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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

RESPONSE TO PETITION FOR WRIT OF SUPERSEDEAS BY APPELLANT WILLOUGHBY & HOEFER, P.A.

Respondents South Carolina Public Interest Foundation ("SCPIF") and John Crangle ("Crangle") [collectively the Respondents] hereby file their response to Appellant Willoughby & Hoefer, P.A.'s Petition for Writ of Supersedeas. SCPIF and Crangle respectfully request this Court deny the Petition, because it is facially defective and lacks merit for the reasons set forth herein.

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I. INTRODUCTION

The circuit court did not abuse its discretion by entering an *ex parte* temporary restraining order (the "Order") freezing $75 million from settlement proceeds payable to the State of South that was sent by wire transfer to Appellant Willoughby & Hoefer P.A. mere hours before the circuit court, in a scheduled hearing with the parties, was set to rule on Respondents' motion requesting a temporary injunction prohibiting such transfer. Defendant Attorney General Wilson filed a response to the motion for a temporary injunction approximately 30 minutes prior to the hearing. In this response, Defendant Wilson notified the court and counsel for Respondents of this wire transfer. Defendant Wilson then argued that the case was moot and the circuit court did not have jurisdiction to award temporary injunctive relief.

During the video conference hearing, Defendant Wilson's counsel represented to the circuit court that the payment process for the $75 million was put in place before the filing of this lawsuit and that the Attorney General's Office did not have any involvement with the process after this lawsuit was filed. This representation is contradicted by documents submitted to the circuit court the following morning, pursuant to the circuit court's directives. Email correspondence establishes that Defendant Wilson's staff contacted the Treasurer's office in the afternoon of September 28, 2020 – *after* the circuit court notified counsel for Defendant Wilson that a hearing on SCPIF and Crangle's motion would be conducted at 3 p.m. on September 29, 2020 – and requested that the payment method be switched from check to a wire transfer. In response to this request made from Defendant Wilson's staff, the Treasurer's office initiated the wire transfer the following morning, just hours before the hearing. As a result of this 11th hour attempt to avoid judicial scrutiny of Defendant Wilson's conduct, Respondents SCIF and Crangle thereafter filed an amended complaint adding Appellant as a party and pled causes of action for constructive trust, restitution, and injunctive relief. Because of the very troubling sequence of events outlined above, and

discussed in more detail below, Respondents requested the circuit court enter an *ex parte* temporary restraining order.

The circuit court did not abuse its discretion in granting the temporary relief. Appellant's appeal of this Order and its Petition for Writ of Supersedeas are without basis. As an initial matter, Appellant's Petition for Writ of Supersedeas fails to comply with the basic requirement of Rule 241 that the petition be verified by the client. The petition should be dismissed on this ground alone. Appellant's objections to Respondents' Motion for a Temporary Restraining Order and the Order also lack merit.

Appellant claims that the motion was not supported by an affidavit, even though the motion relies extensively on an affidavit and attached exhibits filed with the Complaint. Appellant claims that the Order does not fix a date and time for its duration. Yet, the circuit court noticed a date and time for a hearing on a preliminary injunction that was less than three (3) business days after the entry of the Order. Appellant claims that the circuit court improperly shifted the burden of proof to the Appellant at the hearing scheduled on the motion for preliminary injunction when the circuit court has not done any such thing.

Appellant complains that the circuit court did not require Respondents post a bond. However, Rule 65(c), SCRCP does not require security be posted on behalf of the State. Here, Respondents are suing on behalf of the State in this public interest and taxpayer lawsuit and seek an order requiring Appellant to repay the State. The State is the real party in interest and the only party that will financially benefit from a recovery. Thus, the bond requirement for private litigant suits does not apply.

Lastly, Respondents are contemporaneously filing a Petition in the South Carolina Supreme Court to take original jurisdiction of this action. Respondents are also filing a motion

under for Rule 204(b), SCACR requesting that this appeal be transferred to the Supreme Court. This Court should therefore defer any ruling on Appellant's Petition until the Supreme Court decides whether to accept this appeal and the underlying case in its original jurisdiction.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site ("SRS"). Affidavit of James M. Griffin, Sept. 25, 2020 (attached as Exhibit A to the attached Amended Complaint and hereinafter referenced as "Griffin Aff."), Ex. 1. Governor Hodges's brokered settlement is codified at Title 50, United States Code, Section 2566 ("Section 2566"). Under Section 2566, the DOE must pay the State of South Carolina "economic impact and assistance payments" of $100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least $400 million in economic impact and assistance payments. Under the terms of the Settlement Agreement announced by Respondent Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of $600 million. Significantly, under the terms of the Settlement Agreement, the DOE is required to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." Griffin Aff., Ex. 1, ¶ 5(a).

Defendant Wilson announced at an August 31, 2020 press conference that he intended to pay two private law firms $75 million from the proceeds of the DOE settlement. According to Wilson's statement at the press conference, this payment was expected on or after October 1, 2020. Upon learning of Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

On Friday, September 25, 2020, Respondents filed suit against Defendant Wilson. *See* Compl., Sept. 25, 2020 (Plaintiffs' "Initial Complaint" attached hereto as Exhibit B). That same day, Respondents filed their motion for a temporary restraining order and preliminary injunction against Defendant Wilson, seeking to enjoin Defendant Wilson's payment of $75,000,000 to the law firms (Plaintiffs' "Initial Motion" attached hereto as Exhibit C). On the afternoon of September 25, 2020, Respondents' counsel provided Defendant Wilson with copies of Respondents' filings when requesting that the circuit court schedule a hearing on Respondents' Initial Motion. *See* Griffin Aff., Ex. 14.

On the morning of Monday, September 28, 2020, The State newspaper ran an article on the pending lawsuit with links to relevant court filings. John Monk, *Should 2 law firms get $75M of SC's $600M plutonium Settlement? This lawsuit says no.*, The State, Sept. 28, 2020, attached hereto as Exhibit D. The same morning, counsel for Defendant Wilson emailed the circuit court

requesting that the hearing on Respondents' Initial Motion not be held until Thursday, October 1, 2020. *See* Griffin Aff., Ex. 15. The circuit court responded that Respondents' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Respondents' Initial Motion over Defendant Wilson's objections. *See id.* On the afternoon of September 28, 2020, Respondents' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for Defendant Wilson ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17.

Unbeknownst to Respondents and the circuit court, Defendant Wilson had already received the $600 million in settlement proceeds and initiated the process to transfer $75 million to Appellant by Monday, September 28, 2020. Defendant Wilson was aware of this fact at the time that Defendant's counsel was emailing with the circuit court about the hearing to be held the next day. Defendant Wilson was aware of this fact when his counsel was emailing with Respondents' counsel about Respondents' request for an agreement not to distribute the funds until after the hearing. Instead of being candid with the circuit court and Respondents' counsel about the status of the disputed funds, Defendant Wilson was actively engaging the Office of the State Treasurer to ensure the disputed $75 million would be transferred to Willoughby & Hoefer ahead of the 3:00 p.m. hearing the next day, as shown by an email from the Finance Director for the Attorney General's Office. *See* Email K. Buckley to M. Simmons (Sept. 28, 2020), attached hereto as Exhibit E.

In fact, Attorney General Wilson's staff expedited payment to Willoughby & Hoefer via wire transfer on Monday afternoon, September 28, 2020, after the circuit court had set a hearing

on Respondents' Initial Motion for the following afternoon at 3:00 p.m. *See* Affidavit of Kimberly Buckley, Oct. 1, 2020, attached hereto as Exhibit F. Prior to the afternoon of September 28, 2020, the authorization request from the Attorney General to the Treasurer's Office was for payment to be made by check in the amount of $75 million. However, after the hearing was scheduled, Ms. Buckley emailed her counterpart at the Treasurer's office requesting that the payment be made via wire transfer. The request for a wire transfer came from Appellant on Monday as well. *See id*. As a result, the disputed funds were irrevocably deposited into the law firm's bank account mere hours before the hearing, depriving the circuit court of the opportunity to restrain the transfer of funds. If a check had been issued instead, the circuit court could have ordered that payment of the check be stopped before actual funds were transferred.

The circuit court and counsel for Respondents first learned that the disputed $75 million had been disbursed to Appellant moments before the 3:00 p.m. hearing on Monday, September 28, 2020. In his memorandum in opposition to the Respondents' request for a temporary restraining order circulated at 2:12 p.m., Defendant Wilson announced that the disputed funds had been transferred to Appellant and, therefore, Respondents' entire case was moot. *See* Mem. Att'y Gen. in Opp'n to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3, attached hereto as Exhibit G.

Following the hearing, Respondent Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the law firms, and Respondents' counsel informed the Court of this purported fact. *See* Griffin Aff., Ex. 18. Thereafter, the circuit court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the Appellant had received the disputed funds. *See id.* During the hearing, the circuit court explained its intent, in an abundance of caution in the event the funds had not been

transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. Order Granting Temporary Injunction Pendente Lite, signed on September 29, 2020 and entered on September 30, 2020, attached hereto as Exhibit H. That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, Respondents received confirmation from the Treasurer that the proceeds were in fact wired to the law firm mere hours before the 3:00 p.m. hearing on September 29, 2020. According to Treasurer Loftis, "[t]he Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]." Therefore, the Treasurer's Office "processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account." *See id.*, Ex. 19.

Later in the morning of September 30, 2020, Respondents filed their amended complaint (attached hereto as Exhibit A) naming Appellant and Defendant Wren & DeMasters, P.A. as additional defendants (collectively, the "Law Firms"). At the same time, Respondents filed their second Motion for Temporary Restraining Order and Preliminary Injunction, attached hereto as Exhibit I. Thereafter, the circuit court entered its Ex Parte Temporary Restraining Order, attached hereto as Exhibit J.

III. RESPONDENTS' DECLARATORY JUDGMENT ALLEGATIONS

A. Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement.

Respondents contend that the payment of $75 million to the private Law Firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the

Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1 (emphasis added). Accordingly, Section 5(a) clearly requires that payment of the entire $600 million be made directly to the State of South Carolina. Nevertheless, Respondent Wilson paid private lawyers $75 million, out of the $600 million, which was required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges,* 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."). Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295

S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.* Defendant Wilson's payment of $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution Art. I, § 8.

As acknowledged by Defendant Wilson in the litigation pending in Barnwell County over the $600 million in settlement proceeds, the General Assembly is the proper body to determine how the $600 million is allocated, not the Attorney General:

> The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the $600 million in settlement money to the State of South Carolina. The statute under which settlement was reached provides for payment of funds to the State of South Carolina and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. **The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, *but the General Assembly is the proper body to determine how the funds at issue in this action should be allocated***, rather than him or this Court.

Mem. Att'y Gen. in Opp'n to Mot. to TRO or Temp. Inj. 1-2, *Ex Parte Barnwell County et al. v. Wilson*, C/A No. 2020-CP-06-00294 (Barnwell Cnty. Comm. Pleas Sept. 29, 2020) (emphasis added, citation to exhibit omitted) (attached hereto as Exhibit K).

Moreover, according to the Defendant Wilson, he has no authority as the Attorney General to appropriate money that is payable to the State of South Carolina:

> The Attorney General has no authority to appropriate money. The money in the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).
>
> > The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105

> (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2–65–20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).
>
> *Edwards v. State*, 383 S.C. 82, 90–91, 678 S.E.2d 412, 416–17 (2009).

Id. at 4-5.

In an attempt to circumvent Section 1-7-150's requirement that the full $600 million be deposited in the General Fund, the Defendant Wilson purportedly relied on the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et. seq.* However, a close reading of this statute further supports the Respondents' position that, absent an award of attorneys' fees, only the General Assembly can appropriate funds to pay the Law Firms from these settlement proceeds.

Section 2-65-20 provides that "the General Assembly shall appropriate all anticipated *federal funds* and *other funds*." S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds "means financial assistance made to a state agency by the United States Government in any form." S.C. Code Ann. § 2-65-15(5). Examples of federal funds include "a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land." *Id.* The settlement proceeds, although provided by the federal government, do not fall within this definition.

The settlement proceeds were not intended as financial assistance for the South Carolina Attorney General's Office or any other State agency. Instead, the settlement proceeds are payable to the "State of South Carolina" and thus may possibly qualify as "other funds." The term "other funds" means "any revenues received by an agency which are not federal funds and are not general funds appropriated by the General Assembly in the appropriations act." S.C. Code Ann. § 2-65-15(8).

Section 2-65-30 addresses the receipt and expenditure of unanticipated funds received after the passage of the appropriations act. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the Executive Budge Office ("EBO") for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO's authorization to approve expenditures of "other funds" is limited to "funds from private foundations or industries which are not included in the appropriations act." *Id.* Thus, the EBO lacked authority to approve the expenditure of the settlement proceeds because these are not funds received from private foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. S.C. Code Ann. § 2-65-20.

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required. The EBO instructions for an application for an increase in other funds expenditures state that "the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO." *See* South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at https://admin.sc.gov/budget/otherfundsauthorization). The EBO Request submitted on behalf of Defendant Wilson requesting authorization for the $75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. *See* Form BD-100, Exhibit G,

Mem. Att'y Gen. in Opp'n to Mot. for TRO or Temp. Inj, Ex. 2. Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. In short, the EBO Director apparently by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the $75 million fee from funds that the Director lacks authority to appropriate.

More importantly, the statute dealing with litigation costs from settlements is specific and controls over the general "other funds" provisions. "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018), reh'g denied (June 26, 2018) (quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted).). The EBO has no authority to authorize the payment of attorneys' fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

B. The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order.

Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys' fees totaling $75 million for the amount of work performed in this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

In 2016,[1] the Law Firms first sued in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this claim for damages,[2] ruling that any such lawsuit must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the Law Firms refiled the same suit before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the Law Firms lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The Law Firms then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers for the Law Firms engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs arguing the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

In addition, the express terms of the fee agreement with the Law Firms states that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7. There is nothing prohibiting Defendant Wilson from seeking

[1] Appellant attempts to justify their $75 million fee by providing a summary of work performed prior to January 2016. However, the earliest effective date of Appellant's contingency fee agreement is February 8, 2016. Griffin Aff. Ex. 7.

[2] The District Court did not dismiss the State's claim for injunctive relief.

judicial approval of the payment of $75 million to the Law Firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.[3] However, Defendant Wilson seeks to avoid judicial review and paid the law firms $75 million without making any showing of reasonableness.

Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Appellant additional money from any proceeds recovered in the case pending before the Court of Federal Claims and as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019, Appellant along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.,* Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Appellant 2% of the ultimate recovery for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Appellant, *after* the State

[3] Under South Carolina, the following factors are considered to determine whether an award of attorneys' fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

had lost in the Fourth Circuit and *after* the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Under the terms of the amended contingency fee agreement, Appellant is purported to be paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Appellant had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Appellant is receiving .5% of $600 Million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Appellant over $65,000 per page for these filings.

The fee agreement was entered into by the Defendant Wilson as Attorney General on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract. Respondents, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

C. Respondents Have Standing to Assert the Claims in Their Amended Complaint.

Respondents assert both constitutional and public interest standing. Respondents also have derivative standing to pursue the claims for the recovery of State funds asserted under *Ex parte*

Hart, 190 S.C. 473, 2 S.E.2d 52 (1939), and Respondents have standing based on the public importance of the matters at issue in the lawsuit.

1. Respondents Have Adequately Alleged Their Standing to Pursue the Equitable Claims at Issue Derivatively on Behalf of the State of South Carolina.

The South Carolina Supreme Court first addressed the ability of a citizen to assert claims for the recoupment of money on behalf of a governmental entity in the case of *Ex parte Hart*, stating as follows:

> The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. . . .
>
> Generally it should be shown by allegation and proof that the corporate authorities have neglected or refused to proceed, after being requested so to do, or that a request to them to proceed by judicial remedies would be unavailing.

Ex parte Hart, 190 S.C. 473, 2 S.E.2d 52 at 53-54.

It is a logical extension of this precedent that Respondents have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case, particularly because derivative lawsuits sound in equity. *See Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009) (explaining that shareholder derivative actions sound in equity); *see also Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) ("The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." (internal quotation marks omitted)); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920) (describing as well-settled the equitable maxim that "[e]quity will not suffer a wrong without a

remedy"). Indeed, "[t]he requirement of standing is not an inflexible one." *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000) (internal quotation marks omitted).

As shown by proof submitted via affidavit, Defendant Wilson has refused repeated demands to assert the State of South Carolina's rights vis-à-vis the Appellant and has instead violated the South Carolina Constitution in an attempt to overpay Appellant for its services. First, Defendant Wilson refused to act in response to Governor McMaster's August 30, 2020 letter questioning the amount of attorneys' fees that Defendant Wilson intended to pay. *See* Griffin Aff., Ex. 2. Next, Defendant Wilson refused to act in response to the September 10, 2020 letter of First Circuit Solicitor David Pascoe. *See id.*, Ex. 3. Then, Defendant Wilson refused to act in response to Respondents' Initial Complaint and Initial Motion, filed and provided to Defendant Wilson on September 25, 2020. Instead of acting accordingly in response to these demands to prevent payment to Appellant of the disputed $75,000,000, Defendant Wilson instead expedited payment to Appellant via wire transfer on the afternoon of September 28, 2020, after the circuit court had set a hearing on Respondents' Initial Motion for the following afternoon at 3:00 p.m. *See* Affidavit of Kimberly Buckley, Oct. 1, 2020, attached hereto as Exhibit F. Finally, Defendant Wilson then argued to the circuit court that Respondents' claims were now moot on the basis of this wire transfer.

Under these particular circumstances, where the Attorney General has repeatedly refused to assert the State's claims against Appellant and instead has taken drastic unconstitutional and inequitable actions to make a patently unreasonable $75 million payment to Appellant, Respondents have standing to assert the State of South Carolina's claims against Appellant. *See*

Ex parte Hart, 190 S.C. 473, 2 S.E.2d at 53-54; *see also Berry v. McLeod*, 328 S.C. 435, 447-48, 492 S.E.2d 794, 800-01 (Ct. App. 1997) (citing and quoting *Ex parte Hart* with approval).

2. Respondents Have Public Importance Standing.

Respondents have public importance because a resolution of this dispute is needed for future guidance. *See S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017). Upon information and belief, Defendant Wilson has issued several contingent fee contracts, similar to the one at issue in this matter, and plans to continue to issue them. *See* Alan Wilson, South Carolina Attorney General, Contingency Fee Litigation Retention Agreements, http://www.scag.gov/litigation-retention-agreements.

IV. RESPONDENTS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF UNDER RULE 65

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. *AJG Holdings LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009). When a court is requested to issue a temporary injunction it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate. *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has

made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826.

A. Injunctive Relief Is a Proper Remedy in Taxpayer Public Interest Suits Challenging Unauthorized Expenditure of Public Funds

In *Sloan v. School District of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000), the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that "'[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.'" *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). Also, in *South Carolina Department of Revenue v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court's refusal to grant a temporary injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Dep't of Rev. v. Richland Cnty.*, 422 S.C. at 311, 811 S.E.2d at 768.

B. Preliminary Injunctive Relief Freezing the Disputed Funds Is Proper

As noted above, Appellant Willoughby & Hoefer has received a disbursement of the very funds in dispute in this litigation, after the commencement of this lawsuit, and hours before a scheduled hearing on Respondents' motion for a preliminary injunction. Respondents allege that Defendant Wilson did not have legal authority to pay the Law Firms from the proceeds of the

settlement. In the Amended Complaint, Respondents seek restitution on behalf of the State of South Carolina and the imposition of a constructive trust over these funds.

Preliminary injunctive relief has long been recognized as an appropriate remedy in equitable actions seeking restitution and the imposition of a constructive trust. For example, in *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005), the South Carolina Supreme Court reversed the circuit court's refusal to order an injunction on the grounds that plaintiffs had an adequate remedy at law. The Court held that a preliminary injunction to restrain $2 million in financial accounts is the appropriate remedy in equitable actions. In *Grosshuesch*, the plaintiffs were seeking to set aside transfers on the grounds of fraud and undue influence.

In a very thoughtful and instructive opinion, the Fourth Circuit Court of Appeals in *U.S. ex rel Rahman v. Oncology Associates*, 198 F.3d 489 (4th Cir. 1999), held that courts have the inherent equitable authority to order a preliminary injunction restraining assets where there is a specific nexus between the assets and plaintiff's equitable claims.

In *Rahman*, the District Court entered a temporary restraining order in reliance upon the United States Supreme Court decision in *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), ruling that courts have the equitable authority to restrain the spending of specifically identified assets as an aid in granting the ultimate equitable relief of rescission. The District Court, in *Rahman*, ruled as follows:

> The request has been made that the Court impose a constructive trust. Significant issues are therefore presented by the equitable aspects of this suit. Under these circumstances, the conditional freeze of assets imposed by the TRO is an appropriate exercise of this Court's equity jurisdiction.

Id. at 494.

On appeal, the defendant argued that the suit was "overwhelmingly a suit at law for money damages" and therefore equitable injunctive relief was not proper. The defendant relied upon

another Supreme Court decision, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), where the Court held that an injunction freezing assets may not be entered in an action for damages where no lien or equitable interest in the assets is claimed.

The Fourth Circuit rejected the defendants' assertion that a temporary restraining order is not appropriate in a lawsuit that alleges both legal and equitable claims. The Fourth Circuit relied upon a third Supreme Court decision, *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945), where the Court ruled that "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers*, 325 U.S. 220.

Rahman distilled the principles guiding a court's equitable authority to enter asset freezing injunctions:

> From these controlling precedents, we draw several principles applicable to the case before us. First, where a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor's use of his property before obtaining judgment. A debt claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize prejudgment execution against the debtor's assets.
>
> On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets. Thus, the Court in *Deckert* entered an injunction freezing assets "in aid of the recovery" sought by the lawsuit. 311 U.S. at 289, 61 S. Ct. 229. In *De Beers,* the Court noted in a similar vein, "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." 325 U.S. at 220, 65 S. Ct. 1130. And finally, *Grupo Mexicano* held that because the plaintiff claimed no interest in the defendant's assets (by way of lien or an equitable interest), but rather claimed only a money judgment, the district court lacked authority to freeze or otherwise interfere with the defendant's assets. *See* 527 U.S. at ——, 119 S. Ct. at 1975.

Rahman, 198 F.3d at 496-497.

Furthermore, the Fourth Circuit recognized that "when interim equitable relief is authorized and the public interest is involved, the doctrine applies that '[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved,'" *Id*. at 497 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 383, 85 S. Ct. 528, 13 L.Ed.2d 365 (1965)).

Rahman was a qui tam action brought by a "whistleblower" under the False Claims Act alleging that the defendant had been over-paid by the Medicare program. The Court stated "the justification for a preliminary injunction in this case is heightened by the fact that the public interest is at stake. In *First National*, the public interest was represented by $19 million in taxes allegedly owed the United States by a foreign corporation . . . Here, it lies in the $12 million allegedly diverted from the Medicare and CHAMPUS programs . . ." *Rahman*, 198 F.3d at 499.

The Amended Complaint in this action does not allege any legal claims. Rather Respondents allege only equitable claims for declaratory judgment (Count I, Am. Comp.), constructive trust (Count II, Am. Comp.), restitution (Count III, Am. Comp.) and injunctive relief (Count IV, Am. Comp.). The Amended Complaint specifically identifies the $75 million wire transfer to Willoughby & Hoefer as the sole asset that Respondents request be restrained. For these reasons alone, Respondents are entitled to obtain a preliminary injunction.

However, when the public interest is considered, there should be no question of Respondents' right to obtain preliminary injunctive relief. In *First National*, the complaint sought to recover $19 Million of taxpayer funds. In *Rahman*, the complaint sought to recover $12 million in Medicare and CHAMPUS funds. Here, Respondents seek to restrain the spending of $75 million of funds that should be deposited into the State's General Fund for the benefit of all State taxpayers.

C. The Court Has Equity Authority to Order Injunctive Relief to Preserve Its Jurisdiction

Defendant Wilson argued before the circuit court that the Respondents' lawsuit is moot because the fee had been wired before the circuit court could restrain the payment. Under these circumstances, the circuit court has authority to restrain further disbursements of these disputed funds in order to prevent this action from becoming moot.[4] In *Seabrook v. Carolina Power & Light Company*, 159 S.C. 1, 156 S.E. 1, 3 (1930), the court held that the circuit court erred by refusing to grant a temporary injunction when that was the only relief sought in the complaint. The court explained, "the Respondents' action was brought solely for obtaining an injunction, and the refusal to grant the temporary injunction practically disposed of the case without a hearing upon the merits." *Seabrook*, 159 S.C. 1, 156 S.E. at 3.

V. APPELLANT'S PETITION FOR WRIT OF SUPERSEDEAS SHOULD BE DENIED

As established above, Respondents SCPIF and Crangle have established their right to a preliminary injunction preventing Appellant from dissipating the proceeds from the DOE settlement. The circuit court's decision to enter a Temporary Restraining Order was very appropriate considering the troubling circumstances encountered by the circuit court. Judge Lee alluded to these circumstances in the Order but was circumspect[5] in the language used. Furthermore, the circuit court limited the duration of the ruling for three (3) business days, until Wednesday, October 7, 2020.

[4] Respondents disagree that this case will become moot if the Law Firms are not restrained from spending all or a portion of the disputed funds.

[5] Appellant appears to complain that Judge Lee should have used more descriptive and inflammatory language in the Order.

Appellant's decision to file an appeal to this Court and seek a writ of supersedeas, rather than seek an earlier hearing before Judge Lee is curious. Through the Petition, Appellant requests this Court to stay Judge Lee's temporary restraining order. However, Judge Lee has scheduled a hearing on October 7, 2020 at 9:30 a.m. to decide whether to grant a preliminary injunction or dissolve the temporary restraining order.[6] Appellant has not identified any urgency or harm that will result before the scheduled hearing.

Presumably, Appellant Willoughby & Hoefer has the money in an interest-bearing account and will receive the benefit of the increase in value of these funds if Appellant prevails on the merits. Furthermore, placing these funds under a court order freeze will be of greater benefit to Appellant than to Respondents, if Appellant is ultimately ordered to repay the State. Absent a court order, Appellant, its members and others, will collectively receive $75 million in income and will be required to pay federal and state taxes on these proceeds. Moreover, if Respondents prevail, Appellant will be liable for pre-judgment interest on $75 million, which is approximately $6.5 million per year. As a result, Appellant and its members will be liable for well over $75 million to the State. But, if Appellant Willoughby & Hoefer is enjoined from accessing these funds during the course of the litigation, there will be no exposure to pre-judgment interest, no federal or state income tax liability and the entire $75 million will be preserved and accruing interest.

The Petition lacks merit and should be denied. Rule 241 states "[a] person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client." Appellant's Petition is not verified. Therefore, Respondents request that the Petition be dismissed as defective.

[6] However, under Rule 205, SC Rules App. Judge Lee has now been divested of jurisdiction to dissolve or modify the temporary restraining under.

Appellant claims that the motion was not supported by an affidavit. However, the Motion for Temporary Restraining Order and Preliminary Injunction was filed contemporaneously with the Amended Complaint. An affidavit was filed as an attachment to the Amended Complaint. The documents verified in the Affidavit provide the factual basis in support of the motion.

Appellant claims that the Order does not fix a date and time for its duration. However, the Order was signed September 30, 2020 and entered by the Clerk of Court on October 1, 2020. The Temporary Restraining Order requires Appellant to appear at a hearing scheduled for October 7, 2020 at 9:30 a.m. at which time the circuit court will consider Respondent's Motion for Preliminary Injunction. Obviously, this complies with Rule 65.

Appellant claims that the circuit court, through the use of the phrase "show cause why a preliminary injunction should not be issued" has improperly shifted the burden of proof to the Appellant at the hearing scheduled on the motion for preliminary injunction. Appellant reads too much into the lower court's notice. Respondents SCPIF and Crangle readily accept the burden of establishing that a preliminary injunction should be entered in this litigation.

Appellant complains that the circuit court did not require Respondents post a bond. Here, Plaintiffs are suing on behalf of the State in this public interest and taxpayer lawsuit. *See Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939). Under *Ex parte Hart*, Respondents have standing to sue to enforce the rights of the State recover funds transferred to Appellants in violation of Section 1-7-150 of the South Carolina Code of Laws for the benefit of the State. Rule 65(c) does not require security be posted on behalf of the State.

Furthermore, the failure to require a bond is not jurisdictional and can be remedied by subsequent order of the trial court. *See Ex Parte Jones*, 160 S.C. 63, 158 S.E. 134, 140 (1931). The remedy on appeal is to remand the matter to the trial court for a determination of an appropriate

bond. *AJG Holdings LLC v. Dunn*, 382 SC 43, 674 S.E.3d 505 (2009). The remedy is not to vacate the temporary injunction as requested in Appellant's Petition.

VI. CONCLUSION

Respondents request this Court deny the Petition for Writ of Supersedeas.

Respectfully submitted,

s/Badge Humphries

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October 5, 2020

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT A

Amended Summons, Complaint, and Exhibits
South Carolina Public Interest Foundation et al. v. Alan Wilson, et al.,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Sept. 30, 2020)

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	Case No. 2020-CP-40-04603 **AMENDED SUMMONS**

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the Plaintiffs or their attorney, James M. Griffin of Griffin Humphries LLC, 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206-3135, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Badge Humphries
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September 30, 2020

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South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	Case No. 2020-CP-40-04603 **AMENDED COMPLAINT**

NOW COME the Plaintiffs, by their undersigned attorneys, and as a Complaint against the Defendants, would show unto the Court:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff South Carolina Public Interest Foundation ("SCPIF") is a corporation, not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest including the upholding of the Constitution and laws of the State of South Carolina.

2. Plaintiff John Crangle is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated.

3. Defendant Alan Wilson is the Attorney General for the State of South Carolina.

4. Defendant Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") is a law firm organized and existing under the laws of the State of South Carolina with its principal offices located in Columbia, Richland County, South Carolina.

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5. Defendant Davidson, Wren & DeMasters, P.A. ("Davidson, Wren & DeMasters") is a law firm organized and existing under the laws of the State of South Carolina with its principal offices located in Columbia, Richland County, South Carolina.

6. This Court possesses jurisdiction under S.C. Constitution, Art. I, § 8, under S.C. Code Ann. § 15-53-10 *et seq.,* known as the Uniform Declaratory Judgment Act, and under the following decisions, which address public importance standing and citizen or taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

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7. This action raises constitutional and statutory issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the issues this action raises.

FACTS

8. On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site ("SRS"). Affidavit of James M. Griffin, Sept. 25, 2020 (attached hereto as Exhibit A and hereinafter referenced as "Griffin Aff."), Ex. 1.

9. The agreement brokered by Governor Hodges is codified at Title 50, United States Code, Section 2566 ("Section 2566").

10. Section 2566 provides for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility at the SRS (the "MOX Facility") to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors. The MOX Facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019.

11. If the DOE did not meet the MOX production objective by January 1, 2014, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2016, and (2) an amount of plutonium equal to the amount of all

unprocessed plutonium shipped to SRS between April 15, 2002 and January 1, 2022, no later than January 1, 2022.

12. The statute further provides that "[i]f the MOX production objective is not achieved as of January 1, 2016, the Secretary [of the DOE] shall, subject to the availability of appropriations, pay to the State of South Carolina . . . for economic and impact assistance an amount equal to $1 million per day for each day, not to exceed $100 million per year." 50 U.S.C. § 2566(d)(1).

13. The DOE has never met the milestones set forth in 50 USC § 2566.

14. Under the terms of the Settlement Agreement, Defendant Wilson agreed on behalf of the Citizens of South Carolina to forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of violations of 50 USC § 2566 until 2037. Griffin Aff., Ex. 1, ¶ 5(b).

15. In exchange, the United States agreed to an immediate payment to the State of South Carolina in the amount of $600 million. *Id.* ¶ 5(a).

16. The Settlement Agreement resolves "all claims relating to economic assistance payments or removal of plutonium that have arisen, or will arise." *Id.* ¶ 13.

17. Defendant Wilson announced at a press conference that he intends to pay two private law firms $75 million from the $600 million economic impact and assistance payment for their legal services in representing the State.

18. Upon learning of Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous

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advocacy and coordination with members of [the State's] Congressional delegation." Griffin Aff., Ex. 2.

19. Governor McMaster concluded the letter stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.*

20. First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that State law requires the entire amount be deposited into the State's General Fund. Griffin Aff., Ex. 3.

Attorney General Wilson Does Not Possess Authority to Use Proceeds from the U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to South Carolina to Pay Private Law Firms

21. The payment of $75 million to private law firms from a settlement of economic impact and assistance payments owed by the DOE to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution.

22. When money under a settlement agreement is payable directly to the State, as in the case with the Settlement Agreement, the proceeds must be deposited in the General Fund, and only the Legislature controls its appropriation.

23. Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement.

24. In this matter, neither the court order nor the settlement exception applies.

25. There is not any order awarding attorneys' fees.

26. The Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees.

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27. Rather, the United States expressly disclaims any liability for attorneys' fees in Section 5(a) of the Settlement Agreement, which provides for "[i]mmediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1, § 5(a) (emphasis added).

28. Section 5(a) of the Settlement Agreement clearly requires that payment of the entire $600 million be made directly to the State of South Carolina.

29. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million, which is required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.

30. Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.")

31. Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.*

32. Defendant Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

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The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order

33. Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in this case appears to be patently unreasonable.

34. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3.

35. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

36. The lawyers brought suit to collect a statutory payment for economic impact and assistance of $100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.

37. The DOE never contested that it failed to comply with federal law.

38. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.

39. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 Million assistance payment for failing to comply with the statute.

40. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4.

41. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.

42. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5.

43. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.

44. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

45. Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6.

46. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *Id.*, Ex. 2.

47. In apparent recognition that contingency fee agreements entered into with the State of South Carolina may produce an unreasonable fee award, the fee agreement entered into with the law firms expressly provides that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7.

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48. There is nothing prohibiting Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.

49. Furthermore, a payment of $75 million to the law firms exceeds the amount of fee that they would be entitled to receive under the contingency fee agreements entered with these firms.

50. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to$150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

51. Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

52. The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019, the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9.

53. On June 7, 2019, Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

54. Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court.

55. The amended fee agreement was executed on June 13, 2019, by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

56. Under the terms of the amended contingency fee agreement, Willoughby & Hoefer is being paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina.

57. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

58. Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court.

59. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

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60. The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000.

61. The fee agreement was entered into by Defendant Wilson on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract.

62. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

Plaintiff Files Suit, and Defendant Wilson Apparently Disburses the Disputed Fund Before a Hearing Can Be Held on the Propriety of Defendant Wilson's Conduct

63. On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson and filed Plaintiffs' motion for a temporary restraining order and preliminary injunction against Defendant Wilson seeking to enjoin Defendant Wilson's payment of $75,000,000 to the law firms ("Plaintiffs' Initial Motion").

64. On Friday, September 25, 2020 at 11:10 a.m., Defendant Willoughby & Hoefer and a representative of the Office of the Attorney General received notice of a hearing set for Wednesday, September 30, 2020 in a related case that likewise sought to enjoin the expenditure of the $600 million in settlement funds. *See* Griffin Aff. Ex. 13.

65. On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings while requesting that the Court schedule a hearing on Plaintiffs' Initial Motion. *See* Griffin Aff., Ex. 14.

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66. On the morning of Monday, September 28, 2020, counsel for Defendant Wilson emailed the Court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See id.*, Ex. 15.

67. The Court responded by stating that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Motion over Defendant Wilson's objections. *See id.*

68. Counsel for Defendant agreed to accept service as of the Complaint and Plaintiffs' Initial Motion as of September 28, 2020. *See id.*, Ex. 16.

69. On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. In response, counsel for the Attorney General ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17.

70. Immediately prior to that hearing on September 29, 2020, Defendant Wilson filed a memorandum in opposition to Plaintiffs' Initial Motion in which Defendant Wilson claimed that the funds at issue in this dispute had been transferred to the law firms earlier in the day. Based on this purported transfer of the funds, Defendant Wilson claimed that this matter is now moot. *See* Mem. Atty. General in Opp'n. to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3.

71. Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds have not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See id.*, Ex. 18.

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72. Thereafter, the Court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the law firm of Willoughby & Hoefer had received the disputed funds. *See id.*

73. During the hearing, the Court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. That order expires at 5:00 p.m. on Friday, October 2, 2020.

74. On the morning of September 30, 2020 Plaintiffs received confirmation from the State Treasurer that the proceeds were in fact wired to the law firm hours before the 3 p.m. hearing on September 29, 2020. According to Treasurer Loftis: "The Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]. We processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account. This was a standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires." *See id.*, Ex. 19.

CLAIMS FOR RELIEF

COUNT I
(Declaratory Judgment)

75. Plaintiffs reallege each and every allegation set forth above as if repeated verbatim herein.

76. Pursuant to Section 15-53-30 of the South Carolina Code of Laws, Plaintiffs request declaratory relief from this Court.

77. Plaintiffs are entitled to seek, and do hereby seek, an order of this Court declaring the rights, obligations, and status of the parties to this proceeding, and, in particular, as follows:

a. That Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit $600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;

b. That the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;

c. That the Attorney General's intended payment of $75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause; and

d. In the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable.

COUNT II
(Constructive Trust)

78. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.

79. The disputed funds have been transferred to and received by Willoughby & Hoefer and/or Davidson, Wren & DeMasters in an attempt to deprive the Court of jurisdiction to determine whether the Defendant Wilson is authorized to make the payment from the settlement proceeds.

80. Willoughby & Hoefer and Davidson, Wren & DeMasters, as special counsel to the Attorney General for the State of South Carolina, owe fiduciary duties to the Attorney

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General and the State of South Carolina and are bound to act in good faith and with due regard to the interests of the State of South Carolina.

81. Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters have received the disputed funds with full knowledge that Plaintiffs commenced a lawsuit in this Court seeking a declaration that the Defendant Wilson does not have authority to pay the intended fees from the settlement proceeds and knowing that this Court had scheduled a hearing to enjoin the transfer of these funds.

82. Defendant Wilson's payment of funds to Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters was an *ultra vires* action and is *void ab initio*.

83. The State of South Carolina retains equitable title to those funds because those funds do not equitably belong to these law firms and these law firms cannot in good conscience retain or withhold these funds from the State of South Carolina, who is beneficially entitled to them.

84. Accordingly, Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters hold those funds as trustees for the ultimate benefit of the State of South Carolina for the reasons set forth above.

85. Accordingly, Plaintiffs ask this Court to declare a resulting trust in favor of Plaintiffs.

86. Plaintiffs thus request this Court order possession and ownership to be transferred from Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters to the State of South Carolina

87. In the alternative, Plaintiffs request that the Court enjoin Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters from further distributing the disputed funds and to

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continue to hold the disputed funds in trust until this dispute is ultimately resolved on its merits.

COUNT III
(Receipt of Unauthorized Payment/Restitution/Money Had and Received)

88. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.

89. Defendant Wilson lacked authorization to pay attorneys' fees to Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters from the settlement proceeds.

90. Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters are therefore required to return the fees received to the State of South Carolina, together with pre-judgment interest.

COUNT IV
(Injunctive Relief)

91. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.

92. Without the equitable relief requested herein, Plaintiffs will be irreparably harmed.

93. In *Sloan v. School Dist. of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000) the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that "'[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.'" *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)).

94. In *South Carolina Department of Rev. v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court's refusal to grant an

injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Department of Rev. v. Richland County*, 422 S.C. at 311, 811 S.E.2d at 768.

95. Plaintiffs have shown it will succeed on the merits of this case by making a prima facie showing that Plaintiffs are entitled to the injunctive relief sought. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005).

96. Plaintiffs have no adequate remedy at law because the equitable relief sought herein is necessary to preserve the subject of controversy in the condition which it is until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. *See id.*, 367 S.C. at 457, 626 S.E.2d at 37-38.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court:

1. Declare that Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit $600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;
2. Declare that the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;
3. Declare that the Attorney General's intended payment of $75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause;

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4. Declare, in the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable;

5. Enjoin, temporarily and permanently, the disbursement of the funds at issue in this dispute:

   a. Ordering the funds be maintained by or returned to the State of South Carolina until this dispute is resolved on its merits; or

   b. In the alternative, ordering that the funds be maintained by the Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters without further disbursement until this dispute is resolved on its merits.

6. Grant Plaintiffs their costs and attorneys' fees under Section 15-77-300 of the South Carolina Code of Laws; and in the alternative, grant Plaintiffs their reasonable attorneys' fees and costs from the funds preserved through this action for the people of South Carolina, commonly known as the common fund doctrine; and

7. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/Badge Humphries

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Attorneys for Plaintiffs

Columbia, South Carolina
September 30, 2020

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Exhibit A

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No. 2020-CP-40-04603 **AFFIDAVIT OF JAMES M. GRIFFIN**

Comes James M. Griffin and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.

2. That the Willoughby & Hoefer firm were notified on Friday, September 25 at 11:10 a.m. that an injunction had been set in Barnwell for today.

3. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in the Amended Complaint filed concurrently herewith.

Exhibit 1	Settlement Agreement, *South Carolina v. United States*, Fed. Cir. No. 19-2324 (Aug. 28, 2020)
Exhibit 2	Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General (Aug. 30, 2020)
Exhibit 3	Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General (Sept. 10, 2020)
Exhibit 4	Order, *South Carolina v. United States et al.*, Civil Action No. 1:16-cv-00391-JMC (D.S.C. Feb. 7, 2017), ECF No. 76

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Exhibit 5	Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32
Exhibit 6	Federal Court Docket Sheets for *South Carolina v. United States*, Case Nos. 1:16-cv-00391-JMC, 1:17-cv-01068-MMS, and 1:18-cv-00038-MMS
Exhibit 7	Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility
Exhibit 8	Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility (June 13, 2019)
Exhibit 9	*South Carolina v. United States*, 912 F.3d 720 (2019)
Exhibit 10	Petition for Writ of Certiori, *South Carolina v. United States*, No. 18-1531, 2019 WL 2464930 (4th Cir. June 7, 2019)
Exhibit 11	Reply Brief of Petitioner, *South Carolina v. United States*, No. 18-1531 (4th Cir. Sept. 24, 2019)
Exhibit 12	*South Carolina v. United States*, 140 S. Ct. 392 (2019)
Exhibit 13	Email from V. Ware to Willoughby Hoefer counsel re Injunction Hearing Sept. 30 at 10:00 A.M. Barnwell County et al. v. Alan Wilson (Sept. 25, 2020)
Exhibit 14	Email from J. Carpenter to Judge Lee regarding Hearing on Temporary and Preliminary Injunction (Sept. 25, 2020) (requesting hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 15	Email thread between Judge McCaslin law clerk and counsel for all parties re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (scheduling hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 16	Email thread between B. Humphries, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (agreement to accept service of Summons and Complaint)
Exhibit 17	Email thread between J. Griffin, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (discussing temporary hold on payment to counsel)
Exhibit 18	Email thread between counsel for Defendant, counsel for Plaintiffs, and Judge McCaslin re SCPIF v. Wilson 2020CP4004603 (Sept. 29, 2020)

(following WebEx hearing and discussing status of payment of attorneys' fees to law firms)

Exhibit 19 Email thread between J. Griffin and Judge McCaslin and counsel re SCPIF v. Wilson 2020CP4004603 (Sept. 30, 2020) (discussing confirmation from State Treasurer that funds were wired to Willoughby & Hoefer just hours prior to hearing)

Further Affiant sayeth naught.

Dated this 30th day of September, 2020.

James M. Griffin (S.C. Bar No. 9995)
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Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Subscribed and sworn to before me
by James M. Griffin on this
the 30th day of September 2020.

Notary Public, State at Large, South Carolina
My Commission Expires September 12, 2029

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EXHIBIT 1

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Fed. Cir. No. 19-2324
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiff's claims, without any further judicial proceedings and without there being any further trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, the parties stipulate and agree as follows:

1. In early 2000, the Department of Energy elected to construct a MOX fabrication facility (MOX Facility) at the Savannah River Site (SRS), Aiken, South Carolina. Since April 15, 2002, and through the present, the Department of Energy transferred defense plutonium or defense plutonium materials into the State of South Carolina in anticipation of disposition into MOX fuel or otherwise. For purposes of this agreement, the parties agree that the amount of defense plutonium or defense plutonium materials remaining at SRS amounts to nine and one-half (9.5) metric tons and will be referenced as the "subject defense plutonium or defense plutonium materials" in this agreement.

2. 50 U.S.C. § 2566, entitled "Disposition of Weapons-Usable Plutonium at Savannah River Site," provides a detailed plan for the MOX Facility, including a schedule for meeting the MOX production objective, defined as the average rate at which the MOX Facility converts defense plutonium into MOX fuel over a given period of time. Should the MOX

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production objective not be achieved by certain dates, the statute requires the Department of Energy to make specified economic and assistance payments and to remove certain defense plutonium or defense plutonium materials transferred to the Savannah River Site but not processed by the MOX facility – referenced in this agreement as the subject defense plutonium or defense plutonium materials – from the State of South Carolina by certain deadlines.

3. The MOX production objective has not been met and will not be met.

4. On March 3, 2018, the State of South Carolina filed an amended complaint in the Court of Federal Claims, seeking economic and impact assistance payments for the years 2016 and 2017.

5. The parties subsequently entered into negotiations designed to resolve amicably all of the State of South Carolina's present and future claims relating to obligations of the Department of Energy imposed pursuant to 50 U.S.C. § 2566(c) and (d). The State of South Carolina has offered to settle this case based upon the following terms:

a. Immediate payment by the United States to the State of South Carolina in the amount of $600 Million (Six Hundred Million Dollars), inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.

b. The State of South Carolina shall forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of 50 U.S.C. § 2566(c) or 2566(d) until January 1, 2037.

c. After January 1, 2037, the State of South Carolina's rights and remedies under 50 U.S.C. § 2566(c) and 2566(d) will be governed solely by the terms of this agreement, as set forth below.

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d. If, on January 1, 2037, 9.5 metric tons of the subject defense plutonium or defense plutonium materials have not been removed from the State of South Carolina, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during the time period from the signing of this Agreement to January 1, 2037, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be multiplied $1.5 Billion (One Billion Five Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy to the State of South Carolina by April 1, 2037. This payment shall be in full satisfaction of any claim for economic and impact assistance payments pursuant to 50 U.S.C. § 2566(d)(2) owed to the State of South Carolina from 2022 through 2036.

e. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during that calendar year, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be

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multiplied by a sum of money representing $1 Million (One Million Dollars) per day for each day during that said year in which there remains a portion of the said 9.5 metric tons, with said sum of money to be capped for any given year at $100 Million (One Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy by December 31 of that particular calendar year, for which any of the 9.5 metric tons remains in the State of South Carolina, beginning with the year 2037.

f. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, the Department of Energy shall continue to remove from the State of South Carolina such remaining subject defense plutonium or defense plutonium materials. If, after December 31, 2036, the Department of Energy has removed less than 4.75 metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may immediately institute legal action to enforce this paragraph 5(f) removal requirement. If, after December 31, 2036, the Department of Energy has removed 4.75 or more metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may only institute legal action to enforce this paragraph 5(f) removal requirement after January 1, 2042.

6. The parties agree that the United States retains sole discretion in the method of removal of the subject defense plutonium or defense plutonium materials. The parties further agree that the determination of the amount of total material removed from the State shall be by certification of the Department of Energy, through a declaration by an appropriate Department official, pursuant to the provisions of 28 U.S.C. § 1746.

