiffs' Motion for a Three-Judge Panel on October 19, 2021. ECF No. 18.
- On October 21, 2021, Plaintiffs filed a Reply to the House Defendants' Response in Opposition. ECF No. 24.
- Defendants Harvey S. Peeler and Luke A. Rankin (collectively, the "**Senate Defendants**") filed a Response in Opposition to Plaintiffs' Motion for a Three-Judge Panel on October 28, 2021. ECF No. 45. Likewise, Defendant Henry D. McMaster, in his official capacity as Governor of South Carolina, filed a Response in Opposition to the Plaintiffs' Motion for a Three-Judge Panel on October 28, 2021. ECF No. 47.
- On November 4, 2021, Plaintiffs filed a Reply to the Governor's and the Senate Defendants' Responses in Opposition. ECF No. 54.

- On November 12, 2021, the Honorable J. Michelle Childs, United States District Judge for the District of South Carolina ("**Judge Childs**"), granted, in part, the House Defendants' Motion to Stay, and stayed the case until January 18, 2022. ECF No. 63.

- On December 9, 2021, Judge Childs granted Plaintiffs' Motion for a Three-Judge Panel. ECF No. 70.

- On December 16, 2021, the Honorable Roger L. Gregory, Chief Judge of the United States Court of Appeals for the Fourth Circuit, designated the Honorable Toby J. Heytens, United States Circuit Judge of the Fourth Circuit, and Judge Gergel to serve as members on the Three-Judge Panel with Judge Childs (collectively, at times, the "**Panel**"). ECF No. 76.

In a status conference convened by the Panel on December 22, 2021, held on the record via telephone conference call, counsel for the parties discussed anticipated timelines and issues in the ongoing litigation with the Panel. During that status conference, Judge Childs after addressing the issue of whether motions to dismiss should be filed and how to handle those, stated: "I don't want to prejudge anything. But I'm going to defer to Judge Gergel who has tried these [redistricting] cases as a lawyer and who has also been on the panel [as] a judge, just to kind of get some synopsis of what his experience has been over these years because we all value our time." Ex. A (Transcript of Status Conference) at 5. Soon thereafter during that same conference, when discussing the timetable attendant to litigating the House, Senate, and yet-to-be enacted Congressional plans as perhaps three separate mini-trials, Judge Gergel stated after directing a question to Plaintiff's counsel about the status of the Congressional plans and being told that such a plan was not likely to be adopted until mid-January of 2022, that "[W]e've got plenty of work to do before them. You know, there's no reason to sit back. We can attack the House and Senate."[1] *Id.* at 7.

[1] Judge Gergel did not identify or define the "we" to whom he referred and he did not explain what he meant by "attack the House and Senate."

Most recently, on December 23, 2021, Plaintiffs filed their Amended Complaint, alleging three causes of action: (1) racial gerrymandering in violation of Article I, § 2 of the United States Constitution; (2) intentional discrimination in violation of the Fourteenth Amendment of the United States Constitution; and (3) deprivation of the freedom of association in violation of the First and Fourteenth Amendments to the United States Constitution. ECF No. 84. The responsive filings are due by January 6, 2022.

B. *Judge Gergel's Prior Roles as a Lead Attorney Advocate in Earlier Redistricting Cycles*

In redistricting litigation that occurred between 1995 and 1996—prior to his appointment on the bench—Judge Gergel served as lead counsel for multiple plaintiffs who successfully challenged the State House redistricting plan in *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996). Ex. B (*Backus* Disqualification Order) at 1, n.1. In *Smith*, Judge Gergel was opposed and adverse to then-Speaker of the House David H. Wilkins, then-Governor David M. Beasley, and then-Lieutenant Governor and Senate President Robert L. Peeler[2], all of whom were members of the Republican Party. In redistricting litigation that occurred following the 2000 Census and prior to his appointment to the bench in 2010, Judge Gergel again served as lead counsel, representing James H. Hodges, in his official capacity as the Governor of South Carolina ("**Governor Hodges**"), a party in the hallmark case of *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), *opinion clarified* (Apr. 18, 2002). The principal litigants in *Colleton County* were the Republican-controlled House and Senate, advocating for the redistricting plans passed by the legislature, and Governor Hodges, the Democratic Governor, who vetoed the legislature's plans and advocated for his competing plans. *See Colleton Cnty. Council*, 201 F. Supp. 2d at 656–

[2] Robert L. Peeler is the brother of the formerly-named Defendant and former Senate President Harvey S. Peeler in this action.

57. Consequently, prior to his federal judicial appointment, Judge Gergel served as lead counsel and attorney advocate in both *Smith* and *Colleton County*, with a singular focus in opposition to redistricting plans passed by a Republican-controlled legislature—and he took positions similar to those advanced by the Plaintiffs in this litigation.

C. *Judge Gergel's Disqualification in* Backus

In redistricting litigation following the 2010 Census, Judge Gergel was designated one member of the three judge-panel in *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C.), *aff'd*, 568 U.S. 801 (2012). The principal litigants in *Backus* alleged violations of the Voting Rights Act and the Fourteenth Amendment by the Republican-controlled House and Senate and Republican Governor "Nikki" Haley (collectively, "**the *Backus* Defendants**"). Upon filing of a motion to disqualify by the *Backus* Defendants, Judge Gergel granted the motion and recused himself on the grounds that his impartiality might reasonably be questioned using the standard set forth by 28 U.S.C. § 455(a). Ex. B (*Backus* Disqualification Order).

In his order, Judge Gergel acknowledged the view espoused by the motion "that the various South Carolina legislative reapportionment cases are closely linked, with similar legal and factual disputes, overlapping witnesses and common disputed legislative districts." *Id.* at 4. He further acknowledged that his service as "a lead attorney (and for some parties an adversarial attorney) in the allegedly related litigation [i.e. *Colleton County*] . . . might create an appearance of partiality and lessen the public's confidence in the independence and integrity of the judiciary" if he were to serve on the three-judge panel in *Backus*. *Id.* Finally, and perhaps most importantly, Judge Gergel conceded "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." *Id.* Based on the foregoing, Judge Gergel concluded "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, an appearance of partiality that on balance suggests the need to recuse." *Id.* As discussed in more detail herein and with all due respect, the House Defendants submit the same conclusion is compelled in this case.

D. *Judge Gergel's Disqualification in Other Cases*

Judge Gergel recused himself in *Sanders v. United States*, No. 2:16-2356 (D.S.C. 2020), a consolidation of cases concerning the Government's alleged failure to follow Federal Bureau of Investigation Standard Operating Procedures during a firearm background check of Dylann Roof that resulted in his ability to purchase a pistol he used to commit violent criminal acts including the murder of nine parishioners at the Mother Emmanuel Church. Ex. C (*Sanders* Memorandum in Support of Disqualification) at 2. These 16 cases were consolidated by Judge Gergel, who then dismissed them. *Id.* After the dismissal was reversed and remanded by the Fourth Circuit, Judge Gergel disqualified himself in one of the cases. Ex. D (*Sanders* Disqualification Order). The plaintiffs in the remaining consolidated cases then alleged that because Judge Gergel disqualified himself in one of the cases following remand, he was therefore necessarily disqualified from presiding over the remaining cases. Ex. C (*Sanders* Memorandum in Support of Disqualification) at 4. Specifically, the plaintiffs in the consolidated cases cited to two important cases as instructive to the matter: (1) *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 914 (2004), for the proposition that "recusal in the one would entail recusal in the other," and (2) *Shell Oil Co. v. United States*, 672 F.3d 1283, 1291 (Fed. Cir. 2012), for the proposition that attempting to cure a conflict in order to avoid disqualification was inappropriate, especially when "there is substantial overlap with

respect to the issues involved in the remaining parties' claims, and the matters had been considered jointly throughout the proceedings." Ex. C (*Sanders* Memorandum in Support of Disqualification) at 7–10. Judge Gergel subsequently acknowledged the "public appearance issue" raised by his continued participation in the remaining cases and the "risk that a final decision . . . might be overturned on appeal." Ex. D (*Sanders* Disqualification Order).

Judge Gergel also recused himself *sua sponte* in *United States v. Jian-Yun Dong*, No. 2:11-CR-510 (D.S.C. 2012), which concerned an unlawful campaign contribution conspiracy that involved, tangentially, a 2006 campaign fundraising event in which his name appeared on the event solicitation while he was a practicing attorney. Ex. E (*Dong* Disqualification Order) at 1. Judge Gergel disqualified himself, acknowledging his "duty to avoid even an appearance of impartiality [which] extends beyond the parties' interests in a particular matter and must ultimately be decided on an objective standard designed to preserve public confidence in our system of justice." *Id.* at 2. In his disqualification order, Judge Gergel found *United States v. Black*, 490 F. Supp. 2d 630 (E.D.N.C. 2007), especially persuasive. *Black* concerned a judge recusing himself based on the fact that when he was a practicing attorney earlier in his career, he "had sued the Defendant years before in his official capacity as the Speaker of the North Carolina House in a legislative reapportionment case, and now had the former Speaker before him as a criminal defendant." Ex. E (*Dong* Disqualification Order) at 3.

STANDARD OF REVIEW

Section 455 of Title 28 of the United States Code provides:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as [a] lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it . . . .

The standard under Section 455(a) "is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). "The goal of section 455(a) is to avoid even the ***appearance*** of partiality." *Liljeberg*, 486 U.S. at 860 (emphasis added) (quoting *Health Servs. Acquisition Corp.*, 796 F.2d at 802). As the Supreme Court explained in *Liljeberg*, "[s]cienter is not an element of § 455(a)," and disqualification "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Id.* Further, "[t]he Supreme Court has never limited recusal requirements to cases in which the judge's conflict was with the parties named in the suit." *Preston v. United States*, 923 F.2d 731, 735 (9th Cir. 1991) (citing *Liljeberg*, 486 U.S. 847). Thus, the "critical question presented by [Section 455(a)] 'is not whether the judge is impartial in fact. 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***.'" *DeTemple*, 162 F.3d at 286 (emphasis added) (quoting *Hathcock*, 53 F.3d at 41; *Aiken Cnty.*, 866 F.2d at 679).

Regarding Section 455(b)(1), "personal knowledge of disputed evidentiary facts concerning the proceeding" can arise from a prior representation in a similar case. *See Wessmann by Wessmann v. Bos. Sch. Comm.*, 979 F. Supp. 915, 919 (D. Mass. 1997) (judge recusing herself under subsection (b)(1) because she could not be certain that something she learned from her prior representation of a civil rights group in an earlier desegregation case would not be a disputed fact

in the case); *see also W. Clay Jackson Enters., Inc. v. Greyhound Leasing & Fin. Corp.*, 467 F. Supp. 801, 803 (D.P.R. 1979) (holding disqualification was mandated, without a specific identification of a disputed fact in question, when "a reasonable doubt has been raised . . . regarding the possibility that facts which may have come to [the judge's] knowledge while acting as labor counsel in a collective bargaining negotiation in 1969"). Further, at a preliminary stage, a judge is "bound to accept counsel's characterizations of what their defenses 'may be,' or where the litigation 'may' lead," including the characterization that a disputed evidentiary fact may arise. *See Wessmann*, 979 F. Supp. at 916.

Furthermore, "matter in controversy" under Section 455(b)(2) encompasses more than the particular lawsuit pending before the court. The Fourth Circuit has recognized the "case before the court consists of more than" the allegations, it "also includes the defense." *In re Rodgers*, 537 F.2d 1196, 1198 (4th Cir. 1976). If the issues in dispute in the lawsuit pending before the court and a prior case are "sufficiently related," then they "constitute parts of [the] same matter in controversy" triggering the application of Section 455(b)(2). *See DeTemple*, 162 F.3d at 286; *see also Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 167 (4th Cir. 2014). This principle is based on the plain text of the statute and Congressional intent:

> The language chosen by Congress, "matter in controversy," is not defined by the statute. However, Congress easily could have substituted the word "case" for the words "matter in controversy," but did not do so. This deliberate choice by Congress demonstrates an intent that the words "matter in controversy" mean something other than what we commonly refer to as a "case."