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7. The terms of this agreement will remain in effect until the United States removes 9.5 metric tons of the subject defense plutonium or defense plutonium material from the State of South Carolina, or until Congress amends 50 U.S.C. § 2566(c) or (d) with respect to the obligations of the Department of Energy for the removal of defense plutonium or defense plutonium material or payments to the State of South Carolina in a manner that is inconsistent with the terms and conditions of this agreement, whichever is earlier.

8. The State of South Carolina's offer has been accepted on behalf of the United States Attorney General.

9. Upon satisfaction of the terms set forth in paragraph 5(a), the State of South Carolina agrees to join with the United States in stipulating to dismissal, with prejudice, of the appeal pending in the Court of Appeals for the Federal Circuit.

10. Upon removal of the 9.5 metric tons of subject defense plutonium or defense plutonium materials, the State of South Carolina releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related or otherwise involved in: (a) this case, regardless of whether they were included in the complaint, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and (b) any and all outstanding obligations of the Department of Energy arising under 50 U.S.C. § 2566(c) or (d).

11. This agreement is in no way related to or concerned with any taxes for which the State of South Carolina is now liable or may become liable in the future as a result of this agreement.

12. The State of South Carolina warrants and represents that no other action or suit with respect to the claims advanced in this suit or otherwise referenced in paragraph 10 is

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pending or will be filed in or submitted to any other court, administrative agency, or legislative body by the State of South Carolina. The State of South Carolina further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit. Should there be now or in the future any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement shall be refunded promptly by the State of South Carolina, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

13. This agreement is for the purpose of settling this case and all claims that the State of South Carolina may or could bring arising from obligations imposed on the Department of Energy pursuant to 50 U.S.C. § 2566(c) or 2566(d). The parties intend that this agreement will resolve all claims relating to economic and assistance payments or removal of plutonium that have arisen, or will arise, between 2016 and the date on which the Department of Energy completes removal of the subject 9.5 metric tons of defense plutonium or defense plutonium materials. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this agreement.

14. The Attorney General for the State of South Carolina represents that he is authorized to enter into this agreement on behalf of the State of South Carolina.

15. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

AGREED TO:

UNITED STATES OF AMERICA

WILLIAM P. BARR
Attorney General
United States of America

CLAIRE MCCUSKER MURRAY
Principal Deputy Associate Attorney General

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director, National Courts Section

TARA K. HOGAN
Assistant Director
Department of Justice
Civil Division
Commercial Litigation Branch
Washington, DC

DATED: August 28, 2020

STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General
State of South Carolina
Columbia, SC

DATED: August 21, 2020

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EXHIBIT 2

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HENRY MCMASTER
GOVERNOR

August 30, 2020

The Honorable Alan M. Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Attorney General Wilson:

I recently received a copy of the Settlement Agreement you executed with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). As you know, I did not receive the Settlement Agreement until late last week, at which point you had already signed it on behalf the State. Having carefully reviewed the document and your outside counsel's responses to my immediate questions regarding the same, I am compelled to express my concerns regarding the Settlement Agreement.

First, I am not convinced that this long-term arrangement provides sufficient assurances that DOE will remove the plutonium from our State in a timely manner. Currently, federal law provides that all defense plutonium transported into the State between 2002 and the present must be removed from SRS by January 1, 2022. However, under the Settlement Agreement, it appears that DOE will not be required to remove this plutonium until January 1, 2037. And if DOE only removes half of the total amount currently at SRS by this new deadline, the State of South Carolina will be forced to forgo legal action until January 1, 2042. I understand that settlement negotiations are inherently fluid in nature and that the transfer of defense plutonium is not an expeditious process, but the Settlement Agreement does not appear to align with previous discussions. At bottom, I cannot support a compromise that extends the existing removal deadline by up to twenty years.

Second, after reviewing your counsel's responses to my questions regarding the anticipated use of the settlement proceeds, I must note my concerns regarding the payment of attorneys' fees. After years of DOE repeatedly ignoring its obligations and abandoning the MOX project, President Trump and his Administration have demonstrated their commitment to removing surplus plutonium from our State. Secretary Brouillette's willingness to address these inherited issues is

noted and most appreciated. However, the federal government's relatively recent attention to this important issue is due in no small part to our zealous advocacy and coordination with members of the congressional delegation. Accordingly, while I recognize that this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims, I simply cannot endorse the payment of $75 million in attorneys' fees under the circumstances.

To be clear, I appreciate your efforts to recover the economic and impact assistance payments owed to the State and your pursuit of this litigation more generally. However, as I have repeatedly conveyed, it is of paramount importance that South Carolina not become a permanent plutonium waste repository. Therefore, I cannot support a Settlement Agreement that extends DOE's existing removal deadlines by up to twenty years and potentially sidelines South Carolina's future leadership by restricting the State's ability to enforce its legal rights.

Yours very truly,

Henry McMaster

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EXHIBIT 3

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The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

140 N. Main St., Suite 102
Summerville, SC 29484
(843) 871-2640
FAX (843) 871-2643
PTI (843) 873-7842

Courthouse, Amelia Street
Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252
FAX (803) 533-6004
PTI (803) 533-6137

DAVID M. PASCOE
Solicitor

September 10, 2020

The Honorable Alan M. Wilson
S. C. Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear Attorney General Wilson:

I write to raise serious concerns about your intent to pay two law firms $75 Million from the proceeds of a $600 Million settlement with the United States Department of Energy (DOE). I believe such payment is prohibited by South Carolina law and appears to violate the canons of ethics which govern licensed attorneys. I request that you, Governor McMaster, and our legislative leaders get together to resolve these issues to avoid potential litigation.

South Carolina law prohibits the appropriation of State funds by any officer in the Executive Branch of government. The $600 Million allocated in the Settlement Agreement with DOE are public funds allocated to South Carolina. You, of all people, know that an Attorney General has no authority to direct how those public funds are spent. Recently, you filed a Brief in the South Carolina Supreme Court emphasizing the very point that executive officers do not have authority to direct funds from a settlement agreement.

The following is a specific quote from your Brief:

> Executive officers...possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund...See, *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623 (2002)["...there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation powers. Art. I, § 8.

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State v. Quinn, Attorney General's Memorandum In Response to Court's Order of March 12 pg. 25.

This above quote is one of the few points I agree with in your Brief. When money is directed to go to the State's General Fund as in the case with the DOE Settlement Agreement, you nor the Governor have the authority to transfer those funds. Only the Legislature controls what happens with the $600 million.

The Legislature has spoken through S.C. Code Section 1-7-150. This statute requires you to deposit all funds received by judgment or settlement into the State's General Fund, and the exception for investigative costs and litigation costs awarded by court order or settlement in this statute clearly does not apply. There was not any order awarding attorneys' fees. The Settlement Agreement does not allocate any portion of the $600 Million to attorneys' fees. In fact, DOE specifically carved out attorneys' fees in the Settlement Agreement. Section 5(a) provides for:

> Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses*.

Section 5(a) clearly requires that payment of the entire $600 Million be made directly to the State of South Carolina, and S.C. Code Section 1-7-150 directs you to deposit $600 Million into the State's General Fund. These are public funds, not a slush fund to dole out money to private law firms.

Your agreement to pay private law firms also raises ethical concerns. Based upon the information I have been able to review, the agreement that you entered with these firms on behalf of the State appears to violate the South Carolina Rules of Professional Conduct. Rule 1.5 of the Rules of Professional Conduct, S.C. App Ct. Rule 407 states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Contingency fees are not exempt from this reasonable standard. *Id.* at Note 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. See, *Getzen v. L. Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006). At the very least, I believe it would be prudent to seek an opinion from the South Carolina Bar Ethics Advisory Committee regarding the fee amount.

The payment of a $75 Million fee for the services performed by the law firms in this matter seems arbitrary and unreasonable. This is public money. It belongs to the Citizens of South Carolina, and awarding private law firms $75 Million is unconscionable when one considers it is almost 13 times the total amount every Solicitor's Office in the State receives in annual state judicial circuit support. This is more than the State funding received by all 32 of the Solicitors' Offices and Public Defenders' Offices combined. It is more than our State provides our entire Judiciary in annual funding. In fact, it is even 5 times more than the annual base budget for the Attorney General's Office. Perhaps most egregious is your attempt to award more money to

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private law firms than will probably be received by the counties directly impacted by the storage of plutonium.

These law firms unsuccessfully filed suit to enforce a settlement reached by Governor Hodges which is codified in the United States Code at 50 USC § 2566. The federal statute requires DOE to pay South Carolina $100 Million per year for each year it fails to meet certain deadlines relating to the processing and disposition of surplus defense plutonium stored at the Savannah River Site (SRS). DOE never contested that it failed to comply with federal law. Rather, DOE took the position in federal court that Congress had not appropriated money from which DOE could pay the penalty.

Your lawyers first sued in federal court in South Carolina to collect the $100 Million penalty for failing to comply with the statute in 2017. The federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Claims. Subsequently, your lawyers refiled the same suit before the Court of Claims, this time seeking $200 Million because DOE had not complied with the statute for 2018. Once again, your lawyers lost the case. The Court of Claims ruled with DOE. Your lawyers then appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit. While the appeal was pending, you reached this settlement with DOE.

From court records, it does not appear your lawyers engaged in any discovery whatsoever. I can't find any record of them serving interrogatories; taking depositions; hiring experts; or obtaining documents from DOE. Instead, your lawyers only drafted pleadings and wrote briefs to address the legal question of whether DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. Quite frankly, I do not understand why our State felt the need to bring in private counsel in the first place to deal with a relatively straightforward issue that government leaders were ultimately able to negotiate among themselves.

Under the terms of the settlement, you have agreed on behalf of the people of South Carolina to forgo enforcing their federal rights to have the plutonium removed or processed for another 15 years. In exchange, DOE has agreed to pay South Carolina a substantially reduced penalty of $600 Million. As you acknowledged in your press release, this was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. Yet, you now plan to pay private lawyers a contingency fee on the entire $600 Million when they only sued for $200 Million. This makes absolutely no sense, and I agree with Governor McMaster's objection to your intention to pay $75 Million to these law firms.

The contingency fee agreement that you entered with these law firms is more favorable to the lawyers than your standard contingency fee agreements entered in other cases. Under the payment terms of your standard agreements, these law firms would have been entitled to receive approximately $25 Million, not $75 Million. Curiously, you have never posted the fee agreement for this matter on your office's official website, yet you have other contingency fee agreements posted: http://www.scag.gov/litigation-retention-agreements.

Finally, this deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.[1]

$75 Million is an enormous amount of money that can be used to make a real difference in the lives of South Carolinians. You cannot lawfully give funds directed to go into the State General Fund to your political friends and even if you could, you should not. I request that you do the right thing as a constitutional officer of our State and seek approval from our General Assembly before you make any attempt to pay public funds to private law firms.

Respectfully yours,

David M. Pascoe, Jr.
First Circuit Solicitor

cc: The Honorable Henry D. McMaster, Governor
The Honorable Curtis M. Loftis, Jr., Treasurer
The Honorable Richard A. Eckstrom, Comptroller General
President Pro Tem Hugh K. Leatherman, Sr., South Carolina Senate
Minority Leader Nikki G. Setzler, South Carolina Senate
The Honorable James H. "Jay" Lucas, Speaker of the S. C. House of Representatives
The Honorable James T. Rutherford, Minority Leader of S. C. House of Representatives
The Honorable G. Murrell Smith, Jr., Chairman of S. C. House Ways and Means

[1] https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

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EXHIBIT 4

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

State of South Carolina, Plaintiff, v. United States; United States Department Of Energy; Dr. Ernest Moniz, *in his official Capacity as Secretary of Energy*; National Nuclear Security Administration; *and* Lt. General Frank G. Klotz, *in his official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security*, Defendants.	Civil Action No. 1:16-cv-00391-JMC **ORDER**

On April 25, 2016, Defendants United States, the United States Department of Energy ("DOE"), Dr. Ernest Moniz, the National Nuclear Security Administration ("NNSA"), and Lieutenant General Frank G. Klotz (collectively "Defendants") filed a motion to dismiss the complaint filed by Plaintiff, the State of South Carolina (the "State"), arguing, among other things, that the third cause of action in the complaint, seeking review of Defendants' alleged failure to act in compliance with 50 U.S.C. § 2566(d), should be dismissed because the court lacked subject-matter jurisdiction over it. (ECF No. 17.) Specifically, Defendants contended that sovereign immunity had not been waived with respect to the third cause of action because the only potential waiver applicable to that cause of action—that found in the Administrative Procedures Act, 5

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U.S.C. § 701, *et seq.*—is not available where, as here, another court, such as the Court of Federal Claims ("CFC") provides an adequate remedy for the challenged agency action at issue. (*See id.* at 30-34.)

By order entered October 31, 2016, the court agreed with Defendants that the court lacked subject matter jurisdiction over the State's third cause of action because, pursuant to its jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346, 1491, the CFC provides an adequate remedy for the agency action challenged in that cause of action and, therefore, Defendants had not waived sovereign immunity from suit in this court with respect to the complaint's third cause of action. (*See* ECF No. 56.) The court subsequently denied the State's motion for reconsideration of its rulings in the October 31, 2016 order. (*See* ECF No. 75.) Because the court was uncertain whether it should dismiss the third cause of action without prejudice to the State's ability to prosecute it in an original action filed with the CFC or instead should transfer the cause of action to the CFC, pursuant to 28 U.S.C. § 1631, the court directed the parties to file supplemental briefing on the issue and declined to decide Defendants' motion to dismiss the third cause of action until the briefs had been submitted. (*See* ECF No. 56 at 24-31.)

The parties have since filed their supplemental briefs. (ECF Nos. 63, 64.) The parties agree that the court should dismiss the cause of action without prejudice to the State's ability to prosecute it in an original action filed in the CFC rather than transfer it. (*See* ECF Nos. 63, 64.) Accordingly, for the reasons stated in the court's October 31, 2016 order (ECF No. 56), as well as in its order denying the State's motion for reconsideration (ECF No. 75) and in the parties' supplemental briefs, Defendants' motion to dismiss the complaint (ECF No. 17) is hereby **GRANTED IN**

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PART.[1] The third cause of action in the State's complaint (ECF No. 1 ¶¶ 97-112) is hereby **DISMISSED** without prejudice to the State's ability to prosecute it an original action filed in the Court of Federal Claims.

IT IS SO ORDERED.

J. Michelle Childs

United States District Court Judge

February 7, 2017
Columbia, South Carolina

[1] The court notes that Defendants' motion to dismiss is not fully disposed by this order. Defendants have moved to dismiss the first and second causes of action in the State's complaint on grounds that the court has yet to address. (*See* ECF No. 17.)

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EXHIBIT 5

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In the United States Court of Federal Claims

No. 18-38C
(Filed: August 20, 2019)

STATE OF SOUTH CAROLINA,	*	
	*	
Plaintiff,	*	50 U.S.C. § 2566; Appropriations;
	*	Cross-Motions for Summary Judgment;
v.	*	Economic and Impact Assistance Payments;
	*	Judgment Fund; RCFC 56
THE UNITED STATES,	*	
	*	
Defendant.	*	

Randolph R. Lowell, Columbia, SC, for plaintiff.

Tara K. Hogan, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff, the State of South Carolina, seeks an award of economic and impact assistance payments for 2016 and 2017 pursuant to 50 U.S.C. § 2566, which directs such payments if the United States Department of Energy ("DOE") fails to meet certain deadlines related to the processing and disposition of surplus defense plutonium stored at the DOE's Savannah River Site ("SRS").[1] Specifically, plaintiff contends that 50 U.S.C. § 2566(d) requires the DOE to pay it $1 million per day, up to a statutory cap of $100 million per year, for a total of $200 million. Both plaintiff and defendant move for summary judgment. For the reasons set forth below, the court grants defendant's motion and denies plaintiff's motion.

I. BACKGROUND

A. Facts

Following the end of the Cold War, the United States was challenged with finding a safe, secure method to dispose of large amounts of weapons-grade nuclear material, including weapons-grade plutonium, from both foreign and domestic nuclear weapons production

[1] The SRS is a federally owned and operated facility that processes and stores nuclear material in support of national defense, nonproliferation, research, and environmental missions. Pl.'s Mot. App. 145.

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facilities. Am. Compl. Ex. 3 at 2. The need to securely store these materials in a safe environment was paramount; however, there was also great promise in reprocessing this material into fuel for nuclear reactors. Id. at 3. If possible, enriched nuclear material would be repurposed into lower-grade fuel, and if the material was not suitable for conversion into fuel, it would be "immobilized" to render it difficult to use as a weapon.[2] Pl.'s Mot. App. 10. To comply with the terms of an agreement with the Russian Federation, which required irradiation to dispose of the material, the DOE determined that the best option would be irradiating the material in a nuclear reactor to degrade it. Id. at 9-10, 13, 19. See generally Am. Compl. Ex. 7.

In early 2000, the DOE selected the SRS to reprocess the material. Pl.'s Mot. App. 68, 77. Simultaneously, the DOE, interested in cost savings through facility closures, wanted to move the plutonium from the Rocky Flats DOE facility near Denver, Colorado, to the SRS. Id. at 82-86. While legislation for these activities was being considered, the governor of South Carolina expressed concern to the DOE regarding the storage of large amounts of weapons-grade nuclear material within the state's borders. Id. at 93-94 (letter from South Carolina Governor Jim Hodges to DOE Secretary Spencer Abraham, dated April 10, 2002). The governor's primary concern was that an agreement brokered between the state and the DOE to remove or reprocess the material would not be legally enforceable:

> I must insist on an ironclad agreement that is fully enforceable in a court of law. The stakes are too high to accept mere political assurances. I will not risk the health and welfare of South Carolina by allowing the enforceability of any agreement to be bound only by federal departmental policy that changes according to political considerations beyond our control.

Id. at 93; see also id. at 103-09 (agreement enclosed in April 11, 2002 letter from DOE Secretary Spencer Abraham to South Carolina Governor Jim Hodges).

Ultimately, on December 2, 2002, Congress enacted a statute, later codified at 50 U.S.C. § 2566, addressing the disposition of weapons-grade plutonium stored at the SRS. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3182, 116 Stat. 2458, 2747-50 (2002) (codified at 50 U.S.C. § 2566 (Supp. III 2004)). The statute provided for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility ("MOX facility") at the SRS to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors, id.; the MOX facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually, Pl.'s Mot. App. 146. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019. § 3182(a)(1)-(2), (g)(1), 116 Stat. at 2747-50. If the DOE did not meet the MOX production objective by

[2] Immobilization is a process of encasing fissile material in glass or ceramics, making it stable for storage and difficult to recover for use in a nuclear weapon. Pl.'s Mot. App. 16. Defense plutonium that was converted into fuel would be "irradiated" in a nuclear reactor. Id. Both methods render nuclear material difficult to transport, conceal, and process into a nuclear weapon. Id.

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January 1, 2011, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2011, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to the site between April 15, 2002 and January 1, 2017, by January 2017. Id. § 3182(c)(1)-(2), 116 Stat. at 2749. The DOE would also be required to remit economic and impact assistance payments to plaintiff in the amount of $1 million per day for each day that certain milestones went unmet, up to a maximum of $100 million per year. Id. § 3182(d)(1), 116 Stat. at 2749. These payments would come "from funds available to the Secretary [of the DOE] . . . ." Id.

In subsequent enactments of the statute, Congress changed deadlines for both MOX processing and material removal, and also changed the funding source for payment of economic and impact assistance. In 2005, Congress amended 50 U.S.C. § 2566 to make payment of economic and impact assistance "subject to the availability of appropriations." See Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 313(4)(A)(ii), 119 Stat. 2247, 2280-81 (2005). This language was retained in the versions of the statute reenacted in 2013 and 2014. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3116, 126 Stat. 1632, 2172-73; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3142(f), 128 Stat. 3292, 3900 (2014). The current version of 50 U.S.C. § 2566 provides that if the MOX production objective was not met, the DOE would be required to remove from South Carolina at least one metric ton of plutonium by January 1, 2016, and an amount of plutonium equal to all unprocessed plutonium shipped to the site from April 15, 2002, to January 1, 2022, no later than January 1, 2022. See 50 U.S.C. § 2566(c) (2012 & Supp. II 2015). It further provides that if the DOE missed the January 1, 2016 deadline, the DOE would be required to make economic and impact assistance payments to plaintiff beginning in 2016. Id. § 2566(d)(1).

In 2002, the DOE began shipping plutonium to the SRS. Am. Compl. ¶ 41; Answer ¶ 41. In 2016 and 2017, the DOE failed to achieve the MOX production objective, did not remove one ton of plutonium from South Carolina, and did not provide economic and impact assistance payments to plaintiff as specified in 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45.

B. Procedural History

On January 8, 2018, plaintiff filed a complaint in the United States Court of Federal Claims, seeking $100 million in economic and impact assistance payments it alleges it is owed for 2016, prejudgment and postjudgment interest, costs and attorneys' fees, and any further relief deemed proper. On March 6, 2018, plaintiff amended its complaint to add a claim for the $100 million of economic and impact assistance payments it alleges is owed for 2017.

Ten days after defendant filed its answer, plaintiff moved for summary judgment. Defendant then cross-moved for summary judgment. Briefing is now complete and, deeming oral argument unnecessary, the court is prepared to rule.

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II. STANDARD OF REVIEW

Both plaintiff and defendant move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. Id. at 324. Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1).

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the court must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Contessa Food Prods., Inc. v. Conagra, Inc., 282 F.3d 1370, 1376 (Fed. Cir. 2002) ("On summary judgment, the question is not the 'weight' of the evidence, but instead the presence of a genuine issue of material fact . . . .") (abrogated on other grounds by Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008) (en banc)); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment."); Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) ("[T]he Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues."). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. However, if neither party satisfies this burden on the filing of cross-motions for summary judgment, then the court must deny both motions. See First Commerce Corp. v. United States, 335 F.3d 1373, 1379 (Fed. Cir. 2003) ("When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration."); Bubble Room, Inc. v. United States, 159 F.3d 553, 561 (Fed. Cir. 1998) ("The fact that both the parties have moved for summary judgment does not mean that the court must grant summary judgment to one party or the other.").

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III. DISCUSSION

The parties have differing views concerning the issue now pending before the court. Plaintiff states that the issue is whether the United States is liable to make economic and impact assistance payments for 2016 and 2017 under 50 U.S.C. § 2566(d)(1), and suggests that the funds to satisfy the liability may come from appropriations already authorized or the Judgment Fund. Pl.'s Mot. Summ. J. 12, 15-16. Defendant argues that the issue is whether the United States is liable to make economic and impact assistance payments if Congress did not appropriate funds for the payments. Def.'s Cross-Mot. Summ. J. 7-8.

The parties agree that the DOE has not met critical milestones to process or dispose of plutonium as required by 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45. Defendant also agrees that had Congress appropriated funds for economic and impact assistance payments, the DOE would be required to remit those funds to plaintiff in accordance with the statute. See Def.'s Cross-Mot. Summ. J. 8. However, the parties disagree as to whether economic and impact assistance payments may be made from: (1) certain appropriated funds for activities already authorized or funds reprogrammed from those activities; or (2) the Judgment Fund. See id. at 11-22; Pl.'s Mot. Summ. J. 12, 15-16. Because these questions turn on the interpretation of law rather than findings of fact, this case is properly before the court on summary judgment.

A. Relevant Legal Standards

Central to the parties' competing contentions is the meaning of 50 U.S.C. § 2566(d)(1). Thus, the court turns to the text of that statute to ascertain how it should be construed. As originally enacted, this section provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2011, the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina each year beginning on or after that date through 2016 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of--
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. III 2004) (emphasis added).

In 2005, the background of 50 U.S.C. § 2566 and the purpose of the economic and impact assistance payments in 50 U.S.C. § 2566(d)(1) was discussed in the United States Senate:

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> In a sign of good faith to the State of South Carolina, language was negotiated . . . that required the [DOE] to convert one metric ton of defense plutonium into fuel for commercial nuclear reactors by 2011 or face penalties of $1 million per day up to $100 million per year until the plutonium is either converted into the fuel or removed from the State. It has never been the intention of South Carolina to receive penalty payments; the residents . . . simply sought reassurances that weapons-grade plutonium would not remain at [the] SRS indefinitely. South Carolina would not have accepted [the defense] plutonium without this statute.

151 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). Later in that session, a "technical correction" to 50 U.S.C. § 2566(d)(1) was proposed:

> It is also my intention to make a technical correction, in the future, to language contained in the conference report to the Fiscal Year 2006 Energy and Water Appropriations Act. This conference report contains a change to important authorizing language that would make these penalty payments "subject to the availability of appropriations."

Id. (statement of Sen. Graham).

The technical correction was made to the version of 50 U.S.C. § 2566 enacted in 2005; subsection (d) of that statute provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2014, the Secretary shall, subject to the availability of appropriations, pay to the State of South Carolina each year beginning on or after that date through 2019 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of–
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. V 2006) (emphasis added).

Subsequent versions of 50 U.S.C. § 2566 enacted on January 2, 2013, and December 19, 2014, retained the phrase "subject to the availability of appropriations" in subsection (d)(1). See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). Notably, other

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parts of the statute remained essentially unchanged from the version originally enacted, with the exception of the deadlines. For example, 50 U.S.C. § 2566(d)(2)(A) has consistently provided:

> (A) If, as of January 1, 2022, the MOX facility has not processed mixed-oxide fuel from defense plutonium and defense plutonium materials in the amount of not less than—
>
> (i) one metric ton, in each of any two consecutive calendar years; and
>
> (ii) three metric tons total,
>
> the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the removal by the Secretary from the State of South Carolina of an amount of defense plutonium or defense plutonium materials equal to the amount of defense plutonium or defense plutonium materials transferred to the Savannah River Site between April 15, 2002, and January 1, 2022, but not processed by the MOX facility.

50 U.S.C. § 2566(d)(2)(A) (2012 & Supp. II 2015) (emphasis added).

If defendant is liable to plaintiff under 50 U.S.C. § 2566(d)(1), funds to satisfy the obligation in the statute must come from a congressionally sanctioned source because, pursuant to the Appropriations Clause of the United States Constitution, the federal government may only spend money that Congress has appropriated. See U.S. Const. art. I, § 9 cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Congress may also require that funds only be used for specific programs or purposes. See Nutt v. United States, 837 F.3d 1292, 1295 (Fed. Cir. 2016) ("According to the Constitution's Appropriations Clause, 'funds may be paid out [by the Treasury] only on . . . the express terms of a specific statute.'" (quoting Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990) (alteration in original))). If Congress specifies a purpose for appropriated funds, "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2012).

If Congress elects to provide unrestricted, or "lump-sum," appropriations to an agency, those appropriations are normally allocated at the agency's discretion. See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); see also U.S. Government Accountability Office, Principles of Appropriations Law—Vol. II ("GAO Redbook") 6-5 (3d ed. 2006) ("A lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object

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described.").[3] The normally broad agency discretion to direct lump-sum appropriations may be limited when an agency is bound by a contract; in such circumstances, an agency may not avoid contractually obligated payments if unrestricted, i.e., lump-sum, funds are available. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 636-38 (2005). Agency discretion is also limited by line-item appropriations, in which Congress places conditions on how an appropriation may be spent. To determine whether an expenditure is permitted for a particular line item, agencies perform a "necessary expense" analysis. See GAO Redbook, supra, at 3-14 to 3-15. "Under the necessary expense doctrine, '[a]n appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.'" U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quoting GAO Redbook, supra, at 4-20). For an expense to be found necessary, (1) there must be a logical relationship between the expenditure and the appropriation; (2) the expenditure must not be prohibited; and (3) the expenditure must not be provided for in another appropriation. GAO Redbook, supra at 3-14 to 3-17.

B. Plaintiff May Not Receive Economic and Impact Assistance Absent a Congressional Appropriation for That Purpose

Although plaintiff and defendant agree that the DOE did not comply with the statute, they disagree as to whether any funds are available to satisfy the DOE's statutory obligation. See Pl.'s Mot. Summ. J. 12, 15-16; Def.'s Cross-Mot. Summ. J. 11-22. Defendant argues that, absent an appropriation, the DOE is not liable to plaintiff for any payments and, alternatively, that any liability that flows from the statute is limited to the amount Congress appropriated for economic and impact assistance. Def.'s Reply 1-2, 12. Plaintiff appears to concede that no funds were specifically appropriated for economic and impact assistance. See Pl.'s Reply 3. However, the lack of a specific appropriation does not per se remove the DOE's liability for economic and impact assistance payments. Rather, defendant's obligation to make economic and impact assistance payments manifested when it failed to comply with the terms of 50 U.S.C. § 2566. See Greenlee Cty. v. United States, 487 F.3d 871, 880 (Fed. Cir. 2007) ("We conclude that defendant's liability for . . . payments was limited to the amounts appropriated by Congress." (emphasis added)). The question remaining is the extent of defendant's liability, a question that is purely legal in nature.

Plaintiff advances two theories under which the DOE could remit economic and impact assistance payments without an additional congressional appropriation to the DOE: (1) the DOE could use existing lump-sum appropriations or (2) the DOE could reprogram funds Congress appropriated for other purposes. Pl.'s Mot. Summ. J. 15-25. The court examines them in turn.

[3] The first three chapters of the GAO Redbook are in the GAO Redbook's fourth edition, while the remaining chapters are in the third edition. Citations to the GAO Redbook are to the most recent version.

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1. Congress Did Not Provide Lump-Sum Appropriations in the Consolidated Appropriations Acts of 2016 and 2017

Under its first theory, plaintiff initially contends that there are lump-sum appropriations available to made the economic and impact assistance payments for 2016 and 2017. Pl.'s Mot. Summ. J. 15, 22. It primarily relies on the observation in Greenlee County that the United States Supreme Court ("Supreme Court") addressed the question of "what appropriation amounts are available?" in Cherokee Nation–in the context of a contract case–"that the presence of sufficient unrestricted lump-sum appropriations (not specifically appropriated for the program at issue) to meet the government's contractual obligation qualified as available appropriations." 487 F.3d at 880 & n.3, quoted in Pl.'s Mot. Summ. J. 15. In essence, plaintiff is suggesting that the principle espoused in Cherokee Nation–that a court can order an agency to use its lump-sum appropriations to satisfy a contractual obligation–should be extended to situations in which the government's obligation is only statutory in nature. See Pl.'s Reply 6.

Both Greenlee County and a related case, Prairie County, concern a government benefits program enacted to reimburse local governments for lost property tax revenues caused by the federal government's ownership of large amounts of land in their communities. See Prairie Cty. v. United States, 782 F.3d 685 (Fed. Cir. 2015); Greenlee Cty., 487 F.3d at 871. Because the federal government does not pay property taxes to local communities, Congress created a "Payment in Lieu of Taxes" ("PILT") program to compensate local governments for lost tax revenue. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 873-74. Although Congress designated a formula for reimbursing local governments, appropriations for the PILT program were insufficient to reimburse all qualifying communities to the amount yielded by the formula. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 874. Greenlee County and Prairie County, whose compensation fell short when appropriations for PILT were exhausted, separately filed suits in the United States Court of Federal Claims, followed by appeals to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Prairie Cty., 782 F.3d at 687-88; Greenlee Cty., 487 F.3d at 874-75.

In Greenlee County, the Federal Circuit observed that obligations in contractual relationships were distinguishable from obligations flowing from benefits programs. 487 F.3d at 878-79. While contractual obligations could not be avoided if unrestricted appropriations were available for payment, noncontractual statutory obligations, i.e., benefits, could be avoided if Congress circumscribed its liability in the statute itself. See id. at 879 ("The conclusion that [the statute] limits defendant's liability to the amount appropriated is particularly appropriate because [the statute] . . . involves a benefits program not a contract, and 'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated." (emphasis added)). Eight years later, the Federal Circuit in Prairie County again focused on the plain language of the statute: "Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability . . . or whether [the statute] imposes a statutory obligation to pay the full amount . . . regardless of appropriations by Congress." 782 F.3d at 690 (quoting Star-Glo Assocs., LP v. United States, 414 F.3d 1349, 1355 (Fed. Cir. 2005)). Even in a contractual relationship, however, payment requires an appropriation. See Greenlee Cty., 487 F.3d at 878 ("The Supreme Court has noted that, even in the contract context, the 'subject to the availability of appropriations' language means that the government is not contractually bound except to the extent that appropriations are available."

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(citing Cherokee Nation, 543 U.S. at 643)); see also id. ("[A] statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress. . . . [I]t is undisputed that if [a statute] use[s] the phrase 'subject to the availability of appropriations,' [plaintiff's] right to recover would be limited to the amount appropriated.").

The Federal Circuit has also distinguished between the analysis of language limiting liability in contractual relationships from the analysis of similar language in benefit payment statutes, concluding in the latter that congressional intent plays a larger role:

> [When] the government is not seeking to limit contractual liability, but to limit benefit payments, . . . considerations of predictability are far less significant, and . . . there is greater room to rely on other indicia of Congressional intent, such as legislative history, to ascertain the congressional purpose.

Star-Glo Assocs., LP, 414 F.3d at 1355.

The relationship between the plaintiff and the government in Cherokee Nation was contractual, unlike the relationship between the plaintiff and the government here. Compare Cherokee Nation, 543 U.S. at 639, with 28 U.S.C § 2566 (2012 & Supp. II 2015). Plaintiff concedes that defendant's liability in this case is based upon a statute and not a contract. See Pl.'s Reply 6-7 ("The State has not (yet) asserted a contract claim against the United States. . . . [T]his case is only about DOE's failure to meet its statutory obligation to provide the economic and impact assistance payments. . . ."). In the absence of any binding precedent or other legal support for extending the holding of Cherokee Nation to a purely statutory obligation, the court declines to do so. Nevertheless, it is necessary to examine whether 50 U.S.C. § 2566 allows for the use of lump-sum appropriations for economic and impact assistance and, if so, whether Congress made such appropriations in the pertinent Consolidated Appropriations Acts.

When a statute creates a right to compensation, but also limits the government's liability to the amount appropriated, the court must determine "whether there are appropriations available to satisfy the government's liability by considering whether the statute in fact limits the government's liability to the amount appropriated," and "what appropriations are available . . . to satisfy that liability." Greenlee Cty., 487 F.3d at 878. In this case, the statute conditions defendant's payments to plaintiff as "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). This language was first enacted in 2005, well before the DOE's violation of the statute in 2016. See § 313, 119 Stat. at 2280-81. Moreover, this specific language is directly addressed in Greenlee County: "'[S]ubject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." 487 F.3d at 878. Also important is the fact that the less restrictive "from funds available to the Secretary" in the originally enacted version of 50 U.S.C. § 2566(d)(1) was later changed to the more restrictive "subject to the availability of appropriations." Compare 50 U.S.C. § 2566(d)(1) (Supp. V 2006), with 50 U.S.C. § 2566(d)(1) (Supp. III 2004).

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"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978) (collecting cases). Here, Congress twice reenacted 50 U.S.C. § 2566 following the 2005 addition of the "subject to the availability of appropriations" language and the Federal Circuit's 2007 explanation of that language in Greenlee County, retaining that verbiage each time. See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). The court therefore may presume that Congress was aware that courts interpreted the phrase "subject to the availability of appropriations" as limiting the government's liability to the amount appropriated, and purposely retained this more restrictive language in subsequent reenactments.

Given the above, a plain reading of 50 U.S.C. § 2566(d)(1) evidences Congress's intent that payments for economic and impact assistance can only be made if (1) there is a specific appropriation for that purpose, or (2) there is a lump-sum appropriation that the DOE could use for that purpose. The parties do not dispute that Congress did not appropriate funds for the specific purpose of economic and impact assistance payments. Pl.'s Reply 9; Def.'s Reply 2. Plaintiff argues, however, that funds were available through lump-sum appropriations "legally available" to satisfy statutory obligations. Pl.'s Reply 3.

As plaintiff notes, "Congress appropriated approximately $18.59 billion and $19.69 billion to DOE for its 'Atomic Energy Defense Activities' for fiscal years 2016 and 2017, respectively." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 248-50 (fiscal year 2017). Of those amounts, "Congress directed that approximately $1.9 billion would be for 'Defense Nuclear Nonproliferation' each year." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 250-51 (fiscal year 2017). Congress further directed that the $1.9 billion be allocated to certain, specified programs, including:

- Global Material Security
- Material Management and Minimization
  - Nuclear Material Removal
  - Material Disposition
- Nonproliferation and Arms Control
- Defense Nuclear Nonproliferation R&D
- Nonproliferation Construction

Pl.'s Mot. Summ. J. 19-20; Pl.'s Mot. App. 195. Plaintiff asserts that the funds Congress allocated to these programs were lump-sum appropriations that the DOE could use to make economic and impact assistance payments. Pl.'s Mot. Summ. J. 19-20.

Defendant contends that the funds Congress provided for these programs were not lump sums. See Def.'s Cross-Mot. Summ. J. 13-14. In support of its argument, defendant relies on the 2016 and 2017 Consolidated Appropriations Acts, id., which incorporate, by reference, tables allocating funds for specific programs (as plaintiff recognizes). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 301(d), 129 Stat. 2242, 2417 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 301(d), 131 Stat. 135, 320; Pl.'s Mot. App. 166; see also Pl.'s Mot. App. 166, 186-201 (containing the tables). Defendant contends that the

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"DOE's appropriated funds are limited to the specific purposes and amounts provided in the tables contained within the explanatory statements accompanying the relevant [Consolidated Appropriations Acts]." Def.'s Cross-Mot. Summ. J. 14; see also id. at 15 ("'When an appropriation specifies the purpose for which funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds for the specified purpose.'" (quoting GAO Redbook, supra, at 4-11)).

Defendant is correct. The tables incorporated by reference into the Consolidated Appropriations Acts specify funding for specific programs, evidencing that the appropriations for Defense Nuclear Nonproliferation and its constituent programs were not lump-sum appropriations, which, by definition, fund multiple programs. GAO Redbook, supra, at 6-5. Plaintiff fails to acknowledge the import of the tables. See Pl.'s Reply 12 ("[T]hese subprogram appropriations are 'lump-sum' appropriations because they 'cover a number of specific programs, projects, or items.'"). Because of Congress's level of precision, the court is not persuaded that these appropriations were in fact "lump-sum appropriations." Consequently, the appropriations could not be used for economic and impact assistance payments.

2. Reprogramming Is Not Available for Economic and Impact Assistance Payments

Plaintiff alternatively argues that the economic and impact assistance payments could be provided from other funds that Congress appropriated to the DOE via a discretionary reallocation known as "reprogramming." Id. at 16-17. "Reprogramming" refers to "the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation." GAO Redbook, supra, at 2-44. Reprogramming, however, is subject to guidelines to prevent abuse or the allocation of funds to activities that are too far removed from Congress's intended purpose in providing the funds. See id. at 2-44 ("[A]gencies generally are free to reprogram, even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation."); see also id. at 2-45 ("Though agencies generally have authority to reprogram funds, Congress may limit this authority."). These limitations accord with the principle that funds appropriated for a particular purpose may not be used for any other purpose. See 31 U.S.C. § 1301(a)-(b).

Defendant argues that reprogramming funds for economic and impact assistance would effectively create a new program or activity because the purpose of economic and impact assistance is substantially different from the purposes of programs identified in the 2016 and 2017 Consolidated Appropriations Acts. Def.'s Reply 11. Defendant notes that those Acts "prohibit DOE from reprogramming funds to create, initiate, or eliminate a 'program, project, or activity.'" Id. (quoting § 301(f)(1), 129 Stat. at 2417; § 301(f)(1), 131 Stat. at 320). Defendant also observes that § 301(d) of each of these Acts incorporates, by reference, a table that specifically allocates appropriations to individual programs, projects, and activities. Def.'s Cross-Mot. Summ. J. 15. Defendant argues that because the purpose of economic and impact assistance payments are not reasonably related to the purposes for which Congress made appropriations in the 2016 and 2017 Consolidated Appropriations Acts, the funds appropriated in those Acts are not available to pay plaintiff or to be reprogrammed to pay plaintiff. Id. at 15-17.

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As an initial matter, plaintiff provides no legal support for the proposition that this court has the authority to direct an agency to reprogram funds appropriate for one purpose to another purpose. Nor is the court aware of any.[4] Moreover, even if the court could review an agency's decision to reprogram, or not to reprogram, appropriated funds, the record lacks any evidence indicating whether the DOE considered reprogramming funds or conducted an analysis to determine the feasibility of reprogramming funds. In other words, the court lacks the necessary administrative record to review the propriety of the DOE's decision.

Plaintiff also argues that a "necessary expense" analysis supports its contention that economic and impact assistance payments may be made from appropriations in the 2016 and 2017 Consolidated Appropriations Acts. See Pl.'s Reply at 13-14 ("The determinative issue in this case is whether the statutorily-mandated economic and impact assistance payments have a 'logical,' 'reasonable,' or 'sufficient' relationship to, and therefore constitute a necessary expense of, any of DOE's appropriations."). Id. But plaintiff gets ahead of itself. As noted above, an agency performs a "necessary expense" analysis to determine whether a prospective expenditure comports with appropriations Congress has provided. GAO Redbook, supra, at 3-17. As with its request that the court direct the DOE to reprogram funds to make economic and impact assistance payments, plaintiff provides no legal support for the proposition that the court has the authority to conduct a "necessary expense" analysis, and the court is unable to locate any. Moreover, even if the court could conduct such an analysis, the record lacks evidence that would be necessary for the court to proceed. Thus, the court declines to conduct the analysis.

Ultimately, to the extent that the DOE could exercise its discretion to make economic and impact assistance payments, the payments would need to be consistent with the purpose restrictions in the appropriation to be charged because the DOE is required to obey the restrictions Congress places on appropriations. See Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation . . . .'" (quoting UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984))). In the 2016 and 2017 Consolidated Appropriations Acts, the DOE was restricted from using appropriations to create or initiate a program, project, or activity. Thus, the DOE's reprogramming authority was limited to shifting funds within programs, projects, or activities that already existed. And both parties admit that no appropriations for economic and impact assistance were made in the 2016 and 2017 Appropriations Acts. Consequently, Congress provided the DOE with no mechanism through which it could reprogram funds to make economic and impact assistance payments.

Congress could have appropriated money for economic and impact assistance, or it could have broadened the DOE's discretion to reprogram funds. But it did neither. The court cannot ignore the limiting language in the statute–"subject to the availability of appropriations"–which courts have consistently held to limit government liability. The unique mention of economic and impact assistance payments in 50 U.S.C. § 2566, as well as the detail in the appropriations

[4] To the extent that reprogramming decisions are subject to judicial review, they would be reviewable under the Administrative Procedure Act ("APA"), see 5 U.S.C. § 702 (2012), but this court lacks jurisdiction to adjudicate APA claims, see Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

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Congress provided in 2016 and 2017, persuade the court that had Congress intended to appropriate funds for these payments, it would have made a specific appropriation. There is also evidence in the record that the purpose of the economic and impact assistance payments was to assure plaintiff that weapons-grade plutonium would not be stored at the SRS indefinitely. See Pl.'s Mot. App. 93, 100; see also 51 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). These facts support the DOE's failure to use existing appropriations to satisfy the obligation resulting from its failure to meet the MOX production objective.

Agencies must comply with the law and, where Congress has given direction on how to do so, agencies are not free to improvise. Although Congress originally provided that the DOE was required to make economic and impact assistance payments "from funds available to the Secretary [of the DOE]," 50 U.S.C. § 2566(d)(1) (Supp. III 2004), it subsequently narrowed the DOE's discretion, providing that economic and impact assistance payments were "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (Supp. IV 2006); 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). When Congress originally enacted 50 U.S.C. § 2566, the DOE arguably could have had discretion to reprogram funds to make economic and impact assistance payments, but the court cannot ignore that Congress has since intentionally and consistently restricted the DOE's discretion.

C. The Judgment Fund Is Not Available for Economic and Impact Assistance Payments

Finally, plaintiff argues that the economic and impact assistance payments could be paid from the Judgment Fund if there are no legally available appropriations. Pl.'s Mot. Summ. J. 12. Plaintiff is incorrect. Pursuant to the Appropriations Clause, "no money can be paid out of the Treasury unless it has been appropriated by Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). "The Judgment Fund is a permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States." 31 C.F.R. § 256.1(a) (2015); accord 31 U.S.C. § 1304 (providing that the Judgment Fund can be used "to pay final judgments, award compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law"). Significantly, the Judgment Fund may only be used when "payment is not otherwise provided for . . . ." 31 U.S.C. § 1304(a)(1). "Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment." GAO Redbook, supra, at 14-39.

The Judgment Fund was designed to expedite the administration of justice by enabling courts to issue awards without the need to obtain separate appropriations. Slattery v. United States, 635 F.3d 1298, 1316-17 (Fed. Cir. 2011) (en banc); see also United States v. Maryland ex rel. Meyer, 349 F.2d 693, 695 (D.C. Cir. 1965) ("The obvious purposes of the [Judgment Fund] are (1) to enable . . . prompt payment without awaiting a special appropriation, and (2) to relieve the United States of the obligation of paying interest, or of a bad conscience as it were for not doing so, while the principal remains unpaid.").

Plaintiff effectively seeks to exploit the flexibility of the Judgment Fund to circumvent Congress's failure to appropriate funds for economic and impact assistance. But, "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990).

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Two facts are fatal to plaintiff's argument: First, there is clear statutory language limiting the DOE's liability to the amount appropriated, and no funds were subsequently appropriated. Second, there is no contractual relationship available to complement the statutory language and thereby overcome the lack of an appropriation and that limiting language. Given these facts, to resort to the Judgment Fund would ignore the apparent Congressional intent not to appropriate for economic and impact assistance payments.

Congress created a benefit of economic and impact assistance in 50 U.S.C. § 2566 and outlined the circumstances under which plaintiff could receive payment. Congress then did not appropriate funds to make payments, choosing instead to fund other priorities. The record indicates that Congress did make restricted appropriations to the DOE that not only reserved funds for particular purposes, but also prohibited those funds from being used for other, unrelated purposes.

The Judgment Fund is a separate appropriation which is available to furnish awards when other appropriations are not legally available. But plaintiff is not merely asking for a damages award. Plaintiff is effectively asking for the Judgment Fund to be used to create an appropriation where none was made by Congress. Resorting to the Judgment Fund, however, bypasses the case's central question, answered above: Did Congress make any appropriations available to pay economic and impact assistance? The answer is clearly "no." The Judgment Fund cannot be manipulated to change the answer to this question from "no" to "yes." To hold otherwise would enable courts to circumvent congressional decisions not to act. Most importantly, allowing resort to the Judgment Fund in a case where Congress has also clearly limited the government's liability entangles the court in decisions reserved to Congress by the United States Constitution. The court declines to become so entangled.

Under the circumstances of this case, plaintiff's proper course to obtain economic and impact assistance is to request an appropriation from Congress.