Little Rock Sch. Dist. v. Armstrong, 359 F.3d 957, 960 (8th Cir. 2004); *see also* Cynthia Gray, *Disqualification Issues Faced by New Judges*, 32 No. 3 Jud. Conduct Rep. 1 (2010) ("The use of 'matter' rather than 'case' indicates that a judge is disqualified not only from a specific case in

which he appeared on behalf of a party but from any litigation that is in any way related to former representation of a client.").

Importantly, a "confluence of facts [can] create a reason for questioning a judge's impartiality, even though none of those facts, in isolation, necessitates recusal under § 455(a)." *DeTemple*, 162 F.3d at 287. The United States Supreme Court has explained that Section 455(a) essentially operates as a "'catchall' recusal provision." *Liteky v. United States*, 510 U.S. 540, 548 (1994). Thus, when a judge's incidental involvement in matters that are tangentially related to a pending case, the concern for appearances supports recusal. "Even the appearance of impropriety is a matter persuasive of remedial action." *See, e.g.*, *United States v. Bobo*, 323 F. Supp. 2d 1238 (N.D. Ala. 2004); *Black*, 490 F. Supp. 2d 630.

Ultimately, "[i]f it is a close case, the balance tips in ***favor*** of recusal." *Smith v. McMaster*, No. 3:15-CV-02177-JMC, 2015 WL 5178507, at *2 n.1 (D.S.C. Sept. 3, 2015) (emphasis added); *see also United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987)[3] ("[T]he benefit of the doubt is . . . to be resolved in ***favor*** of recusal." (emphasis added)). This assessment of the applicable standard is appropriate when viewed in conjunction with Congress's revision to the disqualification statute in 1974, which Judge Gergel has acknowledged "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.'" Ex. B (*Backus* Disqualification Order) at 3 (citing Section 455(a) and *United States v. DeTemple*, 162 F.3d at 286).

[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).

DISCUSSION

The House Defendants respectfully submit that Judge Gergel should disqualify himself from participating on the Panel in the present case. Disqualification is mandated by Judge Gergel's direct relationship between this case and his participation first as an advocate and then briefly as a judge in the three most recent legislative redistricting proceedings in South Carolina: (1) *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), in which Judge Gergel opposed redistricting plans passed by the Republican-controlled legislature; (2) *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), *opinion clarified* (Apr. 18, 2002), in which Judge Gergel again opposed redistricting plans passed by the Republican-controlled legislature; and (3) *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C.), *aff'd*, 568 U.S. 801 (2012), in which Judge Gergel recused himself in recognition that his involvement in *Smith* and *Colleton County* "creat[ed] . . . an appearance of partiality that on balance suggests the need to recuse." Ex. B (*Backus* Disqualification Order) at 4.

As in the *Backus* proceeding, the obvious reason Judge Gergel should recuse himself is "to avoid even the ***appearance*** of partiality." *Liljeberg*, 486 U.S. at 860 (emphasis added) (quoting *Health Servs. Acquisition Corp.*, 796 F.2d at 802). Judge Gergel himself has acknowledged, "state legislative reapportionment cases constitute some of the most sensitive and intrusive litigation involving federal judicial review of state political and legislative processes." Ex. B (*Backus* Disqualification Order) at 4. The significance of these cases is clear. First, redistricting and subsequent redistricting litigation occur infrequently, just once or twice per decade in recent South Carolina history. Second, the outcome impacts the entire State by establishing the parameters of how the electorate chooses our elected officials. Such matters implicate "fundamental 'choices about the nature of representation.'" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019) (citing

Gaffney v. Cummings, 412 U.S. 735, 749 (1973), quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966)). Due to their infrequency and impact, these matters necessarily garner high levels of public attention. Public confidence in the integrity of these proceedings, involving the legality of redistricting plans affecting millions of South Carolinians, is of the utmost importance. 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." *Alabama*, 828 F.2d at 1546. "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.* Again as Judge Gergel recognized in *Backus*, "the need to preserve the public's confidence in the integrity and impartiality of the judiciary" is of the utmost importance. Ex. B (*Backus* Disqualification Order) at 4.

While one need not look past the plain language of 28 U.S.C. § 455(a) for the primary legal justification for disqualification, two of the specific grounds under Section 455(b)—regarding a judge's personal knowledge of relevant facts and a judge's prior service as a lawyer in the "matter in controversy"—not only require disqualification, but add to the "confluence of facts" that create "a reason for questioning a judge's impartiality" under Section 455(a). *DeTemple*, 162 F.3d at 287. This discussion will turn first to these two specific grounds for disqualification, before addressing Section 455(a) as the primary ground for disqualification.

A. *Personal Knowledge of Disputed Evidentiary Facts under Section 455(b)(1)*

This Motion need not reach the higher standard of demonstrating a personal bias or prejudice. Instead, Judge Gergel's participation as the lead counsel for Governor Hodges in *Colleton County* and a lead counsel in *Smith* forms the basis for his acquiring personal knowledge of disputed evidentiary facts, triggering disqualification under subsection (b)(1).

The disqualification decision in *Wessmann by Wessmann v. Boston School Committee*, 979 F. Supp. 915, 918 (D. Mass. 1997), was cited and relied upon by Judge Gergel in his disqualification order in *Backus*. Ex. B (*Backus* Disqualification Order) at 3. In *Wessmann*, the judge recused herself after recognizing the "disputed facts may include evidence of a key issue in [the prior desegregation case in which she served as an advocate]: the deleterious effects of a racial imbalance in the Boston Schools' teaching staff on minority student performance." Likewise, here, the disputed facts will almost certainly include evidence of a key issue in *Colleton County* (and *Backus*): i.e. whether voter dilution is present based on the number and composition of majority-minority districts in the redrawn maps. Indeed, Plaintiffs have already repeatedly alleged voter dilution in their Amended Complaint. ECF No. 84 at ¶¶ 3–4, 8, 18, 40, 108, 116, 119, 123, 133, 145, 147, & 154. Because Judge Gergel acquired extensive personal knowledge of the facts, issues, allegations, defenses, theories, and arguments in *Colleton County* attendant to such voter dilution claims in the redrawing of legislative districts, he should disqualify himself from the pending case under the standard espoused by Section 455(b)(1).

In *Backus*, Judge Gergel was presented with this same question. In analyzing whether he had obtained personal knowledge in that proceeding, he acknowledged acquiring "considerable exposure to previous legislative redistricting plans and the underlying evidence offered at trial in the 1996 and 2002 litigation." Ex. B (*Backus* Disqualification Order) at 2. However, it appears Judge Gergel was unpersuaded that this exposure triggered disqualification under Section 455(b)(1) for four reasons: (1) the information from *Colleton County* is summarized in court orders that would be reviewed by all judges sitting on the *Backus* case; (2) such information did not constitute "personal knowledge" because he did not acquire it first-hand; (3) the *Backus* Defendants did not identify the alleged disputed evidentiary facts possessed by Judge Gergel; and

(4) prior precedent within the District did not require disqualification. *Id.* at 2–3. Of course, while Judge Gergel correctly recused himself in *Backus*, the House Defendants respectfully disagree with this portion of his analysis and address each rationale in turn.

(i) The Range of Possible Disputed Facts Extends Beyond the Facts Summarized in Earlier Court Orders

First, as the judge in *Wessmann* acknowledged, she could not "be certain that something [she] learned from [her prior] representation—in a submission to the parties, in an interview with a witness, by reviewing an exhibit—will not be a disputed fact . . . ." *Wessmann*, 979 F. Supp. at 919. What *Wessmann* demonstrates is there will be more facts that exist than those captured by summarized court orders in either *Colleton County* or *Backus*. These facts could present themselves in pleadings, motions, exhibits, witness testimony, or even originate from non-public sources, such as deposition testimony and other discovery material never filed in court. Thus, it is implausible to suggest that Judge Gergel has not acquired more facts than can be learned from summarized court orders in those earlier, highly contentious proceedings.

(ii) Facts Learned in Prior Litigation Constitute Personal Knowledge

Second, as the judge in *Wessmann* implies, all of this evidence—arising from a submission, in a witness interview, or in an exhibit—would have been "learned" and therefore acquired first-hand. *See id.* She implicitly found these facts would constitute "personal knowledge."

(iii) Possibility of Disputed Facts is Sufficient to Require Disqualification

Third, the judge in *Wessmann* did not require, nor does the law require, specific identification of the alleged disputed evidentiary facts in common. Because she could not be certain whether a disputed fact may arise, the judge in *Wessmann* found disqualification was required—implying that specific identification of a particular fact is not required. *Id.* The court also used the term "may" when stating the "danger here is that the litigation ***may*** involve disputed

facts with which [she] ***may*** have personal knowledge by virtue of [her] prior representation." *Id.* at 918 (emphasis added). The judge in *Wessmann* was satisfied—and the law is satisfied—with a general showing of the same issues, allegations, defenses, theories, or arguments likely arising between the former and pending cases. *See id.*[4] Further, the allegations here and the disputes surrounding them will become more significant and apparent as litigation continues. Despite the preliminary status of this case, a judge is "bound to accept counsel's characterizations of what their defenses 'may be,' or where the litigation 'may' lead," including the characterization that a disputed evidentiary fact may arise. *See Wessmann*, 979 F. Supp. at 916. Thus, even the possibility of disputed evidentiary facts compels Judge Gergel's disqualification.

(iv) Prior Precedent within the District

Fourth and finally, Judge Gergel looked to perceived precedent by highlighting the Honorable Matthew Perry's ("**Judge Perry**") assignment in both *Colleton County* and *Smith*. Ex. B (*Backus* Disqualification Order) at 3. Noted by Judge Gergel, Judge Perry's assignment to those redistricting cases "follow[ed] 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." *Id.* Judge Gergel cited this precedent for his proposition 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." *Id.* But Section 455(b)(1) is not concerned with experience in the same area of law, so much as with ***personal knowledge*** of potentially disputed facts in similar prior proceedings. Judge Perry's precedent is distinguishable.

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[4] As another example of the law being satisfied with such a showing, another judge recused himself, without a specific identification of a disputed fact in question, when "***a reasonable doubt ha*[*d*] *been raised*** . . . regarding ***the possibility*** that facts which may have come to [the judge's] knowledge while acting as labor counsel in a prior collective bargaining negotiation . . . ." *W. Clay Jackson Enters., Inc.*, 467 F. Supp. at 803 (emphasis added).

The case in which Judge Perry served as a counsel is *McCollum v. West*, C/A No. 71-1211 (D.S.C. filed 12/7/71).[5] *McCollum* dealt with a different issue than the one presented in *Colleton County* and *Smith*. The former dealt with the use of multimember districts, while the latter two dealt with how populations were apportioned in single member districts. These issues are sufficiently different to avoid recusal in Judge Perry's circumstance, because although he gained experience in the general area of election law, he did not acquire personal knowledge of potentially disputed facts. To the contrary, the issues presented in *Smith*, *Colleton County*, *Backus*, and the present case, all deal with the same allegations of voter dilution through malapportionment and racial (and political) gerrymandering. Because these issues are overlapping and nearly identical, and because Judge Gergel acquired extensive personal knowledge of the facts, issues, allegations, defenses, theories, and arguments in both *Smith* and *Colleton County*, he should disqualify himself from the Panel which will ultimately decide the pending case.