IV. CONCLUSION

As set forth in more detail above, the court **DENIES** plaintiff's motion for summary judgment and **GRANTS** defendant's cross-motion for summary judgment. Plaintiff's complaint is **DISMISSED**. Each party shall bear its own costs. The clerk of court shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

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EXHIBIT 6

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U.S. District Court
District of South Carolina (Aiken)
CIVIL DOCKET FOR CASE #: 1:16-cv-00391-JMC

State of South Carolina v. United States et al
Assigned to: Honorable J Michelle Childs
Cause: 05:702 Administrative Procedure Act

Date Filed: 02/09/2016
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

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Date Filed	#	Docket Text
02/09/2016	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0420−6390222.), filed by State of South Carolina. Service due by 5/12/2016 (Attachments: # 1 Table of Exhibits to Complaint, # 2 Exhibit 1 (Am. Interim Action Determination), # 3 Exhibit 2 (SPD Supplemental EIS Factsheet), # 4 Exhibit 2 (SPD Supplemental EIS Factsheet), # 5 Exhibit 4 (Final Surplus Plutonium Disposition Supplemental Environmental Impact, # 6 Exhibit 5 (Excerpt from History of the U.S. Weapons−Usable Plutonium Disposition, # 7 Exhibit 6 (Report to Congress: Disposition of Surplus Defense Plutonium at Savan, # 8 Exhibit 7 (Record of Decision for PEIS), # 9 Exhibit 7 (Record of Decision for PEIS), # 10 Exhibit 9 (Excerpt from Surplus Plutonium Disposition Final EIS, Summary), # 11 Exhibit 10 (Record of Decision for SPD EIS), # 12 Exhibit 11 (PMDA), # 13 Exhibit 12 (Congressional Research Serv., Mem., U.S.−Russia Plutonium Management, # 14 Exhibit 13 Exhibit NRC EIS, # 15 Exhibit 14 (Press Release, No. PR−02−007), # 16 Exhibit 15 (Am. ROD for PEIS & SPD EIS), # 17 Exhibit 16 (Am. SPD EIS ROD), # 18 Exhibit 17 (Storage of Surplus Plutonium Materials at the Savannah River Site Su, # 19 Exhibit 18 (NRC Construction Authorization No. CAMOX−001), # 20 Exhibit 19 (DOE/NNSA Report to Congress), # 21 Exhibit 20 (Excerpt from Draft SPD Supp. EIS), # 22 Exhibit 21 (PMDA as amended by 2010 Protocol), # 23 Exhibit 22 (Letter to Secretary Moniz), # 24 Exhibit 22 (Letter to Secretary Moniz), # 25 Exhibit 24 (Letter of Atty General Wilson to Secretary Moniz), # 26 Exhibit 25 (FY2015 Budget Justification))(asni,) (Entered: 02/09/2016)
02/09/2016	2	Summons Issued as to United States Department of Energy, Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, U.S. Attorney and U.S. Attorney General. (asni,) Modified to edit text on 2/10/2016 (asni,). (Entered: 02/09/2016)
02/09/2016	3	Local Rule 26.01 Answers to Interrogatories by State of South Carolina.(asni,) (Entered: 02/09/2016)
02/18/2016	5	NOTICE of Appearance by William Henry Davidson, II on behalf of State of South Carolina (Davidson, William) (Entered: 02/18/2016)
03/31/2016	6	MOTION to Intervene by Southern Carolina Regional Development Alliance. Response to Motion due by 4/18/2016. (Attachments: # 1 Exhibit A − Complaint, # 2 Exhibit 1 to Complaint (Affidavit of Danny Black), # 3 Exhibit 2 to Complaint (South Carolina Promise Zone Fact Sheet))No proposed order.(Shealy, Samuel) (Entered: 03/31/2016)
04/06/2016	7	MOTION for Extension of Time to File Answer re 1 Complaint by Frank G Klotz, Ernest Moniz, United States, United States Department of Energy and National Nuclear Security Administration. Response to Motion due by 4/25/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) Modified to add filers on 4/7/2016 (asni,). (Entered: 04/06/2016)

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04/06/2016	8	**ORDER granting 7 Motion for Extension of Time to Answer Frank G Klotz answer due 4/25/2016; Ernest Moniz answer due 4/25/2016; United States answer due 4/25/2016; United States Department of Energy answer due 4/25/2016, National Nuclear Security Administration answer due 4/25/2016. Signed by Honorable J Michelle Childs on 4/6/2016.(asni,)** (Main Document 8 replaced on 4/6/2016) (asni,). Modified to edit text on 4/7/2016 (asni,). (Entered: 04/06/2016)
04/06/2016	9	SUMMONS Returned Executed by State of South Carolina. All Defendants. (Attachments: # 1 Summons Service on DOE, # 2 Summons Service on NNSA, # 3 Summons Service on Moniz, # 4 Summons Service on Klotz, # 5 Summons Service on Lynch, # 6 Summons Service on Nettles)(Lowell, Randy) (Entered: 04/06/2016)
04/06/2016	10	MOTION for Summary Judgment by State of South Carolina. Response to Motion due by 4/25/2016. (Attachments: # 1 Memo in Support, # 2 Exhibit Table of Exhibits, # 3 Exhibit 1 (Excerpt from D.J. Spellman et al., History of the U.S. Weapons–Usable Plutonium Disposition Program Leading to DOEs Record of Decision), # 4 Exhibit 2 (Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site), # 5 Exhibit 3 (Record of Decision (ROD) for Storage and Disposition of Weapons–Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS)), # 6 Exhibit 4 (Excerpt from Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS), Vol. I Part A), # 7 Exhibit 5 (ROD for SPD EIS), # 8 Exhibit 6 (Plutonium Management and Disposition Agreement (PMDA)), # 9 Exhibit 7 (Release No. PR–02–007), # 10 Exhibit 8 (Aff. of Jessie Hill Roberson (ECF No. 10), 1:02–cv–01426–CMC), # 11 Exhibit 9 (Ltr. of Hodges to Abraham (Apr. 6, 2001)), # 12 Exhibit 10 (Ltr. of Hodges to Abraham (Apr. 24, 2001)), # 13 Exhibit 11 (Ltr. of Hodges to Abraham (Jun. 13, 2001)), # 14 Exhibit 12 (Ltr. of Abraham to Hodges (Jun. 26, 2001)), # 15 Exhibit 13 (Ltr. of Card to Hodges, Peeler, and Wilkins (Aug. 27, 2001)), # 16 Exhibit 14 (Ltr. of Hodges and Condon to Abraham (Aug. 30, 2001)), # 17 Exhibit 15 (Ltr. of Abraham to Hodges (Sept. 21, 2001)), # 18 Exhibit 16 (Ltr. of Hodges to Abraham (Oct. 26, 2001)), # 19 Exhibit 17 (Ltr. of Hodges to Abraham (Apr. 10, 2002)), # 20 Exhibit 18 (Ltr. of Abraham to Hodges (Apr. 11, 2002)), # 21 Exhibit 19 (Ltr. of Hodges to Abraham (Apr. 11, 2002)), # 22 Exhibit 20 (Ltr. of Bates to Otis (Apr. 11, 2002)), # 23 Exhibit 21 (Am. ROD for SPD EIS), # 24 Exhibit 22 (Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis), # 25 Exhibit 23 (Ltr. of Trice to Congressman Wilson (Oct. 9, 2015)), # 26 Exhibit 24 (Amended PMDA), # 27 Exhibit 25 (CRS PMDA Report), # 28 Exhibit 26 (Excerpt from Draft SPD Supplemental EIS), # 29 Exhibit 27 (Excerpt from FY 2014 DOE Budget Justification), # 30 Exhibit 28 (Excerpt from FY 2015 DOE Budget Justification), # 31 Exhibit 29 (Ltr. to Moniz (Mar. 6, 2014)), # 32 Exhibit 30 (Excerpt from Consolidated Appropriations Act 2016), # 33 Exhibit 31 (Consolidated Appropriations Act FY 2016 Explanatory Statement), # 34 Exhibit 32 (Excerpt from FY 2017 DOE Budget Justification), # 35 Exhibit 33 (High Bridge Associates, Inc., Independent Assessment of the Impact of Disposing of Surplus Plutonium at WIPP), # 36 Exhibit 34 (Excerpt from Senate Armed Services Strategic Forces Subcommittee Hearing Transcript (Feb. 24, 2016)), # 37 Exhibit 35 (Excerpt from Senate Appropriations Subcommittee Hearing Transcript (March 16, 2016)), # 38 Exhibit 36 (Ltr. of Wilson to Moniz (Sept. 4, 2015)), # 39 Exhibit 37 (Ltr. of Haley to Moniz (Dec. 14, 2015)), # 40 Exhibit 38 (Ltr. of Moniz to Haley (Jan. 19, 2016)), # 41 Exhibit 39 (DOE/NNSA Report to Congress (Oct. 3, 2011)), # 42 Exhibit 40 (Environmental Assessment for Gap Material Plutonium Transport, Receipt, and Processing))No proposed order.(Lowell, Randy) (Entered: 04/06/2016)
04/18/2016	11	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by State of South Carolina.Reply to Response to Motion due by 4/28/2016 (Attachments: # 1 Exhibit)(Lowell, Randy) (Entered: 04/18/2016)
04/18/2016	12	MOTION for Extension of Time to File Response/Reply as to 6 MOTION to Intervene by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/18/2016)
04/19/2016	13	**TEXT ORDER granting 12 Motion for Extension of Time to File Response/Reply re 6 MOTION to Intervene Response to Motion due by 5/2/2016. Signed by Honorable J Michelle Childs on 4/19/2016.(asni,)** (Entered: 04/19/2016)

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04/21/2016	14	MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/9/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/21/2016)
04/21/2016	15	RESPONSE in Opposition re 14 MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment Response filed by State of South Carolina.Reply to Response to Motion due by 5/2/2016 (Lowell, Randy) (Entered: 04/21/2016)
04/22/2016	16	**ORDER granting 14 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment Response to Motion due by 5/25/2016. Signed by Honorable J Michelle Childs on 4/22/2016.(asni,)** (Entered: 04/22/2016)
04/25/2016	17	MOTION to Dismiss by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/12/2016. (Attachments: # 1 Exhibit A, MOX February 2013−14 Report, # 2 Exhibit B, HQ Signed Report 2015)No proposed order.(Bowens, Barbara) (Entered: 04/25/2016)
04/28/2016	19	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 04/28/2016)
05/02/2016	20	MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/19/2016. No proposed order.(Bowens, Barbara) (Entered: 05/02/2016)
05/02/2016	21	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 5/12/2016 (Bowens, Barbara) (Entered: 05/02/2016)
05/10/2016	25	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 05/11/2016)
05/11/2016	24	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 5/31/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/11/2016)
05/11/2016	26	**ORDER granting 24 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/11/2016.(asni,)** (Entered: 05/11/2016)
05/12/2016	27	RESPONSE in Opposition re 17 MOTION to Dismiss Response filed by State of South Carolina.Reply to Response to Motion due by 5/23/2016 (Attachments: # 1 Table of Exhibits, # 2 Exhibit 1 (Deadlines Table), # 3 Exhibit 2 (Hodges Ltr), # 4 Exhibit 3 (COA Table), # 5 Exhibit 4 (Transcript Excerpt))(Lowell, Randy) (Entered: 05/12/2016)
05/17/2016	28	Joint MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment , 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by State of South Carolina. Response to Motion due by 6/3/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/17/2016)
05/18/2016	29	**ORDER granting 28 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment, 20 MOTION to Stay Proceedings on Plaintiff's Motion for Summary Judgment Response to Motion to Stay due by 5/24/2016, Response to Motion for Summary Judgment due by 6/10/2016. Signed by Honorable J Michelle Childs on 5/18/2016.(asni,)** (Entered: 05/18/2016)
05/23/2016	31	Consent MOTION for Leave to File Excess Pages by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 6/9/2016. No proposed order.(Bowens, Barbara) (Entered: 05/23/2016)

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05/23/2016	32	**TEXT ORDER granting 31 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/23/2016.(asni,)** (Entered: 05/23/2016)
05/23/2016	33	REPLY to Response to Motion re 17 MOTION to Dismiss Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/23/2016)
05/24/2016	34	NOTICE of Hearing on Motion 10 MOTION for Summary Judgment, 6 MOTION to Intervene, 20 MOTION to Stay, 17 MOTION to Dismiss : Motion Hearing set for 6/30/2016 10:00 AM in Columbia # 3, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable J Michelle Childs. ***Please note this hearing will include all pending motions not ruled upon prior to the date of the hearing***(asni,) (Entered: 05/24/2016)
05/24/2016	35	RESPONSE in Opposition re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by State of South Carolina.Reply to Response to Motion due by 6/3/2016 (Lowell, Randy) (Entered: 05/24/2016)
05/25/2016	36	**ORDER AND OPINION denying 6 Motion to Intervene. Signed by Honorable J Michelle Childs on 5/25/2016.(asni,)** (Entered: 05/25/2016)
05/25/2016	37	REPLY to Response to Motion re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/25/2016)
06/10/2016	38	RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Exhibit 1, Record of Decision, Surplus Plutonium Disposition, 81 Fed. Reg. 19588 (Apr. 5, 2016), # 2 Exhibit 2, Declaration of Henry A. Gunter, # 3 Exhibit 3, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No., # 4 Exhibit 4, Department of Energy, Preferred Alternative for Certain Quantities of Plutonium, 80 Fed. Reg. 80348 (Dec. 24, 2015), # 5 Exhibit 5, Consolidated Appropriations Act of 2016, Pub. L. No. 114−113, div. D, tit. III, Dec. 18, 2015, # 6 Exhibit 6, Explanatory Table, 114 Cong. Rec. 161, H10108−H10123 (daily ed. Dec. 17, 2015), # 7 Exhibit 7, Explanatory Statement, 114 Cong. Rec. 161, H10056, H10102−H10107 (daily ed. Dec. 17, 2015), # 8 Exhibit 8, Declaration of Peter H. Hanlon, # 9 Addendum Table of Exhibits)(Bowens, Barbara) (Entered: 06/10/2016)
06/15/2016	39	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 7/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 06/15/2016)
06/16/2016	40	**ORDER granting 39 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 6/16/2016.(asni,)** (Entered: 06/16/2016)
06/20/2016	42	REPLY to Response to Motion re 10 MOTION for Summary Judgment Response filed by State of South Carolina. (Attachments: # 1 Exhibit, # 2 Exhibit 1 (Ltr. of Del Vecchio), # 3 Exhibit 2 (Moniz Senate Test.), # 4 Exhibit 3 (Fact Sheet), # 5 Exhibit 4 (Rpt. to Congress), # 6 Exhibit 5 (DOE FY16 Budget Excerpt))(Lowell, Randy) (Entered: 06/20/2016)
06/20/2016	41	CORRECTED RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Corrected Memorandum in Opposition) Re−filed by Clerk to correct event type.(mdea) Modified on 6/21/2016 to correct entry number (mdea,). (Entered: 06/21/2016)
06/21/2016	43	**TEXT ORDER denying 20 Motion to Stay: This matter is before the court on Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20) seeking to stay all proceedings on Plaintiffs pending Motion for Summary Judgment (ECF No. 10) until the court adjudicates Defendants pending Motion to Dismiss (ECF No. 17). In support of their Motion to Stay, Defendants assert that all Plaintiffs claims are subject to dismissal on jurisdictional or other legal grounds and, therefore, concerns for judicial**

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		economy and litigation efficiency make it appropriate for the [c]ourt to resolve [D]efendants Motion to Dismiss before proceeding to summary judgment. (ECF No. 20 at 4.) Plaintiff opposes the Motion to Stay arguing that Defendants have not met their burden to demonstrate a need for a stay, and both judicial economy and the prejudice to South Carolina if such stay is granted weigh heavily in favor of denying the stay request. (ECF No. 35 at 1.) When considering a motion to stay, the district court should consider three factors: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non−moving party. Johnson v. DePuy Orthopaedics, Inc., No. 3:12−cv−2274, 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012) (granting stay pending a transfer of the case to MDL) (citation omitted). In view of these factors, the court finds that a stay would not serve the interests of judicial economy and could cause prejudice to Plaintiff. In this regard, the court understands that it will first have to address the merits of Defendants Motion to Dismiss asserting a lack of subject matter jurisdiction. In re Bulldog Trucking, Inc., 147 F.3d 347, 352 (4th Cir. 1998) (A federal court is required, sua sponte, to determine if a valid basis for its jurisdiction exists, and to dismiss the action if no such ground appears.) (citation omitted). However, the court is also persuaded that judicial economy will be best served by allowing the parties to proceed with their arguments relevant to Plaintiffs Motion for Summary Judgment at the June 30, 2016 hearing (ECF No. 34), even if the court has to allow for discovery and additional briefing subsequent to the hearing. Accordingly, the court DENIES Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20). Signed by Honorable J Michelle Childs on 6/21/16.(alew,) (Entered: 06/21/2016)
06/22/2016	44	MOTION to Appear Pro Hac Vice by Raphael Ortega Gomez by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/22/2016)
06/24/2016	45	MOTION to Appear Pro Hac Vice by Spencer Elijah Wittmann Amdur by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/24/2016)
06/27/2016	46	**TEXT ORDER granting 44 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/27/2016	47	**TEXT ORDER granting 45 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/30/2016	50	**Minute Entry. Proceedings held before Honorable J Michelle Childs: taking under advisement 10 Motion for Summary Judgment; 17 Motion to Dismiss. Motion Hearing held on 6/30/2016. Written order forthcoming. Court Reporter Kathleen Richardson. (mbro,)** (Entered: 06/30/2016)
08/18/2016	51	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Motion hearing held on June 30, 2016, before Judge J. Michelle Childs. Court Reporter/Transcriber Kathleen Richardson, RMR, CRR, Telephone number/E−mail Kathleen_Richardson@scd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction.. Redaction Request due 9/8/2016. Redacted Transcript Deadline set for 9/19/2016. Release of Transcript Restriction set for 11/16/2016. (kari,) (Entered: 08/18/2016)
09/15/2016	53	Letter from Counsel for the State. (Lowell, Randy) (Entered: 09/15/2016)
10/03/2016	55	Letter from Spencer E. Amdur. (Attachments: # 1 Letter, # 2 Press Release)(Bowens, Barbara) (Entered: 10/03/2016)
10/31/2016	56	**ORDER AND OPINION: The court declines to rule on Defendants' Motion to Dismiss 17 for failure to state a claim for which relief could be granted as to the**

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		removal claim under Fed. R. Civ. P. 12(b)(6) until supplemental briefs, herein described are submitted. The parties are DIRECTED to file briefs that address the following issues: 1. Whether the court should transfer the monetary claim to the CFC, pursuant to 28 U.S.C. § 1631. 2. Whether the court should dismiss the monetary claim without prejudice to the State's ability to refile the claim in an action in the CFC. The briefs shall comply with rules governing memoranda in Local Civ. Rule 7 (D.S.C.) and must be filed by November 30, 2016. Signed by Honorable J Michelle Childs on 10/31/2016.(asni,) (Entered: 10/31/2016)
11/18/2016	59	Consent MOTION for Extension of Time by State of South Carolina. Response to Motion due by 12/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 11/18/2016)
11/21/2016	60	**ORDER granting in part and denying in part 59 Motion for Extension of Time. The parties are directed to file their supplemental briefs in response to the court's October 31, 2016 order on or before December 5, 2016. The State is given no additional time by this order in which to file a memorandum in support of a motion to reconsider under Rules 59(e) or 60(b). Signed by Honorable J Michelle Childs on 11/21/2016.(asni,)** (Entered: 11/21/2016)
11/28/2016	62	MOTION for Reconsideration re 56 Order on Motion to Dismiss by State of South Carolina. Response to Motion due by 12/15/2016. (Attachments: # 1 Memo in Support)No proposed order.(Lowell, Randy) (Entered: 11/28/2016)
12/05/2016	63	REPLY by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 56 Order on Motion to Dismiss,,, *Defendants' Supplemental Brief.* (Bowens, Barbara) (Entered: 12/05/2016)
12/05/2016	64	REPLY by State of South Carolina to 56 Order on Motion to Dismiss,,, *State of South Carolina's Supplemental Brief.* (Roberts, John) (Entered: 12/05/2016)
12/16/2016	66	Joint MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 1/3/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 12/16/2016)
12/16/2016	67	RESPONSE in Opposition re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 12/28/2016 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Bowens, Barbara) (Entered: 12/16/2016)
12/19/2016	68	**ORDER granting 66 Motion for Extension of Time. Signed by Honorable J Michelle Childs on 12/19/2016.(mbro,)** (Entered: 12/19/2016)
01/11/2017	70	MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 1/25/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 01/11/2017)
01/11/2017	71	**TEXT ORDER granting 70 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 1/11/2017.(asni,)** (Entered: 01/11/2017)
01/13/2017	72	REPLY to Response to Motion re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by State of South Carolina. (Roberts, John) (Entered: 01/13/2017)
02/07/2017	75	**ORDER AND OPINION denying 62 Motion for Reconsideration re 56 Order on Motion to Dismiss. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,)** (Entered: 02/07/2017)
02/07/2017	76	**ORDER AND OPINION granting in part 17 Motion to Dismiss. The third cause of action in the State's complaint (ECF No. 1 97–112) is hereby DISMISSED without prejudice to the State's ability to prosecute it an original action filed in**

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		the Court of Federal Claims. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,) (Entered: 02/07/2017)
02/08/2017	77	**CONFERENCE AND SCHEDULING ORDER Rule 26(f) Conference Deadline 2/28/2017, 26(a) Initial Disclosures due by 3/14/2017, Rule 26 Report due by 3/14/2017, Motions to Amend Pleadings due by 4/24/2017, Plaintiffs ID of Expert Witness due by 5/24/2017, Defendants ID of Expert Witnesses Due by 6/23/2017, Records Custodian Affidavit due by 6/23/2017, Discovery due by 7/24/2017, Motion in Limine due by 11/3/2017, Motions due by 8/7/2017, Rule 26(a)(3) Disclosures due by 11/3/2017, Pretrial Briefs due by 11/28/2017, Bench Trial Deadline 12/5/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/08/2017	78	**MEDIATION ORDER Mediation Due by 7/31/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/13/2017	79	NOTICE of Appearance by Barbara Murcier Bowens on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Bowens, Barbara) (Entered: 02/13/2017)
03/10/2017	81	ADR STATEMENT/CERTIFICATION by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	82	Rule 26(f) Report by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	83	**AMENDED SCHEDULING ORDER Mediation concluded by 7/31/2017, Signed by Honorable J Michelle Childs on 3/10/2017. (asni,)** (Entered: 03/10/2017)
03/14/2017	84	**ORDER AND OPINION Defendants' motion to dismiss the State's complaint 17 is hereby GRANTED IN PART, with respect to the complaint's first cause of action, and DENIED IN PART, with respect to the complaint's second cause of action. The first cause of action in the State's complaint (ECF No. 1 at 84–88) is hereby DISMISSED. Signed by Honorable J Michelle Childs on 3/14/2017. (asni,)** (Entered: 03/14/2017)
03/20/2017	86	**ORDER AND OPINION granting in part and denying in part 10 Motion for Summary Judgment. Parties shall submit a joint written statement to the court on or before April 21, 2017, and, after reviewing the statement, the court will determine the need for further submissions or hearings. Signed by Honorable J Michelle Childs on 3/20/2017.(asni,)** Modified to edit text on 3/24/2017 (asni,). (Entered: 03/20/2017)
04/20/2017	88	NOTICE of Appearance by Jennifer J Aldrich on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	89	Consent MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/4/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.(Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	90	**TEXT ORDER granting 89 Motion for Extension of Time for the parties to submit the joint written statement. Signed by Honorable J Michelle Childs on 4/20/2017.(asni,)** (Entered: 04/20/2017)
07/31/2017	96	STATUS REPORT *(Joint Statement)* by State of South Carolina. (Lowell, Randy) supplement 97 added on 8/1/2017 (asni,). supplement added 100 added on 8/14/2017 (asni,). supplements added 103 104 8/22/2017 (asni,). (Entered: 07/31/2017)
07/31/2017	97	SUPPLEMENT by State of South Carolina *Proposing Injunctive Relief*. (Lowell, Randy) (Entered: 07/31/2017)
08/01/2017	98	**TEXT ORDER: By a March 20, 2017 order, the court granted in part the State of South Carolina's (the "State") motion for summary judgment in this matter,**

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specifically granting the State's requested relief for an injunctive order compelling the Secretary of Energy (the "Secretary") to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the State's summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties "to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]." (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that "[i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy." (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant "is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017," and that (2) one of the four attorneys representing them in this matter is "out of the office" on a scheduled one–week vacation in August and is "out of the office" for another week in August and five days in September while "handling depositions in another matter." (Id.) The State objects to Defendants' proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the State's consideration until July 20, and arguing that Defendant's proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the court's March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the court's March 20, 2017 order. (Id. at 2.) In the court's view, Defendants' April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants' proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the court's previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants' April 20, 2017 motion also contemplated that the parties would "propose" deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants' proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be "out of the office" for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants' proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the State's unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a lackadaisical approach on Defendants' part to complying with the court's order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly,

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Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017.: By a March 20, 2017 order, the court granted in part the State of South Carolinas (the State) motion for summary judgment in this matter, specifically granting the States requested relief for an injunctive order compelling the Secretary of Energy (the Secretary) to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the States summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]. (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that [i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy. (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017, and that (2) one of the four attorneys representing them in this matter is out of the office on a scheduled one–week vacation in August and is out of the office for another week in August and five days in September while handling depositions in another matter. (Id.) The State objects to Defendants proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the States consideration until July 20, and arguing that Defendants proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the courts March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the courts March 20, 2017 order. (Id. at 2.) In the courts view, Defendants April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the courts previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants April 20, 2017 motion also contemplated that the parties would propose deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be out of the office for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the States unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a

		lackadaisical approach on Defendants part to complying with the courts order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly, Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017. (Specific Document due by 8/11/2017.) Signed by Honorable J Michelle Childs on 8/1/2017. (asni,) (Entered: 08/01/2017)
08/11/2017	100	SUPPLEMENT by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 98 Order, Set Deadlines,,,

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CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:17-cv-01068-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Cause: 28:1491 Tucker Act

Date Filed: 08/07/2017
Date Terminated: 03/05/2018
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
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V.

Defendant

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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/07/2017	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4115693) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 10/6/2017.** (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9

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		Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Civil Cover Sheet, # 16 Exh. List)(ac7) (Entered: 08/07/2017)
08/07/2017	2	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 08/07/2017)
08/07/2017	3	NOTICE of Designation of Electronic Case. (ac7) (Entered: 08/07/2017)
08/18/2017	4	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 08/18/2017)
10/06/2017	5	MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Hogan, Tara) (Entered: 10/06/2017)
10/06/2017	6	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/06/2017)
10/18/2017	7	MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA.**Response due by 11/1/2017.**(Hogan, Tara) (Entered: 10/18/2017)
10/24/2017	8	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/7/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/24/2017)
10/30/2017	9	RESPONSE to 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/6/2017.** (Lowell, Randolph) (Entered: 10/30/2017)
10/31/2017	10	REPLY to Response to Motion re 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA. (Hogan, Tara) (Entered: 10/31/2017)
11/07/2017	11	REPLY to Response to Motion re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA. (Hogan, Tara) (Entered: 11/07/2017)
11/20/2017	12	MOTION for Leave to File Surreply , filed by STATE OF SOUTH CAROLINA.**Response due by 12/4/2017.** (Attachments: # 1 Exhibit A)(Lowell, Randolph) (Entered: 11/20/2017)
11/28/2017	13	ORDER granting 7 Motion to Stay; granting 12 Motion for Leave to File Surreply. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/28/2017)
11/28/2017	14	SUR-REPLY re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 11/28/2017)
02/15/2018	15	SCHEDULING ORDER: **Defendant's Supplemental Brief due by 3/8/2018. Plaintiff's Supplemental Response Brief due by 3/29/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/15/2018)
03/05/2018	16	NOTICE of Voluntary Dismissal without prejudice, filed by STATE OF SOUTH CAROLINA (Lowell, Randolph) (Entered: 03/05/2018)
03/05/2018		Complaint dismissed pursuant to Rule 41(a)(1)(A)(i) this day. (ac7) (Entered: 03/06/2018)

PACER Service Center

Transaction Receipt			
09/01/2020 12:08:29			
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Description:	Docket Report	**Search Criteria:**	1:17-cv-01068-MMS
Billable Pages:	2	**Cost:**	0.20

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APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18-cv-00038-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Case in other court: 19-02324
Cause: 28:1491 Tucker Act

Date Filed: 01/08/2018
Date Terminated: 08/20/2019
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202-8416
(803) 252-3300
Fax: (803) 256-8062
Email: rlowell@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
U.S. Department of Justice (C)
Commerical Litigation Branch, Civil Division
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-2228
Fax: (202) 514-8624
Email: tara.hogan@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

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01/08/2018	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4403717) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 3/9/2018.** (Attachments: # 1 Exh. List, # 2 Exhibit 1-13, # 3 Civil Cover Sheet)(ac7) (Entered: 01/08/2018)
01/08/2018	2	NOTICE of Directly Related Case(s) [17-1068C], filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 01/08/2018)
01/08/2018	3	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 01/08/2018)
01/08/2018	4	NOTICE of Designation of Electronic Case. (ac7) (Entered: 01/08/2018)
01/25/2018	5	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 01/25/2018)
03/05/2018	6	MOTION to Amend Pleadings - Rule 15 , filed by STATE OF SOUTH CAROLINA.**Response due by 3/19/2018.** (Attachments: # 1 Exhibit A - Proposed Amended Complaint)(Lowell, Randolph) (Entered: 03/05/2018)
03/06/2018	7	ORDER granting 6 Motion to Amend Pleadings - Rule 15(b). **Amended Complaint due by 3/9/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 03/06/2018)
03/06/2018	8	AMENDED COMPLAINT against USA, filed by STATE OF SOUTH CAROLINA. , filed by STATE OF SOUTH CAROLINA.Answer due by 3/20/2018. (Attachments: # 1 Exhibit Exhibit List, # 2 Exhibit Exhibits 1-14)(Lowell, Randolph) (Entered: 03/06/2018)
03/20/2018	9	ANSWER to 8 Amended Complaint , filed by USA.**JPSR due by 5/8/2018.**(Hogan, Tara) (Entered: 03/20/2018)
03/30/2018	10	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 4/27/2018.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 03/30/2018)
04/23/2018	11	Unopposed MOTION for Extension of Time until 5/18/18 to File Response as to 10 MOTION for Summary Judgment , filed by USA.**Response due by 5/7/2018.**(Hogan, Tara) (Entered: 04/23/2018)
04/24/2018	12	ORDER granting 11 Motion for Extension of Time to File Response re 10 MOTION for Summary Judgment. **Response due by 5/18/2018. Reply due by 6/8/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 04/24/2018)
05/08/2018	13	JOINT PRELIMINARY STATUS REPORT . (Hogan, Tara) (Entered: 05/08/2018)
05/16/2018	14	Unopposed MOTION for Extension of Time until 5/23/18 to File Response , filed by USA.**Response due by 5/30/2018.**(Hogan, Tara) (Entered: 05/16/2018)
05/17/2018	15	ORDER granting 14 Motion for Extension of Time to File Response re: 10 Motion for Summary Judgment. **Response due 5/23/2018. Reply due 6/13/2018.** Signed by Judge Margaret M. Sweeney. (pp) Service on parties made. (Entered: 05/17/2018)
05/23/2018	16	CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA, filed by USA.**Response due by 6/20/2018.**(Hogan, Tara) (Entered: 05/23/2018)
06/12/2018	17	Unopposed MOTION for Extension of Time to File Reply , filed by STATE OF SOUTH CAROLINA.**Response due by 6/26/2018.**(Lowell, Randolph) (Entered:

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		06/12/2018)
06/13/2018	18	ORDER granting 17 Motion for Extension of Time to File Combined Reply in Support of 10 MOTION for Summary Judgment and Response to 16 CROSS MOTION for Summary Judgment. **Plaintiff's Reply and Response due by 6/20/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 06/13/2018)
06/20/2018	19	REPLY to Response to Motion re 10 MOTION for Summary Judgment , 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 06/20/2018)
07/05/2018	20	REPLY to Response to Motion re 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by USA. (Hogan, Tara) (Entered: 07/05/2018)
10/24/2018	21	ORDER Staying Further Consideration of 10 MOTION for Summary Judgment filed by STATE OF SOUTH CAROLINA and 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA filed by USA., ORDER STAYING CASE **Status Report due by 11/26/2018** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 10/24/2018)
11/26/2018	22	JOINT STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 11/26/2018)
01/25/2019	23	JOINT STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 01/25/2019)
03/26/2019	24	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 03/26/2019)
05/28/2019	25	JOINT STATUS REPORT , filed by All Defendants. (Hogan, Tara) (Entered: 05/28/2019)
05/29/2019	26	STATUS REPORT ORDER **Status Report due by 6/28/2019** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 05/29/2019)
06/24/2019		**IMPORTANT NOTICE:** On **Monday, August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e-filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e-filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two-step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e-file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800-676-6856 or the Clerk's Office CM/ECF Help Desk at (202)357-6402.. (dh) (ADI) (Entered: 06/24/2019)

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06/28/2019	27	STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Exhibit Ltr of McMaster to Trump, # 2 Exhibit Ltr of Wilson to Barr)(Lowell, Randolph) (Entered: 06/28/2019)
06/28/2019	28	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 06/28/2019)
07/01/2019	29	ORDER LIFTING STAY and ORDER to file supplemental briefs. The stay on proceedings in this case is lifted. **The parties shall file supplemental briefs by Wednesday, July 31, 2019.** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 07/01/2019)
07/20/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after **August 26, 2019**. To link your upgraded PACER account **on or after August 26, 2019**, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357-6402. (dh) (ADI) (Entered: 07/20/2019)
07/31/2019	30	SUPPLEMENTAL BRIEF , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix to Supplemental Brief)(Lowell, Randolph) (Entered: 07/31/2019)
07/31/2019	31	RESPONSE to *Court's order*, filed by USA. (Hogan, Tara) (Entered: 07/31/2019)
08/16/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. **Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account**on or after August 26, 2019**. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you **MUST** know your CM/ECF login and password---do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk **immediately** at (202) 357-6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/20/2019	32	REPORTED OPINION denying 10 Motion for Summary Judgment; granting 16 Cross Motion. The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 08/20/2019)

08/20/2019	33	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of defendant. Plaintiff' complaint is dismissed. Each party shall bear its own costs. (Service on parties made.) (ac7) (Entered: 08/20/2019)
08/23/2019	34	NOTICE OF APPEAL as to 33 Judgment, filed by STATE OF SOUTH CAROLINA. Filing fee $ 505, receipt number 9998-5597681. Copy to CAFC. (Lowell, Randolph) (Entered: 08/23/2019)
08/26/2019		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 34 Notice of Appeal. (ac7) (Entered: 08/26/2019)
08/28/2019		CAFC Case Number 2019-2324 for 34 Notice of Appeal filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 08/28/2019)

PACER Service Center

Transaction Receipt

09/01/2020 12:04:02

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EXHIBIT 7

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LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A. and Davidson and Lindemann, P.A. ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of radioactive material at the Savannah River Site; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

ARTICLE I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016, and terminates on January 4, 2019, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the termination date, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

ARTICLE II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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1. Special Counsel assumes joint responsibility with the Attorney General's Office for the representation of the State in this litigation. However, the Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion shall appoint a designated assistant or assistants ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General's Office for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must identify the Attorney General or his designated assistant as counsel of record.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Attorney General's Office, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be provided to the Attorney General's Office in draft form in a reasonable and timely manner for review and approval. Special Counsel shall copy the Attorney General's Office on all case-related correspondence. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Attorney General's Office unless otherwise authorized by the Attorney General.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

7. The scope of Special Counsel's retention under this Agreement shall include appellate proceedings in this litigation.

8. The scope of Special Counsel's retention under this Agreement shall include any litigation initiated by the defendant(s) against the Attorney General or the State relating to this litigation.

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B. Non-Delegation of Work

Special Counsel may not, without the express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

C. Employment Status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

ARTICLE III. CASE MANAGEMENT

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within five business days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

At a minimum, status reports must include a description of the current status of the litigation, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

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Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com

Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

Special Counsel agrees to consult in advance, in person, by telephone, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings;
2. Dispositive motions;
3. Hearings;
4. Rulings;
5. Trials;
6. Settlement negotiations;
7. Appeals or Notice of Appeals;
8. Briefs filed by any party or entity;
9. Appellate arguments or decisions; and
10. Enforcement efforts.

Special Counsel agrees to meet with Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Should Special Counsel receive any public records request which seeks records related to this litigation, Special Counsel shall within one business day email that public records request to the Attorney General and obtain his approval before responding to that request. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from

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destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

G. Settlement or Judgment Proceeds

All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's Office, which shall distribute them or have them distributed.

ARTICLE IV. COMPENSATION

A. Contingent Status

Notwithstanding any other term of this Agreement, Special Counsel shall receive no compensation of any kind for any services rendered unless the State of South Carolina receives a settlement or judgment in connection with this litigation.

B. Fee Schedule and Division

If the State receives a settlement or award in connection with this litigation, Special Counsel will be compensated from the litigation's gross recovery (any final settlement or judgment received by the State, including any post-judgment interest) for their services as follows:

1. The Attorney General's Office shall be reimbursed for all costs and expenses incurred in the litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit. Compensation under this Section IV.B.1 shall be deducted from the litigation's gross recovery before any further distribution is made. However, any attorneys' fees retained by the Attorney General's Office are not subtracted from the gross recovery for purposes of calculating Special Counsel's fee.

2. Special Counsel shall be reimbursed for certain costs and expenses incurred in this litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit, pursuant to Article V below. Compensation under this Section IV.B.2 shall be deducted from the litigation's gross recovery before any further distribution is made.

3. After any deduction from the gross recovery pursuant to Section IV.B.1 and IV.B.2, if the defendant(s) filed a separate suit against the Attorney General or the State regarding this litigation or this Agreement, Special Counsel shall be compensated for time spent defending against such suit at the following rates: $190 per hour for attorneys with 10 or more years of experience, $130 per hour for attorneys with more than 6 but less than 10 years of experience, $110 per hour for attorneys with more than 3 but less than 6 years of experience, $100 per hour for attorneys with less than 3 years of experience, and $60 per hour for paralegals. This applies only to time spent defending a

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lawsuit against the Attorney General or the State, and not to time spent on the litigation brought by the Attorney General against the defendant(s). Compensation under this Section IV.B.3 shall be deducted from the net recovery that remains after any deduction pursuant to Section IV.B.1 and IV.B.2 and before any further distribution is made.

4. After any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	24%
$25,000,000.01 to $50,000,000.00	21%
$50,000,000.01 to $75,000,000.00	18%
$75,000,000.01 to $100,000,000.00	16%
$100,000,000.01 to $125,000,000.00	13%
$125,000,000.01 to $150,000,000.00	10%
$150,000,000.01 to $250,000,000.00	5%
Greater than $250,000,000.00	2%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

6. If Special Counsel's fee is to be divided among lawyers who are not in the same firm, all lawyers receiving a fee must jointly submit (a) a declaration that the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and (b) the share each lawyer will receive, for written approval by the Attorney General's Office prior to the disbursement of any fee.

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C. Early Settlement

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees shall be one half of that specified in Section IV.B.4 above.

D. Non-Monetary Relief

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General in his sole discretion shall determine the monetary value to the State and attorneys' fees awarded based on such monetary value. Should the litigation be favorably resolved by solely non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), in consultation with the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee, Special Counsel is entitled to attorneys' fees at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2016 and not to exceed $100,000 for every calendar year thereafter; in such event the obligation for such attorneys' fees shall be upon the opposing party in the litigation or as appropriated by the General Assembly.

E. Compensation upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys' fees as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

F. No Other Payment Source

Special Counsel shall be reimbursed solely from the litigation's recovery. Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for their work in this litigation other than as set forth in Articles IV and V herein. Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

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G. Court Approval of Fees and Costs

When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

B. Expert Expenses

Special Counsel shall seek prior approval from the Attorney General for the retention of experts before incurring expenses related to such expert. Provided that the Attorney General has approved the retention of an expert, Special Counsel shall be reimbursed for the expert's retainer and fees incurred on an hourly basis. Other expert expenses will be reimbursed in accordance with the provisions of Section V.C.

C. Other Expenses

Special Counsel shall be reimbursed for other certain reasonable expenses and costs enumerated below.

1. Overnight lodging shall be reimbursed at actual cost up to a maximum of the rate published by the United States General Services Administration as of the date of the lodging exclusive of taxes and fees. There is no reimbursement for in-room internet, room service, business center services, gratuity, or any other hotel services or upgrades.

2. There is no reimbursement for meals.

3. Automobile travel shall be reimbursed at the rate per mile published by the Internal Revenue Service for business miles driven as of the date of the automobile travel. Special Counsel must document the date of the travel, the address of the departure location, the address of the arrival location, and the purpose of the travel in order to be eligible for reimbursement. Automobile travel reimbursement must not exceed the commercial coach fare available for the same travel. There is no reimbursement for gas.

4. All other travel or travel-related expenses, including airfare, train, bus, taxi, shuttle, parking, and baggage fees, will be reimbursed at actual cost. Airfare reimbursements must be for commercial coach fares. There is no reimbursement for seat upgrades, preferred seating, preferred boarding, internet access, or any other transportation related upgrade.

5. Actual expenses for court fees and both offensive and defensive discovery, including but not limited to filing fees, service of process, motions fees, document productions, transcripts, and witness fees, as well as mailing costs related thereto. Charges for priority or overnight mail services shall be reimbursed only if use of such services is necessary. Should the cost of printing and copying any particular item under this section exceed $100, such expense shall be reimbursed.

6. If Special Counsel determines that the hiring of an Outside Vendor for any discovery, electronic discovery, or printing related project is reasonably necessary to the litigation, Special Counsel shall assess and select an appropriate Outside Vendor based on objective criteria, including but not limited to expertise, experience, professional certifications, capacity, geographic location, and cost. The Attorney General retains the right to veto the selection of any Outside Vendor, and the Attorney General must give written approval prior to the use of or contracting with any Outside Vendor by Special Counsel.

7. There will be no reimbursement for printing, copying or mailing costs other than under Section C.5, secretarial, paralegal, or other staff costs or overtime, Westlaw, LexisNexis, PACER, or other research expenses, or any telephone calls, or any other expense, unless prior approval is obtained in writing from the Attorney General.

Any deviation from these rules, such as a hotel room higher than GSA rate, must be approved by the Attorney General's Office prior to Special Counsel incurring the expense. Should a significant, unusual, and unexpected expense arise that is necessary and germane to the litigation, Special Counsel may request approval from the Attorney General for such expense. The Attorney General shall, in his sole discretion, determine whether Special Counsel shall be reimbursed for such expenses.

D. Hourly Fee

Where Special Counsel seeks payment of an hourly fee for defending litigation brought against the Attorney General or the State under the terms of this Agreement, in accordance with Section IV.B.3, Special Counsel is required to submit detailed time records on a monthly basis for time worked over the previous month. The Attorney General's Office is not obligated to approve or reject any requests for hourly fees until after the conclusion of the litigation. Each monthly time record must clearly identify, by name or initials, the attorney or paralegal who performed the work, the date of the work, a detailed description of the work, and the number of hours or fraction thereof worked to the nearest tenth of an hour. When initials are used, the submission must identify all persons whose initials appear on the invoice and indicate whether each is an attorney or paralegal.

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No time records shall be submitted or paid for work occurring either prior to the effective date of this Agreement or after its termination.

To the extent time was spent working on both the case brought by the Attorney General and the case where the Attorney General or the State is a defendant, it is Special Counsel's duty to separate the time based on the proportion fairly allocated to each case and only seek payment of an hourly fee for time fairly spent defending the Attorney General or the State in a case brought by the defendant(s). The Attorney General, in his sole discretion, may decline to pay an hourly fee for time determined to be unnecessary, unreasonable, and/or not submitted in accordance with the requirements of this Agreement.

E. Form and Timing of Submission

Special Counsel shall submit invoices every 90 days for any expenses incurred over the previous 90 days for which Special Counsel seeks reimbursement; however, the Attorney General's Office is not obligated to approve or reject any expenses until after the conclusion of the litigation.

For an expense to be reimbursed, Special Counsel must provide an original receipt reflecting the charges. Credit card statements are not sufficient unless approved by the Attorney General's Office. The receipts will be scanned and submitted to the Attorney General's Office as a single PDF document.

In addition, Special Counsel will provide an Excel spreadsheet that contains, at a minimum, the following information:

1. Date of expense;
2. Amount of expense;
3. Amount of expense for which reimbursement is sought;
4. Description of expense; and
5. Page reference to the PDF document of receipts.

To the extent prior written approval of the Attorney General's Office was given for a particular expense, such approval shall be included with the invoice.

Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following the termination of this Agreement. All expenses must be itemized and no reimbursement will be granted for "miscellaneous" listings. The Attorney General may, in his sole discretion, decline to reimburse Special Counsel for any expenses determined to be unnecessary, unreasonable, improperly documented, or improperly submitted.

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ARTICLE VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform their duties

required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that it has no conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time for this representation. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment that may impact this representation.

F. Equal Opportunity

Special Counsel hereby represents that neither they nor their law firms discriminate on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Right to Contact

To clarify, nothing in this Agreement shall be construed to prohibit defendant(s) from discussing this case with the Attorney General without the presence of Special Counsel if the Attorney General agrees to such discussion.

H. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

I. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

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J. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

K. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

L. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

SPECIAL COUNSEL

Davidson & Lindemann, P.A.
By:
Its: Shareholder

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EXHIBIT 8

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AMENDMENT TO THE LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

Pursuant to Article VII.J of the Litigation Retention Agreement for Special Counsel Appointed by the Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility, the Litigation Retention Agreement is hereby amended as follows, effective as of January 1, 2019. Except as set forth in this Amendment, the Agreement is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between this amendment and the Agreement or any earlier amendment, the terms of this Amendment will prevail.

1. **The title of the Agreement is deleted in its entirety and replaced with the following:**

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO VIOLATIONS OF 50 U.S.C.A. § 2566 AND OTHER CLAIMS RELATED TO NEPA, CERTIFICATION, AND WAIVER CLAIMS REGARDING THE MIXED OXIDE (MOX) FACILITY AND PLUTONIUM DISPOSITION

2. **The preamble of the Agreement after the title and prior to the recitals is deleted in its entirety and replaced with the following:**

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A., for certain causes of action and claims as set forth herein, and Davidson, Wren & Plyler, P.A., for certain causes of action and claims as set forth herein, each respectively "Special Counsel" for the matters for which each law firm has been engaged.

3. **The recitals of the Agreement are deleted in their entirety and replaced with the following:**

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual

litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of defense plutonium at the Savannah River Site; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's attempts to terminate the MOX Project at the Savannah River Site without compliance with applicable law; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

4. Article I of the Agreement is deleted in its entirety and replaced with the following:

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016 and terminates at the completion of these litigation matters, unless the Attorney General or Special Counsel terminates this appointment earlier pursuant to Article VI of this Agreement. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

5. Article II.D is added to the Agreement as follows:

D. Legal Services

Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are retained as Special Counsel for litigation matters to enforce claims for injunctive relief under 50 U.S.C.A. § 2566(c) and for monetary claims under 50 U.S.C.A. § 2566(d). Willoughby & Hoefer, P.A., is further retained as Special Counsel for litigation matters: arising from and related to all other matters under 50 U.S.C.A. § 2566; in venues outside of the State of South Carolina arising from or related to any claim under 50 U.S.C.A. § 2566 or defense plutonium disposition at the Savannah River Site; and arising from NEPA, waiver, or certification claims regarding the MOX Facility project termination.