B. _Service as a Lawyer in the Matter in Controversy under Section 455(b)(2)_

Judge Gergel's participation in *Colleton County* and *Smith*—and his opposition to restricting plans approved by the Republican-controlled legislature in both cases—require disqualification under subsection (b)(2) as well. The District Court of Rhode Island found the Fourth Circuit had "rejected the . . . argument that the terms 'matter' and 'matter in controversy' should be construed to mean the actual case before the court." *Blue Cross & Blue Shield of Rhode Island v. Delta Dental of Rhode Island*, 248 F. Supp. 2d 39, 43 (D.R.I. 2003) (citing *In re Rodgers*, 537 F.2d at 1198). Instead, if the issues in dispute in the lawsuit pending before the court and a prior case are "sufficiently related," then they "constitute parts of [the] same matter in

[5] This case is not available on Westlaw, but for a history and summary of the case, *see Simkins v. Gressette*, 495 F. Supp. 1075, 1077 (D.S.C.), *aff'd*, 631 F.2d 287 (4th Cir. 1980).

controversy," triggering the application of Section 455(b)(2). *See DeTemple*, 162 F.3d at 286; *see also Kolon Indus. Inc.*, 748 F.3d at 167.

Although in *Backus*, Judge Gergel did ***not*** address this question in any detail in his disqualification order. Nevertheless, it is clear the issues in *Colleton County* and the pending case[6] are sufficiently related to constitute parts of the same matter in controversy, the mirror-image issues and allegations, and the similarity of the evidence, defenses, and witnesses.

(i) <u>Reliance Upon Precedent Established by Prior Redistricting Litigation</u>

As set forth above, the issues presented in *Colleton County* and the present case concern the same allegations of voter dilution and problematic gerrymandering. Such a situation is not surprising, as redistricting litigation often refers to and is based upon the facts and law from the most recent round of redistricting litigation. For example, *Colleton County* repeatedly referenced earlier redistricting plans and attendant judicial proceedings:

- In determining what traditional redistricting principles it should apply, the court "look[ed] to the historical redistricting policies of the state." *Colleton Cnty. Council*, 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.

Further, *Backus* cited *Colleton County* nine separate times, second only to *Miller v. Johnson*, 515 U.S. 900 (1995), which was cited ten separate times. In addition, Plaintiffs'

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[6] For the sake of brevity, this Motion focuses only on the similarities between this case and *Colleton County*. However, the same arguments apply with equal force to the similarities between this case and *Smith*. Indeed, the *Colleton County* court cited to *Smith* at least 16 separate times in its opinion.

Amended Complaint cites to *Colleton County* on three separate occasions, ECF No. 84 at ¶¶ 43, 50 n.7, & 61, and to *Backus* twice, *id.* at ¶¶ 43 & 50 n.7. Clearly, Plaintiffs implicitly concede the pending case will refer to and be based upon the facts and law arising from the most recent round of redistricting litigation.

The heavy reliance upon precedent in redistricting cases, perhaps more so than in many other contexts, demonstrates just how much these cases constitute part of the same matter in controversy. Accordingly, this factor weighs heavily in favor of disqualification.

(ii) Mirror-Image Issues and Allegations

Just as in *Backus*, a comparison of the specific allegations in *Colleton County* with the allegations in the instant case reveals striking similarities and relationships between the two cases. The chart below demonstrates some of the specific, mirror-image allegations as compared between *Colleton County* and the pending case. Of note, many of these allegations were asserted by Governor Hodges, whom Judge Gergel represented in *Colleton County*. Each of these parallel issues and allegations compel disqualification.

Colleton County Case	**Pending Case**
"Based upon the 2000 Census, the existing districts for the House of Representatives are ***malapportioned*** on the basis of population . . . ." Ex. F (*Colleton County* Amended Complaint) at ¶ 35 (emphasis added). "[O]ur primary charge is to remedy the ***malapportionment*** present in the existing plan." *Colleton Cnty. Council*, 201 F. Supp. 2d at 653 (emphasis added). "The Governor, for his part, charges that the Senate plan is ***racially*** and politically ***gerrymandered*** . . . ." *Colleton Cnty. Council*, 201 F. Supp. 2d at 659 (emphasis added). "Governor Hodges has consistently maintained that the intentional dilution of existing, naturally occurring influence districts is unconstitutional ***racial gerrymandering***." Ex. G (Gov. Hodges' Response in *Colleton County*) at 2 (emphasis added).	"Plaintiffs . . . originally brought this action as a challenge to South Carolina's ***malapportioned*** state House and U.S. Congressional districts. . . . The Legislature passed legislation for new state House districts that Governor McMaster signed into law. But in doing so, Defendants traded one constitutional violation—***malapportionment***—for two others: ***racial gerrymandering*** and ***intentional racial discrimination***." ECF No. 84 at ¶¶ 1–2 (emphasis added).
"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***." *Colleton Cnty. Council*, 201 F. Supp. 2d at 651 (emphasis added).	"Any denial that the Legislature unconstitutionally used race as predominant factor and to intentionally dilute Black voting strength is belied by how elected officials repeatedly ignored warnings by the public that the proposed plans would ***harm Black South Carolinian voters***. There is also no indication that they conducted a ***racially polarized*** voting analysis ("**RPV**") or any other analysis to determine whether the BVAPs [black voting age populations] present in the challenged districts were necessary to comply with the [Voting Rights Act] and how districts might function for Black voters." ECF No. 84 at ¶ 8 (emphasis added).