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6. Article III.B is deleted in its entirety and replaced with the following:

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); or (5) by email.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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Name: Kenneth P. Woodington
Davidson, Wren & Plyler, P.A.
Address: 1611 Devonshire Drive, Second Floor
Columbia, SC 29204
Phone: 803-806-8222
Email: kwoodington@dml-law.com

7. Article III.F is deleted in its entirety and replaced with the following:

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Public records requests are to be handled by the Attorney General's Office, and any public records requests received by Special Counsel shall be emailed to the Attorney General's Office within one business day of receipt. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

8. Article IV.B.4 is deleted in its entirety and replaced with the following:

4.i. For the matters for which Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are jointly engaged as Special Counsel in the District Court of South Carolina and Court of Federal Claims, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

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4.ii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of South Carolina related to the MOX Facility and its termination, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

4.iii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of Nevada related to the transport and storage of defense plutonium from South Carolina and its disposition, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating the claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court in the Ninth Circuit	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

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9. Article IV.B.5 is deleted in its entirety and replaced with the following:

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings for any matter under the ambit of Section IV.B.4.i only, Special Counsel shall receive the following in additional attorneys' fees for each individual appellate matter, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	3%
$25,000,000.00 to $50,000,000.00	3%
$50,000,000.00 to $75,000,000.00	3%
$75,000,000.00 to $100,000,000.00	2%
$100,000,000.00 to $125,000,000.00	2%
$125,000,000.00 to $150,000,000.00	1%
$150,000,000.00 to $250,000,000.00	1%
Greater than $250,000,000.00	1%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. These fees are not awarded for any matter for which Special Counsel receives additional attorneys' fees under Section IV.B.4.ii or iii. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

10. Article IV.C is deleted in its entirety and replaced with the following:

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees may be reduced to one half of that specified in Section IV.B.4 above, in the sole discretion of the Attorney General.

11. Article IV.D is deleted in its entirety and replaced with the following:

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Except as otherwise set forth and contemplated in the compensation and fee recovery provisions in Article IV.B.4 and 5 for those actions and the requested relief, should the litigation be favorably resolved solely by other non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), Special Counsel shall engage in best efforts to recover attorneys' fees from the opposing party in the litigation. If attorneys' fees cannot be recovered from the opposing party, the

Attorney General shall seek an appropriation of attorneys' fees from the General Assembly at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2017 and not to exceed $100,000 for every calendar year thereafter. In no event shall Special Counsel be entitled to attorneys' fees directly from the Attorney General's office except out of a monetary recovery as specified in Article IV.B.

[Signatures on following page.]

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ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

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Its: Shareholder

Date: 6/13/19

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EXHIBIT 9

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912 F.3d 720
United States Court of Appeals, Fourth Circuit.

State of SOUTH CAROLINA, Plaintiff – Appellee,

v.

UNITED STATES of America; United States Department of Energy; Rick Perry, in His Official Capacity as Secretary of Energy; National Nuclear Security Administration; Lisa E. Gordon-Hagerty, in Her Official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants – Appellants.

No. 18-1684
|
Argued: September 27, 2018
|
Decided: January 8, 2019

Synopsis

Background: State brought action against United States Department of Energy (DOE) and National Nuclear Security Administration (NNSA) and their officials challenging termination of mixed oxide fuel fabrication facility project in state. The United States District Court for the District of South Carolina, No. 1:18-cv-01431-JMC, J. Michelle Childs, J., 329 F.Supp.3d 214, granted state's motion for preliminary injunction, and defendants appealed.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

[1] state did not suffer sufficiently concrete injury-in-fact to support standing to bring action, and

[2] state's claims were not ripe for adjudication.

Vacated and remanded.

West Headnotes (12)

[1] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears burden of establishing standing to assert each of its claims.

1 Cases that cite this headnote

[2] **Federal Courts** Standing

Court of Appeals reviews question of whether plaintiff possesses standing de novo.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must show that: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to defendant's challenged action; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

To satisfy injury-in-fact requirement for standing, plaintiff must establish realistic danger of sustaining direct injury.

2 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

While it is true that threatened rather than actual injury can satisfy Article III standing requirements, not all threatened injuries constitute injury-in-fact; rather, injury-in-fact

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must be concrete in both qualitative and temporal sense. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[6] **Environmental Law** Government entities, agencies, and officials

State did not suffer sufficiently concrete injury-in-fact to support standing to bring action alleging that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state, despite state's contention that DOE's decision meant that it would become permanent repository of weapons-grade plutonium and be subject to environmental, health, and safety risks that entailed, where current environmental impact statement provided that DOE had 28 years to identify alternative method for disposing of nuclear material or otherwise removing it from state, Secretary of Energy had already certified that one potential alternative to MOX program existed, and Congress had put in place contingency plans for removal of plutonium shipped to site to forestall indefinite storage of plutonium in state. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[7] **Constitutional Law** Nature and scope in general

Federal Civil Procedure In general; injury or interest

Standing doctrine is built on separation-of-powers principles, and serves to prevent judicial process from being used to usurp political branches' powers.

1 Cases that cite this headnote

[8] **Federal Courts** Ripeness; Prematurity

Ripeness is question of subject matter jurisdiction.

10 Cases that cite this headnote

[9] **Federal Courts** Fitness and hardship

Question of whether claim is ripe turns on fitness of issues for judicial decision and hardship to parties of withholding court consideration.

4 Cases that cite this headnote

[10] **Administrative Law and Procedure** Ripeness; prematurity

In context of claims challenging agency actions, ripeness doctrine's purpose is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties.

5 Cases that cite this headnote

[11] **Administrative Law and Procedure** What constitutes finality in general

To be fit for judicial review, controversy should be presented in clean-cut and concrete form, which occurs when action is final and not dependent on future uncertainties or intervening agency rulings.

5 Cases that cite this headnote

[12] **Environmental Law** Ripeness

State's claims that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state were not ripe for adjudication, where state based its claims on premise that it would be permanent repository of weapons-grade nuclear material currently stored in state, but numerous contingent future events would have to occur before that would occur, including DOE's failure to identify alternative method of disposal and breach its commitment

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to dispose of waste, and failure by Congress and courts to set aside or refuse to enforce statutory mechanisms currently in place to ensure timely removal of nuclear material. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

***722** Appeal from the United States District Court for the District of South Carolina, at Aiken. J. Michelle Childs, District Judge. (1:18-cv-01431-JMC)

Attorneys and Law Firms

ARGUED: Andrew Alperin Rohrbach, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Randolph R. Lowell, WILLOUGHBY & HOEFER, PA, Columbia, South Carolina, for Appellee. ON BRIEF: Chad A. Readler, Acting Assistant Attorney General, Mark B. Stern, Daniel Tenny, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellants.

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Opinion

Vacated and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Niemeyer and Judge King joined.

WYNN, Circuit Judge:

The State of South Carolina brought this action to enjoin the United States of America and other Defendants[1] (collectively, "the United States") from terminating the construction of a mixed-oxide fuel nuclear processing facility located at the Savannah River Site in South Carolina. South Carolina alleges that the United States Department of Energy unlawfully failed to (1) prepare a supplemental Environmental Impact Statement analyzing the long-term storage of plutonium in the state; and (2) follow statutory waiver provisions for terminating construction of the facility. We conclude that South Carolina ***723** has not established standing to pursue either of these claims. Accordingly, we vacate the preliminary injunction imposed by the district court.

I.

Following the collapse of the Soviet Union and the end of the Cold War, the United States of America and the Russian Federation began a worldwide nuclear nonproliferation effort that included developing plans for the safe disposition of nuclear weapons material. As part of this nonproliferation pact, the Department of Energy began studying the effects of various nuclear waste storage and disposal strategies. In its initial 1996 study, the Department of Energy prepared an Environmental Impact Statement in accordance with Section 4332 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., analyzing the potential environmental consequences associated with the long-term storage of weapons-grade plutonium and highly enriched uranium prior to disposition. The Environmental Impact Statement addressed storage of these materials for a period of up to fifty years.

Ultimately, the Department of Energy determined that the best approach to nuclear waste disposal was a dual strategy involving (1) immobilization of a portion of the surplus plutonium in glass or ceramic; and (2) irradiation of the remaining plutonium in mixed oxide fuel (the "MOX process"). Both strategies would convert the surplus nuclear material into forms that would meet the National Academy of Science's Spent Fuel Standard, meaning that the material would be "inaccessible and unattractive for weapons" use. J.A. 78.

In 1997, the Department of Energy announced its intention to build a new mixed oxide fuel fabrication facility (the "MOX facility") to dispose of some of the nuclear material using the MOX process. Following completion of a supplemental Environmental Impact Statement and a Record of Decision in January of 2000, the Department of Energy announced that the MOX facility would be located at the Savannah River Site along South Carolina's border with Georgia. The facility's original production goals included disposition of up to thirty-three metric tons of nuclear material using the MOX process and immobilization of up to seventeen metric tons of additional nuclear material. As part of its supplemental Environmental Impact Statement, the Department of Energy continued to look at the environmental impacts of long-term plutonium storage.

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In 2002, the Department of Energy decided to drop the immobilization portion of the disposition strategy, leaving the MOX process as the sole plutonium disposal method. That same year, Congress directed the Secretary of Energy to submit a plan for the construction and operation of the MOX facility at the Savannah River site. Pub. L. No. 107-314, § 3182 (2002), *subsequently codified* as 50 U.S.C. § 2566. Congress further authorized the Secretary to take corrective actions if the construction timetable and operation schedule for the MOX facility were not being met. Additionally, Congress also required that in the event the MOX facility failed to achieve its production goals, the Department of Energy remove plutonium shipped to South Carolina for processing. *See* 50 U.S.C. § 2566(c), § 2566(e). Finally, as part of its findings, Congress mentioned the economic benefit that the MOX facility would bring to the State of South Carolina, noting that the economic benefit would not be fully realized unless the facility was built. *See* Pub. L. No. 107-314 at § 3181.

Three years later, in 2005, the Department of Energy began transferring plutonium to the Savannah River Site for conversion, and in 2007, construction began on ***724** the MOX facility. The original cost estimate for construction of the facility was $4.8 billion, with completion anticipated in 2016. And the original production goal estimate for the facility was to have thirty-four metric tons of defense plutonium processed no later than January 1, 2019. 50 U.S.C. § 2566(a)(2)(B).

These original estimates proved grossly inaccurate due to delays and cost overruns in the construction of the MOX facility. The Department of Energy now estimates cost for construction of the facility to be $17.17 billion, with completion now anticipated to be in 2048, over thirty years beyond the original estimated schedule.

Since 2014, the Department of Energy has sought to terminate the MOX program and pursue an alternative method of plutonium disposal known as "Dilute and Dispose," which it contends is less costly, faster, and safer. Under the Dilute and Dispose method, nuclear material would be "downblended" with inhibitor materials to reduce the plutonium content to less than ten percent by weight. Upon completion of the downblending process, the material would then be shipped from the Savannah River Site to the Waste Isolation Pilot Plant near Carlsbad, New Mexico, for permanent disposal.

Thus far, Congress has continued to fund construction of the MOX facility and has, to date, restricted the Department of Energy from utilizing MOX-related appropriations to begin termination of the program. To that end, in 2017, Congress enacted a statute providing that the Secretary of Energy "shall carry out construction and project support activities relating to the MOX facility." Pub. L. 115-91, § 3121(a), 131 Stat. 1283, 1892.

However, Section 3121(b) of that statute allows the Secretary of Energy to discontinue construction of the MOX facility if certain conditions have been met. Specifically, the Secretary of Energy must submit to the Congressional defense committees:

> (A) the commitment of the Secretary [of Energy] to remove plutonium intended to be disposed of in the MOX facility from South Carolina and ensure a sustainable future for the Savannah River Site;
>
> (B) a certification that—
>
> (i) an alternative option for carrying out the plutonium disposition program for the same amount of plutonium as the amount of plutonium intended to be disposed of in the MOX facility exists, meeting the requirements of the Business Operating Procedure of the National Nuclear Security Administration entitled "Analysis of Alternatives" and dated March 14, 2016 (BOP-03.07); and
>
> (ii) the remaining lifecycle cost, determined in a manner comparable to the cost estimating and assessment best practices of the Government Accountability Office ["GAO"], as found in the document of the Government Accountability Office entitled "GAO Cost Estimating and Assessment Guide" (GAO-09-3SP), for the alternative option would be less than approximately half of the estimated remaining lifecycle costs of the mixed oxide fuel program; and
>
> (C) the details of any statutory or regulatory changes necessary to complete the alternative option.

§ 3121(b)(1).

Additionally, in exercising his authority to discontinue construction of the MOX facility, the Secretary of Energy

> (1) shall concurrently submit to the Committees on Appropriations of both Houses of Congress the lifecycle

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cost estimate used to make the certification under section 3121(b) of such Act; and

***725** (2) may not use funds provided for the Project to eliminate such Project until the date that is 30 days after the submission of the lifecycle cost estimate required under paragraph (1).

Pub. L. No. 115-141, § 309(c), 132 Stat. 348, 530 (2018).

Pursuant to these provisions, on May 10, 2018, the Secretary of Energy submitted a letter to the Chairman of the House Armed Services Committee that purported to execute the authority of the Secretary of Energy under Section 3121(b) to discontinue construction of the MOX facility. The Secretary of Energy certified, *inter alia*, that (1) the Department of Energy is committed to removing plutonium from South Carolina; (2) an alternative option for carrying out the plutonium disposition, the Dilute and Dispose method, exists and has a lifecycle cost of less than approximately half of the remaining lifecycle cost for the MOX program; (3) the Department of Energy estimated the cost of the Dilute and Dispose approach in a manner compatible with the best practices of the GAO; and (4) the Department of Energy is committed to ensuring a sustainable future for the Savannah River Site. The Secretary of Energy further reported that the Department of Energy expected the total cost of disposition via the Dilute and Dispose method to be $19.9 billion, compared to $49.4 billion for the total cost of construction of the MOX facility and conversion of all the plutonium into MOX fuel.

In accordance with the Secretary of Energy's letter, the Department of Energy and the National Nuclear Security Administration issued a Partial Stop Work Order on May 14, 2018, ending all new contracts and hiring related to the MOX program. The Department of Energy further indicated its intent to issue a Full Stop Work Order and begin winding down the MOX program, including terminating employees currently working on the project, on or about June 11, 2018.

On May 25, 2018, before the Department of Energy issued a full stop work order, South Carolina brought this action in the United States District Court for the District of South Carolina and moved for a preliminary injunction barring the federal government from terminating the MOX program. In its complaint, South Carolina asserted that the United States (1) violated NEPA by failing to prepare a supplemental Environmental Impact Statement covering a period of more than fifty years and (2) failed to satisfy Section 3121(b) because of the alleged insufficiency of the Secretary of Energy's certifications.[2]

On June 7, 2018, the district court granted South Carolina's motion for preliminary injunction. The district court first found that South Carolina had standing due to environmental risks associated with long-term storage at the Savannah River Site, which abuts property owned by South Carolina. As to the merits, the district court held, in pertinent part, that South Carolina was likely to succeed on the merits of its NEPA claim and its claim that the Secretary of Energy's certifications were insufficient. The district court further found that South Carolina would be irreparably harmed absent a preliminary injunction and that the balance of equities tilted in South Carolina's favor. Thus, the district court enjoined the federal government from ceasing construction of the MOX facility and issuing the full stop work order. The United States timely appealed.

***726** After careful review, we dispositively hold that South Carolina failed to establish standing and therefore we do not reach the district court's determination on the merits of this matter.

II.

A.

On appeal, the United States contends that the district court erred in concluding that South Carolina established standing to pursue the two claims that serve as the basis of the district court's preliminary injunction order—the NEPA claim and the claim premised on the alleged insufficiency of the Secretary's certifications. The standing doctrine derives from "the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.' " *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 750–51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Standing implicates the court's subject matter jurisdiction. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 230 (4th Cir. 2008).

[1] **[2]** Here, South Carolina, as plaintiff, bears the burden of establishing standing to assert each of its claims. *See id.*;

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see also Lewis v. Casey, 518 U.S. 343, 359 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." (internal quotation marks omitted)). We review the question of whether South Carolina possesses standing de novo. *Frank Krasner Enters.*, 401 F.3d at 234.

[3] To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The United States contends South Carolina failed to show it has suffered an injury-in-fact sufficient to give rise to Article III standing.

[4] **[5]** To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "[W]hile it is true 'that threatened rather than actual injury can satisfy Article III standing requirements,' ... not all threatened injuries constitute an injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc)). "Rather, as the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.' " *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The requirement that an alleged injury be palpable and imminent ensures that the injury "is not too speculative for Article III purposes." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564–65 n.2, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[6] On appeal, South Carolina contends that it has suffered an injury-in-fact sufficient ***727** to support standing because "[South Carolina] is harmed by being rendered the permanent repository of weapons-grade plutonium as a result of [the Department of Energy's] decision to terminate the MOX Facility without first complying with NEPA or following the congressional mandates of § 3121." Appellee's Br. at 15–16. According to South Carolina, this "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 14. But this alleged injury is too speculative and thus, does not give rise to a concrete injury-in-fact sufficient to support either of South Carolina's claims.

The Supreme Court has repeatedly held that an alleged harm is too "speculative" to support Article III standing when the harm lies at the end of a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *see also*, *e.g.*, *Beck*, 848 F.3d at 275 (holding that plaintiffs, who received treatment at a medical center that suffered a data breach and alleged that they were at risk of experiencing identity theft, failed to establish standing because their theory of injury rested on an "attenuated chain of possibilities").

Illustratively in *Clapper*, the Supreme Court considered a challenge to Section 702 of the Foreign Intelligence Surveillance Act, which "authoriz[es] the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." 568 U.S. at 401, 133 S.Ct. 1138. The plaintiffs—a group of "attorneys and human rights, labor, legal, and media organizations"—alleged that their work demanded that they "engage in sensitive international communication with individuals who they believe are likely targets of surveillance under" Section 702, rendering it reasonably likely that the government would target and intercept the plaintiffs' communications. *Id.* at 401, 406, 133 S.Ct. 1138.

The Supreme Court held that the plaintiffs failed to establish a concrete injury-in-fact based on the possibility that their communications would be intercepted, explaining that a series of hypothetical events would have to occur before the government would intercept any particular plaintiff's communications. *Id.* at 1148–50, 133 S.Ct. 1138. The Court held that among other steps, the government would have to decide to invoke its Section 702 authority to target a non-U.S. person with whom a plaintiff communicated, a panel of federal judges would have to "conclude that the Government's proposed surveillance procedures satisfy [the statute's] many safeguards and are consistent with the Fourth Amendment," and the government would have to succeed in intercepting one of the target's communications with the plaintiff. *Id.* Thus, the Court held that that the "highly attenuated chain of possibilities, d[id] not satisfy

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the requirement that threatened injury must be certainly impending." *Id.* at 1148, 133 S.Ct. 1138 (citation omitted).

Applying *Clapper*, this Court reached a similar conclusion in *Beck*, in which a putative class of veterans who received medical treatment at a veterans' medical center alleged that they had been injured when two sets of records were stolen from the center. 848 F.3d at 262, 267. Although none of the named plaintiffs alleged any actual or attempted misuse of the personal information contained in their stolen records, they alleged that they suffered cognizable injuries-in-fact because they faced "(1) [an] increased risk of future identity theft, and (2) the costs of protecting against the same." *Id.* at 273. We concluded ***728** that both alleged injuries were too speculative to confer standing. *Id.* at 275–77. As to the alleged increased risk of identity theft, in particular, we explained that plaintiffs' theory of injury required us to "assume that the thie[ves] targeted the stolen items for the personal information they contained" and that the thieves would "then select, from thousands of others, the personal information of the named plaintiffs, and attempt successfully to use that information to steal their identities." *Id.* at 275. "This 'attenuated chain' cannot confer standing," we held. *Id.* We likewise rejected the plaintiffs' costs of mitigation theory of standing as a "repackaged" version of their first theory of standing, amounting to an effort to recoup "costs they incurred in response to a *speculative threat*." *Id.* at 276 (emphasis added) (quoting *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138).

Here, South Carolina's theory of standing—that it will become "the permanent repository of weapons-grade plutonium" and all the environmental, health, and safety risks that entails, Appellee's Br. at 15–16—rests on a similarly "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138. Between now and 2046—when the analysis in the current Environmental Impact Statement governing the risks associated with long-term storage of weapons-grade nuclear material at the Savannah River Site expires—the Department of Energy has twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina. The Secretary of Energy already has certified that one potential alternative to the MOX program exists, the Dilute and Dispose method. And the Department of Energy may identify and develop other methods during that twenty-eight-year period. Or the Department of Energy may decide to transfer the plutonium out of South Carolina to another location.

Furthermore, Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina. A federal statute requires that, by 2022, all additional plutonium transferred into South Carolina to the MOX facility, but not processed, must be removed. 50 U.S.C. § 2566(c)(2). Notably, because the Department of Energy already has failed to meet certain statutory time limits for disposing of nuclear material at the site, South Carolina has successfully brought suit pursuant to the Administrative Procedure Act to enforce these congressionally mandated deadlines via a mandatory injunction. *See id.* § 2566(c)(1) (requiring removal of one metric ton of plutonium no later than January 1, 2016); *South Carolina v. United States*, 243 F.Supp.3d 673 (D.S.C. 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018) (ordering the Department of Energy to remove one metric ton of plutonium within two years).

In sum, for South Carolina's alleged injury—becoming "the permanent repository of weapons-grade plutonium," Appellee's Br. at 15–16—to occur: (1) the proposed Dilute and Dispose method must fail; (2) the Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and (3) the Department of Energy must breach its statutory obligation to remove the nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation. At this juncture, before the Department of Energy has even had an opportunity to finish analyzing the Dilute and Dispose method, this "chain of possibilities" is too speculative to give rise to a sufficiently concrete injury-in-fact.

[7] That several of the links in this "chain of possibilities" the State's standing ***729** theory contemplates require our coordinate branches to either breach or abandon their existing commitments to ensure timely removal of the nuclear material at the Savannah River Site further weighs against treating the South Carolina's alleged injury as conferring standing. As *Clapper* recognized, the standing doctrine is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408, 133 S.Ct. 1138 (citations omitted); *see also Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315 (1984) ("[Article] III standing is built on a single basic idea—the idea of separation of powers."). To confer standing on South Carolina at this juncture based on an alleged injury —becoming the permanent repository of nuclear material— that the political branches already have made written and legally binding commitments to forestall would improperly

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"usurp the powers of the political branches." *Clapper*, 568 U.S. at 408, 133 S.Ct. 1138.

The "highly attenuated chain of possibilities" that must occur for South Carolina to become the permanent repository of nuclear material also sets this case apart from this Court's decision in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), upon which South Carolina principally relies.

Like the instant case, *Hodges* dealt with the storage of plutonium at the Savannah River Site. *Id.* at 436. In 2002, the Department of Energy issued a Record of Decision authorizing the immediate shipment of six metric tons of plutonium from a nuclear facility in Colorado to the Savannah River Site. *Id.* The Governor of South Carolina sought to enjoin shipment of the plutonium into South Carolina, alleging that the Department of Energy's *existing* Environmental Impact Statement, and its supplemental analyses to the Environmental Impact Statement, related to storage of plutonium at the Savannah River Site violated NEPA in several ways. *Id.* at 445. This Court held that the Governor adequately alleged an injury-in-fact to support his NEPA claims because the South Carolina owned property adjacent to the Savannah River Site. *Id.* "[T]he Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage" as a result of the Department of Energy's shipment of plutonium to the Savannah River Site and storage of that plutonium there, we explained. *Id.*

Here, unlike in *Hodges*, South Carolina does not argue that its injury, as a neighboring landowner, is attributable to the *current* storage of nuclear material at the Savannah River Site or the inadequacy of the Environmental Impact Statement pursuant to which the nuclear material is *currently* stored—a question that *Hodges* already resolved in the federal government's favor. *Id.* at 446–49. Rather, South Carolina contends it is injured because the termination of the MOX program renders it the *permanent* repository of the nuclear material when the Department of Energy has not issued an Environmental Impact Statement analyzing the environmental impact of the storage of the material at the Savannah River Site *beyond the year 2046*, the year when the existing Environmental Impact Statement's analysis terminates, or, allegedly, satisfies its statutory obligations in terminating the MOX program. There is a meaningful distinction between the alleged *immediate* environmental injuries associated with storing plutonium at the Savannah River Site, which were at issue in *Hodges*, and the alleged *future* adverse environmental impacts on South Carolina as a neighboring landowner if the Department of Energy continues to store the plutonium at the Savannah River Site *decades in the future*. That distinction is particularly meaningful because, as explained ***730** above, numerous contingencies must occur in order for the plutonium to remain in South Carolina after 2046, the year when South Carolina's alleged injury will mature.

In sum, the single theory of injury[3] that South Carolina relies on to support both of its claims is too speculative at this juncture to support Article III standing. The district court, therefore, was without jurisdiction to enter its preliminary injunction premised on those two claims.

B.

[8] For reasons similar to those that lead us to find that South Carolina lacks standing, we also find that the two claims at issue fail on ripeness grounds. Like standing, the ripeness doctrine "originates in the 'case or controversy' constraint of Article III." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 269 (4th Cir. 2013) (citations omitted). "Analyzing ripeness is similar to determining whether a party has standing." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). "Although the phrasing makes the questions of who may sue and when they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness." *Id.* (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)). As with standing, ripeness is a question of subject matter jurisdiction. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (citation omitted).

[9] **[10]** The question of whether a claim is ripe "turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) (citation omitted). In the context of claims challenging agency actions, like the two at issue, the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136,

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148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[11] To be fit for judicial review, a controversy should be presented in a "clean-cut and concrete form." *Miller*, 462 F.3d at 319 (citation omitted). This occurs when the action is "final and not dependent on future uncertainties or intervening agency rulings." *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (citation omitted). On the other hand, just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, a plaintiff's claim is not ripe for judicial review "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

[12] The two claims that South Carolina advances before this Court rest on the premise that South Carolina will be the permanent repository of the weapons-grade ***731** nuclear material currently stored at the Savannah River Site. But, numerous "contingent future events," *id.*, must occur before South Carolina becomes the *permanent* repository of the nuclear material, *see supra* Part II.A. In particular, the Dilute and Dispose method must prove unworkable. The Department of Energy must fail to identify an alternative method of disposal and breach its commitment to dispose of the waste. And Congress or the courts must set aside or refuse to enforce the statutory mechanisms currently in place to ensure timely removal of the nuclear material. All of these "future uncertainties," *Franks*, 313 F.3d at 195, lead us to conclude that the two claims at issue are not ripe for review at this time —at least as presented by South Carolina. Accordingly, the ripeness doctrine provides an additional basis for our holding that the district court was without jurisdiction to enter the preliminary injunction.

III.

In sum, the only theory of injury advanced by South Carolina —that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site—rests upon a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270. In such circumstances, we must conclude that South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review.

That the two claims are not currently justiciable does not mean that they never will be so. If uncertainty as to several links in the chain of possibilities is resolved, then South Carolina's alleged injury may move from the speculative to the concrete, and therefore the two claims also may become ripe for review. But until that uncertainty is lifted, the Constitution demands that we withhold judicial review.

Accordingly, we vacate the preliminary injunction imposed by the district court and remand the case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED

All Citations

912 F.3d 720

Footnotes

1 The other Defendants are the United States Department of Energy; Rick Perry, in his official capacity as Secretary of Energy; the National Nuclear Security Administration; and Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration.

2 South Carolina further claimed that the United States violated 50 U.S.C. § 2567 by failing to consult with the governor before deciding to terminate the MOX facility. The district court held that South Carolina failed to establish that that claim was likely to succeed on the merits, and therefore that claim is not before this Court.

3 Because South Carolina has advanced only one theory of injury to support the two claims before this Court—that South Carolina is harmed by becoming the permanent repository of weapons-grade nuclear material—we cannot and do not take any position on whether other theories of injury would presently confer standing on South Carolina to support either of the two claims before us on appeal.

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EXHIBIT 10

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2019 WL 2464930 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
June 7, 2019.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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***i** QUESTION PRESENTED

The U.S. Department of Energy (DOE) shipped massive amounts of weapons-grade plutonium to South Carolina for a decade in anticipation of building a facility there - the "MOX Facility" - to process it. After running way behind schedule and far over budget, DOE sought to mothball the still-uncompleted MOX Facility. In response, Congress enacted a statute requiring DOE to keep building the MOX Facility unless DOE gets a "waiver" of that requirement. This lawsuit arose from DOE's decision to halt construction of the MOX Facility permanently after purportedly satisfying the statute's requirements for a waiver. South Carolina claims in this suit that DOE's decision violates the statute, which was specifically designed to protect South Carolina's interests, and the National Environmental Policy Act.

The question presented is whether the United States Court of Appeals for the Fourth Circuit erred in holding that South Carolina lacked standing to challenge the DOE's final action and that the challenge is not ripe.

***ii** PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. State of South Carolina, Plaintiff and Petitioner;

2. United States of America, Defendant and Respondent;

3. United States Department of Energy, Defendant and Respondent;

4. Rick Perry, in his official capacity as Secretary of Energy, Defendant and Respondent;

5. National Nuclear Security Administration, Defendant and Respondent;

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6. Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendant and Respondent.

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner State of South Carolina (South Carolina or State) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.3d 720. App. 1a-22a. The opinion of the district court is reported at 329 F. Supp. 3d 214. App. 34a-82a. The decision of the United States Secretary of Energy is unreported but is reproduced in the appendix. App. 107a-109a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on January 8, 2019. On March 29, 2019, the Chief Justice extended the time to file a petition for a writ of certiorari up to and including June 7, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the U.S. Constitution provides in relevant part, "[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 83a-106a.

*2 INTRODUCTION

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This case involves the justiciability of a State's claims against the federal government for statutory violations, including violations of provisions expressly designed to protect the State's concrete interests. The decision below, which denied the justiciability of those claims, conflicts with this Court's decision in *Massachusetts v. EPA,* 549 U.S. 497 (2007), and provides an excellent vehicle for dispelling continuing confusion among the lower courts about the standing of States to sue the federal government.

South Carolina is home to the Savannah River Site (SRS), where Congress directed the U.S. Department of Energy (DOE) to build a facility to convert weapons-grade plutonium (also known as "defense plutonium") into mixedoxide (MOX) fuel for use in commercial nuclear reactors. App. 3a-4a, 83a.[1] In the statute directing DOE to build this facility - known as the MOX Facility or Project - Congress included multiple provisions designed to address South Carolina's concern about becoming a permanent dumping ground for multiple tons of this admittedly dangerous material. 50 U.S.C. § 2566. Starting in 2014, DOE sought to terminate construction of the MOX Facility after its construction had fallen way behind schedule and gone way over budget.

On May 10, 2018, the Secretary of DOE announced his decision to permanently abandon construction of the ***3** MOX Facility and to pursue a new concept for processing weapons-grade plutonium called "Dilute and Dispose" or "downblending." In the letter announcing this decision, the Secretary purported to comply with the statutory requirements for a "waiver" of the statutory mandate to continue construction of the MOX Facility. DOE made this decision without any analysis under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA), or complying with the analysis requirements of the governing statute.[2]

To remedy these statutory violations, South Carolina brought this action against DOE. The district court granted a preliminary injunction to prevent DOE from terminating construction of the MOX Facility, but the Fourth Circuit reversed. Without reaching the merits, the Fourth Circuit held that South Carolina lacked Article III standing and that its claims are not ripe. The Fourth Circuit characterized South Carolina's standing argument as resting on its fear of being "the permanent repository of weapons-grade plutonium." App. 12a. The Fourth Circuit believed that this fear was "too speculative" to constitute injury in fact or present ripe claims. App. 12a. The Fourth Circuit did not cite *Massachusetts v. EPA* despite its obvious relevance and South Carolina's citation of that decision in its brief.

The Fourth Circuit's decision conflicts with this Court's decision in *Massachusetts v. EPA* and misreads ***4** other decisions of this Court on Article Ill's standing and ripeness requirements. The decision warrants this Court's review because it could hamper South Carolina's ability to enforce statutory provisions that relate to the weapons-grade plutonium at SRS, and other States' ability to enforce statutory rights enacted to protect their interests.

STATEMENT OF THE CASE

South Carolina is home to 10 metric tons of weapons-grade plutonium, which are stored at SRS. If the decision below stands and DOE has its way, South Carolina will be forced to host at least an additional 20 metric tons indefinitely, while DOE tries to turn a new concept for processing it into a reality. DOE's track record in dealing (more accurately, in failing to deal) with the existing 10 metric tons does not inspire confidence that the proposed total of more than 30 metric tons, and their associated dangers, will be going anywhere any time soon. Remarkably, after the district court held that South Carolina was likely to succeed on the merits of its claims in this action, the Fourth Circuit foreclosed the State from even being able to question executive-branch compliance with statutory requirements that Congress specifically and expressly designed to protect South Carolina's interests.

I. Congress enacts statutory protections to prevent South Carolina from becoming the permanent repository of weapons-grade plutonium put there by the federal government.

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In September 2000, the United States and Russia entered an agreement under which each country ***5** would dispose of 34 metric tons of weapons-grade plutonium. App. 35a, 76a. To meet its obligations under this agreement, Congress in 2003 enacted legislation authorizing the construction of the MOX Facility at SRS. App. 39a, 76a-77a. The legislation included a finding that the "agreement with Russia is a significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists." Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), § 3181(1), 116 Stat. 2458, 2747 (2002). Another finding stated that DOE planned - quite optimistically in hindsight - for the MOX Facility to begin operating in 2009 and to convert 34 metric tons of weapons-grade plutonium into mixed-oxide fuel "before the end of 2019." *Id.* § 3181(3) & (4).

South Carolina had protested selection of SRS as the site for the MOX Facility. In addition to the concern that weapons-grade plutonium could fall into the wrong hands, South Carolina worried about its citizens' prolonged exposure to multiple tons of this admittedly hazardous material. Indeed, the Nuclear Regulatory Commission (NRC) recognized, when it issued the construction license for the MOX Facility in 2005, that the primary benefit of the Facility's operation would be to reduce the supply of weapons-grade plutonium "available for unauthorized use." App. 62a. The NRC also recognized that "continued storage [of the plutonium] would result in higher annual impacts" of public radiation exposure than implementation of the Project. App. 62a. Besides concerns for its citizens, South Carolina had concerns as the owner of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

***6** Congress addressed some of South Carolina's concerns in the 2003 statute authorizing the MOX Facility. NDAA FY03, § 3182, *subsequently codified* as 50 U.S.C.A. § 2566 (Section 2566). Section 2566 prescribes deadlines for construction of the Facility and for its processing of the plutonium. *E.g., id.* § 2566. The key deadline provided that, as of January 1, 2012, the MOX Facility would be processing no less than one metric ton of weapons-grade plutonium per year. *Id.* 2566(a), (h). The statute also prescribes remedies against DOE for missing these deadlines. *Id.* § 2566(b)(6)(B), (b)(6)(C); *id.* § 2566(c); *id.* § 2461.

Beginning shortly after the enactment of § 2566 and continuing through 2012, DOE shipped significant amounts of defense plutonium to South Carolina for conversion into MOX fuel. Construction began on the MOX Facility on or about August 1, 2007. As the National Academy of Sciences observed, however, "Construction has encountered substantial schedule delays and cost overruns." National Academies of Sciences, Engineering, and Medicine, *Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report* 2 (Washington, DC: The National Academies Press, Oct. 2018) [hereafter cited as NAS Interim Report].[3] Although the MOX Facility originally was supposed to begin operating in 2009, today DOE estimates construction will not be completed until at least 2048. App. 5a. The delay caused DOE to violate, among other statutory requirements, a requirement that it remove not less than one metric ton of weapons-grade plutonium by January 1, 2016. In a prior action, South Carolina successfully sued DOE for this statutory ***7** violation. *South Carolina v. United States,* 907 F.3d 742 (4th Cir. 2018).

II. DOE terminates construction of the MOX Facility with no approved alternative for disposition of the defense plutonium at SRS.

Since 2014, DOE has continuously sought termination of the MOX Project and advocated for its proposed "Dilute and Dispose" concept, under which DOE would prepare "dilute" plutonium at SRS for ultimate "disposition" at the Waste Isolation Pilot Plant (WIPP) in New Mexico. Despite DOE's new idea, Congress has continued to mandate that DOE build the MOX Facility. The current mandate is found in two statutory provisions: Section 3121(a) of the NDAA FY18, and Section 309(a) of the Consolidated Appropriations Act, 2018 (CAA FY18). App. 95a-98a.[4]

Recognizing South Carolina's concerns that it be left as an indefinite repository for defense plutonium, Congress specified that DOE can avoid the statutory mandate to construct the MOX Facility only if the Secretary of Energy obtained a waiver of it. The waiver requirements are prescribed in Section 3121(b) of NDAA FY18, and are incorporated by reference in Section 309(b)

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of CAA ***8** FY18. App. 95a-98a. To get a waiver, the Secretary must "submit to the congressional defense committees" (1) a commitment to remove defense plutonium from South Carolina and (2) a certification regarding certain points, including the existence of a viable and feasible alternative option.[5] This waiver requirement was enacted by Congress to ensure a legally viable and feasible disposition pathway existed to remove defense plutonium from South Carolina.

The Secretary of Energy purported to meet the waiver requirement in a letter dated May 10, 2018 ("May 10 Letter"). The May 10 Letter notified Congress of DOE's decision to permanently abandon construction of the MOX Facility and pursue its "Dilute and Dispose" concept for plutonium disposition. App. 107a-109a. In the May 10 Letter, the Secretary stated, "I confirm that the Department is committed to removing plutonium from South Carolina intended to be disposed of in the MOX facility." App. 107a. The Secretary also certified that "an alternative option for carrying out the plutonium disposition program … exists" - namely, the "Dilute and Dispose Approach." App. 108a. But the Secretary did not address the "many barriers" that the National Academy of Sciences has identified and said "must be addressed … before the dilute and dispose conceptual plans can be implemented." NAS Interim Report, *supra,* at 19. In particular, the Secretary did not address any of the legal barriers that exist, despite the waiver provision's requirement that he identify "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose concept. NDAA FY18, § 3121(b)(1)(C).

***9** Based on the decision reported in the May 10 Letter, the Secretary issued a "partial stop work order" on May 14, 2018. App. 50a (quoting ECF No. 19-1 ¶ 10). The partial stop work order "halted any new contracts or new hires at SRS for the MOX Project." App. 44a, 72a. The order "was issued to minimize cos[t] to the government during the 30 day period leading up to an eventual full stop work order and the termination letter expected to be issued on June 11, 2018." App. 50a (quoting ECF No. 19-1 ¶ 10). South Carolina filed this action before the termination letter issued and obtained a preliminary injunction against its issuance.

Today, South Carolina continues to host about 10 metric tons of weapons-grade plutonium at SRS slated for MOX Facility processing. South Carolina has no reason to believe that this material is going anywhere anytime soon. To the contrary, as discussed above, DOE has repeatedly missed statutory deadlines for construction and operation of the MOX Facility. In the meantime, South Carolina and its people continue to live with the dangers that are associated with this material and that led to the international agreement with Russia and the Act of Congress directing construction of the MOX Facility in the first place.

III. The Proceedings Below.

A. Federal District Court

On May 25, 2018, the State filed a complaint in the United States District Court for the District of South Carolina challenging DOE's final agency action to terminate the Project. The complaint invoked subjectmatter ***10** jurisdiction under the federal-question statute, 28 U.S.C. § 1331. The State asserted two claims of statutory violations, both resting on the cause of action created by the Administrative Procedure Act (5 U.S.C. §§ 702, 704 & 706): DOE violated (1) NEPA by failing to prepare a supplemental Environmental Impact Statement analyzing its decision to terminate the MOX Facility in favor of the Dilute and Dispose approach; and (2) the statutory provisions requiring DOE to obtain a waiver before terminating construction of the MOX Facility (NDAA FY18, § 3121(b) and CAA FY18, § 309(b)). The State sought declaratory relief and a permanent injunction.

The State also moved for a preliminary injunction to maintain the status quo by enjoining DOE from terminating the Project during the pendency of this lawsuit. The district court granted the preliminary injunction on June 7, 2018. App. 34a-82a.

In its preliminary injunction order, the district court comprehensively addressed and rejected DOE's arguments that South Carolina lacks standing and that the May 10 Letter is not final agency action. App. 44a-54a. The court held that South Carolina has standing to assert its procedural rights under NEPA and the statutory waiver provisions "because the State owns extensive property adjoining, and one road traversing the impacted area." App. 47a. The court further held that the decision of the Secretary

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announced in the May 10 Letter is final agency action reviewable under the APA. The Secretary's "execution of the MOX termination waiver" in the May 10 Letter, if allowed to stand, waives the statutory requirements to continue building the MOX Facility. In addition to this legal effect, the May 10 Letter creates the ***11** "practical reality that the full stop order that is planned for June 11, 2018 will shut down the MOX Facility." App. 50a. Furthermore, the court concluded, "[b]ecause the MOX Project is the only legally authorized disposition method for MOXable plutonium at SRS," the "practical effect" of the decision announced in the May 10 Letter "is that the plutonium will remain at SRS indefinitely." App. 54a.[6]

The court also held that South Carolina is likely to succeed on the merits of both its claims.

In analyzing the State's NEPA claim, the court observed that the relevant statutes, and DOE itself, contemplate that NEPA applies "when rendering decisions and taking action related to the disposition of defense plutonium at SRS." App. 60a. DOE relied, however, on an Environmental Impact Statement (EIS) issued in December 1996 that analyzed the storage of weapons-grade plutonium for a period of up to 50 years - *i.e.,* until 2046. App. 63a, 65a. DOE argued that this EIS sufficed because its use of the new Dilute and Dispose approach would remove all the MOXable plutonium before that 50- ***12** year period ended. App. 63a. The district court rejected that argument on two grounds. First, DOE's past actions with regard to the MOX Facility "have called into question the viability" of DOE's timeline for removal using the Dilute and Dispose approach. App. 65a. Second, and in any event, "pursuing the Dilute and Dispose approach" for the MOXable plutonium "would have a significant impact on the environment." App. 65a. Therefore, the court held, DOE must "produce a supplemental EIS that addresses the conceivability, both practically and legally" of its proposed new approach. App. 65a-66a.

The court also held that the State is likely to succeed on its claim that the Secretary violated the statutory requirements for a waiver of the statutory mandate to continue building the MOX Facility. App. 66a-72a. The court identified three flaws in the May 10 Letter announcing the Secretary's decision to terminate the MOX Project. First, there is no basis for the Secretary's commitment to remove the MOXable plutonium from SRS, since it rests on the unauthorized and unanalyzed Dilute and Dispose approach. App. 68a. Second, the Secretary's cost comparison of the MOX Project and the Dilute and Dispose approach does not meet statutory requirements for accuracy. App. 69a-70a. Third, although the statutory waiver provision requires the Secretary to report to Congress "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose alternative, the May 10 letter provides no such details. App. 70a-71a. The district court, however, held that adoption of the Dilute and Dispose approach would require, among other changes, the amendment of two federal statutes. App. 71a-72a.

***13** DOE appealed the district court order granting the preliminary injunction to the Fourth Circuit under 28 U.S.C. § 1291(a)(1).[7]

B. Court of Appeals

The Fourth Circuit vacated and remanded, holding that "South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review." App. 22a.

The court held that South Carolina lacks Article III standing because it cannot establish injury in fact. App. 10a-19a. The State argued that DOE's failure to comply with NEPA and Section 3121's waiver provision "results in increased radiation exposure to the public, increased risk of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." App. 12a (quoting State's brief on appeal). The court concluded that those alleged injuries were "too speculative" because they rest "on a … 'highly attenuated chain of possibilities.' " App. 13a (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013)).

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The court focused on the time frame "[b]etween now and 2046 - when the analysis in the current [EIS] governing the risks associated with long-term storage of ***14** weapons-grade nuclear material at the Savannah River Site expires." App. 15a. The court did not explain how the EIS's time frame bears on South Carolina's standing. Nonetheless, it assigned 2046 as "the year when South Carolina's alleged injur[ies] will mature." App. 19a. On this view, the court reasoned that the EIS gives DOE "twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina." App. 15a. The court observed that DOE has already identified the Dilute and Dispose method as "one potential alternative," and it might come up with more. App. 15a. The court also observed that DOE is under a statutory deadline to remove, by January 1, 2022, any weapons-grade plutonium that have been slated for processing by the MOX Facility but not yet processed by then. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)). If DOE failed to meet that deadline, the court explained, South Carolina could sue it, just as it had for DOE's past failure to meet statutory deadlines. App. 16a.

"For reasons similar to" the ones that led the court of appeals to hold that South Carolina lacks standing, it also held that "the two claims at issue fail on ripeness grounds." App. 19a. The court recognized that " 'ripeness turns on the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " App. 20a (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983)). The court apparently found the problem here to be a lack of fitness. *See* App. 20a-21a (paragraph discussing requirements for a case "[t]o be fit for review"). The court said that a case is fit "when the action is final and not dependent on future uncertainties." App. 21a (internal quotation marks omitted). Despite this reference to ***15** "final[ity]," the court of appeals did not discuss, much less express disagreement with, the district court's conclusion that DOE's decision to terminate the MOX Project was final agency action. *Cf.* App. 21a. Instead, the court of appeals seemed to conclude that neither the NEPA claim nor the statutory-waiver-provision claim is ripe because of "uncertainties" about whether South Carolina will indeed become "the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a.

REASONS FOR GRANTING THE PETITION

There are four compelling reasons for this Court to grant review of the Fourth Circuit's opinion on a writ of certiorari.

First, the Fourth Circuit's decision conflicts with *Massachusetts v. EPA, Lujan v. Defenders of Wildlife,* and other decisions of this Court addressing the justiciability of suits by States and other plaintiffs seeking to compel a federal agency to comply with express statutory directives. Rule 10(c). Instead, the Fourth Circuit rejected the precedent of this Court in favor of a novel standing and ripeness analysis that narrowly interprets and, thus, unduly restricts the ability of a State to seek enforcement of a statute that involves and pertains to its legitimate interests.

Second, the Fourth Circuit's opinion creates a conflict among the circuits in applying this Court's holdings on standing. By circumscribing the State's ability to invoke the federal judicial power in seeking the enforcement of an existing statutory framework, the Fourth Circuit went far ***16** beyond any other circuit in heightening the level of injury sufficient to form the basis for a "case or controversy." This Court's intervention is necessary to address the conflict among the circuits. Rule 10(a).

Third, this case presents important Constitutional issues regarding the justiciability of claims brought by a State seeking to vindicate its sovereign interests. The State has a legitimate interest in protecting its environment and in enforcing its substantive and procedural rights in its relations with the federal government. The Fourth Circuit's opinion denies the State the ability to even adjudicate its claims, which strikes at the heart of the federalism principle accepted by the State and the United States upon the formation of the union.

Fourth, this case provides an excellent opportunity for this Court to provide the clarification of *Massachusetts v. EPA* that the Fourth Circuit's decision and the conflict among the circuits demonstrate is warranted. This case presents fundamental and well-defined questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA,* including how "special solicitude" relates to a State's possession of a "procedural right" and to the apparent limitations on suits against the federal government by States suing as *parens patriae.*

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I. The decision below squarely conflicts with decisions of this Court.

A. The decision below conflicts with *Massachusetts v. EPA*.

The decision below conflicts in approach and result with this Court's decision in *Massachusetts v. EPA* by ***17** failing to give "special solicitude" to South Carolina when analyzing the State's standing. South Carolina met all the requirements for Article III and statutory standing, and had the court below given South Carolina the "special solicitude" required by *Massachusetts v. EPA,* it would have been compelled to uphold South Carolina's standing in this case.