Colleton County Case	**Pending Case**
"... Plaintiffs will be seriously injured and their right to vote will be ***diluted*** or denied." Ex. F (*Colleton County* Amended Complaint) at ¶ 31 (emphasis added). "[T]o prevail on a § 2 claim, a plaintiff must demonstrate that, under the totality of the circumstances, the election scheme enacted by a legislature ***dilutes*** the minority's voting strength by either unnecessarily ***fragmenting*** or ***packing*** a politically cohesive minority population." *Colleton Cnty. Council*, 201 F. Supp. 2d at 633 (emphasis added).	"The Legislature did so by using race as the predominant factor in creating certain state House districts without a legally acceptable justification and having a discriminatory purpose in ***packing*** and ***cracking*** Black voters to ***dilute*** their vote. . . . H. 4493 represents the Legislature's intent to use race to maintain political power by unnecessarily ***packing*** Black South Carolinians into certain districts and ***cracking*** Black voters in other districts." ECF No. 84 at ¶¶ 4–5 (emphasis added). "[T]he House enacted a plan that overall ***dilutes*** South Carolinian Black voting power . . . ." ECF No. 84 at ¶ 108 (emphasis added).
"The Governor also asserts that his proposed plan ***adheres more closely to traditional districting principles in South Carolina*** and maintains more closely the cores of existing districts than does the legislatively passed House plan." *Colleton Cnty. Council*, 201 F. Supp. 2d at 651 (emphasis added).	"The House purportedly endeavored to balance the populations (within its criteria of plus or minus 2.5% of the mathematical mean or 5% of the total population), comply with the [Voting Rights Act] and not racially gerrymander in contravention of the U.S. Constitution, and ***adhere to state criteria based on its guidelines*** (e.g., keep districts contiguous and compact; and consider communities of interest and incumbency protection). . . . Yet the House enacted a plan that overall dilutes South Carolinian Black voting power . . . ." ECF No. 84 at ¶¶ 107–08 (emphasis added).
"Plaintiffs seek in bringing this action to preserve to the extent possible the ***county lines*** of Colleton County and other ***communities of interest*** identifiable in Colleton County." Ex. F (*Colleton County* Amended Complaint) at ¶ 34 (emphasis added). "Generally speaking, ***traditional redistricting principles*** in South Carolina have directed courts to maintain, where possible, recognized ***communities of interest*** and the cores of existing districts, as well as ***political and geographical boundaries*** delineated within the state." *Colleton Cnty. Council*, 201 F. Supp. 2d at 647 (emphasis added).	"Race was the predominant factor in the creation of 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 in H. 4493. . . . Race predominated over ***traditional redistricting principles*** such as maintaining ***communities of interest***, respecting ***county and municipal boundaries***, having compact districts, and protecting incumbents." ECF No. 84 at ¶¶ 163–64 (emphasis added).

Colleton County Case	**Pending Case**
"[The Governor alleges that] [b]y ***increasing the BVAP*** **[black voting age population]** ***in current majority-minority districts***, the Senate Republicans . . . make the adjoining 'superwhite' districts Republican strongholds." *Colleton Cnty. Council*, 201 F. Supp. 2d at 659 (emphasis added). "The Governor asserts that this 'max-black' policy has resulted in an unnecessarily ***high black voting age percentage*** in most majority-minority districts." *Colleton Cnty. Council*, 201 F. Supp. 2d at 644 (emphasis added).	"Defendants ***increased*** District 93's ***BVAP*** an unusually high amount, from 43% to 51%, unnecessarily moving a large number of BVAP precincts into the area." ECF No. 84 at ¶ 157 (emphasis added).
"Black voters are generally politically cohesive and white voters almost always vote in blocs to defeat the ***minority's candidate of choice***. . . . [T]here is a well-documented hierarchy in the preference of black voters. With few exceptions, black voters demonstrate an ***overwhelming preference*** for black Democrats as their representatives, followed by white Democrats, particularly in a general election, but black voters virtually never vote for a Republican candidate." *Colleton Cnty. Council*, 201 F. Supp. 2d at 641 (emphasis added).	"RPV [racially polarized voting] patterns continue to exist in various parts of South Carolina. On the state level, for example, according to an RPV analysis of the 2020 election for U.S. Senate, Jamie Harrison, the ***candidate of choice*** of Black voters across South Carolina, received only 25% of white voter support and was defeated, despite receiving ***98% of Black voter support***. Similar patterns were present in elections featuring ***Black-preferred candidates*** in other key elections . . . . For example, in the 2018 election for Secretary of State, Melvin Whittenburg, the ***candidate of choice*** of Black voters across South Carolina, received only 23% of white voter support and was defeated, despite receiving ***95% of Black voter support***. In the 2018 election for State Treasurer, Rosalyn Glenn, the ***candidate of choice*** of Black voters across South Carolina, received only 21% of white voter support and was defeated, despite receiving ***95% of Black voter support***." ECF No. 84 at ¶ 72 (emphasis added).
"Although white voters will ***cross over*** to vote for black candidates at a rate of 21% in general elections, they will ***cross over*** to vote for a black candidate in primary elections at a rate of only 8%." *Colleton Cnty. Council*, 201 F. Supp. 2d at 641 (emphasis added).	Plaintiffs' Amended Complaint cites to *Jackson v. Edgefield County, South Carolina School District*, 650 F. Supp. 1176, 1198 (D.S.C. 1986), for the proposition that "[t]he tenacious strength of white bloc voting usually is sufficient to overcome an electoral coalition of black votes and white '***crossover***' votes." ECF No. 84 at ¶ 61 (emphasis added).

(iii) ***Similarity of Evidence, Defenses, and Witnesses***

The evidence, defenses, and witnesses will be similar as well. In *Colleton County*, "***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 this case." *Colleton Cnty. Council*, 201 F. Supp. 2d at 631 (emphasis added). In the pending case, Paragraphs 112 through 159 of Plaintiffs' Amended Complaint allege a ***number*** of separate House Districts (28 to be exact) have BVAP ***compositions*** that are not to their liking. ECF No. 84 at ¶¶ 112–59. Admittedly, Plaintiffs have not yet offered a competing plan of House Districts with more or less majority-minority districts than the plan passed by the South Carolina General Assembly. However, it is unreasonable to conclude the total number of majority-minority districts will not be a critical piece of evidence in the pending litigation, especially when it was so critical in *Colleton County*. *See Colleton Cnty. Council*, 201 F. Supp. 2d at 656–57 (discussing "the Governor's plan [with] 27 majority-minority districts," "the House plan [with] 28 majority-minority districts," and the "court-drawn plan contain[ing] 29 majority-minority districts").

Regardless of whether Plaintiffs present a competing plan, the number of majority-minority districts will certainly be a defense offered to rebut Plaintiffs' claims of intentional discrimination under Section 2 of the Voting Rights Act based on allegations of packing of majority-minority districts. In fact, there were only 17 majority-minority House Districts during the 2020 election cycle, but the enacted plan for future elections of House Districts includes 21 majority-minority districts. *See Current District Demographics*, South Carolina House of Representatives Redistricting 2021, https://redistricting.schouse.gov/demographicspredraw.html (last visited Jan. 5, 2022) (reporting Current House District Demographics Final Data); South Carolina House of Representatives Redistricting 2021, https://redistricting.schouse.gov/index.html (last visited Jan.

5, 2022) (reporting Act No. 117 Plan Demographics). Admittedly, this "benchmark standard" is traditionally analyzed under Section 5 claims, but the benchmark analysis under Section 2 was important in *Colleton County* and will be important in the present litigation as well. *See Colleton Cnty. Council*, 201 F. Supp. 2d 655 ("The court plan also complies with § 2 of the Voting Rights Act. In preparing the new districting plan, we considered every existing majority-minority district present in the benchmark plan, as well as other areas pointed out to us by the parties as ones that § 2 might require."). After all, it is a strong defense against intentional discrimination when the current enacted plan ***increases*** majority-minority districts from the previous cycle.

In addition to BVAP percentages, other statistical evidence will be similar as well. That evidence includes, but is not limited to:

- Population growth and shifts, *see Colleton Cnty. Council*, 201 F. Supp. 2d at 626, ECF No. 84 at ¶ 106 ("South Carolina's population grew by 10.7% between 2010 and 2020. Although the Black population grew only slightly over the last decade, it shifted within the State . . . .");

- Population deviation between districts, *see Colleton Cnty. Council*, 201 F. Supp. 2d at 631, ECF No. 84 at ¶¶ 49–50 (discussing state and federal views on deviation);

- Black voter preference percentages, *see Colleton Cnty. Council*, 201 F. Supp. 2d at 641, ECF No. 84 at ¶ 72; and

- White crossover percentages, *see Colleton Cnty. Council*, 201 F. Supp. 2d at 641, ECF No. 84 at ¶ 61.

The House Districts at issue are similar as well. At least three of the seven sets of challenged House Districts in the instant case cover the same counties that were in dispute in *Colleton County*, i.e. Sumter, Horry/Dillon, and Richland Counties. *Colleton Cnty. Council*, 201 F. Supp. 2d at 651–57. In other words, at least 15 of the 28 currently-challenged House Districts (i.e. a majority) are within the same general area as the ones in dispute in *Colleton County*. But no

one anticipates these to be the only districts challenged, as it is reasonably foreseeable for there to be even more crossover in districts when Plaintiffs present their challenge to the Senate and Congressional districts.

Lastly, it is reasonably foreseeable that at least some number of witnesses will be identical. Congressman James Clyburn testified in *Colleton County* and, 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 order referenced above, and will almost certainly be a witness to be deposed or called at trial by one of the parties here during any phase of the litigation dealing with the Congressional maps. Likewise, Defendant House Speaker James H. Lucas was deposed by Judge Gergel as a witness in *Colleton County* and, as a named defendant here and the current Speaker of the House of Representatives, will likely testify. Moreover, there are other witnesses who testified in *Colleton County* and/or *Backus* who will likely testify here, including at least one expert witness. ***The commonality of witnesses*** was highlighted by Judge Gergel himself in his disqualification order in *Backus*. Judge Gergel acknowledged that a number of likely witnesses in the defense of the *Backus* redistricting plan played key roles in the plans under consideration in *Colleton County* and were extensively deposed or cross-examined by Judge Gergel himself. Ex. B (*Backus* Disqualification Order) 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 the extensive interactions between himself and the similar witnesses created a public appearance issue that required disqualification. *Id.* at 4.

Based on the foregoing, the reliance upon precedent in these redistricting cases, the mirror-image issues and allegations, and the similarity of the evidence, defenses, and witnesses, all demonstrate how *Colleton County* and the pending case constitute the same matter in controversy. As such, Judge Gergel's participation in *Colleton County* mandates disqualification under subsection (b)(2) of Section 455.

C. ***Confluence of Facts under Section 455(a)***

Notwithstanding the two prongs of Section 455(b), the "confluence of facts" set forth above and below "create a reason for questioning" Judge Gergel's impartiality and independently necessitates disqualification under the "catchall" provision of Section 455(a). *DeTemple*, 162 F.3d at 287; *Liteky*, 510 U.S. at 548.

A judge "***shall*** disqualify himself in any proceeding in which his impartiality ***might reasonably be questioned***." 28 U.S.C. § 455(a) (emphasis added). 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)." *DeTemple*, 162 F.3d at 286. "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.* at 287. However, in applying the objective standard of 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. (emphasis added).* Lastly, Section 455(a) favors disqualification even more so when, as here, the judge, rather than the jury, makes factual determinations. *See Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 129 (2d Cir. 2003); *Travelers Ins. Co. v. Liljeberg Enters.,*

Inc., 38 F.3d 1404, 1412 (5th Cir. 1994). As set forth below, Judge Gergel's history of disqualification, his zealous advocacy as a participant in the historical fabric of South Carolina's redistricting jurisprudence, and most recently, statements made in the course of the present litigation, all add to the confluence of facts discussed above and compel the conclusion that Judge Gergel should disqualify himself.

(i) <u>Judge Gergel's History of Disqualifications</u>

First and foremost is Judge Gergel's previous disqualification in *Backus*. A reasonable observer expects consistency from the judicial system and the judiciary—to rule alike in similar cases and controversies. *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)."). Here, Chief Justice Roberts' recent comments bear repeating: "[federal judges] 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 rules. . . ." Chief Justice John Roberts, *2021 Year-End Report on the Federal Judiciary* 3–4 (Dec. 31, 2021).