In *Massachusetts v. EPA,* this Court held that Massachusetts was "entitled to special solicitude in [its] standing analysis" because of (1) the State's possession of a "procedural right" and (2) its "stake in protecting its quasi-sovereign interests." 549 U.S. at 520. The State's "procedural right" was the statutory right to seek judicial review "for agency action unlawfully withheld." *Id.* at 517 (quoting 42 U.S.C. § 7607(b)(1)). The "quasi-sovereign interests" at stake were Massachusetts' "desire to preserve its sovereign territory" from harmful effects assertedly imposed on that State by greenhouse gases (GHGs). *Id.* at 519. The latter interests were reinforced by Massachusetts ownership of "a great deal of the territory alleged to be affected" by GHGs. *Id.* (internal quotation marks omitted).

Both conditions for "special solicitude" exist here. First, South Carolina asserts violations of its procedural rights under NEPA and the statutory provisions requiring DOE to get a waiver before terminating the MOX Facility. NEPA's creation of a procedural right was recognized by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992). And the statutory waiver provisions plainly create procedural rights designed to protect South Carolina's interests. *Cf. Maryland People's Counsel v. FERC,* 760 F.2d 318, 320 (D.C. Cir. 1985) (per Scalia, J.) ***18** (stating that statute authorizing state agencies to seek judicial review of FERC orders showed "special solicitude" for States, removing prudential barriers on States' relying on *parens patriae* standing in litigation against federal government). Second, South Carolina asserts its quasi-sovereign interests in protecting its territory against the environmental harms threatened by the DOE's decision to terminate the MOX Facility. *See* App. 12a (quoting South Carolina's allegations that DOE's May 10 decision "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increase threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium"). Here, as in *Massachusetts v. EPA,* the State's quasi-sovereign interests are reinforced by its ownership of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

Given South Carolina's "procedural right[s] and [its] stake in protecting its quasi-sovereign interests," South Carolina was "entitled to special solicitude" in the Fourth Circuit's standing analysis. *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina plainly identified those rights and interests in its brief for the Fourth Circuit, and cited *Massachusetts v. EPA* in its brief. Br. of Pl.-Appellee at 16-17, *South Carolina v. United States,* 912 F.3d 720 (4th Cir. 2019) (No. 18-1684), ECF No. 31. Yet the Fourth Circuit disregarded those rights and interests, and based its standing analysis - not on *Massachusetts v. EPA* - but instead primarily on *Clapper,* a case involving the standing of private plaintiffs. *Id.* at 406; App. 13a-17a (citing *Clapper*).[8]

***19** The Fourth Circuit's disregard of *Massachusetts v. EPA* led to error. South Carolina's argument for standing closely resembles Massachusetts'. Both States attack agency decisions (to deny a rulemaking petition; to terminate the MOX Project) for failure to follow statutory requirements that, if followed, could have led to a different decision. As things stood, the challenged agency decisions exposed the States to increased risk of harms (additional loss of coastal land; additional radiation and risks of accidents and theft). The risks of harm associated with prolonged storage of weapons-grade plutonium are at least as well established and imminent as those associated with greenhouse gases. *See* App. 39a (district court decision quoting federal officials' acknowledgement of dangers posed by storage of weapons-grade plutonium). Thus, South Carolina's standing in this case follows *a fortiori* from this Court's decision upholding Massachusetts' standing in *Massachusetts v. EPA*.

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***20 B. The decision below conflicts with decisions of this Court on ripeness.**

The Fourth Circuit held that South Carolina's claims are not ripe because they are not "fit" for review. App. 19a-21a. They are not fit for review, the Fourth Circuit concluded, because South Carolina might not "become[] the *permanent* repository" of "weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a (emphasis in original). This conclusion, however, conflicts with decisions of this Court.

South Carolina's claims are fit for review under this Court's precedent. That precedent establishes that a claim is generally fit for review when it challenges agency action that is final, the challenge is purely legal, and the court's ability to resolve the challenge will not benefit from further factual development. *E.g., Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 811 (2003). The court of appeals below did not disturb the district court's holding that DOE's decision to terminate the MOX Facility is "final agency action" within the meaning of the federal APA. App. 48a-54a; 5 U.S.C. § 704. Furthermore, South Carolina's claims that DOE violated NEPA and the statutory waiver requirements are purely legal, as is clear from the district court's analysis of these claims. *See* App. 59a-72a. The court of appeals below did not identify any further factual developments that would facilitate the resolution of South Carolina's NEPA and statutory-waiver claims.

As this Court has held, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes ***21** place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 737 (1998). The decision below squarely conflicts with this holding in *Ohio Forestry Ass'n* by finding South Carolina's NEPA claim unripe. *See* App. 19a-21a. Moreover, this Court's holding in *Ohio Forestry Ass'n* also applies to South Carolina's claim that DOE violated the requirements for a waiver of the statutory mandate to continue construction of the MOX Facility: Nothing that happened after the date of the Secretary's May 10 Letter will affect analysis of South Carolina's claim that the DOE violated the requirements for a waiver of that mandate.[9]

Although the Fourth Circuit apparently, erroneously - and in conflict with this Court's precedent - relied on the "fitness" prong of ripeness analysis, its conclusion of unripeness seemed to rest on a supposed lack of hardship. That conclusion, in turn, rested on the Fourth Circuit's belief that only in the year 2046 will "South Carolina's alleged injury mature." App. 19a. The Fourth Circuit cited the year 2046 because it was the end date of the 50-year period analyzed in DOE's 1996 Programmatic EIS (PEIS) on storage of weapons-grade plutonium at SRS. App. 15a, 36a. The 1996 PEIS's 50-year period of analysis arguably *might* bear on the merits of South Carolina's claim that DOE must now prepare a supplemental EIS for its termination of the MOX Project. But it has no bearing on South Carolina's standing or the ripeness of its claims. In concluding otherwise, the Fourth Circuit's ***22** ruling reflects "the familiar confusion between standing and the merits." 13B Charles Alan Wright *et al., Federal Practice and Procedure* § 3531.11.1, at 98 (3d ed. 2008).

Properly understood, South Carolina's standing and hardship stem from the *existing* 10 metric tons of weapons-grade plutonium stored within its borders, plus the additional 20 metric tons that DOE currently plans to ship to South Carolina. The existing plutonium exposes South Carolina's property and its citizens to ongoing radiation and the risks of nuclear accidents and threats. South Carolina reasonably fears that DOE's decision to terminate the MOX Facility to pursue the unstudied, unauthorized "Dilute and Dispose" concept will indefinitely *prolong* the storage of massive amounts of plutonium in South Carolina, and in turn cause South Carolina to incur additional costs associated with protecting against the radiation and risks. South Carolina's fear is well-founded considering DOE's dismal track record in meeting statutory deadlines for construction of the MOX Facility. *See* App. 5a.

The Fourth Circuit dismissed this fear, reasoning that South Carolina can always sue DOE when DOE fails to meet the *next* statutory deadline. App. 16a. But the likelihood that DOE will violate *additional* statutory requirements in the future surely cannot disable South Carolina from suing DOE for current statutory violations arising from its termination of the Project. To the contrary, the possibility that South Carolina will have to sue DOE again in the future represents just another realistic risk of future harm that supports its standing to bring this suit. *Cf. Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 154-55 (2010) (upholding standing based ***23** partly on costs incurred by plaintiffs to mitigate realistic risks); *Texas v. United States,* 497

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F.3d 491, 497 (5th Cir. 2007) (upholding State's standing based partly on realistic risk that State would have to participate in compelled mediation over tribal gaming).

II. The Fourth Circuit's decision creates a conflict among the circuits concerning the justiciability of State suits against the federal government.

The Fourth Circuit's decision conflicts in approach with decisions in at least three other circuits: the Second, Fifth, and Tenth. Courts of appeals in these circuits rely on *Massachusetts v. EPA* to accord "special solicitude" to States in analyzing the States' standing to sue the federal government. The analysis in those decisions strongly suggest that those courts of appeals would have upheld South Carolina's standing to bring the present suit.

A. Second Circuit

The Second Circuit analyzed *Massachusetts v. EPA* in a decision that upheld the standing of eight States to sue electric power companies that allegedly contributed to global warming. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 109 (2d Cir. 2015), *rev'd on other grounds,* 564 U.S. 410 (2011).[10] As the Second Circuit understood ***24** *Massachusetts v. EPA,* in that case this Court "seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land." *Id.* at 338.

The Second Circuit upheld the States' standing using reasoning that, if applied in the present case, would have led it to uphold South Carolina's standing: The Second Circuit emphasized that the States were suffering present harms from the defendants' conduct - just as South Carolina's property and residents are currently exposed to radiation and other threats from the continued storage of plutonium - and the relief sought could incrementally reduce the harm - as could occur here, if DOE's compliance with its statutory obligations reduces the amount of time that massive amounts of weapons-grade plutonium are stored at SRS. *Id.* at 340-43.

Although *Connecticut* was a suit against private defendants, the Second Circuit relied on it, as well as on *Massachusetts v. EPA,* in a later decision upholding several States' standing to sue a federal agency for statutory violations. *Nat. Res. Def Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 103-04 (2d Cir. 2018) (internal citations omitted).

***25** B. Fifth Circuit

The Fifth Circuit accorded "special solicitude" to a State under circumstances close enough to those of this case to indicate that it would have upheld South Carolina's standing in this case.

Texas and other States sued the United States over the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). *Texas v. United States,* 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court,* 136 S. Ct. 2271 (2016). After the federal district court preliminarily enjoined implementation of DAPA, the United States appealed. *Id.* On appeal, the Fifth Circuit affirmed the preliminary injunction and upheld Texas's standing to bring the suit. *Id.* at 151-62.

The Fifth Circuit said, "[O]ur determination that Texas has standing is based in part on the 'special solicitude' we afford it under *Massachusetts v. EPA.* " *Id.* at 162. The court described "special solicitude" as a "presumption," presumably meaning a presumption that favors standing in close cases. *Id.; see also id.* at 159 (relying partly on "special solicitude" in finding traceability). The court afforded "special solicitude" based on the same two conditions that exist in the present case: The State was asserting procedural rights that required interpretation of federal statutes, and the challenged conduct implicated the State's "quasi-sovereign interests." *Id.* at 152-53.

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Moreover, the Fifth Circuit's reasons for concluding that "quasi-sovereign interests" were at stake equally apply here. Texas challenged DAPA, a federal immigration program. The Fifth Circuit observed that "[w]hen the ***26** states joined the union, they surrendered some of their sovereign prerogatives over immigration." *Id.* at 153. Consequently, the Fifth Circuit explained, States must rely on the federal government to protect their interests in immigration matters, just as they must with respect to their interests in the matters involved in *Massachusetts v. EPA:* namely, interstate and international pollution. *Id.* at 153-54. So too here: Because of the federal government's control over nuclear defense material, South Carolina cannot prevent it from storing that material at SRS as long as federal law allows. South Carolina must rely on the federal government to protect its interests and those of its citizens. This reliance warrants consideration when South Carolina sues to enforce the federal executive-branch's compliance with federal statutory requirements enacted, in part, to protect the State's interests. In short, South Carolina's present lawsuit provides at least as compelling a case for "special solicitude" as did the States' lawsuit in *Texas v. United States.*

C. Tenth Circuit

Like the Fifth Circuit, the Tenth Circuit has relied partly on "special solicitude" to uphold State standing.

Illustrative is *New Mexico v. Dep't of Interior,* 854 F.3d 1207 (10th Cir. 2017). In that case, New Mexico sued the Department of Interior (DOI) claiming that DOI lacked statutory authority for regulations on tribal gaming. *Id.* at 1211. Under the challenged regulations, DOI could allow tribal gaming without the State's input unless the State participated in a process that included mediation. *Id.* at 1213. The Tenth Circuit held that New Mexico had standing to challenge the regulations ***27** on two grounds. First, the regulations caused New Mexico procedural injury by depriving it of its asserted statutory right to have a court determine that the State had bargained in bad faith before tribal gaming could be allowed without the State's input. *Id.* at 1216-17. Second, the regulations "injure[d] New Mexico by forcing it to choose between participating in a process it considers unlawful and forgoing any benefit from that allegedly unlawful process - viz., the benefit of being able to offer input, presumably beneficial to its interests, relating to the content of those procedures." *Id.* at 1218. After identifying these two injuries, the Tenth Circuit said, "[T]he Supreme Court's direction that we give states special solicitude in analyzing standing provides further support for each basis establishing New Mexico's standing." *Id.*

In *New Mexico v. Dep't of Interior* and other cases, the Tenth Circuit has, like the Fifth Circuit, apparently treated "special solicitude" as a presumption favoring standing in close cases, or possibly as a "plus factor" applicable in all cases. At the same time, the Tenth Circuit has remarked on " 'the lack of guidance on how lower courts are to apply the special solicitude doctrine to state standing.' " *Id.* at 1219 (quoting *Wyoming v. United States Dep't of Interior,* 674 F.3d 1220, 1238 (10th Cir. 2012); *see also Ariz. State Legisl. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions … are hard to reconcile.") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009)); *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683, 696 n.13 (10th Cir. 2009) ("In determining ***28** that New Mexico has standing because of the threat of environmental damage to lands within its boundaries, we consider that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders."); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States,* 528 F.3d 712, 721 (10th Cir. 2008) (attaching "importan[ce]" to "special solicitude" in analyzing State's standing).

III. This case presents important issues of constitutional justiciability for a State seeking to vindicate its rights under federal law.

The proper handling of weapons-grade plutonium is a public policy matter of exceptional importance, implicating not only issues of national defense and national security but also the United States' obligations under an agreement with Russia. *Cf. New York v. United States.* 505 U.S. 144, 149 (1992). South Carolina does not challenge the federal government's broad authority to regulate this matter or to control operations at the SRS as a federal facility. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983); *Hancock v. Train,* 426 U.S. 167 (1976). But being forced by virtue

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of the Supremacy Clause to host SRS, South Carolina seeks only to ensure federal executive-branch compliance with federal law. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607-08 (1982) ("[T]he State has an interest in securing observance of the terms under which it participates in the federal system.… [A] State does have an interest … in assuring that the benefits of the federal system are not denied to its general population."). This petition thus poses a question of the justiciability of claims by a State against the federal government.

***29** The importance of this question is reflected in the long line of cases in which this Court has addressed it. In addition to *Massachusetts v. EPA, see, e.g., Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995) (addressing State's standing to assert claim against the United States under prior decree); *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (addressing scope of statutory waiver of federal government's sovereign immunity from State's suit); *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966) (addressing standing of State to challenge constitutionality of federal statute); *Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923) (addressing State's standing to challenge constitutionality of federal statute); *Kansas v. United States,* 204 U.S. 331 (1907) (addressing United States' sovereign immunity from suits by States); *Georgia v. Stanton,* 73 U.S. 50 (1867) (addressing justiciability of State's suit to enjoin federal Reconstruction Act).

Although the defense plutonium at issue implicates domestic and international concerns of broad significance, even in these areas, States play an important role. Implementing policies and actions involving defense plutonium necessarily require some degree of state involvement through state regulation of related, collateral matters (such as the issuance of certain environmental permits), the utilization of state infrastructure, and the emissions and impact on state proprietary interests.[11] For ***30** that reason, this case implicates the relationship between the federal government and the States. The Supremacy Clause gives the United States the upper-hand in this relationship. But the federal government's supremacy rests on the rule of law. The federal government's violation of the rule of law generally is objectionable, but for an executive agency to inflict violence upon statutory obligations enacted by the legislature to protect a State without any mechanism of accountability by the state through the judiciary is particularly harmful to our system of government. This Court's review is necessary to ensure a State can remedy that harm, especially when, as here, the harm concerns the State's concrete interests in the proper disposition of the massive amounts of weapons-grade plutonium within its borders.

IV. This case provides an excellent vehicle for clarifying *Massachusetts v. EPA.*

The decision below and the circuit split discussed above show the need for clarification of *Massachusetts v. EPA*. This Court has granted certiorari in two prior cases that offered opportunities to do so that were not subsequently realized. *See United States v. Texas,* 136 S. Ct. 2271; *Connecticut,* 546 U.S. at 420. This case provides an excellent opportunity to provide the needed clarification.

For one thing, the decision below is for all practical and legal purposes final. *Cf., e.g., Trump v. Hawaii,* 138 S. Ct. 2392 (2018) (granting certiorari to review court of appeals decision affirming preliminary injunction on dispositive grounds). Although the Fourth Circuit below addressed an interlocutory appeal from an order granting ***31** a preliminary injunction, its holding that South Carolina lacks standing prevents the case from going forward on the merits. By the same token, this Court's reversal of the decision below will enable South Carolina to pursue legal claims that the district court held, in rulings not disturbed on appeal, are likely to succeed. App. 59a-72a.

For another thing, South Carolina preserved below the arguments that it would advance in this Court. The Fourth Circuit characterized South Carolina as advancing "one theory of injury" (App. 19a n.3) because the State's injuries all arise from the real risk of it becoming the indefinite - and, as a practical matter, the "permanent" - "repository of weapons-grade plutonium." App. 12a (quoting South Carolina's brief for the Fourth Circuit). As the Fourth Circuit's opinion reflects, however, South Carolina argued for standing based on its quasi-sovereign interests and its proprietary interests. App. 9a, 12a. Thus, South Carolina has asserted in the courts below precisely the same claims of injury-in-fact that Massachusetts advanced in *Massachusetts v. EPA,* 549 U.S. at 518-23.[12]

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Finally, this case presents legal claims that crystallize key questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA*. One key question is how "special solicitude" relates to the ***32** State's possession of a "procedural right." That question is cleanly posed here by South Carolina's claim under NEPA, a statute that this Court has recognized creates a procedural right. *See Defenders of Wildlife,* 504 U.S. at 572 n.7. Another key question is how "special solicitude" relates to case law apparently limiting suits against the federal government by States suing as *parens patriae. See Massachusetts v. EPA,* 549 U.S. at 539 (Roberts, C.J. dissenting). That question is posed starkly by South Carolina's claim under SRS-specific statutory provisions that are designed partly for the precise purpose of protecting South Carolina's interests and therefore evince "special solicitude" for the State and a corresponding intention to allow South Carolina to sue for enforcement of those provisions. *Cf. Maryland People's Counsel,* 760 F.2d at 320; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 266 (6th ed. 2009). A decision by this Court addressing those questions would go far toward providing the needed clarification of *Massachusetts v. EPA*.

***33 CONCLUSION**

The petition for a writ of certiorari should be granted.

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Footnotes

1 We use "DOE" to refer collectively to the respondents. Among the respondents is the National Nuclear Security Administration (NNSA). NNSA is "established within the Department of Energy [as] a separately organized agency." 50 U.S.C. § 2401(a). The NNSA administers and manages activities related to the MOX Facility. *See id.* §§ 2471(2)(D) & 2481(a).

2 National Defense Authorization Act for Fiscal Year 2018 (NDAA FY18), § 3121(b)(1)(B)(i), 131 Stat. 1283, 1892-93 (2017) (App. 95a); Business Operating Procedure of the National Nuclear Security Administration, "Analysis of Alternatives," dated March 14, 2016 (BOP-03.07), available at https://directives.nnsa.doe.gov/bop/bop-0003-0007.

3 Available at https://www.nap.edu/read/25272/chapter/1.

4 *See* NDAA FY18, § 3121(a); CAA FY18, § 309(a), 132 Stat. 348, 530 (2018). After the district court issued its preliminary injunction and while this case was pending at the Fourth Circuit, Congress reaffirmed this mandate for fiscal year 2019. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, § 3119, 132 Stat. 1636, 2292 (2018) (requiring continued construction of the MOX Facility unless the waiver requirements prescribed in Section 3121(b) of NDAA FY18 are met).

5 NDAA FY18, § 3121(b)(1); CAA FY18, § 309(b), (c).

6 The district court's reference to "MOXable plutonium" (App. 54a) reflects that, as the court explained, "[t]he plutonium at SRS can be divided into two general categories - the plutonium intended for disposition through the MOX Facility and the plutonium not intended for MOX disposition." App. 63a-64a. For the latter, "non-MOXable" plutonium at SRS, DOE has "assign[ed] Dilute and Dispose as the preferred alternative" in a supplemental Environmental Impact Statement published on April 5, 2016. App. 64a. As the district court further explained, "The ongoing Dilute and Dispose approach is limited in resources and legal authority and is not applicable to the plutonium intended for disposition through the MOX Facility." App. 64a.

7 The district court denied DOE's motion for a stay of the preliminary injunction pending appeal. App. 27a-33a. After briefing and oral argument before the Fourth Circuit, however, that court granted DOE's motion for a stay on October 9, 2018. App. 24a. On October 10, 2018, DOE issued a Project termination notice and began terminating employees at the Project.

8 The Fourth Circuit below erred in relying on *Clapper* not only because *Clapper* involved private plaintiffs but also because the plaintiff in *Clapper* did not assert procedural rights. Lacking procedural rights, the plaintiffs in *Clapper* were subject to a determination in an "injury-in-fact" analysis inapplicable to this case. *Massachusetts v. EPA,* 549 U.S. at 517-18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." (citing *Lujan v. Defenders of Wildlife,* 504 U.S. at 572 n.7)). Moreover, the plaintiffs - as "US persons" - did not fall into a class to which the FISA provision in *Clapper* was directed, and that provision did not create any legal rights or protections for the plaintiffs. But, here, through NDAA FY18 and CAA FY18, Congress established statutory protections specifically for South Carolina, and South Carolina also falls within the class entitled to bring claims for NEPA violations. Accordingly - "special solicitude" or not - South Carolina met all the requirements for Article III and statutory standing

9 Nor does South Carolina's lawsuit present a programmatic challenge of the sort that, if addressed now, would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n,* 523 U.S. at 733. South Carolina challenges a highly discrete agency action - DOE's decision to terminate the MOX Facility.

10 The Second Circuit's ruling on standing was affirmed by an equally divided Court. "Four Members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*.... Four Members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing." *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 420 (2011). The Court reversed the Second Circuit's ruling on the merits, holding that the plaintiffs' federal common-law public nuisance claim was displaced by the Clean Air Act and EPA action authorized under the Act. *Id.* at 420-29.

11 All those elements are indisputably present here. South Carolina has and will continue to provide regulatory oversight on certain aspects of the operations at SRS, such as waste disposal. Much of the supporting infrastructure for SRS is provided by the State of South Carolina or its political subdivisions (such as roads and emergency services). *See generally* Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.*; Atomic Energy Act, 42 U.S.C. §§ 2201 *et seq.*

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12 In the decision below, the Fourth Circuit purports to reserve the question "whether other theories of injury would presently confer standing on South Carolina." App. 19a n.3. There are no "other theories" of standing remaining to the State. Accordingly, DOE has given notice of its intent to move for dismissal of the action for lack of jurisdiction if this Court denies further review. Notice, *South Carolina v. United States,* No. 1:18-cv-01431-JMC (D.S.C. May 1, 2019), ECF No. 45.

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EXHIBIT 11

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2019 WL 4730104 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
September 24, 2019.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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***1 REPLY BRIEF FOR PETITIONER**

In this case, a State sues the federal executive branch for statutory violations that deprive it of procedural rights designed to protect its quasi-sovereign interests. This case thus presents the same situation - and presents the same issue of the State's Article III standing - as presented in *Massachusetts v. EPA,* 549 U.S. 497 (2007). This Court's decision in that case would have accordingly controlled analysis of the State's standing if this case had arisen in the Second, Fifth, or Tenth Circuits. *See* Pet. 23-28. In square conflict with those circuits, however, the Fourth Circuit ignored *Massachusetts v. EPA* and failed to accord South Carolina the "special solicitude" to which it was entitled under that case. *Id.* at 521. Had the Fourth Circuit properly applied *Massachusetts v. EPA,* it would have upheld South Carolina's standing to assert the statutory claims upon which, the district court below determined (in rulings not disturbed on appeal), the State is likely to prevail. Pet. App. 59a-72a.

The United States defends the Fourth Circuit's disregard of *Massachusetts v. EPA* on the ground that *Massachusetts v. EPA* applies only "in a close case." Br. in Opp. 14. Even if this were a close case, which it is not, the United States misreads *Massachusetts v. EPA,* and its defense of the decision below merely highlights the need for "guidance on how lower courts are to apply the special solicitude doctrine to state standing." *New Mexico v. Dep't of Interior,* 854 F.3d 1207, 1219 (10th Cir. 2017). The United States does not dispute the importance and complexity of the issue of the States' standing to sue the federal government. *See, e.g.,* ***2** *United States v. Texas,* 136 S. Ct. 2271 (2016). Nor does the United States impugn South Carolina's showing that this Court's decision in *Massachusetts v. EPA* has bred uncertainty among lower federal courts and that this case provides a good vehicle for clarifying it.

ARGUMENT

I. The Decision Below Conflicts with *Massachusetts v. EPA* and Decisions in at Least Three Circuits.

The United States argues that under *Massachusetts v. EPA,* "a State's status as a plaintiff" affects standing analysis only "in a close case." Br. in Opp. 14. This is not a close case, as discussed in the next section. More fundamentally, the United States misreads *Massachusetts v. EPA,* Under a straightforward reading of that case, the Fourth Circuit erred by failing to accord South Carolina "special solicitude" in analyzing the State's standing, and, in the process, the Fourth Circuit put itself in conflict with decisions in at least three other circuits.

Contrary to the United States' submission, this Court did not hold in *Massachusetts v. EPA* that a State's status as the plaintiff matters only in cases where standing is a close call. The Court broadly said that "States are not normal litigants for purposes of invoking federal jurisdiction," and that it was therefore "of considerable relevance that the party seeking review [there] [wa]s a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. Accordingly, the dissent read the ***3** majority's opinion as "adopt[ing] a new theory of Article III standing for States." *Id.* at 539-540 (Roberts, C.J., dissenting). Thus, the Fourth Circuit below ignored the plain import of *Massachusetts v. EPA* by attaching no significance to South Carolina's status as a sovereign State and failing even to cite this Court's decision. Those failures alone warrant further review. *Cf., e.g.,Horn v. Banks,* 536 U.S. 266, 271 (2002) (summarily reversing because of lower court's failure to apply *Teague v. Lane,* 489 U.S. 288 (1989)); *see also* Stephen M. Shapiro, *Supreme Court Practice* 251 (10th ed. 2013) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari.").

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Moreover, further review is warranted here to clarify that the special solicitude to which States are entitled under *Massachusetts v. EPA* is not limited - as the United States would have it - to "close case[s]." Br. in Opp. 14. Instead, as explained in our petition (at 17-18), special solicitude is required when, as here, the State asserts procedural rights connected with protecting its quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 520. The United States does not directly dispute that South Carolina is asserting procedural rights to protect its quasi-sovereign interests. And the United States' oblique arguments against South Carolina's entitlement to special solicitude are unavailing.

The United States seeks to obscure South Carolina's quasi-sovereign interests by repeatedly referring ***4** only to its general concern about becoming an indefinite repository for weapons-grade plutonium. *See* Br. in Opp. 7, 9, 10, 11, 13 & 15. But that concern stems from "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium," as the Fourth Circuit recognized. Pet. App. 12a (quoting Appellee's Br. at 14). The United States cannot contest that these dangers implicate South Carolina's quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 518-519 ("[I]n its capacity of *quasi*-sovereign … the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.") (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). And here, as in *Massachusetts v. EPA,* those quasi-sovereign interests are reinforced by the State's ownership of property adjacent to, and a road traversing, the Savannah River Site (SRS), all of which property is directly affected by these threats. *See id.* at 519; Pet. App. 47a.

The United States observes that there is no "special statutory right of judicial review" in this case. Br. in Opp. 15. But special solicitude under *Massachusetts v. EPA* does not depend on any such right. What matters is the existence of a "procedural right." *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina has procedural rights under NEPA, which this Court recognized as a source of such rights in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (cited in *Massachusetts v. EPA,* 549 US. at 517-518); and under ***5** statutes enacted expressly and specifically to protect the State's concrete interests in connection with SRS. *See* Pet. 17-18; Br. of *Amicus Curiae* United States Senator Lindsey Graham in Support of Petitioner 4-10 [hereinafter Sen. Graham *Amicus* Br.]. Those procedural rights, together with the quasi-sovereign interests that those rights protect, entitle South Carolina to special solicitude under *Massachusetts v. EPA*.

As shown in our petition (at 23-28), the State would have been accorded this solicitude in, among other courts, the Second, Fifth, and Tenth Circuit. *See also Brackeen v. Bernhardt,* No. 18-11479, 2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019) (relying on *Massachusetts v. EPA* to analyze States' standing to challenge Indian Child Welfare Act and final rule implementing it). The United States argues, however, that precedent from those courts involves different facts from those of this case. Br. in Opp. 16. The argument misses the point. Those other circuits, unlike the Fourth Circuit, would have recognized that it is "of considerable significance that the party seeking review here is a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. By failing to attach any significance to that circumstance, the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and with decisions of other federal courts of appeals. Sup. Ct. R. 10(a) & (c).[1]

6 II. South Carolina Has Article III Standing under *Massachusetts v. EPA.

In holding that South Carolina lacks standing and that its claims are not ripe, the Fourth Circuit reasoned that South Carolina's injuries will not "mature" until 2046, the end date of the period analyzed in a prior Environmental Impact Statement. Pet. App. 19a. Understandably, the United States does not defend this reasoning, which confuses the issue of standing with the issue of the merits of South Carolina's NEPA claim. Pet. 21-22. Instead, the United States argues that South Carolina's injuries will not mature until *2048,* because that is the earliest that the MOX Facility can be completed. Br. in Opp. 11. That argument suffers from the same two flaws that underlay the Fourth Circuit's reasoning.

First, the argument ignores that South Carolina is suffering *current* injuries. Those injuries include the legal wrongs caused by the United States' violations of South Carolina's statutory rights. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action … is entitled to judicial review thereof."). Those legal wrongs create ongoing actual harms and threats ***7** of harm caused by the approximately 10 metric tons of weapons-grade plutonium at SRS. Just as Massachusetts asserted current

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injury in the form of rising sea levels submerging its coast, South Carolina asserts current injuries in the form of excessive radiation contaminating its environment and other dangers associated with the plutonium's continuing (and mounting) presence. *Cf.* *Massachusetts v. EPA,* 549 U.S. at 522-523.

Second, South Carolina also faces imminent *future* injuries traceable to the federal government's May 10 decision to halt construction of the MOX Facility in favor of the unauthorized and untested Dilute and Dispose concept for processing the MOXable plutonium at SRS. There is at least a "reasonable probability" that the May 10 decision to switch horses in midstream will *prolong* the presence of massive amounts of weapons-grade plutonium at SRS, especially considering the federal government's current plan to ship an additional 26 metric tons of plutonium to SRS. Pet. App. 72a. *Clapper v. Amnesty Int'l,* 568 U.S. 398, 432 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 (2010)). This probability exists despite the United States' prediction that "the decision to halt construction of the MOX facility *reduces* the likelihood of injury by allowing the Department to focus its resources on other disposal methods that can begin more quickly and with greater certainty." Br. in Opp. 12 (emphasis in original).

The federal government's prediction partakes of magical thinking. For one thing, it contradicts the ***8** federal government's own prior forecast that the Dilute and Dispose method will not be completed before 2049, a year *after* completion of the MOX Facility is forecast. *See* National Academies of Sciences, Engineering, and Medicine, Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report 17-18 (Washington, D.C.: The National Academies Press, Oct. 2018) [hereinafter NAS Interim Report]. Moreover, the district court below identified multiple legal and practical hurdles that are likely to delay or altogether block implementation of the Dilute and Dispose alternative. Pet. App. 67a (lack of NEPA analysis of alternative); *id.* at 70a-72a (statutory and regulatory changes required before implementation of alternative); *id.* at 75a-76a (lack of congressional approval for alternative); *id.* at 78a (federal government's prior view that alternative violates agreement with Russia); *see also* NAS Interim Report at 2-3, 19-35 (also discussing "barriers" to implementation of Dilute and Dispose alternative). Beyond all this, the federal government's dismal track record strongly suggests that the predicted 2049 completion date for processing all the SRS plutonium under the Dilute and Dispose method is a chimera.[2]

***9** This Court upheld Massachusetts' standing to challenge EPA's failure to address the long-term, global, hard-to-quantify threat of injury assertedly posed by greenhouse gases from new-car engines manufactured in the United States. *Massachusetts v. EPA,* 549 U.S. at 516-526. This case concerns South Carolina's standing to challenge the Department of Energy's failure to address the ongoing, localized, well-established injuries and threat of future injuries posed by the massive and growing amounts of weapons-grade plutonium within South Carolina's borders. Because the injuries asserted here surely are no more speculative or remote than those found sufficient in *Massachusetts v. EPA,* South Carolina's standing follows a fortiori from this Court's decision in that case.

III. South Carolina's Claims Are Ripe.

As discussed in our petition (at 20-23), the Fourth Circuit's ripeness analysis conflicts with this Court's decisions in *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803 (2003), and *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726 (1998). Indeed, the Fourth Circuit failed even to identify clearly why it found a lack of ripeness under this Court's precedent: Its analysis implies that the claims are not "fit" for review, even though the claims (1) challenge discrete agency action that is indisputably final, (2) pose pure questions of law, and (3) do not depend for their resolution on ***10** further factual development. Reflecting the weakness of the Fourth Circuit's ripeness analysis, the United States does not defend it or attempt to reconcile it with this Court's ripeness precedent. Instead, the United States mischaracterizes the Fourth Circuit's decision.

The United States says the Fourth Circuit "understood petitioner to challenge a decision to make South Carolina 'the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site.' " Pet. 13 (quoting Pet. App. 21a). But that is wrong. The Fourth Circuit correctly recognized that South Carolina challenges a much more narrow, discrete decision: the decision to halt construction of the MOX Facility. Pet. App. 2a. And the Fourth Circuit also correctly understood that ripeness analysis applies to South Carolina's legal *claims,* not its assertions of injury. *See id.* at 19a. Where the Fourth

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Circuit erred was in apparently concluding that South Carolina could not satisfy the hardship prong of ripeness analysis. *See* Pet. 21-22. That conclusion rested on "reasons similar to those that" led it to conclude that South Carolina lacks standing (Pet. App. 19a), and is flawed for the same reasons that its conclusion on standing is flawed.

IV. This Case Is an Excellent Vehicle for Addressing an Issue of Exceptional Importance.

The United States does not impugn South Carolina's showing that the Fourth Circuit's decision is ***11** final and that the question presented was properly raised below. *See* note 1 *supra.*

Nor does the United States contest the importance of the question presented, which concerns the justiciability of suits by States against the federal executive branch. The importance of that question is established by the long line of decisions by this Court on that issue. *See* Pet. 29. Its importance is reinforced by the growing number of suits by States against the federal government - many of which have reached this Court[3] - and by uncertainties among lower federal courts and commentators about *Massachusetts v. EPA* and related precedent. *See Ariz. State Legis. v. Ariz. Indep. Redisricting Comm'n,* 135 S. Ct. 2664, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government … are hard to reconcile.") (internal quotation marks omitted).

This case arises in a setting that vividly illustrates the close connection between State standing and federalism. As set forth in the brief of *amicus curiae* U.S. Senator Lindsey Graham in support of South Carolina's Petition, the federal statutes violated by the federal government were intended to protect South Carolina from exactly what is occurring here - the federal government abandoning its statutory obligations and leaving South Carolina to deal with the ***12** consequences. Sen. Graham *Amicus* Br. 3-10. These statutes were enacted after high-level negotiations between the federal government and the State, and were specifically enacted to provide the State with recourse should the federal government fail to construct and begin operations of the MOX project. *Id.* at 5-10.

Allowing the federal government to shirk its statutory responsibilities to the State in an instance where Congress's clear intent was to protect it sets a dangerous precedent for other States and their relations with the federal government. For, if the federal government is free to violate statutes resulting from negotiations between the federal government and a sovereign State and that are specifically designed to protect the State's sovereign interests with no judicial recourse available to the State once protection is necessary, then the practicality of such negotiations becomes obsolete and the State's sovereign interests may never be protected against injuries caused by the federal government. This contravenes the principles of federalism upon which this nation was established.

*13 CONCLUSION

The petition for a writ of certiorari should be granted.

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Footnotes

1 The United States admits that, in South Carolina's brief for the Fourth Circuit, South Carolina cited *Massachusetts v. EPA* in support of its standing, but the United States criticizes South Carolina's failure to give *Massachusetts v. EPA* more prominence. Br. in Opp. 14. The criticism is misplaced. South Carolina satisfied this Court's "traditional rule" limiting certiorari to issues "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992). The issue of South Carolina's standing under *Massachusetts v. EPA* was presented to the Fourth Circuit, and the Fourth Circuit's disregard of that decision warrants further review because it creates a split among the circuits over a "significant issue." *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 530 (2002).

2 In holding that South Carolina's threat of future injury was speculative, the Fourth Circuit partly relied on the statutory provision requiring removal by January 1, 2022, of weapons-grade plutonium shipped to SRS between April 15, 2002, and January 1, 2022 for processing at the MOX Facility. Pet. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)); *id.* at 21a. Significantly, the United States does not rely on that provision in defending the Fourth Circuit's holding (Br. in Opp. 11), presumably because if the executive branch has

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its way that provision is not long for this world. After all, the federal government has not altered its plans to ship an additional 26 metric tons of plutonium to SRS, notwithstanding the looming January 1, 2022, deadline. Pet. App. 72a.

3 *E.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 139 S. Ct. 2779 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *see also* Tara L. Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851, 852 (2016) ("State suits against the federal government are on the rise.").

End of Document

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ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

EXHIBIT 12

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

140 S.Ct. 392
Supreme Court of the United States.

SOUTH CAROLINA, Petitioner
v.
UNITED STATES, et al.

No. 18-1531
|
October 15, 2019

Case below, 912 F.3d 720.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

All Citations

140 S.Ct. 392 (Mem), 205 L.Ed.2d 214

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EXHIBIT 13

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

1:25

INJUNCTION HEARING SEPT. 30 AT 10:00 A.M. BARNWELL COUNTY ET AL. V. ALAN WILSON

VW

Vicky Ware
vmware@williamsattys.com

To: rlowell@willoughbyhoefer.com
tyoung@tomyounglaw.com

Cc: You cbhutto@williamsattys.com

Friday, September 25, 11:10 AM

Please see the email below from Judge Newman with hearing date in the above matter.

Thank you

Vicky

WILLIAMS & WILLIAMS
ATTORNEYS AT LAW

VICKY WARE LEE

Reply to All

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

EXHIBIT 14

Subject: Hearing on Temporary and Preliminary Injunctions
Date: Friday, September 25, 2020 at 4:57:38 PM Eastern Daylight Time
From: James Carpenter <james.carpenter@carpenterlawfirm.net>
To: aleelc@sccourts.org <aleelc@sccourts.org>
CC: Alan Wilson <AWilson@scag.gov>, Jim Griffin <jgriffin@griffindavislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>
Attachments: image001.jpg, 2020-09-25_Motion for TRO Preliminary Injunction.pdf

Dear Judge Lee:

Today the South Carolina Public Interest Foundation and John Crangle filed a Summons and Complaint (Case Number 2020-CP-40-04603) and a Motion for Temporary and Preliminary Injunctions objecting to the Attorney General's anticipated payout of $75 million in attorneys' fees from funds which we believe belong to the State of South Carolina. I attach a copy of the Motion.

The money is expected to arrive in South Carolina by October 1, or shortly thereafter. We are seeking Temporary and Preliminary Injunctions to maintain the status quo during the litigation and prevent the payout of $75 million, which, once paid out, would probably be very difficult to reclaim.

We are flexible on scheduling. We have notified the Attorney General of our filing the case and the motion.

Please telephone me to discuss scheduling a time for a hearing on our Motion for Temporary Injunction.

Respectfully submitted,

Jim Carpenter
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Mobile: (864) 380-4880
www.carpenterlawfirm.net

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EXHIBIT 15

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 4:02:53 PM Eastern Daylight Time
From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>, Emory Smith <ESmith@scag.gov>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, jgriffin@davislaw.com <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, McCaslin, Debra Secretary (Danita O. Martin) <dmccaslinsc@sccourts.org>, Fitzgerald, Roderick <rfitzgerald@sccourts.org>

All,

Below is the link to join the Virtual Courtroom via WebEx for tomorrow's hearing at 3:00 PM. Please join several minutes prior to ensure you are able to properly connect, and contact me If you have any questions

https://scjudicial.webex.com/scjudicial/onstage/g.php?MTID=ec472dac763c1e4f902b0e7479f1f27cd

Best,
Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:56 PM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

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We prefer to go forward tomorrow at 3pm via WebEx.

Thank you.

Jim Griffin

Get Outlook for Android

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From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44:11 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>; jgriffin@davislaw.com <jgriffin@davislaw.com>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com
Subject: SCPIF v. Wilson 2020CP4004603

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 16

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 12:06:55 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Badge Humphries <bhumphries@griffinhumphries.com>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Jim Griffin <jgriffin@griffinhumphries.com>, James Griffin <jgriffin@griffindavislaw.com>
Attachments: image002.jpg

I will accept service as of today.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Badge Humphries <bhumphries@griffinhumphries.com>
Sent: Monday, September 28, 2020 12:01 PM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; Jim Griffin <jgriffin@griffinhumphries.com>; James Griffin <jgriffin@griffindavislaw.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

Emory,

Please see attached, and please advise if you are willing and able to accept service on behalf of the Attorney General.

Thanks.

Badge

BADGE HUMPHRIES
ATTORNEY

Griffin Humphries LLC
2113 Middle Street, Ste. 305
Sullivan's Island, SC 29482
o. 843.883.7424 f. 843.883.7462 c. 843.991.7080
BHumphries@griffinhumphries.com
www.griffinhumphries.com

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this e-mail message in error, please notify us immediately at the telephone number listed above to arrange for the return and/or deletion of the original message. Thank you for your cooperation.

From: Emory Smith <ESmith@scag.gov>
Date: Monday, September 28, 2020 at 10:13 AM
To: "aleelc@sccourts.org" <aleelc@sccourts.org>
Cc: "james.carpenter@carpenterlawfirm.net" <james.carpenter@carpenterlawfirm.net>, "jgriffin@davislaw.com" <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 17

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 3:46:03 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>
CC: James Carpenter <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 3:44 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

OK.

Who should we speak with then?

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 3:03 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

As I said below, I cannot agree to a temporary hold on the monies.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 2:23 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I have spoken with Brad Hutto and we both would like to reach an agreement with your office to prevent disbursement of the money until the cases are determined on the merits.

Thanks

Jim

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 12:04 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I may have misunderstood about the request to hear both matters at the same time, but having both matters heard at the same time before Judge Newman makes sense and would serve judicial economy. I don't know the process for referral of the Richland case to Judge Newman. I don't know if it could come from Judge Lee or a party.

An email just came in that you may have seen that a hearing can be held tomorrow at 3pm before Judge McCaslin. I have not responded, but believe that having Judge Newman would be better b/c he could consider both matters and avoid the possibility of differing orders in the two cases.

I have not been involved in this matter until your suit and the Barnwell suit were brought. I am just the lawyer on these cases, and I am not involved in the handling of funds. I cannot agree to a temporary hold on the monies.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 11:30 AM
To: Emory Smith <ESmith@scag.gov>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I don't know where you heard that we intended to request that our motion for TRO be heard before Judge Newman at the same time. Frankly, we had not give it any thought.

I did speak with Brad today about the possibility of reaching an agreement with you that covers both his case and ours. We are certainly amenable to an agreement that the funds not be dispersed until the cases are heard on the merits.

If we cannot reach an agreement, we are certainly fine with Judge Newman hearing our motion as well, if this is a possibility. But our case is a Richland County case and Brad's case is in Barnwell County.

I think we would need a special assignment from Court administration or the Chief before Judge Newman could hear our Richland County motion.

Jim

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: aleelc@sccourts.org
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 18

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Tuesday, September 29, 2020 at 6:59:35 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

For the information of all, I note that following the WebEx hearing earlier today, the law firm reported that it had received the money. I don't understand the information reported in Mr. Griffin's email about the money still being at the Treasurer's Office.

As noted in our call today, our Office sent the it to the CG through the system for doing so at 11:21 am on Friday, before this suit was filed. The Executive Budget Office had approved the funds earlier that morning following this Office's request on Sept. 17.

Emory Smith

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 6:43 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please see a revised order. I apologize for the earlier draft. Please use this one.

From: Jim Griffin
Sent: Tuesday, September 29, 2020 6:39 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please find a proposed order from the Plaintiffs' granting a TRO.

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 6:13 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is asking to hold a conference via WebEx to discuss this matter tonight, tentatively at 7:00

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PM. I will be sending invitations to each of you immediately. I will also be reaching out via telephone to all parties to alert them of this conference in case they do not have access to email. Please contact me as soon as possible to confirm receipt of this message.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 5:48 PM
To: Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Crangle was informed that the funds may have been "wired" out of the AG's litigation account but that they have not yet been received by the Treasurer. The Treasure expects to receives the fund tomorrow in the Treasurer's bank account and then will wire to the law firms as requested by the AG.

Also, he was informed that normally payment is made via check and takes approximately 22 days. Here, there has been a request for an expedited wire.

From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 5:06 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I do not understand. My understanding is that the transfer of funds has occurred.

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 4:58 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Judge McCaslin

Our client Mr Crangle has just been informed by an official in Treasurers office that the money has not been wired. They received an expedited request for a wire and it is scheduled to be sent either tomorrow or Thursday.

We would therefore request that the Court enter an injunction ASAP to enjoin the Treasurer's office from making the transfer.

We are available if the Court wishes to reconvene the hearing.

Thank you

Jim

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Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

In addition to the grounds for and against imposing a constructive trust, Judge McCaslin is requesting both parties submit brief proposed Orders as quickly as possible. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072

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Your Honor:

I have just submitted for efiling the attached documents. I am sorry that I have not submitted them earlier but had a computer glitch that delayed me a little while. Will look forward to seeing the Court and counsel at the hearing via WebEx at 3 pm.

Respectfully,

Emory Smith
Counsel for Attorney General Wilson

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All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

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Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

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Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com

Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
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EXHIBIT 19

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Wednesday, September 30, 2020 at 9:27:04 AM Eastern Daylight Time
From: Jim Griffin <jgriffin@griffinhumphries.com>
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, Emory Smith <ESmith@scag.gov>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>

Judge McCaslin

I received confirmation this morning from the State Treasurer that the funds were wired to the Willoughby & Hoefer yesterday just hours prior to the hearing.

Mr. Loftis informed two members of the State Senate of the following in writing: "The Treasurers office received a warrant for payment from the Comptrollers Office Monday night. We processed and wired the funds on Tuesday morning to the law firm's account. This was a standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires."

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 9:29 PM
To: Emory Smith <ESmith@scag.gov>; Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Evening,

Please find attached Judge McCaslin's Order in the above referenced matter which is to remain in effect until a final Order is issued in this matter, no later than 5:00 PM on Friday, October 2, 2020. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 7:00 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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For the information of all, I note that following the WebEx hearing earlier today, the law firm reported that it had received the money. I don't understand the information reported in Mr. Griffin's email about the money still being at the Treasurer's Office.

As noted in our call today, our Office sent the it to the CG through the system for doing so at 11:21 am on Friday, before this suit was filed. The Executive Budget Office had approved the funds earlier that morning following this Office's request on Sept. 17.

Emory Smith

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 6:43 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please see a revised order. I apologize for the earlier draft. Please use this one.

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Sent: Tuesday, September 29, 2020 6:39 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please find a proposed order from the Plaintiffs' granting a TRO.