As a corollary, a reasonable observer is someone who would expect disqualification in one case to require disqualification in the other. Indeed, there is ample authority supporting this position. For example, in cases that have been consolidated, "recusal in the one would entail recusal in the other." *Cheney*, 541 U.S. at 914. This issue occurred in a case in which a judge attempted to sever two parties from a case in order to "cure" the conflict. The Court of Appeals for the Federal Circuit held that severing rather than recusal from the entire proceeding was

inappropriate. *Shell Oil Co.*, 672 F.3d at 1291. The Federal Circuit also held disqualification was particularly warranted "where, as here, there is substantial overlap with respect to the issues involved in the remaining parties' claims, and the matters had been considered jointly throughout the proceedings." *Id.* Likewise in the instant case, there is substantial overlap between the issues of *Colleton County* and the pending case, which Judge Gergel will not be able to sever. Further, although *Backus* is not consolidated with the pending case, *Backus*—alongside *Colleton County*—constitutes the same matter in controversy, such that a reasonable observer would expect the determination that disqualification was required in *Backus* to require disqualification in the pending case. Because Judge Gergel disqualified himself in *Backus*, he should disqualify himself from this case as well.[7]

Second, in *Dong*, Judge Gergel recognized disqualification was required to "preserve public confidence in our system of justice." Ex. E (*Dong* Disqualification Order) at 2. Further, Judge Gergel's citation to *Black* is notable. Much like in 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 House Speaker when the judge had a history of representing litigants in reapportionment cases on the ***opposite*** side of the Speaker of the House. A comparison of this case and *Black* is far more striking from a factual perspective than the comparison of *Black* and *Dong*—and the rationale supporting recusal here is much stronger, as the facts are more analogous and as *Dong* involved a criminal prosecution of one individual, while this case will impact millions of South Carolinians.

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[7] Of note, when presented with this same case law of *Cheney* and *Shell Oil* in the consolidated case involving the lawsuits against the Federal Bureau of Investigation for failures in conducting proper background checks of Dylann Roof, Judge Gergel acknowledged the "public appearance issue" raised by his continued participation in the remaining cases and the "risk that a final decision . . . might be overturned on appeal." Ex. D (*Sanders* Disqualification Order). The same is true here.

(ii) Judge Gergel's Participation in South Carolina Prior Redistricting Litigation

The three-judge panel in *Colleton County* observed that the "redistricting process in South Carolina has historically been a troubled one." *Colleton Cnty. Council*, 201 F. Supp. 2d at 623. Indeed, in both their initial and now in their Amended Complaint, Plaintiffs in the instant case spent over three pages recounting some of this history. ECF No.1 at ¶¶ 8, 16, & 53–62; ECF No. 84 at ¶¶ 3, 37–44, & 172. The House Defendants do not dispute the historical backdrop to legislative redistricting in this state, but the great strides South Carolina has made in recent decades should also be recognized, such as the House's successful receipt of a preclearance decision from the Justice Department under Attorney General Eric Holder and its successful defense of the House's maps in *Backus*—***maps on which the instant maps are based***. Rather than recognize this development, however, Plaintiffs have chosen to invoke the more inglorious points of South Carolina's redistricting history in this litigation—and Judge Gergel has been an integral player in that history in both recent and relevant redistricting jurisprudence. Indeed, Judge Gergel has, in two separate cases, sided with and advocated for positions taken by Plaintiffs in ***this*** litigation. In a filing he submitted to the district court, Judge Gergel stated the maps passed by the Republican-controlled legislature in the *Colleton County* litigation "represents another episode of South Carolina's continuing difficulty in fulfilling its responsibility to draw valid election districts." Ex. H (Gov. Hodges' Trial Brief in *Colleton County*) at 2. Echoing Judge Gergel's earlier words, as noted earlier, Plaintiffs submitted a re-telling of this history in their Amended Complaint from a vantage point strikingly similar to Judge Gergel's trial brief in *Colleton County*. ECF No. 84 at ¶¶ 3, 37–44, & 172. The unavoidable appearance issue arising from these facts is that Judge Gergel formed an opinion on these issues in prior litigation and is now being asked to focus on this history

again in an impossibly impartial and unbiased manner. It is axiomatic that a reasonable observer outside the judiciary might reasonably question whether Judge Gergel can be impartial and unbiased, or whether he is necessarily susceptible to undue influence from his sincere beliefs regarding South Carolina's past legislative redistricting. Because this history would cause a reasonable observer to question Judge Gergel's impartiality, disqualification is required.

(iii) Judge Gergel's Statements Within the Current Litigation

Lastly, comments made during the December 22, 2021, status conference further support disqualification. Most concerning, Judge Gergel made a comment about attacking the House and Senate plans. Ex. A (Transcript of Status Conference) at 7. A reasonable observer, only able to review the transcript of the status conference, would reasonably be alarmed at this statement, especially in light of Judge Gergel's previous opposition to Senate- and House-approved redistricting plans as a lawyer. These statements could reasonably create the appearance of impartiality, particularly when considered with, among other facts discussed herein, Judge Gergel's prior history of litigating redistricting cases representing plaintiffs seeking relief similar to that sought by Plaintiffs in this case. His personal participation as lead counsel in these unique landmark proceedings coupled with these recent statements would necessarily give pause to a reasonable, outside observer, "not knowing whether or not the judge is actually impartial . . . ." *DeTemple*, 162 F.3d at 286 (emphasis added) (quoting *Hathcock*, 53 F.3d at 41). These recent statements in this proceeding constitute additional facts within the confluence of facts that would lead a reasonable observer to question his impartiality. Thus, at a minimum, the standard under Section 455(a) has been met.

CONCLUSION

Based on the foregoing, disqualification is necessary to avoid, as the Supreme Court held, "even the appearance of partiality." Writing as an advocate in the *Colleton County* case, Judge Gergel aptly described redistricting as a "political thicket." The House Defendants agree and respectfully add that Judge Gergel's history with, and his active participation in, previous redistricting cases, coupled with the other facts and circumstances earlier cited, produce the inescapable conclusion that recusal is the only way to comply with the "letter and spirit of our rules" codified in 28 USC § 455. As such, the House Defendants respectfully request that Judge Gergel disqualify himself from the Panel, and for such other and further relief as the Court deems just and proper. The House Defendants consulted with Plaintiffs before filing this Motion to ensure strict compliance with Rule 7.02 of the Local Civil Rules for the United States District Court for the District of South Carolina, and Plaintiffs are expected to oppose this Motion.

s/ William W. Wilkins

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