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Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is asking to hold a conference via WebEx to discuss this matter tonight, tentatively at 7:00

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PM. I will be sending invitations to each of you immediately. I will also be reaching out via telephone to all parties to alert them of this conference in case they do not have access to email. Please contact me as soon as possible to confirm receipt of this message.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
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From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 5:48 PM
To: Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
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Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Crangle was informed that the funds may have been "wired" out of the AG's litigation account but that they have not yet been received by the Treasurer. The Treasure expects to receives the fund tomorrow in the Treasurer's bank account and then will wire to the law firms as requested by the AG.

Also, he was informed that normally payment is made via check and takes approximately 22 days. Here, there has been a request for an expedited wire.

From: Emory Smith <ESmith@scag.gov>
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Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I do not understand. My understanding is that the transfer of funds has occurred.

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549

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We would therefore request that the Court enter an injunction ASAP to enjoin the Treasurer's office from making the transfer.

We are available if the Court wishes to reconvene the hearing.

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Counsel for Attorney General Wilson

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Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
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Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

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Thank you for your consideration of this matter.

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Emory Smith

J. Emory Smith, Jr.
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Office of the Attorney General
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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT B

Summons, Complaint, and Exhibits
South Carolina Public Interest Foundation et al. v. Alan Wilson,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Sept. 25, 2020)

ELECTRONICALLY FILED - 2020 Sep 25 11:58 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-_____ **SUMMONS**

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the Plaintiffs or their attorney, James M. Griffin of Griffin Humphries LLC, 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206-3135, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Badge Humphries
James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
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Attorneys for Plaintiffs

Columbia, South Carolina
September 25, 2020

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-_____ **COMPLAINT**

NOW COME the Plaintiffs, by their undersigned attorneys, and as a Complaint against the Defendant, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation ("SCPIF") is a corporation, not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest including the upholding of the Constitution and laws of the State of South Carolina.

2. Plaintiff John Crangle is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated.

3. Defendant Alan Wilson is the Attorney General for the State of South Carolina.

4. This Court possesses jurisdiction under S.C. Constitution, Art. I, § 8, under S.C. Code Ann. § 15-53-10 *et seq.,* known as the Uniform Declaratory Judgment Act, and under the following decisions, which address public importance standing and citizen or taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina*

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Public Interest Foundation v. Lucas, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Friends of the Hunley,* 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

5. This action raises constitutional and statutory issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the issues this action raises.

FACTS

6. On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade

plutonium at the Savannah River Site ("SRS"). Affidavit of James M. Griffin, Sept. 25, 2020 (attached hereto as Exhibit A and hereinafter referenced as "Griffin Aff."), Ex. 1.

7. The agreement brokered by Governor Hodges is codified at Title 50, United States Code, Section 2566 ("Section 2566").

8. Section 2566 provides for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility at the SRS (the "MOX Facility") to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors. The MOX Facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019.

9. If the DOE did not meet the MOX production objective by January 1, 2014, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2016, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to SRS between April 15, 2002 and January 1, 2022, no later than January 1, 2022.

10. The statute further provides that "[i]f the MOX production objective is not achieved as of January 1, 2016, the Secretary [of the DOE] shall, subject to the availability of appropriations, pay to the State of South Carolina . . . for economic and impact assistance an amount equal to $1 million per day for each day, not to exceed $100 million per year." 50 U.S.C. § 2566(d)(1).

11. The DOE has never met the milestones set forth in 50 USC § 2566.

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12. Under the terms of the Settlement Agreement, Defendant Wilson agreed on behalf of the Citizens of South Carolina to forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of violations of 50 USC § 2566 until 2037. Griffin Aff., Ex. 1, ¶ 5(b).

13. In exchange, the United States agreed to an immediate payment to the State of South Carolina in the amount of $600 million. *Id.* ¶ 5(a).

14. The Settlement Agreement resolves "all claims relating to economic assistance payments or removal of plutonium that have arisen, or will arise." *Id.* ¶ 13.

15. Defendant Wilson announced at a press conference that he intends to pay two private law firms $75 million from the $600 million economic impact and assistance payment for their legal services in representing the State.

16. Upon learning of Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." Griffin Aff., Ex. 2.

17. Governor McMaster concluded the letter stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.*

18. First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that State law requires the entire amount be deposited into the State's General Fund. Griffin Aff., Ex. 3.

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Attorney General Wilson Does Not Possess Authority to Use Proceeds from the U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to South Carolina to Pay Private Law Firms

19. The payment of $75 million to private law firms from a settlement of economic impact and assistance payments owed by the DOE to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution.

20. When money under a settlement agreement is payable directly to the State, as in the case with the Settlement Agreement, the proceeds must be deposited in the General Fund, and only the Legislature controls its appropriation.

21. Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement.

22. In this matter, neither the court order nor the settlement exception applies.

23. There is not any order awarding attorneys' fees.

24. The Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees.

25. Rather, the United States expressly disclaims any liability for attorneys' fees in Section 5(a) of the Settlement Agreement, which provides for "[i]mmediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1, § 5(a) (emphasis added).

26. Section 5(a) of the Settlement Agreement clearly requires that payment of the entire $600 million be made directly to the State of South Carolina.

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27. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million, which is required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.

28. The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act ("Federal Funds Oversight Act") specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et. seq.*

29. Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office ("EBO") and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30.

30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay $75 million to the law firms from the $600 million his agency will receive through this settlement.

31. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

32. Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.")

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33. Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.*

34. Defendant Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order

35. Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in this case appears to be patently unreasonable.

36. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3.

37. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

38. The lawyers brought suit to collect a statutory payment for economic impact and assistance of $100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.

39. The DOE never contested that it failed to comply with federal law.

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40. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.

41. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 Million assistance payment for failing to comply with the statute.

42. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4.

43. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.

44. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5.

45. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.

46. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

47. Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6.

48. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated. The Settlement

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Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *Id.*, Ex. 2.

49. In apparent recognition that contingency fee agreements entered into with the State of South Carolina may produce an unreasonable fee award, the fee agreement entered into with the law firms expressly provides that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7.

50. There is nothing prohibiting Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.

51. Furthermore, a payment of $75 million to the law firms exceeds the amount of fee that they would be entitled to receive under the contingency fee agreements entered with these firms.

52. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to$150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

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53. Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

54. The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019, the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9.

55. On June 7, 2019, Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

56. Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court.

57. The amended fee agreement was executed on June 13, 2019, by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

58. Under the terms of the amended contingency fee agreement, Willoughby & Hoefer is being paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina.

59. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

60. Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court.

61. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

62. The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000.

63. The fee agreement was entered into by Defendant Wilson on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract.

64. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

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WHEREFORE, Plaintiffs pray the Court:

1. Declare that Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit $600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;
2. Declare that Section 2-65-30 prohibits the Attorney General from spending any portion of the $600 million in federal funds unless and until he receives authorization from the EBO;
3. Declare that the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;
4. Declare that the Attorney General's intended payment of $75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause;
5. Declare, in the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable;
6. Enjoin, temporarily and permanently, the payment of attorneys' fees;
7. Grant Plaintiffs their costs and attorneys' fees under Section 15-77-300 of the South Carolina Code of Laws; and in the alternative, grant Plaintiffs their reasonable attorneys' fees and costs from the funds preserved through this action for the people of South Carolina, commonly known as the common fund doctrine; and
8. Grant Plaintiffs such other and further relief as the Court deems just and proper.

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Respectfully submitted,

s/ Badge Humphries

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Exhibit A

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-_____ **AFFIDAVIT OF JAMES M. GRIFFIN**

Comes James M. Griffin and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.

2. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in the Complaint filed concurrently herewith.

Exhibit 1	Settlement Agreement, *South Carolina v. United States*, Fed. Cir. No. 19-2324 (Aug. 28, 2020)
Exhibit 2	Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General (Aug. 30, 2020)
Exhibit 3	Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General (Sept. 10, 2020)
Exhibit 4	Order, *South Carolina v. United States et al.*, Civil Action No. 1:16-cv-00391-JMC (D.S.C. Feb. 7, 2017), ECF No. 76
Exhibit 5	Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32
Exhibit 6	Federal Court Docket Sheets for *South Carolina v. United States*, Case Nos. 1:16-cv-00391-JMC, 1:17-cv-01068-MMS, and 1:18-cv-00038-MMS

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Exhibit 7	Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility
Exhibit 8	Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility (June 13, 2019)
Exhibit 9	*South Carolina v. United States*, 912 F.3d 720 (2019)
Exhibit 10	Petition for Writ of Certiori, *South Carolina v. United States*, No. 18-1531, 2019 WL 2464930 (4th Cir. June 7, 2019)
Exhibit 11	Reply Brief of Petitioner, *South Carolina v. United States*, No. 18-1531 (4th Cir. Sept. 24, 2019)
Exhibit 12	*South Carolina v. United States*, 140 S. Ct. 392 (2019)

Further Affiant sayeth naught.

Dated this 25 day of September, 2020.

James M. Griffin (S.C. Bar No. 9995)
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PO Box 999 (29202)
(803) 744-0800

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Subscribed and sworn to before me
by James M. Griffin on this
the 25 day of September 2020.

Notary Public, State at Large, South Carolina
My Commission Expires September 12, 2029

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EXHIBIT 1

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Fed. Cir. No. 19-2324
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiff's claims, without any further judicial proceedings and without there being any further trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, the parties stipulate and agree as follows:

1. In early 2000, the Department of Energy elected to construct a MOX fabrication facility (MOX Facility) at the Savannah River Site (SRS), Aiken, South Carolina. Since April 15, 2002, and through the present, the Department of Energy transferred defense plutonium or defense plutonium materials into the State of South Carolina in anticipation of disposition into MOX fuel or otherwise. For purposes of this agreement, the parties agree that the amount of defense plutonium or defense plutonium materials remaining at SRS amounts to nine and one-half (9.5) metric tons and will be referenced as the "subject defense plutonium or defense plutonium materials" in this agreement.

2. 50 U.S.C. § 2566, entitled "Disposition of Weapons-Usable Plutonium at Savannah River Site," provides a detailed plan for the MOX Facility, including a schedule for meeting the MOX production objective, defined as the average rate at which the MOX Facility converts defense plutonium into MOX fuel over a given period of time. Should the MOX

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production objective not be achieved by certain dates, the statute requires the Department of Energy to make specified economic and assistance payments and to remove certain defense plutonium or defense plutonium materials transferred to the Savannah River Site but not processed by the MOX facility – referenced in this agreement as the subject defense plutonium or defense plutonium materials – from the State of South Carolina by certain deadlines.

3. The MOX production objective has not been met and will not be met.

4. On March 3, 2018, the State of South Carolina filed an amended complaint in the Court of Federal Claims, seeking economic and impact assistance payments for the years 2016 and 2017.

5. The parties subsequently entered into negotiations designed to resolve amicably all of the State of South Carolina's present and future claims relating to obligations of the Department of Energy imposed pursuant to 50 U.S.C. § 2566(c) and (d). The State of South Carolina has offered to settle this case based upon the following terms:

a. Immediate payment by the United States to the State of South Carolina in the amount of $600 Million (Six Hundred Million Dollars), inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.

b. The State of South Carolina shall forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of 50 U.S.C. § 2566(c) or 2566(d) until January 1, 2037.

c. After January 1, 2037, the State of South Carolina's rights and remedies under 50 U.S.C. § 2566(c) and 2566(d) will be governed solely by the terms of this agreement, as set forth below.

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d. If, on January 1, 2037, 9.5 metric tons of the subject defense plutonium or defense plutonium materials have not been removed from the State of South Carolina, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during the time period from the signing of this Agreement to January 1, 2037, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be multiplied $1.5 Billion (One Billion Five Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy to the State of South Carolina by April 1, 2037. This payment shall be in full satisfaction of any claim for economic and impact assistance payments pursuant to 50 U.S.C. § 2566(d)(2) owed to the State of South Carolina from 2022 through 2036.

e. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during that calendar year, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be

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multiplied by a sum of money representing $1 Million (One Million Dollars) per day for each day during that said year in which there remains a portion of the said 9.5 metric tons, with said sum of money to be capped for any given year at $100 Million (One Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy by December 31 of that particular calendar year, for which any of the 9.5 metric tons remains in the State of South Carolina, beginning with the year 2037.

f. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, the Department of Energy shall continue to remove from the State of South Carolina such remaining subject defense plutonium or defense plutonium materials. If, after December 31, 2036, the Department of Energy has removed less than 4.75 metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may immediately institute legal action to enforce this paragraph 5(f) removal requirement. If, after December 31, 2036, the Department of Energy has removed 4.75 or more metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may only institute legal action to enforce this paragraph 5(f) removal requirement after January 1, 2042.

6. The parties agree that the United States retains sole discretion in the method of removal of the subject defense plutonium or defense plutonium materials. The parties further agree that the determination of the amount of total material removed from the State shall be by certification of the Department of Energy, through a declaration by an appropriate Department official, pursuant to the provisions of 28 U.S.C. § 1746.

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7. The terms of this agreement will remain in effect until the United States removes 9.5 metric tons of the subject defense plutonium or defense plutonium material from the State of South Carolina, or until Congress amends 50 U.S.C. § 2566(c) or (d) with respect to the obligations of the Department of Energy for the removal of defense plutonium or defense plutonium material or payments to the State of South Carolina in a manner that is inconsistent with the terms and conditions of this agreement, whichever is earlier.

8. The State of South Carolina's offer has been accepted on behalf of the United States Attorney General.

9. Upon satisfaction of the terms set forth in paragraph 5(a), the State of South Carolina agrees to join with the United States in stipulating to dismissal, with prejudice, of the appeal pending in the Court of Appeals for the Federal Circuit.

10. Upon removal of the 9.5 metric tons of subject defense plutonium or defense plutonium materials, the State of South Carolina releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related or otherwise involved in: (a) this case, regardless of whether they were included in the complaint, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and (b) any and all outstanding obligations of the Department of Energy arising under 50 U.S.C. § 2566(c) or (d).

11. This agreement is in no way related to or concerned with any taxes for which the State of South Carolina is now liable or may become liable in the future as a result of this agreement.

12. The State of South Carolina warrants and represents that no other action or suit with respect to the claims advanced in this suit or otherwise referenced in paragraph 10 is

pending or will be filed in or submitted to any other court, administrative agency, or legislative body by the State of South Carolina. The State of South Carolina further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit. Should there be now or in the future any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement shall be refunded promptly by the State of South Carolina, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

13. This agreement is for the purpose of settling this case and all claims that the State of South Carolina may or could bring arising from obligations imposed on the Department of Energy pursuant to 50 U.S.C. § 2566(c) or 2566(d). The parties intend that this agreement will resolve all claims relating to economic and assistance payments or removal of plutonium that have arisen, or will arise, between 2016 and the date on which the Department of Energy completes removal of the subject 9.5 metric tons of defense plutonium or defense plutonium materials. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this agreement.

14. The Attorney General for the State of South Carolina represents that he is authorized to enter into this agreement on behalf of the State of South Carolina.

15. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

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AGREED TO:

UNITED STATES OF AMERICA

WILLIAM P. BARR
Attorney General
United States of America

CLAIRE MCCUSKER MURRAY
Principal Deputy Associate Attorney General

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director, National Courts Section

TARA K. HOGAN
Assistant Director
Department of Justice
Civil Division
Commercial Litigation Branch
Washington, DC

DATED: August 28, 2020

STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General
State of South Carolina
Columbia, SC

DATED: August 21, 2020

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EXHIBIT 2

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HENRY MCMASTER
GOVERNOR

August 30, 2020

The Honorable Alan M. Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Attorney General Wilson:

I recently received a copy of the Settlement Agreement you executed with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). As you know, I did not receive the Settlement Agreement until late last week, at which point you had already signed it on behalf the State. Having carefully reviewed the document and your outside counsel's responses to my immediate questions regarding the same, I am compelled to express my concerns regarding the Settlement Agreement.

First, I am not convinced that this long-term arrangement provides sufficient assurances that DOE will remove the plutonium from our State in a timely manner. Currently, federal law provides that all defense plutonium transported into the State between 2002 and the present must be removed from SRS by January 1, 2022. However, under the Settlement Agreement, it appears that DOE will not be required to remove this plutonium until January 1, 2037. And if DOE only removes half of the total amount currently at SRS by this new deadline, the State of South Carolina will be forced to forgo legal action until January 1, 2042. I understand that settlement negotiations are inherently fluid in nature and that the transfer of defense plutonium is not an expeditious process, but the Settlement Agreement does not appear to align with previous discussions. At bottom, I cannot support a compromise that extends the existing removal deadline by up to twenty years.

Second, after reviewing your counsel's responses to my questions regarding the anticipated use of the settlement proceeds, I must note my concerns regarding the payment of attorneys' fees. After years of DOE repeatedly ignoring its obligations and abandoning the MOX project, President Trump and his Administration have demonstrated their commitment to removing surplus plutonium from our State. Secretary Brouillette's willingness to address these inherited issues is

noted and most appreciated. However, the federal government's relatively recent attention to this important issue is due in no small part to our zealous advocacy and coordination with members of the congressional delegation. Accordingly, while I recognize that this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims, I simply cannot endorse the payment of $75 million in attorneys' fees under the circumstances.

To be clear, I appreciate your efforts to recover the economic and impact assistance payments owed to the State and your pursuit of this litigation more generally. However, as I have repeatedly conveyed, it is of paramount importance that South Carolina not become a permanent plutonium waste repository. Therefore, I cannot support a Settlement Agreement that extends DOE's existing removal deadlines by up to twenty years and potentially sidelines South Carolina's future leadership by restricting the State's ability to enforce its legal rights.

Yours very truly,

Henry McMaster

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EXHIBIT 3

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The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

140 N. Main St., Suite 102
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(843) 871-2640
FAX (843) 871-2643
PTI (843) 873-7842

Courthouse, Amelia Street
Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252
FAX (803) 533-6004
PTI (803) 533-6137

DAVID M. PASCOE
Solicitor

September 10, 2020

The Honorable Alan M. Wilson
S. C. Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear Attorney General Wilson:

I write to raise serious concerns about your intent to pay two law firms $75 Million from the proceeds of a $600 Million settlement with the United States Department of Energy (DOE). I believe such payment is prohibited by South Carolina law and appears to violate the canons of ethics which govern licensed attorneys. I request that you, Governor McMaster, and our legislative leaders get together to resolve these issues to avoid potential litigation.

South Carolina law prohibits the appropriation of State funds by any officer in the Executive Branch of government. The $600 Million allocated in the Settlement Agreement with DOE are public funds allocated to South Carolina. You, of all people, know that an Attorney General has no authority to direct how those public funds are spent. Recently, you filed a Brief in the South Carolina Supreme Court emphasizing the very point that executive officers do not have authority to direct funds from a settlement agreement.

The following is a specific quote from your Brief:

> Executive officers...possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund...See, *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623 (2002)["...there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation powers. Art. I, § 8.

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State v. Quinn, Attorney General's Memorandum In Response to Court's Order of March 12 pg. 25.

This above quote is one of the few points I agree with in your Brief. When money is directed to go to the State's General Fund as in the case with the DOE Settlement Agreement, you nor the Governor have the authority to transfer those funds. Only the Legislature controls what happens with the $600 million.

The Legislature has spoken through S.C. Code Section 1-7-150. This statute requires you to deposit all funds received by judgment or settlement into the State's General Fund, and the exception for investigative costs and litigation costs awarded by court order or settlement in this statute clearly does not apply. There was not any order awarding attorneys' fees. The Settlement Agreement does not allocate any portion of the $600 Million to attorneys' fees. In fact, DOE specifically carved out attorneys' fees in the Settlement Agreement. Section 5(a) provides for:

> Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses*.

Section 5(a) clearly requires that payment of the entire $600 Million be made directly to the State of South Carolina, and S.C. Code Section 1-7-150 directs you to deposit $600 Million into the State's General Fund. These are public funds, not a slush fund to dole out money to private law firms.

Your agreement to pay private law firms also raises ethical concerns. Based upon the information I have been able to review, the agreement that you entered with these firms on behalf of the State appears to violate the South Carolina Rules of Professional Conduct. Rule 1.5 of the Rules of Professional Conduct, S.C. App Ct. Rule 407 states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Contingency fees are not exempt from this reasonable standard. *Id.* at Note 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. See, *Getzen v. L. Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006). At the very least, I believe it would be prudent to seek an opinion from the South Carolina Bar Ethics Advisory Committee regarding the fee amount.

The payment of a $75 Million fee for the services performed by the law firms in this matter seems arbitrary and unreasonable. This is public money. It belongs to the Citizens of South Carolina, and awarding private law firms $75 Million is unconscionable when one considers it is almost 13 times the total amount every Solicitor's Office in the State receives in annual state judicial circuit support. This is more than the State funding received by all 32 of the Solicitors' Offices and Public Defenders' Offices combined. It is more than our State provides our entire Judiciary in annual funding. In fact, it is even 5 times more than the annual base budget for the Attorney General's Office. Perhaps most egregious is your attempt to award more money to

private law firms than will probably be received by the counties directly impacted by the storage of plutonium.

These law firms unsuccessfully filed suit to enforce a settlement reached by Governor Hodges which is codified in the United States Code at 50 USC § 2566. The federal statute requires DOE to pay South Carolina $100 Million per year for each year it fails to meet certain deadlines relating to the processing and disposition of surplus defense plutonium stored at the Savannah River Site (SRS). DOE never contested that it failed to comply with federal law. Rather, DOE took the position in federal court that Congress had not appropriated money from which DOE could pay the penalty.

Your lawyers first sued in federal court in South Carolina to collect the $100 Million penalty for failing to comply with the statute in 2017. The federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Claims. Subsequently, your lawyers refiled the same suit before the Court of Claims, this time seeking $200 Million because DOE had not complied with the statute for 2018. Once again, your lawyers lost the case. The Court of Claims ruled with DOE. Your lawyers then appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit. While the appeal was pending, you reached this settlement with DOE.

From court records, it does not appear your lawyers engaged in any discovery whatsoever. I can't find any record of them serving interrogatories; taking depositions; hiring experts; or obtaining documents from DOE. Instead, your lawyers only drafted pleadings and wrote briefs to address the legal question of whether DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. Quite frankly, I do not understand why our State felt the need to bring in private counsel in the first place to deal with a relatively straightforward issue that government leaders were ultimately able to negotiate among themselves.

Under the terms of the settlement, you have agreed on behalf of the people of South Carolina to forgo enforcing their federal rights to have the plutonium removed or processed for another 15 years. In exchange, DOE has agreed to pay South Carolina a substantially reduced penalty of $600 Million. As you acknowledged in your press release, this was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. Yet, you now plan to pay private lawyers a contingency fee on the entire $600 Million when they only sued for $200 Million. This makes absolutely no sense, and I agree with Governor McMaster's objection to your intention to pay $75 Million to these law firms.

The contingency fee agreement that you entered with these law firms is more favorable to the lawyers than your standard contingency fee agreements entered in other cases. Under the payment terms of your standard agreements, these law firms would have been entitled to receive approximately $25 Million, not $75 Million. Curiously, you have never posted the fee agreement for this matter on your office's official website, yet you have other contingency fee agreements posted: http://www.scag.gov/litigation-retention-agreements.

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Finally, this deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.[1]

$75 Million is an enormous amount of money that can be used to make a real difference in the lives of South Carolinians. You cannot lawfully give funds directed to go into the State General Fund to your political friends and even if you could, you should not. I request that you do the right thing as a constitutional officer of our State and seek approval from our General Assembly before you make any attempt to pay public funds to private law firms.

Respectfully yours,

David M. Pascoe, Jr.
First Circuit Solicitor

cc: The Honorable Henry D. McMaster, Governor
The Honorable Curtis M. Loftis, Jr., Treasurer
The Honorable Richard A. Eckstrom, Comptroller General
President Pro Tem Hugh K. Leatherman, Sr., South Carolina Senate
Minority Leader Nikki G. Setzler, South Carolina Senate
The Honorable James H. "Jay" Lucas, Speaker of the S. C. House of Representatives
The Honorable James T. Rutherford, Minority Leader of S. C. House of Representatives
The Honorable G. Murrell Smith, Jr., Chairman of S. C. House Ways and Means

[1] https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

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EXHIBIT 4

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

State of South Carolina, Plaintiff, v. United States; United States Department Of Energy; Dr. Ernest Moniz, *in his official Capacity as Secretary of Energy*; National Nuclear Security Administration; *and* Lt. General Frank G. Klotz, *in his official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security*, Defendants.	Civil Action No. 1:16-cv-00391-JMC **ORDER**

On April 25, 2016, Defendants United States, the United States Department of Energy ("DOE"), Dr. Ernest Moniz, the National Nuclear Security Administration ("NNSA"), and Lieutenant General Frank G. Klotz (collectively "Defendants") filed a motion to dismiss the complaint filed by Plaintiff, the State of South Carolina (the "State"), arguing, among other things, that the third cause of action in the complaint, seeking review of Defendants' alleged failure to act in compliance with 50 U.S.C. § 2566(d), should be dismissed because the court lacked subject-matter jurisdiction over it. (ECF No. 17.) Specifically, Defendants contended that sovereign immunity had not been waived with respect to the third cause of action because the only potential waiver applicable to that cause of action—that found in the Administrative Procedures Act, 5

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U.S.C. § 701, *et seq.*—is not available where, as here, another court, such as the Court of Federal Claims ("CFC") provides an adequate remedy for the challenged agency action at issue. (*See id.* at 30-34.)

By order entered October 31, 2016, the court agreed with Defendants that the court lacked subject matter jurisdiction over the State's third cause of action because, pursuant to its jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346, 1491, the CFC provides an adequate remedy for the agency action challenged in that cause of action and, therefore, Defendants had not waived sovereign immunity from suit in this court with respect to the complaint's third cause of action. (*See* ECF No. 56.) The court subsequently denied the State's motion for reconsideration of its rulings in the October 31, 2016 order. (*See* ECF No. 75.) Because the court was uncertain whether it should dismiss the third cause of action without prejudice to the State's ability to prosecute it in an original action filed with the CFC or instead should transfer the cause of action to the CFC, pursuant to 28 U.S.C. § 1631, the court directed the parties to file supplemental briefing on the issue and declined to decide Defendants' motion to dismiss the third cause of action until the briefs had been submitted. (*See* ECF No. 56 at 24-31.)

The parties have since filed their supplemental briefs. (ECF Nos. 63, 64.) The parties agree that the court should dismiss the cause of action without prejudice to the State's ability to prosecute it in an original action filed in the CFC rather than transfer it. (*See* ECF Nos. 63, 64.) Accordingly, for the reasons stated in the court's October 31, 2016 order (ECF No. 56), as well as in its order denying the State's motion for reconsideration (ECF No. 75) and in the parties' supplemental briefs, Defendants' motion to dismiss the complaint (ECF No. 17) is hereby **GRANTED IN**

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PART.[1] The third cause of action in the State's complaint (ECF No. 1 ¶¶ 97-112) is hereby **DISMISSED** without prejudice to the State's ability to prosecute it an original action filed in the Court of Federal Claims.

IT IS SO ORDERED.

J. Michelle Childs

United States District Court Judge

February 7, 2017
Columbia, South Carolina

[1] The court notes that Defendants' motion to dismiss is not fully disposed by this order. Defendants have moved to dismiss the first and second causes of action in the State's complaint on grounds that the court has yet to address. (*See* ECF No. 17.)

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EXHIBIT 5

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In the United States Court of Federal Claims

No. 18-38C
(Filed: August 20, 2019)

STATE OF SOUTH CAROLINA,	*	
	*	
Plaintiff,	*	50 U.S.C. § 2566; Appropriations;
	*	Cross-Motions for Summary Judgment;
v.	*	Economic and Impact Assistance Payments;
	*	Judgment Fund; RCFC 56
THE UNITED STATES,	*	
	*	
Defendant.	*	

Randolph R. Lowell, Columbia, SC, for plaintiff.

Tara K. Hogan, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff, the State of South Carolina, seeks an award of economic and impact assistance payments for 2016 and 2017 pursuant to 50 U.S.C. § 2566, which directs such payments if the United States Department of Energy ("DOE") fails to meet certain deadlines related to the processing and disposition of surplus defense plutonium stored at the DOE's Savannah River Site ("SRS").[1] Specifically, plaintiff contends that 50 U.S.C. § 2566(d) requires the DOE to pay it $1 million per day, up to a statutory cap of $100 million per year, for a total of $200 million. Both plaintiff and defendant move for summary judgment. For the reasons set forth below, the court grants defendant's motion and denies plaintiff's motion.

I. BACKGROUND

A. Facts

Following the end of the Cold War, the United States was challenged with finding a safe, secure method to dispose of large amounts of weapons-grade nuclear material, including weapons-grade plutonium, from both foreign and domestic nuclear weapons production

[1] The SRS is a federally owned and operated facility that processes and stores nuclear material in support of national defense, nonproliferation, research, and environmental missions. Pl.'s Mot. App. 145.

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facilities. Am. Compl. Ex. 3 at 2. The need to securely store these materials in a safe environment was paramount; however, there was also great promise in reprocessing this material into fuel for nuclear reactors. Id. at 3. If possible, enriched nuclear material would be repurposed into lower-grade fuel, and if the material was not suitable for conversion into fuel, it would be "immobilized" to render it difficult to use as a weapon.[2] Pl.'s Mot. App. 10. To comply with the terms of an agreement with the Russian Federation, which required irradiation to dispose of the material, the DOE determined that the best option would be irradiating the material in a nuclear reactor to degrade it. Id. at 9-10, 13, 19. See generally Am. Compl. Ex. 7.

In early 2000, the DOE selected the SRS to reprocess the material. Pl.'s Mot. App. 68, 77. Simultaneously, the DOE, interested in cost savings through facility closures, wanted to move the plutonium from the Rocky Flats DOE facility near Denver, Colorado, to the SRS. Id. at 82-86. While legislation for these activities was being considered, the governor of South Carolina expressed concern to the DOE regarding the storage of large amounts of weapons-grade nuclear material within the state's borders. Id. at 93-94 (letter from South Carolina Governor Jim Hodges to DOE Secretary Spencer Abraham, dated April 10, 2002). The governor's primary concern was that an agreement brokered between the state and the DOE to remove or reprocess the material would not be legally enforceable:

> I must insist on an ironclad agreement that is fully enforceable in a court of law. The stakes are too high to accept mere political assurances. I will not risk the health and welfare of South Carolina by allowing the enforceability of any agreement to be bound only by federal departmental policy that changes according to political considerations beyond our control.

Id. at 93; see also id. at 103-09 (agreement enclosed in April 11, 2002 letter from DOE Secretary Spencer Abraham to South Carolina Governor Jim Hodges).

Ultimately, on December 2, 2002, Congress enacted a statute, later codified at 50 U.S.C. § 2566, addressing the disposition of weapons-grade plutonium stored at the SRS. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3182, 116 Stat. 2458, 2747-50 (2002) (codified at 50 U.S.C. § 2566 (Supp. III 2004)). The statute provided for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility ("MOX facility") at the SRS to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors, id.; the MOX facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually, Pl.'s Mot. App. 146. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019. § 3182(a)(1)-(2), (g)(1), 116 Stat. at 2747-50. If the DOE did not meet the MOX production objective by

[2] Immobilization is a process of encasing fissile material in glass or ceramics, making it stable for storage and difficult to recover for use in a nuclear weapon. Pl.'s Mot. App. 16. Defense plutonium that was converted into fuel would be "irradiated" in a nuclear reactor. Id. Both methods render nuclear material difficult to transport, conceal, and process into a nuclear weapon. Id.

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January 1, 2011, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2011, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to the site between April 15, 2002 and January 1, 2017, by January 2017. Id. § 3182(c)(1)-(2), 116 Stat. at 2749. The DOE would also be required to remit economic and impact assistance payments to plaintiff in the amount of $1 million per day for each day that certain milestones went unmet, up to a maximum of $100 million per year. Id. § 3182(d)(1), 116 Stat. at 2749. These payments would come "from funds available to the Secretary [of the DOE] . . . ." Id.

In subsequent enactments of the statute, Congress changed deadlines for both MOX processing and material removal, and also changed the funding source for payment of economic and impact assistance. In 2005, Congress amended 50 U.S.C. § 2566 to make payment of economic and impact assistance "subject to the availability of appropriations." See Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 313(4)(A)(ii), 119 Stat. 2247, 2280-81 (2005). This language was retained in the versions of the statute reenacted in 2013 and 2014. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3116, 126 Stat. 1632, 2172-73; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3142(f), 128 Stat. 3292, 3900 (2014). The current version of 50 U.S.C. § 2566 provides that if the MOX production objective was not met, the DOE would be required to remove from South Carolina at least one metric ton of plutonium by January 1, 2016, and an amount of plutonium equal to all unprocessed plutonium shipped to the site from April 15, 2002, to January 1, 2022, no later than January 1, 2022. See 50 U.S.C. § 2566(c) (2012 & Supp. II 2015). It further provides that if the DOE missed the January 1, 2016 deadline, the DOE would be required to make economic and impact assistance payments to plaintiff beginning in 2016. Id. § 2566(d)(1).

In 2002, the DOE began shipping plutonium to the SRS. Am. Compl. ¶ 41; Answer ¶ 41. In 2016 and 2017, the DOE failed to achieve the MOX production objective, did not remove one ton of plutonium from South Carolina, and did not provide economic and impact assistance payments to plaintiff as specified in 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45.

B. Procedural History

On January 8, 2018, plaintiff filed a complaint in the United States Court of Federal Claims, seeking $100 million in economic and impact assistance payments it alleges it is owed for 2016, prejudgment and postjudgment interest, costs and attorneys' fees, and any further relief deemed proper. On March 6, 2018, plaintiff amended its complaint to add a claim for the $100 million of economic and impact assistance payments it alleges is owed for 2017.

Ten days after defendant filed its answer, plaintiff moved for summary judgment. Defendant then cross-moved for summary judgment. Briefing is now complete and, deeming oral argument unnecessary, the court is prepared to rule.

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II. STANDARD OF REVIEW

Both plaintiff and defendant move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. Id. at 324. Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1).

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the court must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Contessa Food Prods., Inc. v. Conagra, Inc., 282 F.3d 1370, 1376 (Fed. Cir. 2002) ("On summary judgment, the question is not the 'weight' of the evidence, but instead the presence of a genuine issue of material fact . . . .") (abrogated on other grounds by Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008) (en banc)); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment."); Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) ("[T]he Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues."). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. However, if neither party satisfies this burden on the filing of cross-motions for summary judgment, then the court must deny both motions. See First Commerce Corp. v. United States, 335 F.3d 1373, 1379 (Fed. Cir. 2003) ("When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration."); Bubble Room, Inc. v. United States, 159 F.3d 553, 561 (Fed. Cir. 1998) ("The fact that both the parties have moved for summary judgment does not mean that the court must grant summary judgment to one party or the other.").

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III. DISCUSSION

The parties have differing views concerning the issue now pending before the court. Plaintiff states that the issue is whether the United States is liable to make economic and impact assistance payments for 2016 and 2017 under 50 U.S.C. § 2566(d)(1), and suggests that the funds to satisfy the liability may come from appropriations already authorized or the Judgment Fund. Pl.'s Mot. Summ. J. 12, 15-16. Defendant argues that the issue is whether the United States is liable to make economic and impact assistance payments if Congress did not appropriate funds for the payments. Def.'s Cross-Mot. Summ. J. 7-8.

The parties agree that the DOE has not met critical milestones to process or dispose of plutonium as required by 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45. Defendant also agrees that had Congress appropriated funds for economic and impact assistance payments, the DOE would be required to remit those funds to plaintiff in accordance with the statute. See Def.'s Cross-Mot. Summ. J. 8. However, the parties disagree as to whether economic and impact assistance payments may be made from: (1) certain appropriated funds for activities already authorized or funds reprogrammed from those activities; or (2) the Judgment Fund. See id. at 11-22; Pl.'s Mot. Summ. J. 12, 15-16. Because these questions turn on the interpretation of law rather than findings of fact, this case is properly before the court on summary judgment.

A. Relevant Legal Standards

Central to the parties' competing contentions is the meaning of 50 U.S.C. § 2566(d)(1). Thus, the court turns to the text of that statute to ascertain how it should be construed. As originally enacted, this section provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2011, the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina each year beginning on or after that date through 2016 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of--
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. III 2004) (emphasis added).

In 2005, the background of 50 U.S.C. § 2566 and the purpose of the economic and impact assistance payments in 50 U.S.C. § 2566(d)(1) was discussed in the United States Senate:

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> In a sign of good faith to the State of South Carolina, language was negotiated . . . that required the [DOE] to convert one metric ton of defense plutonium into fuel for commercial nuclear reactors by 2011 or face penalties of $1 million per day up to $100 million per year until the plutonium is either converted into the fuel or removed from the State. It has never been the intention of South Carolina to receive penalty payments; the residents . . . simply sought reassurances that weapons-grade plutonium would not remain at [the] SRS indefinitely. South Carolina would not have accepted [the defense] plutonium without this statute.

151 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). Later in that session, a "technical correction" to 50 U.S.C. § 2566(d)(1) was proposed:

> It is also my intention to make a technical correction, in the future, to language contained in the conference report to the Fiscal Year 2006 Energy and Water Appropriations Act. This conference report contains a change to important authorizing language that would make these penalty payments "subject to the availability of appropriations."

Id. (statement of Sen. Graham).

The technical correction was made to the version of 50 U.S.C. § 2566 enacted in 2005; subsection (d) of that statute provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2014, the Secretary shall, subject to the availability of appropriations, pay to the State of South Carolina each year beginning on or after that date through 2019 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of–
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. V 2006) (emphasis added).

Subsequent versions of 50 U.S.C. § 2566 enacted on January 2, 2013, and December 19, 2014, retained the phrase "subject to the availability of appropriations" in subsection (d)(1). See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). Notably, other

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parts of the statute remained essentially unchanged from the version originally enacted, with the exception of the deadlines. For example, 50 U.S.C. § 2566(d)(2)(A) has consistently provided:

> (A) If, as of January 1, 2022, the MOX facility has not processed mixed-oxide fuel from defense plutonium and defense plutonium materials in the amount of not less than—
>
> > (i) one metric ton, in each of any two consecutive calendar years; and
> >
> > (ii) three metric tons total,
> >
> > the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the removal by the Secretary from the State of South Carolina of an amount of defense plutonium or defense plutonium materials equal to the amount of defense plutonium or defense plutonium materials transferred to the Savannah River Site between April 15, 2002, and January 1, 2022, but not processed by the MOX facility.

50 U.S.C. § 2566(d)(2)(A) (2012 & Supp. II 2015) (emphasis added).

If defendant is liable to plaintiff under 50 U.S.C. § 2566(d)(1), funds to satisfy the obligation in the statute must come from a congressionally sanctioned source because, pursuant to the Appropriations Clause of the United States Constitution, the federal government may only spend money that Congress has appropriated. See U.S. Const. art. I, § 9 cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Congress may also require that funds only be used for specific programs or purposes. See Nutt v. United States, 837 F.3d 1292, 1295 (Fed. Cir. 2016) ("According to the Constitution's Appropriations Clause, 'funds may be paid out [by the Treasury] only on . . . the express terms of a specific statute.'" (quoting Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990) (alteration in original))). If Congress specifies a purpose for appropriated funds, "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2012).

If Congress elects to provide unrestricted, or "lump-sum," appropriations to an agency, those appropriations are normally allocated at the agency's discretion. See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); see also U.S. Government Accountability Office, Principles of Appropriations Law—Vol. II ("GAO Redbook") 6-5 (3d ed. 2006) ("A lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object

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described.").[3] The normally broad agency discretion to direct lump-sum appropriations may be limited when an agency is bound by a contract; in such circumstances, an agency may not avoid contractually obligated payments if unrestricted, i.e., lump-sum, funds are available. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 636-38 (2005). Agency discretion is also limited by line-item appropriations, in which Congress places conditions on how an appropriation may be spent. To determine whether an expenditure is permitted for a particular line item, agencies perform a "necessary expense" analysis. See GAO Redbook, supra, at 3-14 to 3-15. "Under the necessary expense doctrine, '[a]n appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.'" U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quoting GAO Redbook, supra, at 4-20). For an expense to be found necessary, (1) there must be a logical relationship between the expenditure and the appropriation; (2) the expenditure must not be prohibited; and (3) the expenditure must not be provided for in another appropriation. GAO Redbook, supra at 3-14 to 3-17.

B. Plaintiff May Not Receive Economic and Impact Assistance Absent a Congressional Appropriation for That Purpose

Although plaintiff and defendant agree that the DOE did not comply with the statute, they disagree as to whether any funds are available to satisfy the DOE's statutory obligation. See Pl.'s Mot. Summ. J. 12, 15-16; Def.'s Cross-Mot. Summ. J. 11-22. Defendant argues that, absent an appropriation, the DOE is not liable to plaintiff for any payments and, alternatively, that any liability that flows from the statute is limited to the amount Congress appropriated for economic and impact assistance. Def.'s Reply 1-2, 12. Plaintiff appears to concede that no funds were specifically appropriated for economic and impact assistance. See Pl.'s Reply 3. However, the lack of a specific appropriation does not per se remove the DOE's liability for economic and impact assistance payments. Rather, defendant's obligation to make economic and impact assistance payments manifested when it failed to comply with the terms of 50 U.S.C. § 2566. See Greenlee Cty. v. United States, 487 F.3d 871, 880 (Fed. Cir. 2007) ("We conclude that defendant's liability for . . . payments was limited to the amounts appropriated by Congress." (emphasis added)). The question remaining is the extent of defendant's liability, a question that is purely legal in nature.

Plaintiff advances two theories under which the DOE could remit economic and impact assistance payments without an additional congressional appropriation to the DOE: (1) the DOE could use existing lump-sum appropriations or (2) the DOE could reprogram funds Congress appropriated for other purposes. Pl.'s Mot. Summ. J. 15-25. The court examines them in turn.

[3] The first three chapters of the GAO Redbook are in the GAO Redbook's fourth edition, while the remaining chapters are in the third edition. Citations to the GAO Redbook are to the most recent version.

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1. Congress Did Not Provide Lump-Sum Appropriations in the Consolidated Appropriations Acts of 2016 and 2017

Under its first theory, plaintiff initially contends that there are lump-sum appropriations available to made the economic and impact assistance payments for 2016 and 2017. Pl.'s Mot. Summ. J. 15, 22. It primarily relies on the observation in Greenlee County that the United States Supreme Court ("Supreme Court") addressed the question of "what appropriation amounts are available?" in Cherokee Nation–in the context of a contract case–"that the presence of sufficient unrestricted lump-sum appropriations (not specifically appropriated for the program at issue) to meet the government's contractual obligation qualified as available appropriations." 487 F.3d at 880 & n.3, quoted in Pl.'s Mot. Summ. J. 15. In essence, plaintiff is suggesting that the principle espoused in Cherokee Nation–that a court can order an agency to use its lump-sum appropriations to satisfy a contractual obligation–should be extended to situations in which the government's obligation is only statutory in nature. See Pl.'s Reply 6.

Both Greenlee County and a related case, Prairie County, concern a government benefits program enacted to reimburse local governments for lost property tax revenues caused by the federal government's ownership of large amounts of land in their communities. See Prairie Cty. v. United States, 782 F.3d 685 (Fed. Cir. 2015); Greenlee Cty., 487 F.3d at 871. Because the federal government does not pay property taxes to local communities, Congress created a "Payment in Lieu of Taxes" ("PILT") program to compensate local governments for lost tax revenue. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 873-74. Although Congress designated a formula for reimbursing local governments, appropriations for the PILT program were insufficient to reimburse all qualifying communities to the amount yielded by the formula. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 874. Greenlee County and Prairie County, whose compensation fell short when appropriations for PILT were exhausted, separately filed suits in the United States Court of Federal Claims, followed by appeals to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Prairie Cty., 782 F.3d at 687-88; Greenlee Cty., 487 F.3d at 874-75.

In Greenlee County, the Federal Circuit observed that obligations in contractual relationships were distinguishable from obligations flowing from benefits programs. 487 F.3d at 878-79. While contractual obligations could not be avoided if unrestricted appropriations were available for payment, noncontractual statutory obligations, i.e., benefits, could be avoided if Congress circumscribed its liability in the statute itself. See id. at 879 ("The conclusion that [the statute] limits defendant's liability to the amount appropriated is particularly appropriate because [the statute] . . . involves a benefits program not a contract, and 'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated." (emphasis added)). Eight years later, the Federal Circuit in Prairie County again focused on the plain language of the statute: "Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability . . . or whether [the statute] imposes a statutory obligation to pay the full amount . . . regardless of appropriations by Congress." 782 F.3d at 690 (quoting Star-Glo Assocs., LP v. United States, 414 F.3d 1349, 1355 (Fed. Cir. 2005)). Even in a contractual relationship, however, payment requires an appropriation. See Greenlee Cty., 487 F.3d at 878 ("The Supreme Court has noted that, even in the contract context, the 'subject to the availability of appropriations' language means that the government is not contractually bound except to the extent that appropriations are available."

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(citing Cherokee Nation, 543 U.S. at 643)); see also id. ("[A] statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress. . . . [I]t is undisputed that if [a statute] use[s] the phrase 'subject to the availability of appropriations,' [plaintiff's] right to recover would be limited to the amount appropriated.").

The Federal Circuit has also distinguished between the analysis of language limiting liability in contractual relationships from the analysis of similar language in benefit payment statutes, concluding in the latter that congressional intent plays a larger role:

> [When] the government is not seeking to limit contractual liability, but to limit benefit payments, . . . considerations of predictability are far less significant, and . . . there is greater room to rely on other indicia of Congressional intent, such as legislative history, to ascertain the congressional purpose.

Star-Glo Assocs., LP, 414 F.3d at 1355.

The relationship between the plaintiff and the government in Cherokee Nation was contractual, unlike the relationship between the plaintiff and the government here. Compare Cherokee Nation, 543 U.S. at 639, with 28 U.S.C § 2566 (2012 & Supp. II 2015). Plaintiff concedes that defendant's liability in this case is based upon a statute and not a contract. See Pl.'s Reply 6-7 ("The State has not (yet) asserted a contract claim against the United States. . . . [T]his case is only about DOE's failure to meet its statutory obligation to provide the economic and impact assistance payments. . . ."). In the absence of any binding precedent or other legal support for extending the holding of Cherokee Nation to a purely statutory obligation, the court declines to do so. Nevertheless, it is necessary to examine whether 50 U.S.C. § 2566 allows for the use of lump-sum appropriations for economic and impact assistance and, if so, whether Congress made such appropriations in the pertinent Consolidated Appropriations Acts.

When a statute creates a right to compensation, but also limits the government's liability to the amount appropriated, the court must determine "whether there are appropriations available to satisfy the government's liability by considering whether the statute in fact limits the government's liability to the amount appropriated," and "what appropriations are available . . . to satisfy that liability." Greenlee Cty., 487 F.3d at 878. In this case, the statute conditions defendant's payments to plaintiff as "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). This language was first enacted in 2005, well before the DOE's violation of the statute in 2016. See § 313, 119 Stat. at 2280-81. Moreover, this specific language is directly addressed in Greenlee County: "'[S]ubject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." 487 F.3d at 878. Also important is the fact that the less restrictive "from funds available to the Secretary" in the originally enacted version of 50 U.S.C. § 2566(d)(1) was later changed to the more restrictive "subject to the availability of appropriations." Compare 50 U.S.C. § 2566(d)(1) (Supp. V 2006), with 50 U.S.C. § 2566(d)(1) (Supp. III 2004).

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"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978) (collecting cases). Here, Congress twice reenacted 50 U.S.C. § 2566 following the 2005 addition of the "subject to the availability of appropriations" language and the Federal Circuit's 2007 explanation of that language in Greenlee County, retaining that verbiage each time. See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). The court therefore may presume that Congress was aware that courts interpreted the phrase "subject to the availability of appropriations" as limiting the government's liability to the amount appropriated, and purposely retained this more restrictive language in subsequent reenactments.

Given the above, a plain reading of 50 U.S.C. § 2566(d)(1) evidences Congress's intent that payments for economic and impact assistance can only be made if (1) there is a specific appropriation for that purpose, or (2) there is a lump-sum appropriation that the DOE could use for that purpose. The parties do not dispute that Congress did not appropriate funds for the specific purpose of economic and impact assistance payments. Pl.'s Reply 9; Def.'s Reply 2. Plaintiff argues, however, that funds were available through lump-sum appropriations "legally available" to satisfy statutory obligations. Pl.'s Reply 3.

As plaintiff notes, "Congress appropriated approximately $18.59 billion and $19.69 billion to DOE for its 'Atomic Energy Defense Activities' for fiscal years 2016 and 2017, respectively." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 248-50 (fiscal year 2017). Of those amounts, "Congress directed that approximately $1.9 billion would be for 'Defense Nuclear Nonproliferation' each year." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 250-51 (fiscal year 2017). Congress further directed that the $1.9 billion be allocated to certain, specified programs, including:

- Global Material Security
- Material Management and Minimization
  - Nuclear Material Removal
  - Material Disposition
- Nonproliferation and Arms Control
- Defense Nuclear Nonproliferation R&D
- Nonproliferation Construction

Pl.'s Mot. Summ. J. 19-20; Pl.'s Mot. App. 195. Plaintiff asserts that the funds Congress allocated to these programs were lump-sum appropriations that the DOE could use to make economic and impact assistance payments. Pl.'s Mot. Summ. J. 19-20.

Defendant contends that the funds Congress provided for these programs were not lump sums. See Def.'s Cross-Mot. Summ. J. 13-14. In support of its argument, defendant relies on the 2016 and 2017 Consolidated Appropriations Acts, id., which incorporate, by reference, tables allocating funds for specific programs (as plaintiff recognizes). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 301(d), 129 Stat. 2242, 2417 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 301(d), 131 Stat. 135, 320; Pl.'s Mot. App. 166; see also Pl.'s Mot. App. 166, 186-201 (containing the tables). Defendant contends that the

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"DOE's appropriated funds are limited to the specific purposes and amounts provided in the tables contained within the explanatory statements accompanying the relevant [Consolidated Appropriations Acts]." Def.'s Cross-Mot. Summ. J. 14; see also id. at 15 ("'When an appropriation specifies the purpose for which funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds for the specified purpose.'" (quoting GAO Redbook, supra, at 4-11)).

Defendant is correct. The tables incorporated by reference into the Consolidated Appropriations Acts specify funding for specific programs, evidencing that the appropriations for Defense Nuclear Nonproliferation and its constituent programs were not lump-sum appropriations, which, by definition, fund multiple programs. GAO Redbook, supra, at 6-5. Plaintiff fails to acknowledge the import of the tables. See Pl.'s Reply 12 ("[T]hese subprogram appropriations are 'lump-sum' appropriations because they 'cover a number of specific programs, projects, or items.'"). Because of Congress's level of precision, the court is not persuaded that these appropriations were in fact "lump-sum appropriations." Consequently, the appropriations could not be used for economic and impact assistance payments.

2. Reprogramming Is Not Available for Economic and Impact Assistance Payments

Plaintiff alternatively argues that the economic and impact assistance payments could be provided from other funds that Congress appropriated to the DOE via a discretionary reallocation known as "reprogramming." Id. at 16-17. "Reprogramming" refers to "the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation." GAO Redbook, supra, at 2-44. Reprogramming, however, is subject to guidelines to prevent abuse or the allocation of funds to activities that are too far removed from Congress's intended purpose in providing the funds. See id. at 2-44 ("[A]gencies generally are free to reprogram, even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation."); see also id. at 2-45 ("Though agencies generally have authority to reprogram funds, Congress may limit this authority."). These limitations accord with the principle that funds appropriated for a particular purpose may not be used for any other purpose. See 31 U.S.C. § 1301(a)-(b).

Defendant argues that reprogramming funds for economic and impact assistance would effectively create a new program or activity because the purpose of economic and impact assistance is substantially different from the purposes of programs identified in the 2016 and 2017 Consolidated Appropriations Acts. Def.'s Reply 11. Defendant notes that those Acts "prohibit DOE from reprogramming funds to create, initiate, or eliminate a 'program, project, or activity.'" Id. (quoting § 301(f)(1), 129 Stat. at 2417; § 301(f)(1), 131 Stat. at 320). Defendant also observes that § 301(d) of each of these Acts incorporates, by reference, a table that specifically allocates appropriations to individual programs, projects, and activities. Def.'s Cross-Mot. Summ. J. 15. Defendant argues that because the purpose of economic and impact assistance payments are not reasonably related to the purposes for which Congress made appropriations in the 2016 and 2017 Consolidated Appropriations Acts, the funds appropriated in those Acts are not available to pay plaintiff or to be reprogrammed to pay plaintiff. Id. at 15-17.

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As an initial matter, plaintiff provides no legal support for the proposition that this court has the authority to direct an agency to reprogram funds appropriate for one purpose to another purpose. Nor is the court aware of any.[4] Moreover, even if the court could review an agency's decision to reprogram, or not to reprogram, appropriated funds, the record lacks any evidence indicating whether the DOE considered reprogramming funds or conducted an analysis to determine the feasibility of reprogramming funds. In other words, the court lacks the necessary administrative record to review the propriety of the DOE's decision.

Plaintiff also argues that a "necessary expense" analysis supports its contention that economic and impact assistance payments may be made from appropriations in the 2016 and 2017 Consolidated Appropriations Acts. See Pl.'s Reply at 13-14 ("The determinative issue in this case is whether the statutorily-mandated economic and impact assistance payments have a 'logical,' 'reasonable,' or 'sufficient' relationship to, and therefore constitute a necessary expense of, any of DOE's appropriations."). Id. But plaintiff gets ahead of itself. As noted above, an agency performs a "necessary expense" analysis to determine whether a prospective expenditure comports with appropriations Congress has provided. GAO Redbook, supra, at 3-17. As with its request that the court direct the DOE to reprogram funds to make economic and impact assistance payments, plaintiff provides no legal support for the proposition that the court has the authority to conduct a "necessary expense" analysis, and the court is unable to locate any. Moreover, even if the court could conduct such an analysis, the record lacks evidence that would be necessary for the court to proceed. Thus, the court declines to conduct the analysis.

Ultimately, to the extent that the DOE could exercise its discretion to make economic and impact assistance payments, the payments would need to be consistent with the purpose restrictions in the appropriation to be charged because the DOE is required to obey the restrictions Congress places on appropriations. See Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation . . . .'" (quoting UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984))). In the 2016 and 2017 Consolidated Appropriations Acts, the DOE was restricted from using appropriations to create or initiate a program, project, or activity. Thus, the DOE's reprogramming authority was limited to shifting funds within programs, projects, or activities that already existed. And both parties admit that no appropriations for economic and impact assistance were made in the 2016 and 2017 Appropriations Acts. Consequently, Congress provided the DOE with no mechanism through which it could reprogram funds to make economic and impact assistance payments.

Congress could have appropriated money for economic and impact assistance, or it could have broadened the DOE's discretion to reprogram funds. But it did neither. The court cannot ignore the limiting language in the statute–"subject to the availability of appropriations"–which courts have consistently held to limit government liability. The unique mention of economic and impact assistance payments in 50 U.S.C. § 2566, as well as the detail in the appropriations

[4] To the extent that reprogramming decisions are subject to judicial review, they would be reviewable under the Administrative Procedure Act ("APA"), see 5 U.S.C. § 702 (2012), but this court lacks jurisdiction to adjudicate APA claims, see Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

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Congress provided in 2016 and 2017, persuade the court that had Congress intended to appropriate funds for these payments, it would have made a specific appropriation. There is also evidence in the record that the purpose of the economic and impact assistance payments was to assure plaintiff that weapons-grade plutonium would not be stored at the SRS indefinitely. See Pl.'s Mot. App. 93, 100; see also 51 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). These facts support the DOE's failure to use existing appropriations to satisfy the obligation resulting from its failure to meet the MOX production objective.

Agencies must comply with the law and, where Congress has given direction on how to do so, agencies are not free to improvise. Although Congress originally provided that the DOE was required to make economic and impact assistance payments "from funds available to the Secretary [of the DOE]," 50 U.S.C. § 2566(d)(1) (Supp. III 2004), it subsequently narrowed the DOE's discretion, providing that economic and impact assistance payments were "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (Supp. IV 2006); 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). When Congress originally enacted 50 U.S.C. § 2566, the DOE arguably could have had discretion to reprogram funds to make economic and impact assistance payments, but the court cannot ignore that Congress has since intentionally and consistently restricted the DOE's discretion.

C. The Judgment Fund Is Not Available for Economic and Impact Assistance Payments

Finally, plaintiff argues that the economic and impact assistance payments could be paid from the Judgment Fund if there are no legally available appropriations. Pl.'s Mot. Summ. J. 12. Plaintiff is incorrect. Pursuant to the Appropriations Clause, "no money can be paid out of the Treasury unless it has been appropriated by Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). "The Judgment Fund is a permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States." 31 C.F.R. § 256.1(a) (2015); accord 31 U.S.C. § 1304 (providing that the Judgment Fund can be used "to pay final judgments, award compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law"). Significantly, the Judgment Fund may only be used when "payment is not otherwise provided for . . . ." 31 U.S.C. § 1304(a)(1). "Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment." GAO Redbook, supra, at 14-39.

The Judgment Fund was designed to expedite the administration of justice by enabling courts to issue awards without the need to obtain separate appropriations. Slattery v. United States, 635 F.3d 1298, 1316-17 (Fed. Cir. 2011) (en banc); see also United States v. Maryland ex rel. Meyer, 349 F.2d 693, 695 (D.C. Cir. 1965) ("The obvious purposes of the [Judgment Fund] are (1) to enable . . . prompt payment without awaiting a special appropriation, and (2) to relieve the United States of the obligation of paying interest, or of a bad conscience as it were for not doing so, while the principal remains unpaid.").

Plaintiff effectively seeks to exploit the flexibility of the Judgment Fund to circumvent Congress's failure to appropriate funds for economic and impact assistance. But, "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990).

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Two facts are fatal to plaintiff's argument: First, there is clear statutory language limiting the DOE's liability to the amount appropriated, and no funds were subsequently appropriated. Second, there is no contractual relationship available to complement the statutory language and thereby overcome the lack of an appropriation and that limiting language. Given these facts, to resort to the Judgment Fund would ignore the apparent Congressional intent not to appropriate for economic and impact assistance payments.

Congress created a benefit of economic and impact assistance in 50 U.S.C. § 2566 and outlined the circumstances under which plaintiff could receive payment. Congress then did not appropriate funds to make payments, choosing instead to fund other priorities. The record indicates that Congress did make restricted appropriations to the DOE that not only reserved funds for particular purposes, but also prohibited those funds from being used for other, unrelated purposes.

The Judgment Fund is a separate appropriation which is available to furnish awards when other appropriations are not legally available. But plaintiff is not merely asking for a damages award. Plaintiff is effectively asking for the Judgment Fund to be used to create an appropriation where none was made by Congress. Resorting to the Judgment Fund, however, bypasses the case's central question, answered above: Did Congress make any appropriations available to pay economic and impact assistance? The answer is clearly "no." The Judgment Fund cannot be manipulated to change the answer to this question from "no" to "yes." To hold otherwise would enable courts to circumvent congressional decisions not to act. Most importantly, allowing resort to the Judgment Fund in a case where Congress has also clearly limited the government's liability entangles the court in decisions reserved to Congress by the United States Constitution. The court declines to become so entangled.

Under the circumstances of this case, plaintiff's proper course to obtain economic and impact assistance is to request an appropriation from Congress.

IV. CONCLUSION

As set forth in more detail above, the court **DENIES** plaintiff's motion for summary judgment and **GRANTS** defendant's cross-motion for summary judgment. Plaintiff's complaint is **DISMISSED**. Each party shall bear its own costs. The clerk of court shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

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EXHIBIT 6

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U.S. District Court
District of South Carolina (Aiken)
CIVIL DOCKET FOR CASE #: 1:16-cv-00391-JMC

State of South Carolina v. United States et al
Assigned to: Honorable J Michelle Childs
Cause: 05:702 Administrative Procedure Act

Date Filed: 02/09/2016
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

State of South Carolina

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in his official capacity as Secretary of Energy

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Date Filed	#	Docket Text
02/09/2016	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0420−6390222.), filed by State of South Carolina. Service due by 5/12/2016 (Attachments: # 1 Table of Exhibits to Complaint, # 2 Exhibit 1 (Am. Interim Action Determination), # 3 Exhibit 2 (SPD Supplemental EIS Factsheet), # 4 Exhibit 2 (SPD Supplemental EIS Factsheet), # 5 Exhibit 4 (Final Surplus Plutonium Disposition Supplemental Environmental Impact, # 6 Exhibit 5 (Excerpt from History of the U.S. Weapons−Usable Plutonium Disposition, # 7 Exhibit 6 (Report to Congress: Disposition of Surplus Defense Plutonium at Savan, # 8 Exhibit 7 (Record of Decision for PEIS), # 9 Exhibit 7 (Record of Decision for PEIS), # 10 Exhibit 9 (Excerpt from Surplus Plutonium Disposition Final EIS, Summary), # 11 Exhibit 10 (Record of Decision for SPD EIS), # 12 Exhibit 11 (PMDA), # 13 Exhibit 12 (Congressional Research Serv., Mem., U.S.−Russia Plutonium Management, # 14 Exhibit 13 Exhibit NRC EIS, # 15 Exhibit 14 (Press Release, No. PR−02−007), # 16 Exhibit 15 (Am. ROD for PEIS & SPD EIS), # 17 Exhibit 16 (Am. SPD EIS ROD), # 18 Exhibit 17 (Storage of Surplus Plutonium Materials at the Savannah River Site Su, # 19 Exhibit 18 (NRC Construction Authorization No. CAMOX−001), # 20 Exhibit 19 (DOE/NNSA Report to Congress), # 21 Exhibit 20 (Excerpt from Draft SPD Supp. EIS), # 22 Exhibit 21 (PMDA as amended by 2010 Protocol), # 23 Exhibit 22 (Letter to Secretary Moniz), # 24 Exhibit 22 (Letter to Secretary Moniz), # 25 Exhibit 24 (Letter of Atty General Wilson to Secretary Moniz), # 26 Exhibit 25 (FY2015 Budget Justification))(asni,) (Entered: 02/09/2016)
02/09/2016	2	Summons Issued as to United States Department of Energy, Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, U.S. Attorney and U.S. Attorney General. (asni,) Modified to edit text on 2/10/2016 (asni,). (Entered: 02/09/2016)
02/09/2016	3	Local Rule 26.01 Answers to Interrogatories by State of South Carolina.(asni,) (Entered: 02/09/2016)
02/18/2016	5	NOTICE of Appearance by William Henry Davidson, II on behalf of State of South Carolina (Davidson, William) (Entered: 02/18/2016)
03/31/2016	6	MOTION to Intervene by Southern Carolina Regional Development Alliance. Response to Motion due by 4/18/2016. (Attachments: # 1 Exhibit A − Complaint, # 2 Exhibit 1 to Complaint (Affidavit of Danny Black), # 3 Exhibit 2 to Complaint (South Carolina Promise Zone Fact Sheet))No proposed order.(Shealy, Samuel) (Entered: 03/31/2016)
04/06/2016	7	MOTION for Extension of Time to File Answer re 1 Complaint by Frank G Klotz, Ernest Moniz, United States, United States Department of Energy and National Nuclear Security Administration. Response to Motion due by 4/25/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) Modified to add filers on 4/7/2016 (asni,). (Entered: 04/06/2016)

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04/06/2016	8	**ORDER granting 7 Motion for Extension of Time to Answer Frank G Klotz answer due 4/25/2016; Ernest Moniz answer due 4/25/2016; United States answer due 4/25/2016; United States Department of Energy answer due 4/25/2016, National Nuclear Security Administration answer due 4/25/2016. Signed by Honorable J Michelle Childs on 4/6/2016.(asni,)** (Main Document 8 replaced on 4/6/2016) (asni,). Modified to edit text on 4/7/2016 (asni,). (Entered: 04/06/2016)
04/06/2016	9	SUMMONS Returned Executed by State of South Carolina. All Defendants. (Attachments: # 1 Summons Service on DOE, # 2 Summons Service on NNSA, # 3 Summons Service on Moniz, # 4 Summons Service on Klotz, # 5 Summons Service on Lynch, # 6 Summons Service on Nettles)(Lowell, Randy) (Entered: 04/06/2016)
04/06/2016	10	MOTION for Summary Judgment by State of South Carolina. Response to Motion due by 4/25/2016. (Attachments: # 1 Memo in Support, # 2 Exhibit Table of Exhibits, # 3 Exhibit 1 (Excerpt from D.J. Spellman et al., History of the U.S. Weapons–Usable Plutonium Disposition Program Leading to DOEs Record of Decision), # 4 Exhibit 2 (Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site), # 5 Exhibit 3 (Record of Decision (ROD) for Storage and Disposition of Weapons–Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS)), # 6 Exhibit 4 (Excerpt from Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS), Vol. I Part A), # 7 Exhibit 5 (ROD for SPD EIS), # 8 Exhibit 6 (Plutonium Management and Disposition Agreement (PMDA)), # 9 Exhibit 7 (Release No. PR–02–007), # 10 Exhibit 8 (Aff. of Jessie Hill Roberson (ECF No. 10), 1:02–cv–01426–CMC), # 11 Exhibit 9 (Ltr. of Hodges to Abraham (Apr. 6, 2001)), # 12 Exhibit 10 (Ltr. of Hodges to Abraham (Apr. 24, 2001)), # 13 Exhibit 11 (Ltr. of Hodges to Abraham (Jun. 13, 2001)), # 14 Exhibit 12 (Ltr. of Abraham to Hodges (Jun. 26, 2001)), # 15 Exhibit 13 (Ltr. of Card to Hodges, Peeler, and Wilkins (Aug. 27, 2001)), # 16 Exhibit 14 (Ltr. of Hodges and Condon to Abraham (Aug. 30, 2001)), # 17 Exhibit 15 (Ltr. of Abraham to Hodges (Sept. 21, 2001)), # 18 Exhibit 16 (Ltr. of Hodges to Abraham (Oct. 26, 2001)), # 19 Exhibit 17 (Ltr. of Hodges to Abraham (Apr. 10, 2002)), # 20 Exhibit 18 (Ltr. of Abraham to Hodges (Apr. 11, 2002)), # 21 Exhibit 19 (Ltr. of Hodges to Abraham (Apr. 11, 2002)), # 22 Exhibit 20 (Ltr. of Bates to Otis (Apr. 11, 2002)), # 23 Exhibit 21 (Am. ROD for SPD EIS), # 24 Exhibit 22 (Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis), # 25 Exhibit 23 (Ltr. of Trice to Congressman Wilson (Oct. 9, 2015)), # 26 Exhibit 24 (Amended PMDA), # 27 Exhibit 25 (CRS PMDA Report), # 28 Exhibit 26 (Excerpt from Draft SPD Supplemental EIS), # 29 Exhibit 27 (Excerpt from FY 2014 DOE Budget Justification), # 30 Exhibit 28 (Excerpt from FY 2015 DOE Budget Justification), # 31 Exhibit 29 (Ltr. to Moniz (Mar. 6, 2014)), # 32 Exhibit 30 (Excerpt from Consolidated Appropriations Act 2016), # 33 Exhibit 31 (Consolidated Appropriations Act FY 2016 Explanatory Statement), # 34 Exhibit 32 (Excerpt from FY 2017 DOE Budget Justification), # 35 Exhibit 33 (High Bridge Associates, Inc., Independent Assessment of the Impact of Disposing of Surplus Plutonium at WIPP), # 36 Exhibit 34 (Excerpt from Senate Armed Services Strategic Forces Subcommittee Hearing Transcript (Feb. 24, 2016)), # 37 Exhibit 35 (Excerpt from Senate Appropriations Subcommittee Hearing Transcript (March 16, 2016)), # 38 Exhibit 36 (Ltr. of Wilson to Moniz (Sept. 4, 2015)), # 39 Exhibit 37 (Ltr. of Haley to Moniz (Dec. 14, 2015)), # 40 Exhibit 38 (Ltr. of Moniz to Haley (Jan. 19, 2016)), # 41 Exhibit 39 (DOE/NNSA Report to Congress (Oct. 3, 2011)), # 42 Exhibit 40 (Environmental Assessment for Gap Material Plutonium Transport, Receipt, and Processing))No proposed order.(Lowell, Randy) (Entered: 04/06/2016)
04/18/2016	11	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by State of South Carolina.Reply to Response to Motion due by 4/28/2016 (Attachments: # 1 Exhibit)(Lowell, Randy) (Entered: 04/18/2016)
04/18/2016	12	MOTION for Extension of Time to File Response/Reply as to 6 MOTION to Intervene by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/18/2016)
04/19/2016	13	**TEXT ORDER granting 12 Motion for Extension of Time to File Response/Reply re 6 MOTION to Intervene Response to Motion due by 5/2/2016. Signed by Honorable J Michelle Childs on 4/19/2016.(asni,)** (Entered: 04/19/2016)

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04/21/2016	14	MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/9/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/21/2016)
04/21/2016	15	RESPONSE in Opposition re 14 MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment Response filed by State of South Carolina.Reply to Response to Motion due by 5/2/2016 (Lowell, Randy) (Entered: 04/21/2016)
04/22/2016	16	**ORDER granting 14 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment Response to Motion due by 5/25/2016. Signed by Honorable J Michelle Childs on 4/22/2016.(asni,)** (Entered: 04/22/2016)
04/25/2016	17	MOTION to Dismiss by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/12/2016. (Attachments: # 1 Exhibit A, MOX February 2013−14 Report, # 2 Exhibit B, HQ Signed Report 2015)No proposed order.(Bowens, Barbara) (Entered: 04/25/2016)
04/28/2016	19	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 04/28/2016)
05/02/2016	20	MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/19/2016. No proposed order.(Bowens, Barbara) (Entered: 05/02/2016)
05/02/2016	21	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 5/12/2016 (Bowens, Barbara) (Entered: 05/02/2016)
05/10/2016	25	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 05/11/2016)
05/11/2016	24	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 5/31/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/11/2016)
05/11/2016	26	**ORDER granting 24 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/11/2016.(asni,)** (Entered: 05/11/2016)
05/12/2016	27	RESPONSE in Opposition re 17 MOTION to Dismiss Response filed by State of South Carolina.Reply to Response to Motion due by 5/23/2016 (Attachments: # 1 Table of Exhibits, # 2 Exhibit 1 (Deadlines Table), # 3 Exhibit 2 (Hodges Ltr), # 4 Exhibit 3 (COA Table), # 5 Exhibit 4 (Transcript Excerpt))(Lowell, Randy) (Entered: 05/12/2016)
05/17/2016	28	Joint MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment , 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by State of South Carolina. Response to Motion due by 6/3/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/17/2016)
05/18/2016	29	**ORDER granting 28 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment, 20 MOTION to Stay Proceedings on Plaintiff's Motion for Summary Judgment Response to Motion to Stay due by 5/24/2016, Response to Motion for Summary Judgment due by 6/10/2016. Signed by Honorable J Michelle Childs on 5/18/2016.(asni,)** (Entered: 05/18/2016)
05/23/2016	31	Consent MOTION for Leave to File Excess Pages by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 6/9/2016. No proposed order.(Bowens, Barbara) (Entered: 05/23/2016)

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05/23/2016	32	**TEXT ORDER granting 31 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/23/2016.(asni,)** (Entered: 05/23/2016)
05/23/2016	33	REPLY to Response to Motion re 17 MOTION to Dismiss Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/23/2016)
05/24/2016	34	NOTICE of Hearing on Motion 10 MOTION for Summary Judgment, 6 MOTION to Intervene, 20 MOTION to Stay, 17 MOTION to Dismiss : Motion Hearing set for 6/30/2016 10:00 AM in Columbia # 3, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable J Michelle Childs. ***Please note this hearing will include all pending motions not ruled upon prior to the date of the hearing***(asni,) (Entered: 05/24/2016)
05/24/2016	35	RESPONSE in Opposition re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by State of South Carolina.Reply to Response to Motion due by 6/3/2016 (Lowell, Randy) (Entered: 05/24/2016)
05/25/2016	36	**ORDER AND OPINION denying 6 Motion to Intervene. Signed by Honorable J Michelle Childs on 5/25/2016.(asni,)** (Entered: 05/25/2016)
05/25/2016	37	REPLY to Response to Motion re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/25/2016)
06/10/2016	38	RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Exhibit 1, Record of Decision, Surplus Plutonium Disposition, 81 Fed. Reg. 19588 (Apr. 5, 2016), # 2 Exhibit 2, Declaration of Henry A. Gunter, # 3 Exhibit 3, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No., # 4 Exhibit 4, Department of Energy, Preferred Alternative for Certain Quantities of Plutonium, 80 Fed. Reg. 80348 (Dec. 24, 2015), # 5 Exhibit 5, Consolidated Appropriations Act of 2016, Pub. L. No. 114−113, div. D, tit. III, Dec. 18, 2015, # 6 Exhibit 6, Explanatory Table, 114 Cong. Rec. 161, H10108−H10123 (daily ed. Dec. 17, 2015), # 7 Exhibit 7, Explanatory Statement, 114 Cong. Rec. 161, H10056, H10102−H10107 (daily ed. Dec. 17, 2015), # 8 Exhibit 8, Declaration of Peter H. Hanlon, # 9 Addendum Table of Exhibits)(Bowens, Barbara) (Entered: 06/10/2016)
06/15/2016	39	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 7/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 06/15/2016)
06/16/2016	40	**ORDER granting 39 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 6/16/2016.(asni,)** (Entered: 06/16/2016)
06/20/2016	42	REPLY to Response to Motion re 10 MOTION for Summary Judgment Response filed by State of South Carolina. (Attachments: # 1 Exhibit, # 2 Exhibit 1 (Ltr. of Del Vecchio), # 3 Exhibit 2 (Moniz Senate Test.), # 4 Exhibit 3 (Fact Sheet), # 5 Exhibit 4 (Rpt. to Congress), # 6 Exhibit 5 (DOE FY16 Budget Excerpt))(Lowell, Randy) (Entered: 06/20/2016)
06/20/2016	41	CORRECTED RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Corrected Memorandum in Opposition) Re−filed by Clerk to correct event type.(mdea) Modified on 6/21/2016 to correct entry number (mdea,). (Entered: 06/21/2016)
06/21/2016	43	**TEXT ORDER denying 20 Motion to Stay: This matter is before the court on Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20) seeking to stay all proceedings on Plaintiffs pending Motion for Summary Judgment (ECF No. 10) until the court adjudicates Defendants pending Motion to Dismiss (ECF No. 17). In support of their Motion to Stay, Defendants assert that all Plaintiffs claims are subject to dismissal on jurisdictional or other legal grounds and, therefore, concerns for judicial**

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		economy and litigation efficiency make it appropriate for the [c]ourt to resolve [D]efendants Motion to Dismiss before proceeding to summary judgment. (ECF No. 20 at 4.) Plaintiff opposes the Motion to Stay arguing that Defendants have not met their burden to demonstrate a need for a stay, and both judicial economy and the prejudice to South Carolina if such stay is granted weigh heavily in favor of denying the stay request. (ECF No. 35 at 1.) When considering a motion to stay, the district court should consider three factors: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non−moving party. Johnson v. DePuy Orthopaedics, Inc., No. 3:12−cv−2274, 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012) (granting stay pending a transfer of the case to MDL) (citation omitted). In view of these factors, the court finds that a stay would not serve the interests of judicial economy and could cause prejudice to Plaintiff. In this regard, the court understands that it will first have to address the merits of Defendants Motion to Dismiss asserting a lack of subject matter jurisdiction. In re Bulldog Trucking, Inc., 147 F.3d 347, 352 (4th Cir. 1998) (A federal court is required, sua sponte, to determine if a valid basis for its jurisdiction exists, and to dismiss the action if no such ground appears.) (citation omitted). However, the court is also persuaded that judicial economy will be best served by allowing the parties to proceed with their arguments relevant to Plaintiffs Motion for Summary Judgment at the June 30, 2016 hearing (ECF No. 34), even if the court has to allow for discovery and additional briefing subsequent to the hearing. Accordingly, the court DENIES Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20). Signed by Honorable J Michelle Childs on 6/21/16.(alew,) (Entered: 06/21/2016)
06/22/2016	44	MOTION to Appear Pro Hac Vice by Raphael Ortega Gomez by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/22/2016)
06/24/2016	45	MOTION to Appear Pro Hac Vice by Spencer Elijah Wittmann Amdur by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/24/2016)
06/27/2016	46	**TEXT ORDER granting 44 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/27/2016	47	**TEXT ORDER granting 45 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/30/2016	50	**Minute Entry. Proceedings held before Honorable J Michelle Childs: taking under advisement 10 Motion for Summary Judgment; 17 Motion to Dismiss. Motion Hearing held on 6/30/2016. Written order forthcoming. Court Reporter Kathleen Richardson. (mbro,)** (Entered: 06/30/2016)
08/18/2016	51	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Motion hearing held on June 30, 2016, before Judge J. Michelle Childs. Court Reporter/Transcriber Kathleen Richardson, RMR, CRR, Telephone number/E−mail Kathleen_Richardson@scd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction.. Redaction Request due 9/8/2016. Redacted Transcript Deadline set for 9/19/2016. Release of Transcript Restriction set for 11/16/2016. (kari,) (Entered: 08/18/2016)
09/15/2016	53	Letter from Counsel for the State. (Lowell, Randy) (Entered: 09/15/2016)
10/03/2016	55	Letter from Spencer E. Amdur. (Attachments: # 1 Letter, # 2 Press Release)(Bowens, Barbara) (Entered: 10/03/2016)
10/31/2016	56	**ORDER AND OPINION: The court declines to rule on Defendants' Motion to Dismiss 17 for failure to state a claim for which relief could be granted as to the**

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		removal claim under Fed. R. Civ. P. 12(b)(6) until supplemental briefs, herein described are submitted. The parties are DIRECTED to file briefs that address the following issues: 1. Whether the court should transfer the monetary claim to the CFC, pursuant to 28 U.S.C. § 1631. 2. Whether the court should dismiss the monetary claim without prejudice to the State's ability to refile the claim in an action in the CFC. The briefs shall comply with rules governing memoranda in Local Civ. Rule 7 (D.S.C.) and must be filed by November 30, 2016. Signed by Honorable J Michelle Childs on 10/31/2016.(asni,) (Entered: 10/31/2016)
11/18/2016	59	Consent MOTION for Extension of Time by State of South Carolina. Response to Motion due by 12/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 11/18/2016)
11/21/2016	60	**ORDER granting in part and denying in part 59 Motion for Extension of Time. The parties are directed to file their supplemental briefs in response to the court's October 31, 2016 order on or before December 5, 2016. The State is given no additional time by this order in which to file a memorandum in support of a motion to reconsider under Rules 59(e) or 60(b). Signed by Honorable J Michelle Childs on 11/21/2016.(asni,)** (Entered: 11/21/2016)
11/28/2016	62	MOTION for Reconsideration re 56 Order on Motion to Dismiss by State of South Carolina. Response to Motion due by 12/15/2016. (Attachments: # 1 Memo in Support)No proposed order.(Lowell, Randy) (Entered: 11/28/2016)
12/05/2016	63	REPLY by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 56 Order on Motion to Dismiss,,, *Defendants' Supplemental Brief.* (Bowens, Barbara) (Entered: 12/05/2016)
12/05/2016	64	REPLY by State of South Carolina to 56 Order on Motion to Dismiss,,, *State of South Carolina's Supplemental Brief.* (Roberts, John) (Entered: 12/05/2016)
12/16/2016	66	Joint MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 1/3/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 12/16/2016)
12/16/2016	67	RESPONSE in Opposition re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 12/28/2016 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Bowens, Barbara) (Entered: 12/16/2016)
12/19/2016	68	**ORDER granting 66 Motion for Extension of Time. Signed by Honorable J Michelle Childs on 12/19/2016.(mbro,)** (Entered: 12/19/2016)
01/11/2017	70	MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 1/25/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 01/11/2017)
01/11/2017	71	**TEXT ORDER granting 70 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 1/11/2017.(asni,)** (Entered: 01/11/2017)
01/13/2017	72	REPLY to Response to Motion re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by State of South Carolina. (Roberts, John) (Entered: 01/13/2017)
02/07/2017	75	**ORDER AND OPINION denying 62 Motion for Reconsideration re 56 Order on Motion to Dismiss. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,)** (Entered: 02/07/2017)
02/07/2017	76	**ORDER AND OPINION granting in part 17 Motion to Dismiss. The third cause of action in the State's complaint (ECF No. 1 97–112) is hereby DISMISSED without prejudice to the State's ability to prosecute it an original action filed in**

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		the Court of Federal Claims. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,) (Entered: 02/07/2017)
02/08/2017	77	**CONFERENCE AND SCHEDULING ORDER Rule 26(f) Conference Deadline 2/28/2017, 26(a) Initial Disclosures due by 3/14/2017, Rule 26 Report due by 3/14/2017, Motions to Amend Pleadings due by 4/24/2017, Plaintiffs ID of Expert Witness due by 5/24/2017, Defendants ID of Expert Witnesses Due by 6/23/2017, Records Custodian Affidavit due by 6/23/2017, Discovery due by 7/24/2017, Motion in Limine due by 11/3/2017, Motions due by 8/7/2017, Rule 26(a)(3) Disclosures due by 11/3/2017, Pretrial Briefs due by 11/28/2017, Bench Trial Deadline 12/5/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/08/2017	78	**MEDIATION ORDER Mediation Due by 7/31/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/13/2017	79	NOTICE of Appearance by Barbara Murcier Bowens on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Bowens, Barbara) (Entered: 02/13/2017)
03/10/2017	81	ADR STATEMENT/CERTIFICATION by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	82	Rule 26(f) Report by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	83	**AMENDED SCHEDULING ORDER Mediation concluded by 7/31/2017, Signed by Honorable J Michelle Childs on 3/10/2017. (asni,)** (Entered: 03/10/2017)
03/14/2017	84	**ORDER AND OPINION Defendants' motion to dismiss the State's complaint 17 is hereby GRANTED IN PART, with respect to the complaint's first cause of action, and DENIED IN PART, with respect to the complaint's second cause of action. The first cause of action in the State's complaint (ECF No. 1 at 84–88) is hereby DISMISSED. Signed by Honorable J Michelle Childs on 3/14/2017. (asni,)** (Entered: 03/14/2017)
03/20/2017	86	**ORDER AND OPINION granting in part and denying in part 10 Motion for Summary Judgment. Parties shall submit a joint written statement to the court on or before April 21, 2017, and, after reviewing the statement, the court will determine the need for further submissions or hearings. Signed by Honorable J Michelle Childs on 3/20/2017.(asni,)** Modified to edit text on 3/24/2017 (asni,). (Entered: 03/20/2017)
04/20/2017	88	NOTICE of Appearance by Jennifer J Aldrich on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	89	Consent MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/4/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.(Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	90	**TEXT ORDER granting 89 Motion for Extension of Time for the parties to submit the joint written statement. Signed by Honorable J Michelle Childs on 4/20/2017.(asni,)** (Entered: 04/20/2017)
07/31/2017	96	STATUS REPORT *(Joint Statement)* by State of South Carolina. (Lowell, Randy) supplement 97 added on 8/1/2017 (asni,). supplement added 100 added on 8/14/2017 (asni,). supplements added 103 104 8/22/2017 (asni,). (Entered: 07/31/2017)
07/31/2017	97	SUPPLEMENT by State of South Carolina *Proposing Injunctive Relief*. (Lowell, Randy) (Entered: 07/31/2017)
08/01/2017	98	**TEXT ORDER: By a March 20, 2017 order, the court granted in part the State of South Carolina's (the "State") motion for summary judgment in this matter,**

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specifically granting the State's requested relief for an injunctive order compelling the Secretary of Energy (the "Secretary") to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the State's summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties "to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]." (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that "[i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy." (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant "is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017," and that (2) one of the four attorneys representing them in this matter is "out of the office" on a scheduled one–week vacation in August and is "out of the office" for another week in August and five days in September while "handling depositions in another matter." (Id.) The State objects to Defendants' proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the State's consideration until July 20, and arguing that Defendant's proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the court's March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the court's March 20, 2017 order. (Id. at 2.) In the court's view, Defendants' April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants' proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the court's previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants' April 20, 2017 motion also contemplated that the parties would "propose" deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants' proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be "out of the office" for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants' proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the State's unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a lackadaisical approach on Defendants' part to complying with the court's order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly,

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Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017.: By a March 20, 2017 order, the court granted in part the State of South Carolinas (the State) motion for summary judgment in this matter, specifically granting the States requested relief for an injunctive order compelling the Secretary of Energy (the Secretary) to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the States summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]. (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that [i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy. (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017, and that (2) one of the four attorneys representing them in this matter is out of the office on a scheduled one–week vacation in August and is out of the office for another week in August and five days in September while handling depositions in another matter. (Id.) The State objects to Defendants proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the States consideration until July 20, and arguing that Defendants proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the courts March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the courts March 20, 2017 order. (Id. at 2.) In the courts view, Defendants April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the courts previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants April 20, 2017 motion also contemplated that the parties would propose deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be out of the office for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the States unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a

		lackadaisical approach on Defendants part to complying with the courts order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly, Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017. (Specific Document due by 8/11/2017.) Signed by Honorable J Michelle Childs on 8/1/2017. (asni,) (Entered: 08/01/2017)
08/11/2017	100	SUPPLEMENT by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 98 Order, Set Deadlines,,,

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CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:17-cv-01068-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Cause: 28:1491 Tucker Act

Date Filed: 08/07/2017
Date Terminated: 03/05/2018
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
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Fax: (202) 514-8624
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/07/2017	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4115693) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 10/6/2017.** (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9

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		Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Civil Cover Sheet, # 16 Exh. List)(ac7) (Entered: 08/07/2017)
08/07/2017	2	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 08/07/2017)
08/07/2017	3	NOTICE of Designation of Electronic Case. (ac7) (Entered: 08/07/2017)
08/18/2017	4	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 08/18/2017)
10/06/2017	5	MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Hogan, Tara) (Entered: 10/06/2017)
10/06/2017	6	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/06/2017)
10/18/2017	7	MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA.**Response due by 11/1/2017.**(Hogan, Tara) (Entered: 10/18/2017)
10/24/2017	8	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/7/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/24/2017)
10/30/2017	9	RESPONSE to 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/6/2017.** (Lowell, Randolph) (Entered: 10/30/2017)
10/31/2017	10	REPLY to Response to Motion re 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA. (Hogan, Tara) (Entered: 10/31/2017)
11/07/2017	11	REPLY to Response to Motion re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA. (Hogan, Tara) (Entered: 11/07/2017)
11/20/2017	12	MOTION for Leave to File Surreply , filed by STATE OF SOUTH CAROLINA.**Response due by 12/4/2017.** (Attachments: # 1 Exhibit A)(Lowell, Randolph) (Entered: 11/20/2017)
11/28/2017	13	ORDER granting 7 Motion to Stay; granting 12 Motion for Leave to File Surreply. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/28/2017)
11/28/2017	14	SUR-REPLY re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 11/28/2017)
02/15/2018	15	SCHEDULING ORDER: **Defendant's Supplemental Brief due by 3/8/2018. Plaintiff's Supplemental Response Brief due by 3/29/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/15/2018)
03/05/2018	16	NOTICE of Voluntary Dismissal without prejudice, filed by STATE OF SOUTH CAROLINA (Lowell, Randolph) (Entered: 03/05/2018)
03/05/2018		Complaint dismissed pursuant to Rule 41(a)(1)(A)(i) this day. (ac7) (Entered: 03/06/2018)

PACER Service Center

Transaction Receipt			
09/01/2020 12:08:29			
PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:17-cv-01068-MMS
Billable Pages:	2	**Cost:**	0.20

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APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18-cv-00038-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Case in other court: 19-02324
Cause: 28:1491 Tucker Act

Date Filed: 01/08/2018
Date Terminated: 08/20/2019
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202-8416
(803) 252-3300
Fax: (803) 256-8062
Email: rlowell@willoughbyhoefer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
U.S. Department of Justice (C)
Commerical Litigation Branch, Civil Division
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-2228
Fax: (202) 514-8624
Email: tara.hogan@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

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01/08/2018	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4403717) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 3/9/2018.** (Attachments: # 1 Exh. List, # 2 Exhibit 1-13, # 3 Civil Cover Sheet)(ac7) (Entered: 01/08/2018)
01/08/2018	2	NOTICE of Directly Related Case(s) [17-1068C], filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 01/08/2018)
01/08/2018	3	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 01/08/2018)
01/08/2018	4	NOTICE of Designation of Electronic Case. (ac7) (Entered: 01/08/2018)
01/25/2018	5	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 01/25/2018)
03/05/2018	6	MOTION to Amend Pleadings - Rule 15 , filed by STATE OF SOUTH CAROLINA.**Response due by 3/19/2018.** (Attachments: # 1 Exhibit A - Proposed Amended Complaint)(Lowell, Randolph) (Entered: 03/05/2018)
03/06/2018	7	ORDER granting 6 Motion to Amend Pleadings - Rule 15(b). **Amended Complaint due by 3/9/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 03/06/2018)
03/06/2018	8	AMENDED COMPLAINT against USA, filed by STATE OF SOUTH CAROLINA. , filed by STATE OF SOUTH CAROLINA.Answer due by 3/20/2018. (Attachments: # 1 Exhibit Exhibit List, # 2 Exhibit Exhibits 1-14)(Lowell, Randolph) (Entered: 03/06/2018)
03/20/2018	9	ANSWER to 8 Amended Complaint , filed by USA.**JPSR due by 5/8/2018.**(Hogan, Tara) (Entered: 03/20/2018)
03/30/2018	10	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 4/27/2018.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 03/30/2018)
04/23/2018	11	Unopposed MOTION for Extension of Time until 5/18/18 to File Response as to 10 MOTION for Summary Judgment , filed by USA.**Response due by 5/7/2018.**(Hogan, Tara) (Entered: 04/23/2018)
04/24/2018	12	ORDER granting 11 Motion for Extension of Time to File Response re 10 MOTION for Summary Judgment. **Response due by 5/18/2018. Reply due by 6/8/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 04/24/2018)
05/08/2018	13	JOINT PRELIMINARY STATUS REPORT . (Hogan, Tara) (Entered: 05/08/2018)
05/16/2018	14	Unopposed MOTION for Extension of Time until 5/23/18 to File Response , filed by USA.**Response due by 5/30/2018.**(Hogan, Tara) (Entered: 05/16/2018)
05/17/2018	15	ORDER granting 14 Motion for Extension of Time to File Response re: 10 Motion for Summary Judgment. **Response due 5/23/2018. Reply due 6/13/2018.** Signed by Judge Margaret M. Sweeney. (pp) Service on parties made. (Entered: 05/17/2018)
05/23/2018	16	CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA, filed by USA.**Response due by 6/20/2018.**(Hogan, Tara) (Entered: 05/23/2018)
06/12/2018	17	Unopposed MOTION for Extension of Time to File Reply , filed by STATE OF SOUTH CAROLINA.**Response due by 6/26/2018.**(Lowell, Randolph) (Entered:

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		06/12/2018)
06/13/2018	18	ORDER granting 17 Motion for Extension of Time to File Combined Reply in Support of 10 MOTION for Summary Judgment and Response to 16 CROSS MOTION for Summary Judgment. **Plaintiff's Reply and Response due by 6/20/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 06/13/2018)
06/20/2018	19	REPLY to Response to Motion re 10 MOTION for Summary Judgment , 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 06/20/2018)
07/05/2018	20	REPLY to Response to Motion re 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by USA. (Hogan, Tara) (Entered: 07/05/2018)
10/24/2018	21	ORDER Staying Further Consideration of 10 MOTION for Summary Judgment filed by STATE OF SOUTH CAROLINA and 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA filed by USA., ORDER STAYING CASE **Status Report due by 11/26/2018** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 10/24/2018)
11/26/2018	22	JOINT STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 11/26/2018)
01/25/2019	23	JOINT STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 01/25/2019)
03/26/2019	24	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 03/26/2019)
05/28/2019	25	JOINT STATUS REPORT , filed by All Defendants. (Hogan, Tara) (Entered: 05/28/2019)
05/29/2019	26	STATUS REPORT ORDER **Status Report due by 6/28/2019** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 05/29/2019)
06/24/2019		**IMPORTANT NOTICE:** On **Monday, August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e-filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e-filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two-step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e-file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800-676-6856 or the Clerk's Office CM/ECF Help Desk at (202)357-6402.. (dh) (ADI) (Entered: 06/24/2019)

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06/28/2019	27	STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Exhibit Ltr of McMaster to Trump, # 2 Exhibit Ltr of Wilson to Barr)(Lowell, Randolph) (Entered: 06/28/2019)
06/28/2019	28	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 06/28/2019)
07/01/2019	29	ORDER LIFTING STAY and ORDER to file supplemental briefs. The stay on proceedings in this case is lifted. **The parties shall file supplemental briefs by Wednesday, July 31, 2019.** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 07/01/2019)
07/20/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after **August 26, 2019**. To link your upgraded PACER account **on or after August 26, 2019**, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357-6402. (dh) (ADI) (Entered: 07/20/2019)
07/31/2019	30	SUPPLEMENTAL BRIEF , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix to Supplemental Brief)(Lowell, Randolph) (Entered: 07/31/2019)
07/31/2019	31	RESPONSE to *Court's order*, filed by USA. (Hogan, Tara) (Entered: 07/31/2019)
08/16/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. **Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account**on or after August 26, 2019**. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you **MUST** know your CM/ECF login and password---do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk **immediately** at (202) 357-6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/20/2019	32	REPORTED OPINION denying 10 Motion for Summary Judgment; granting 16 Cross Motion. The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 08/20/2019)

08/20/2019	33	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of defendant. Plaintiff' complaint is dismissed. Each party shall bear its own costs. (Service on parties made.) (ac7) (Entered: 08/20/2019)
08/23/2019	34	NOTICE OF APPEAL as to 33 Judgment, filed by STATE OF SOUTH CAROLINA. Filing fee $ 505, receipt number 9998-5597681. Copy to CAFC. (Lowell, Randolph) (Entered: 08/23/2019)
08/26/2019		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 34 Notice of Appeal. (ac7) (Entered: 08/26/2019)
08/28/2019		CAFC Case Number 2019-2324 for 34 Notice of Appeal filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 08/28/2019)

PACER Service Center

Transaction Receipt

09/01/2020 12:04:02

PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:18-cv-00038-MMS
Billable Pages:	4	**Cost:**	0.40

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EXHIBIT 7

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LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A. and Davidson and Lindemann, P.A. ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of radioactive material at the Savannah River Site; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

ARTICLE I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016, and terminates on January 4, 2019, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the termination date, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

ARTICLE II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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1. Special Counsel assumes joint responsibility with the Attorney General's Office for the representation of the State in this litigation. However, the Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion shall appoint a designated assistant or assistants ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General's Office for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must identify the Attorney General or his designated assistant as counsel of record.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Attorney General's Office, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be provided to the Attorney General's Office in draft form in a reasonable and timely manner for review and approval. Special Counsel shall copy the Attorney General's Office on all case-related correspondence. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Attorney General's Office unless otherwise authorized by the Attorney General.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

7. The scope of Special Counsel's retention under this Agreement shall include appellate proceedings in this litigation.

8. The scope of Special Counsel's retention under this Agreement shall include any litigation initiated by the defendant(s) against the Attorney General or the State relating to this litigation.

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B. Non-Delegation of Work

Special Counsel may not, without the express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

C. Employment Status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

ARTICLE III. CASE MANAGEMENT

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within five business days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

At a minimum, status reports must include a description of the current status of the litigation, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

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Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com

Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

Special Counsel agrees to consult in advance, in person, by telephone, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

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Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings;
2. Dispositive motions;
3. Hearings;
4. Rulings;
5. Trials;
6. Settlement negotiations;
7. Appeals or Notice of Appeals;
8. Briefs filed by any party or entity;
9. Appellate arguments or decisions; and
10. Enforcement efforts.

Special Counsel agrees to meet with Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Should Special Counsel receive any public records request which seeks records related to this litigation, Special Counsel shall within one business day email that public records request to the Attorney General and obtain his approval before responding to that request. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from

destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

G. Settlement or Judgment Proceeds

All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's Office, which shall distribute them or have them distributed.

ARTICLE IV. COMPENSATION

A. Contingent Status

Notwithstanding any other term of this Agreement, Special Counsel shall receive no compensation of any kind for any services rendered unless the State of South Carolina receives a settlement or judgment in connection with this litigation.

B. Fee Schedule and Division

If the State receives a settlement or award in connection with this litigation, Special Counsel will be compensated from the litigation's gross recovery (any final settlement or judgment received by the State, including any post-judgment interest) for their services as follows:

1. The Attorney General's Office shall be reimbursed for all costs and expenses incurred in the litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit. Compensation under this Section IV.B.1 shall be deducted from the litigation's gross recovery before any further distribution is made. However, any attorneys' fees retained by the Attorney General's Office are not subtracted from the gross recovery for purposes of calculating Special Counsel's fee.

2. Special Counsel shall be reimbursed for certain costs and expenses incurred in this litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit, pursuant to Article V below. Compensation under this Section IV.B.2 shall be deducted from the litigation's gross recovery before any further distribution is made.

3. After any deduction from the gross recovery pursuant to Section IV.B.1 and IV.B.2, if the defendant(s) filed a separate suit against the Attorney General or the State regarding this litigation or this Agreement, Special Counsel shall be compensated for time spent defending against such suit at the following rates: $190 per hour for attorneys with 10 or more years of experience, $130 per hour for attorneys with more than 6 but less than 10 years of experience, $110 per hour for attorneys with more than 3 but less than 6 years of experience, $100 per hour for attorneys with less than 3 years of experience, and $60 per hour for paralegals. This applies only to time spent defending a

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lawsuit against the Attorney General or the State, and not to time spent on the litigation brought by the Attorney General against the defendant(s). Compensation under this Section IV.B.3 shall be deducted from the net recovery that remains after any deduction pursuant to Section IV.B.1 and IV.B.2 and before any further distribution is made.

4. After any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	24%
$25,000,000.01 to $50,000,000.00	21%
$50,000,000.01 to $75,000,000.00	18%
$75,000,000.01 to $100,000,000.00	16%
$100,000,000.01 to $125,000,000.00	13%
$125,000,000.01 to $150,000,000.00	10%
$150,000,000.01 to $250,000,000.00	5%
Greater than $250,000,000.00	2%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

6. If Special Counsel's fee is to be divided among lawyers who are not in the same firm, all lawyers receiving a fee must jointly submit (a) a declaration that the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and (b) the share each lawyer will receive, for written approval by the Attorney General's Office prior to the disbursement of any fee.

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C. Early Settlement

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees shall be one half of that specified in Section IV.B.4 above.

D. Non-Monetary Relief

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General in his sole discretion shall determine the monetary value to the State and attorneys' fees awarded based on such monetary value. Should the litigation be favorably resolved by solely non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), in consultation with the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee, Special Counsel is entitled to attorneys' fees at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2016 and not to exceed $100,000 for every calendar year thereafter; in such event the obligation for such attorneys' fees shall be upon the opposing party in the litigation or as appropriated by the General Assembly.

E. Compensation upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys' fees as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

F. No Other Payment Source

Special Counsel shall be reimbursed solely from the litigation's recovery. Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for their work in this litigation other than as set forth in Articles IV and V herein. Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

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G. Court Approval of Fees and Costs

When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

B. Expert Expenses

Special Counsel shall seek prior approval from the Attorney General for the retention of experts before incurring expenses related to such expert. Provided that the Attorney General has approved the retention of an expert, Special Counsel shall be reimbursed for the expert's retainer and fees incurred on an hourly basis. Other expert expenses will be reimbursed in accordance with the provisions of Section V.C.

C. Other Expenses

Special Counsel shall be reimbursed for other certain reasonable expenses and costs enumerated below.

1. Overnight lodging shall be reimbursed at actual cost up to a maximum of the rate published by the United States General Services Administration as of the date of the lodging exclusive of taxes and fees. There is no reimbursement for in-room internet, room service, business center services, gratuity, or any other hotel services or upgrades.

2. There is no reimbursement for meals.

3. Automobile travel shall be reimbursed at the rate per mile published by the Internal Revenue Service for business miles driven as of the date of the automobile travel. Special Counsel must document the date of the travel, the address of the departure location, the address of the arrival location, and the purpose of the travel in order to be eligible for reimbursement. Automobile travel reimbursement must not exceed the commercial coach fare available for the same travel. There is no reimbursement for gas.

4. All other travel or travel-related expenses, including airfare, train, bus, taxi, shuttle, parking, and baggage fees, will be reimbursed at actual cost. Airfare reimbursements must be for commercial coach fares. There is no reimbursement for seat upgrades, preferred seating, preferred boarding, internet access, or any other transportation related upgrade.

5. Actual expenses for court fees and both offensive and defensive discovery, including but not limited to filing fees, service of process, motions fees, document productions, transcripts, and witness fees, as well as mailing costs related thereto. Charges for priority or overnight mail services shall be reimbursed only if use of such services is necessary. Should the cost of printing and copying any particular item under this section exceed $100, such expense shall be reimbursed.

6. If Special Counsel determines that the hiring of an Outside Vendor for any discovery, electronic discovery, or printing related project is reasonably necessary to the litigation, Special Counsel shall assess and select an appropriate Outside Vendor based on objective criteria, including but not limited to expertise, experience, professional certifications, capacity, geographic location, and cost. The Attorney General retains the right to veto the selection of any Outside Vendor, and the Attorney General must give written approval prior to the use of or contracting with any Outside Vendor by Special Counsel.

7. There will be no reimbursement for printing, copying or mailing costs other than under Section C.5, secretarial, paralegal, or other staff costs or overtime, Westlaw, LexisNexis, PACER, or other research expenses, or any telephone calls, or any other expense, unless prior approval is obtained in writing from the Attorney General.

Any deviation from these rules, such as a hotel room higher than GSA rate, must be approved by the Attorney General's Office prior to Special Counsel incurring the expense. Should a significant, unusual, and unexpected expense arise that is necessary and germane to the litigation, Special Counsel may request approval from the Attorney General for such expense. The Attorney General shall, in his sole discretion, determine whether Special Counsel shall be reimbursed for such expenses.

D. Hourly Fee

Where Special Counsel seeks payment of an hourly fee for defending litigation brought against the Attorney General or the State under the terms of this Agreement, in accordance with Section IV.B.3, Special Counsel is required to submit detailed time records on a monthly basis for time worked over the previous month. The Attorney General's Office is not obligated to approve or reject any requests for hourly fees until after the conclusion of the litigation. Each monthly time record must clearly identify, by name or initials, the attorney or paralegal who performed the work, the date of the work, a detailed description of the work, and the number of hours or fraction thereof worked to the nearest tenth of an hour. When initials are used, the submission must identify all persons whose initials appear on the invoice and indicate whether each is an attorney or paralegal.

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No time records shall be submitted or paid for work occurring either prior to the effective date of this Agreement or after its termination.

To the extent time was spent working on both the case brought by the Attorney General and the case where the Attorney General or the State is a defendant, it is Special Counsel's duty to separate the time based on the proportion fairly allocated to each case and only seek payment of an hourly fee for time fairly spent defending the Attorney General or the State in a case brought by the defendant(s). The Attorney General, in his sole discretion, may decline to pay an hourly fee for time determined to be unnecessary, unreasonable, and/or not submitted in accordance with the requirements of this Agreement.

E. Form and Timing of Submission

Special Counsel shall submit invoices every 90 days for any expenses incurred over the previous 90 days for which Special Counsel seeks reimbursement; however, the Attorney General's Office is not obligated to approve or reject any expenses until after the conclusion of the litigation.

For an expense to be reimbursed, Special Counsel must provide an original receipt reflecting the charges. Credit card statements are not sufficient unless approved by the Attorney General's Office. The receipts will be scanned and submitted to the Attorney General's Office as a single PDF document.

In addition, Special Counsel will provide an Excel spreadsheet that contains, at a minimum, the following information:

1. Date of expense;
2. Amount of expense;
3. Amount of expense for which reimbursement is sought;
4. Description of expense; and
5. Page reference to the PDF document of receipts.

To the extent prior written approval of the Attorney General's Office was given for a particular expense, such approval shall be included with the invoice.

Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following the termination of this Agreement. All expenses must be itemized and no reimbursement will be granted for "miscellaneous" listings. The Attorney General may, in his sole discretion, decline to reimburse Special Counsel for any expenses determined to be unnecessary, unreasonable, improperly documented, or improperly submitted.

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ARTICLE VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform their duties

required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that it has no conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time for this representation. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment that may impact this representation.

F. Equal Opportunity

Special Counsel hereby represents that neither they nor their law firms discriminate on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Right to Contact

To clarify, nothing in this Agreement shall be construed to prohibit defendant(s) from discussing this case with the Attorney General without the presence of Special Counsel if the Attorney General agrees to such discussion.

H. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

I. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

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J. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

K. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

L. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

SPECIAL COUNSEL

Davidson & Lindemann, P.A.
By:
Its: Shareholder

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EXHIBIT 8

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AMENDMENT TO THE LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

Pursuant to Article VII.J of the Litigation Retention Agreement for Special Counsel Appointed by the Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility, the Litigation Retention Agreement is hereby amended as follows, effective as of January 1, 2019. Except as set forth in this Amendment, the Agreement is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between this amendment and the Agreement or any earlier amendment, the terms of this Amendment will prevail.

1. **The title of the Agreement is deleted in its entirety and replaced with the following:**

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO VIOLATIONS OF 50 U.S.C.A. § 2566 AND OTHER CLAIMS RELATED TO NEPA, CERTIFICATION, AND WAIVER CLAIMS REGARDING THE MIXED OXIDE (MOX) FACILITY AND PLUTONIUM DISPOSITION

2. **The preamble of the Agreement after the title and prior to the recitals is deleted in its entirety and replaced with the following:**

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A., for certain causes of action and claims as set forth herein, and Davidson, Wren & Plyler, P.A., for certain causes of action and claims as set forth herein, each respectively "Special Counsel" for the matters for which each law firm has been engaged.

3. **The recitals of the Agreement are deleted in their entirety and replaced with the following:**

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual

litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of defense plutonium at the Savannah River Site; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's attempts to terminate the MOX Project at the Savannah River Site without compliance with applicable law; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

4. Article I of the Agreement is deleted in its entirety and replaced with the following:

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016 and terminates at the completion of these litigation matters, unless the Attorney General or Special Counsel terminates this appointment earlier pursuant to Article VI of this Agreement. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

5. Article II.D is added to the Agreement as follows:

D. Legal Services

Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are retained as Special Counsel for litigation matters to enforce claims for injunctive relief under 50 U.S.C.A. § 2566(c) and for monetary claims under 50 U.S.C.A. § 2566(d). Willoughby & Hoefer, P.A., is further retained as Special Counsel for litigation matters: arising from and related to all other matters under 50 U.S.C.A. § 2566; in venues outside of the State of South Carolina arising from or related to any claim under 50 U.S.C.A. § 2566 or defense plutonium disposition at the Savannah River Site; and arising from NEPA, waiver, or certification claims regarding the MOX Facility project termination.

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6. Article III.B is deleted in its entirety and replaced with the following:

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); or (5) by email.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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Name: Kenneth P. Woodington
Davidson, Wren & Plyler, P.A.
Address: 1611 Devonshire Drive, Second Floor
Columbia, SC 29204
Phone: 803-806-8222
Email: kwoodington@dml-law.com

7. Article III.F is deleted in its entirety and replaced with the following:

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Public records requests are to be handled by the Attorney General's Office, and any public records requests received by Special Counsel shall be emailed to the Attorney General's Office within one business day of receipt. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

8. Article IV.B.4 is deleted in its entirety and replaced with the following:

4.i. For the matters for which Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are jointly engaged as Special Counsel in the District Court of South Carolina and Court of Federal Claims, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

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4.ii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of South Carolina related to the MOX Facility and its termination, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

4.iii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of Nevada related to the transport and storage of defense plutonium from South Carolina and its disposition, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating the claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court in the Ninth Circuit	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

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9. Article IV.B.5 is deleted in its entirety and replaced with the following:

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings for any matter under the ambit of Section IV.B.4.i only, Special Counsel shall receive the following in additional attorneys' fees for each individual appellate matter, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	3%
$25,000,000.00 to $50,000,000.00	3%
$50,000,000.00 to $75,000,000.00	3%
$75,000,000.00 to $100,000,000.00	2%
$100,000,000.00 to $125,000,000.00	2%
$125,000,000.00 to $150,000,000.00	1%
$150,000,000.00 to $250,000,000.00	1%
Greater than $250,000,000.00	1%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. These fees are not awarded for any matter for which Special Counsel receives additional attorneys' fees under Section IV.B.4.ii or iii. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

10. Article IV.C is deleted in its entirety and replaced with the following:

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees may be reduced to one half of that specified in Section IV.B.4 above, in the sole discretion of the Attorney General.

11. Article IV.D is deleted in its entirety and replaced with the following:

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Except as otherwise set forth and contemplated in the compensation and fee recovery provisions in Article IV.B.4 and 5 for those actions and the requested relief, should the litigation be favorably resolved solely by other non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), Special Counsel shall engage in best efforts to recover attorneys' fees from the opposing party in the litigation. If attorneys' fees cannot be recovered from the opposing party, the

Attorney General shall seek an appropriation of attorneys' fees from the General Assembly at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2017 and not to exceed $100,000 for every calendar year thereafter. In no event shall Special Counsel be entitled to attorneys' fees directly from the Attorney General's office except out of a monetary recovery as specified in Article IV.B.

[Signatures on following page.]

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ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

Date: 6/13/19

SPECIAL COUNSEL

Davidson, Wren & Plyler, P.A.
By: William H. Davidson, II
Its: Shareholder

Date: 6/2/19

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EXHIBIT 9

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912 F.3d 720
United States Court of Appeals, Fourth Circuit.

State of SOUTH CAROLINA,
Plaintiff – Appellee,
v.
UNITED STATES of America; United States Department of Energy; Rick Perry, in His Official Capacity as Secretary of Energy; National Nuclear Security Administration; Lisa E. Gordon-Hagerty, in Her Official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants – Appellants.

No. 18-1684
|
Argued: September 27, 2018
|
Decided: January 8, 2019

Synopsis

Background: State brought action against United States Department of Energy (DOE) and National Nuclear Security Administration (NNSA) and their officials challenging termination of mixed oxide fuel fabrication facility project in state. The United States District Court for the District of South Carolina, No. 1:18-cv-01431-JMC, J. Michelle Childs, J., 329 F.Supp.3d 214, granted state's motion for preliminary injunction, and defendants appealed.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

[1] state did not suffer sufficiently concrete injury-in-fact to support standing to bring action, and

[2] state's claims were not ripe for adjudication.

Vacated and remanded.

West Headnotes (12)

[1] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears burden of establishing standing to assert each of its claims.

1 Cases that cite this headnote

[2] **Federal Courts** Standing

Court of Appeals reviews question of whether plaintiff possesses standing de novo.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must show that: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to defendant's challenged action; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

To satisfy injury-in-fact requirement for standing, plaintiff must establish realistic danger of sustaining direct injury.

2 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

While it is true that threatened rather than actual injury can satisfy Article III standing requirements, not all threatened injuries constitute injury-in-fact; rather, injury-in-fact

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must be concrete in both qualitative and temporal sense. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[6] **Environmental Law** Government entities, agencies, and officials

State did not suffer sufficiently concrete injury-in-fact to support standing to bring action alleging that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state, despite state's contention that DOE's decision meant that it would become permanent repository of weapons-grade plutonium and be subject to environmental, health, and safety risks that entailed, where current environmental impact statement provided that DOE had 28 years to identify alternative method for disposing of nuclear material or otherwise removing it from state, Secretary of Energy had already certified that one potential alternative to MOX program existed, and Congress had put in place contingency plans for removal of plutonium shipped to site to forestall indefinite storage of plutonium in state. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[7] **Constitutional Law** Nature and scope in general

Federal Civil Procedure In general; injury or interest

Standing doctrine is built on separation-of-powers principles, and serves to prevent judicial process from being used to usurp political branches' powers.

1 Cases that cite this headnote

[8] **Federal Courts** Ripeness; Prematurity

Ripeness is question of subject matter jurisdiction.

10 Cases that cite this headnote

[9] **Federal Courts** Fitness and hardship

Question of whether claim is ripe turns on fitness of issues for judicial decision and hardship to parties of withholding court consideration.

4 Cases that cite this headnote

[10] **Administrative Law and Procedure** Ripeness; prematurity

In context of claims challenging agency actions, ripeness doctrine's purpose is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties.

5 Cases that cite this headnote

[11] **Administrative Law and Procedure** What constitutes finality in general

To be fit for judicial review, controversy should be presented in clean-cut and concrete form, which occurs when action is final and not dependent on future uncertainties or intervening agency rulings.

5 Cases that cite this headnote

[12] **Environmental Law** Ripeness

State's claims that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state were not ripe for adjudication, where state based its claims on premise that it would be permanent repository of weapons-grade nuclear material currently stored in state, but numerous contingent future events would have to occur before that would occur, including DOE's failure to identify alternative method of disposal and breach its commitment

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to dispose of waste, and failure by Congress and courts to set aside or refuse to enforce statutory mechanisms currently in place to ensure timely removal of nuclear material. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

***722** Appeal from the United States District Court for the District of South Carolina, at Aiken. J. Michelle Childs, District Judge. (1:18-cv-01431-JMC)

Attorneys and Law Firms

ARGUED: Andrew Alperin Rohrbach, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Randolph R. Lowell, WILLOUGHBY & HOEFER, PA, Columbia, South Carolina, for Appellee. ON BRIEF: Chad A. Readler, Acting Assistant Attorney General, Mark B. Stern, Daniel Tenny, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellants.

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Opinion

Vacated and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Niemeyer and Judge King joined.

WYNN, Circuit Judge:

The State of South Carolina brought this action to enjoin the United States of America and other Defendants[1] (collectively, "the United States") from terminating the construction of a mixed-oxide fuel nuclear processing facility located at the Savannah River Site in South Carolina. South Carolina alleges that the United States Department of Energy unlawfully failed to (1) prepare a supplemental Environmental Impact Statement analyzing the long-term storage of plutonium in the state; and (2) follow statutory waiver provisions for terminating construction of the facility. We conclude that South Carolina ***723** has not established standing to pursue either of these claims. Accordingly, we vacate the preliminary injunction imposed by the district court.

I.

Following the collapse of the Soviet Union and the end of the Cold War, the United States of America and the Russian Federation began a worldwide nuclear nonproliferation effort that included developing plans for the safe disposition of nuclear weapons material. As part of this nonproliferation pact, the Department of Energy began studying the effects of various nuclear waste storage and disposal strategies. In its initial 1996 study, the Department of Energy prepared an Environmental Impact Statement in accordance with Section 4332 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., analyzing the potential environmental consequences associated with the long-term storage of weapons-grade plutonium and highly enriched uranium prior to disposition. The Environmental Impact Statement addressed storage of these materials for a period of up to fifty years.

Ultimately, the Department of Energy determined that the best approach to nuclear waste disposal was a dual strategy involving (1) immobilization of a portion of the surplus plutonium in glass or ceramic; and (2) irradiation of the remaining plutonium in mixed oxide fuel (the "MOX process"). Both strategies would convert the surplus nuclear material into forms that would meet the National Academy of Science's Spent Fuel Standard, meaning that the material would be "inaccessible and unattractive for weapons" use. J.A. 78.

In 1997, the Department of Energy announced its intention to build a new mixed oxide fuel fabrication facility (the "MOX facility") to dispose of some of the nuclear material using the MOX process. Following completion of a supplemental Environmental Impact Statement and a Record of Decision in January of 2000, the Department of Energy announced that the MOX facility would be located at the Savannah River Site along South Carolina's border with Georgia. The facility's original production goals included disposition of up to thirty-three metric tons of nuclear material using the MOX process and immobilization of up to seventeen metric tons of additional nuclear material. As part of its supplemental Environmental Impact Statement, the Department of Energy continued to look at the environmental impacts of long-term plutonium storage.

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In 2002, the Department of Energy decided to drop the immobilization portion of the disposition strategy, leaving the MOX process as the sole plutonium disposal method. That same year, Congress directed the Secretary of Energy to submit a plan for the construction and operation of the MOX facility at the Savannah River site. Pub. L. No. 107-314, § 3182 (2002), *subsequently codified* as 50 U.S.C. § 2566. Congress further authorized the Secretary to take corrective actions if the construction timetable and operation schedule for the MOX facility were not being met. Additionally, Congress also required that in the event the MOX facility failed to achieve its production goals, the Department of Energy remove plutonium shipped to South Carolina for processing. *See* 50 U.S.C. § 2566(c), § 2566(e). Finally, as part of its findings, Congress mentioned the economic benefit that the MOX facility would bring to the State of South Carolina, noting that the economic benefit would not be fully realized unless the facility was built. *See* Pub. L. No. 107-314 at § 3181.

Three years later, in 2005, the Department of Energy began transferring plutonium to the Savannah River Site for conversion, and in 2007, construction began on ***724** the MOX facility. The original cost estimate for construction of the facility was $4.8 billion, with completion anticipated in 2016. And the original production goal estimate for the facility was to have thirty-four metric tons of defense plutonium processed no later than January 1, 2019. 50 U.S.C. § 2566(a)(2)(B).

These original estimates proved grossly inaccurate due to delays and cost overruns in the construction of the MOX facility. The Department of Energy now estimates cost for construction of the facility to be $17.17 billion, with completion now anticipated to be in 2048, over thirty years beyond the original estimated schedule.

Since 2014, the Department of Energy has sought to terminate the MOX program and pursue an alternative method of plutonium disposal known as "Dilute and Dispose," which it contends is less costly, faster, and safer. Under the Dilute and Dispose method, nuclear material would be "downblended" with inhibitor materials to reduce the plutonium content to less than ten percent by weight. Upon completion of the downblending process, the material would then be shipped from the Savannah River Site to the Waste Isolation Pilot Plant near Carlsbad, New Mexico, for permanent disposal.

Thus far, Congress has continued to fund construction of the MOX facility and has, to date, restricted the Department of Energy from utilizing MOX-related appropriations to begin termination of the program. To that end, in 2017, Congress enacted a statute providing that the Secretary of Energy "shall carry out construction and project support activities relating to the MOX facility." Pub. L. 115-91, § 3121(a), 131 Stat. 1283, 1892.

However, Section 3121(b) of that statute allows the Secretary of Energy to discontinue construction of the MOX facility if certain conditions have been met. Specifically, the Secretary of Energy must submit to the Congressional defense committees:

> (A) the commitment of the Secretary [of Energy] to remove plutonium intended to be disposed of in the MOX facility from South Carolina and ensure a sustainable future for the Savannah River Site;
>
> (B) a certification that—
>
> (i) an alternative option for carrying out the plutonium disposition program for the same amount of plutonium as the amount of plutonium intended to be disposed of in the MOX facility exists, meeting the requirements of the Business Operating Procedure of the National Nuclear Security Administration entitled "Analysis of Alternatives" and dated March 14, 2016 (BOP-03.07); and
>
> (ii) the remaining lifecycle cost, determined in a manner comparable to the cost estimating and assessment best practices of the Government Accountability Office ["GAO"], as found in the document of the Government Accountability Office entitled "GAO Cost Estimating and Assessment Guide" (GAO-09-3SP), for the alternative option would be less than approximately half of the estimated remaining lifecycle costs of the mixed oxide fuel program; and
>
> (C) the details of any statutory or regulatory changes necessary to complete the alternative option.

§ 3121(b)(1).

Additionally, in exercising his authority to discontinue construction of the MOX facility, the Secretary of Energy

> (1) shall concurrently submit to the Committees on Appropriations of both Houses of Congress the lifecycle

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cost estimate used to make the certification under section 3121(b) of such Act; and

***725** (2) may not use funds provided for the Project to eliminate such Project until the date that is 30 days after the submission of the lifecycle cost estimate required under paragraph (1).

Pub. L. No. 115-141, § 309(c), 132 Stat. 348, 530 (2018).

Pursuant to these provisions, on May 10, 2018, the Secretary of Energy submitted a letter to the Chairman of the House Armed Services Committee that purported to execute the authority of the Secretary of Energy under Section 3121(b) to discontinue construction of the MOX facility. The Secretary of Energy certified, *inter alia*, that (1) the Department of Energy is committed to removing plutonium from South Carolina; (2) an alternative option for carrying out the plutonium disposition, the Dilute and Dispose method, exists and has a lifecycle cost of less than approximately half of the remaining lifecycle cost for the MOX program; (3) the Department of Energy estimated the cost of the Dilute and Dispose approach in a manner compatible with the best practices of the GAO; and (4) the Department of Energy is committed to ensuring a sustainable future for the Savannah River Site. The Secretary of Energy further reported that the Department of Energy expected the total cost of disposition via the Dilute and Dispose method to be $19.9 billion, compared to $49.4 billion for the total cost of construction of the MOX facility and conversion of all the plutonium into MOX fuel.

In accordance with the Secretary of Energy's letter, the Department of Energy and the National Nuclear Security Administration issued a Partial Stop Work Order on May 14, 2018, ending all new contracts and hiring related to the MOX program. The Department of Energy further indicated its intent to issue a Full Stop Work Order and begin winding down the MOX program, including terminating employees currently working on the project, on or about June 11, 2018.

On May 25, 2018, before the Department of Energy issued a full stop work order, South Carolina brought this action in the United States District Court for the District of South Carolina and moved for a preliminary injunction barring the federal government from terminating the MOX program. In its complaint, South Carolina asserted that the United States (1) violated NEPA by failing to prepare a supplemental Environmental Impact Statement covering a period of more than fifty years and (2) failed to satisfy Section 3121(b) because of the alleged insufficiency of the Secretary of Energy's certifications.[2]

On June 7, 2018, the district court granted South Carolina's motion for preliminary injunction. The district court first found that South Carolina had standing due to environmental risks associated with long-term storage at the Savannah River Site, which abuts property owned by South Carolina. As to the merits, the district court held, in pertinent part, that South Carolina was likely to succeed on the merits of its NEPA claim and its claim that the Secretary of Energy's certifications were insufficient. The district court further found that South Carolina would be irreparably harmed absent a preliminary injunction and that the balance of equities tilted in South Carolina's favor. Thus, the district court enjoined the federal government from ceasing construction of the MOX facility and issuing the full stop work order. The United States timely appealed.

***726** After careful review, we dispositively hold that South Carolina failed to establish standing and therefore we do not reach the district court's determination on the merits of this matter.

II.

A.

On appeal, the United States contends that the district court erred in concluding that South Carolina established standing to pursue the two claims that serve as the basis of the district court's preliminary injunction order—the NEPA claim and the claim premised on the alleged insufficiency of the Secretary's certifications. The standing doctrine derives from "the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.' " *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 750–51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Standing implicates the court's subject matter jurisdiction. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 230 (4th Cir. 2008).

[1] **[2]** Here, South Carolina, as plaintiff, bears the burden of establishing standing to assert each of its claims. *See id.*;

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see also Lewis v. Casey, 518 U.S. 343, 359 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." (internal quotation marks omitted)). We review the question of whether South Carolina possesses standing de novo. *Frank Krasner Enters.*, 401 F.3d at 234.

[3] To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The United States contends South Carolina failed to show it has suffered an injury-in-fact sufficient to give rise to Article III standing.

[4] **[5]** To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "[W]hile it is true 'that threatened rather than actual injury can satisfy Article III standing requirements,' ... not all threatened injuries constitute an injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc)). "Rather, as the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.' " *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The requirement that an alleged injury be palpable and imminent ensures that the injury "is not too speculative for Article III purposes." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564–65 n.2, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[6] On appeal, South Carolina contends that it has suffered an injury-in-fact sufficient ***727** to support standing because "[South Carolina] is harmed by being rendered the permanent repository of weapons-grade plutonium as a result of [the Department of Energy's] decision to terminate the MOX Facility without first complying with NEPA or following the congressional mandates of § 3121." Appellee's Br. at 15–16. According to South Carolina, this "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 14. But this alleged injury is too speculative and thus, does not give rise to a concrete injury-in-fact sufficient to support either of South Carolina's claims.

The Supreme Court has repeatedly held that an alleged harm is too "speculative" to support Article III standing when the harm lies at the end of a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *see also*, *e.g.*, *Beck*, 848 F.3d at 275 (holding that plaintiffs, who received treatment at a medical center that suffered a data breach and alleged that they were at risk of experiencing identity theft, failed to establish standing because their theory of injury rested on an "attenuated chain of possibilities").

Illustratively in *Clapper*, the Supreme Court considered a challenge to Section 702 of the Foreign Intelligence Surveillance Act, which "authoriz[es] the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." 568 U.S. at 401, 133 S.Ct. 1138. The plaintiffs—a group of "attorneys and human rights, labor, legal, and media organizations"—alleged that their work demanded that they "engage in sensitive international communication with individuals who they believe are likely targets of surveillance under" Section 702, rendering it reasonably likely that the government would target and intercept the plaintiffs' communications. *Id.* at 401, 406, 133 S.Ct. 1138.

The Supreme Court held that the plaintiffs failed to establish a concrete injury-in-fact based on the possibility that their communications would be intercepted, explaining that a series of hypothetical events would have to occur before the government would intercept any particular plaintiff's communications. *Id.* at 1148–50, 133 S.Ct. 1138. The Court held that among other steps, the government would have to decide to invoke its Section 702 authority to target a non-U.S. person with whom a plaintiff communicated, a panel of federal judges would have to "conclude that the Government's proposed surveillance procedures satisfy [the statute's] many safeguards and are consistent with the Fourth Amendment," and the government would have to succeed in intercepting one of the target's communications with the plaintiff. *Id.* Thus, the Court held that that the "highly attenuated chain of possibilities, d[id] not satisfy

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the requirement that threatened injury must be certainly impending." *Id.* at 1148, 133 S.Ct. 1138 (citation omitted).

Applying *Clapper*, this Court reached a similar conclusion in *Beck*, in which a putative class of veterans who received medical treatment at a veterans' medical center alleged that they had been injured when two sets of records were stolen from the center. 848 F.3d at 262, 267. Although none of the named plaintiffs alleged any actual or attempted misuse of the personal information contained in their stolen records, they alleged that they suffered cognizable injuries-in-fact because they faced "(1) [an] increased risk of future identity theft, and (2) the costs of protecting against the same." *Id.* at 273. We concluded ***728** that both alleged injuries were too speculative to confer standing. *Id.* at 275–77. As to the alleged increased risk of identity theft, in particular, we explained that plaintiffs' theory of injury required us to "assume that the thie[ves] targeted the stolen items for the personal information they contained" and that the thieves would "then select, from thousands of others, the personal information of the named plaintiffs, and attempt successfully to use that information to steal their identities." *Id.* at 275. "This 'attenuated chain' cannot confer standing," we held. *Id.* We likewise rejected the plaintiffs' costs of mitigation theory of standing as a "repackaged" version of their first theory of standing, amounting to an effort to recoup "costs they incurred in response to a *speculative threat*." *Id.* at 276 (emphasis added) (quoting *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138).

Here, South Carolina's theory of standing—that it will become "the permanent repository of weapons-grade plutonium" and all the environmental, health, and safety risks that entails, Appellee's Br. at 15–16—rests on a similarly "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138. Between now and 2046—when the analysis in the current Environmental Impact Statement governing the risks associated with long-term storage of weapons-grade nuclear material at the Savannah River Site expires—the Department of Energy has twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina. The Secretary of Energy already has certified that one potential alternative to the MOX program exists, the Dilute and Dispose method. And the Department of Energy may identify and develop other methods during that twenty-eight-year period. Or the Department of Energy may decide to transfer the plutonium out of South Carolina to another location.

Furthermore, Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina. A federal statute requires that, by 2022, all additional plutonium transferred into South Carolina to the MOX facility, but not processed, must be removed. 50 U.S.C. § 2566(c)(2). Notably, because the Department of Energy already has failed to meet certain statutory time limits for disposing of nuclear material at the site, South Carolina has successfully brought suit pursuant to the Administrative Procedure Act to enforce these congressionally mandated deadlines via a mandatory injunction. *See id.* § 2566(c)(1) (requiring removal of one metric ton of plutonium no later than January 1, 2016); *South Carolina v. United States*, 243 F.Supp.3d 673 (D.S.C. 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018) (ordering the Department of Energy to remove one metric ton of plutonium within two years).

In sum, for South Carolina's alleged injury—becoming "the permanent repository of weapons-grade plutonium," Appellee's Br. at 15–16—to occur: (1) the proposed Dilute and Dispose method must fail; (2) the Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and (3) the Department of Energy must breach its statutory obligation to remove the nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation. At this juncture, before the Department of Energy has even had an opportunity to finish analyzing the Dilute and Dispose method, this "chain of possibilities" is too speculative to give rise to a sufficiently concrete injury-in-fact.

[7] That several of the links in this "chain of possibilities" the State's standing ***729** theory contemplates require our coordinate branches to either breach or abandon their existing commitments to ensure timely removal of the nuclear material at the Savannah River Site further weighs against treating the South Carolina's alleged injury as conferring standing. As *Clapper* recognized, the standing doctrine is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408, 133 S.Ct. 1138 (citations omitted); *see also Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315 (1984) ("[Article] III standing is built on a single basic idea—the idea of separation of powers."). To confer standing on South Carolina at this juncture based on an alleged injury —becoming the permanent repository of nuclear material— that the political branches already have made written and legally binding commitments to forestall would improperly

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"usurp the powers of the political branches." *Clapper*, 568 U.S. at 408, 133 S.Ct. 1138.

The "highly attenuated chain of possibilities" that must occur for South Carolina to become the permanent repository of nuclear material also sets this case apart from this Court's decision in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), upon which South Carolina principally relies.

Like the instant case, *Hodges* dealt with the storage of plutonium at the Savannah River Site. *Id.* at 436. In 2002, the Department of Energy issued a Record of Decision authorizing the immediate shipment of six metric tons of plutonium from a nuclear facility in Colorado to the Savannah River Site. *Id.* The Governor of South Carolina sought to enjoin shipment of the plutonium into South Carolina, alleging that the Department of Energy's *existing* Environmental Impact Statement, and its supplemental analyses to the Environmental Impact Statement, related to storage of plutonium at the Savannah River Site violated NEPA in several ways. *Id.* at 445. This Court held that the Governor adequately alleged an injury-in-fact to support his NEPA claims because the South Carolina owned property adjacent to the Savannah River Site. *Id.* "[T]he Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage" as a result of the Department of Energy's shipment of plutonium to the Savannah River Site and storage of that plutonium there, we explained. *Id.*

Here, unlike in *Hodges*, South Carolina does not argue that its injury, as a neighboring landowner, is attributable to the *current* storage of nuclear material at the Savannah River Site or the inadequacy of the Environmental Impact Statement pursuant to which the nuclear material is *currently* stored—a question that *Hodges* already resolved in the federal government's favor. *Id.* at 446–49. Rather, South Carolina contends it is injured because the termination of the MOX program renders it the *permanent* repository of the nuclear material when the Department of Energy has not issued an Environmental Impact Statement analyzing the environmental impact of the storage of the material at the Savannah River Site *beyond the year 2046*, the year when the existing Environmental Impact Statement's analysis terminates, or, allegedly, satisfies its statutory obligations in terminating the MOX program. There is a meaningful distinction between the alleged *immediate* environmental injuries associated with storing plutonium at the Savannah River Site, which were at issue in *Hodges*, and the alleged *future* adverse environmental impacts on South Carolina as a neighboring landowner if the Department of Energy continues to store the plutonium at the Savannah River Site *decades in the future*. That distinction is particularly meaningful because, as explained ***730** above, numerous contingencies must occur in order for the plutonium to remain in South Carolina after 2046, the year when South Carolina's alleged injury will mature.

In sum, the single theory of injury[3] that South Carolina relies on to support both of its claims is too speculative at this juncture to support Article III standing. The district court, therefore, was without jurisdiction to enter its preliminary injunction premised on those two claims.

B.

[8] For reasons similar to those that lead us to find that South Carolina lacks standing, we also find that the two claims at issue fail on ripeness grounds. Like standing, the ripeness doctrine "originates in the 'case or controversy' constraint of Article III." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 269 (4th Cir. 2013) (citations omitted). "Analyzing ripeness is similar to determining whether a party has standing." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). "Although the phrasing makes the questions of who may sue and when they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness." *Id.* (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)). As with standing, ripeness is a question of subject matter jurisdiction. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (citation omitted).

[9] **[10]** The question of whether a claim is ripe "turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) (citation omitted). In the context of claims challenging agency actions, like the two at issue, the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136,

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148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[11] To be fit for judicial review, a controversy should be presented in a "clean-cut and concrete form." *Miller*, 462 F.3d at 319 (citation omitted). This occurs when the action is "final and not dependent on future uncertainties or intervening agency rulings." *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (citation omitted). On the other hand, just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, a plaintiff's claim is not ripe for judicial review "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

[12] The two claims that South Carolina advances before this Court rest on the premise that South Carolina will be the permanent repository of the weapons-grade ***731** nuclear material currently stored at the Savannah River Site. But, numerous "contingent future events," *id.*, must occur before South Carolina becomes the *permanent* repository of the nuclear material, *see supra* Part II.A. In particular, the Dilute and Dispose method must prove unworkable. The Department of Energy must fail to identify an alternative method of disposal and breach its commitment to dispose of the waste. And Congress or the courts must set aside or refuse to enforce the statutory mechanisms currently in place to ensure timely removal of the nuclear material. All of these "future uncertainties," *Franks*, 313 F.3d at 195, lead us to conclude that the two claims at issue are not ripe for review at this time —at least as presented by South Carolina. Accordingly, the ripeness doctrine provides an additional basis for our holding that the district court was without jurisdiction to enter the preliminary injunction.

III.

In sum, the only theory of injury advanced by South Carolina —that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site—rests upon a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270. In such circumstances, we must conclude that South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review.

That the two claims are not currently justiciable does not mean that they never will be so. If uncertainty as to several links in the chain of possibilities is resolved, then South Carolina's alleged injury may move from the speculative to the concrete, and therefore the two claims also may become ripe for review. But until that uncertainty is lifted, the Constitution demands that we withhold judicial review.

Accordingly, we vacate the preliminary injunction imposed by the district court and remand the case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED

All Citations

912 F.3d 720

Footnotes

1 The other Defendants are the United States Department of Energy; Rick Perry, in his official capacity as Secretary of Energy; the National Nuclear Security Administration; and Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration.

2 South Carolina further claimed that the United States violated 50 U.S.C. § 2567 by failing to consult with the governor before deciding to terminate the MOX facility. The district court held that South Carolina failed to establish that that claim was likely to succeed on the merits, and therefore that claim is not before this Court.

3 Because South Carolina has advanced only one theory of injury to support the two claims before this Court—that South Carolina is harmed by becoming the permanent repository of weapons-grade nuclear material—we cannot and do not take any position on whether other theories of injury would presently confer standing on South Carolina to support either of the two claims before us on appeal.

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EXHIBIT 10

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2019 WL 2464930 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
June 7, 2019.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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***i** QUESTION PRESENTED

The U.S. Department of Energy (DOE) shipped massive amounts of weapons-grade plutonium to South Carolina for a decade in anticipation of building a facility there - the "MOX Facility" - to process it. After running way behind schedule and far over budget, DOE sought to mothball the still-uncompleted MOX Facility. In response, Congress enacted a statute requiring DOE to keep building the MOX Facility unless DOE gets a "waiver" of that requirement. This lawsuit arose from DOE's decision to halt construction of the MOX Facility permanently after purportedly satisfying the statute's requirements for a waiver. South Carolina claims in this suit that DOE's decision violates the statute, which was specifically designed to protect South Carolina's interests, and the National Environmental Policy Act.

The question presented is whether the United States Court of Appeals for the Fourth Circuit erred in holding that South Carolina lacked standing to challenge the DOE's final action and that the challenge is not ripe.

***ii** PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. State of South Carolina, Plaintiff and Petitioner;

2. United States of America, Defendant and Respondent;

3. United States Department of Energy, Defendant and Respondent;

4. Rick Perry, in his official capacity as Secretary of Energy, Defendant and Respondent;

5. National Nuclear Security Administration, Defendant and Respondent;

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6. Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendant and Respondent.

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner State of South Carolina (South Carolina or State) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.3d 720. App. 1a-22a. The opinion of the district court is reported at 329 F. Supp. 3d 214. App. 34a-82a. The decision of the United States Secretary of Energy is unreported but is reproduced in the appendix. App. 107a-109a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on January 8, 2019. On March 29, 2019, the Chief Justice extended the time to file a petition for a writ of certiorari up to and including June 7, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the U.S. Constitution provides in relevant part, "[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 83a-106a.

*2 INTRODUCTION

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This case involves the justiciability of a State's claims against the federal government for statutory violations, including violations of provisions expressly designed to protect the State's concrete interests. The decision below, which denied the justiciability of those claims, conflicts with this Court's decision in *Massachusetts v. EPA,* 549 U.S. 497 (2007), and provides an excellent vehicle for dispelling continuing confusion among the lower courts about the standing of States to sue the federal government.

South Carolina is home to the Savannah River Site (SRS), where Congress directed the U.S. Department of Energy (DOE) to build a facility to convert weapons-grade plutonium (also known as "defense plutonium") into mixedoxide (MOX) fuel for use in commercial nuclear reactors. App. 3a-4a, 83a.[1] In the statute directing DOE to build this facility - known as the MOX Facility or Project - Congress included multiple provisions designed to address South Carolina's concern about becoming a permanent dumping ground for multiple tons of this admittedly dangerous material. 50 U.S.C. § 2566. Starting in 2014, DOE sought to terminate construction of the MOX Facility after its construction had fallen way behind schedule and gone way over budget.

On May 10, 2018, the Secretary of DOE announced his decision to permanently abandon construction of the ***3** MOX Facility and to pursue a new concept for processing weapons-grade plutonium called "Dilute and Dispose" or "downblending." In the letter announcing this decision, the Secretary purported to comply with the statutory requirements for a "waiver" of the statutory mandate to continue construction of the MOX Facility. DOE made this decision without any analysis under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA), or complying with the analysis requirements of the governing statute.[2]

To remedy these statutory violations, South Carolina brought this action against DOE. The district court granted a preliminary injunction to prevent DOE from terminating construction of the MOX Facility, but the Fourth Circuit reversed. Without reaching the merits, the Fourth Circuit held that South Carolina lacked Article III standing and that its claims are not ripe. The Fourth Circuit characterized South Carolina's standing argument as resting on its fear of being "the permanent repository of weapons-grade plutonium." App. 12a. The Fourth Circuit believed that this fear was "too speculative" to constitute injury in fact or present ripe claims. App. 12a. The Fourth Circuit did not cite *Massachusetts v. EPA* despite its obvious relevance and South Carolina's citation of that decision in its brief.

The Fourth Circuit's decision conflicts with this Court's decision in *Massachusetts v. EPA* and misreads ***4** other decisions of this Court on Article Ill's standing and ripeness requirements. The decision warrants this Court's review because it could hamper South Carolina's ability to enforce statutory provisions that relate to the weapons-grade plutonium at SRS, and other States' ability to enforce statutory rights enacted to protect their interests.

STATEMENT OF THE CASE

South Carolina is home to 10 metric tons of weapons-grade plutonium, which are stored at SRS. If the decision below stands and DOE has its way, South Carolina will be forced to host at least an additional 20 metric tons indefinitely, while DOE tries to turn a new concept for processing it into a reality. DOE's track record in dealing (more accurately, in failing to deal) with the existing 10 metric tons does not inspire confidence that the proposed total of more than 30 metric tons, and their associated dangers, will be going anywhere any time soon. Remarkably, after the district court held that South Carolina was likely to succeed on the merits of its claims in this action, the Fourth Circuit foreclosed the State from even being able to question executive-branch compliance with statutory requirements that Congress specifically and expressly designed to protect South Carolina's interests.

I. Congress enacts statutory protections to prevent South Carolina from becoming the permanent repository of weapons-grade plutonium put there by the federal government.

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In September 2000, the United States and Russia entered an agreement under which each country ***5** would dispose of 34 metric tons of weapons-grade plutonium. App. 35a, 76a. To meet its obligations under this agreement, Congress in 2003 enacted legislation authorizing the construction of the MOX Facility at SRS. App. 39a, 76a-77a. The legislation included a finding that the "agreement with Russia is a significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists." Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), § 3181(1), 116 Stat. 2458, 2747 (2002). Another finding stated that DOE planned - quite optimistically in hindsight - for the MOX Facility to begin operating in 2009 and to convert 34 metric tons of weapons-grade plutonium into mixed-oxide fuel "before the end of 2019." *Id.* § 3181(3) & (4).

South Carolina had protested selection of SRS as the site for the MOX Facility. In addition to the concern that weapons-grade plutonium could fall into the wrong hands, South Carolina worried about its citizens' prolonged exposure to multiple tons of this admittedly hazardous material. Indeed, the Nuclear Regulatory Commission (NRC) recognized, when it issued the construction license for the MOX Facility in 2005, that the primary benefit of the Facility's operation would be to reduce the supply of weapons-grade plutonium "available for unauthorized use." App. 62a. The NRC also recognized that "continued storage [of the plutonium] would result in higher annual impacts" of public radiation exposure than implementation of the Project. App. 62a. Besides concerns for its citizens, South Carolina had concerns as the owner of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

***6** Congress addressed some of South Carolina's concerns in the 2003 statute authorizing the MOX Facility. NDAA FY03, § 3182, *subsequently codified* as 50 U.S.C.A. § 2566 (Section 2566). Section 2566 prescribes deadlines for construction of the Facility and for its processing of the plutonium. *E.g., id.* § 2566. The key deadline provided that, as of January 1, 2012, the MOX Facility would be processing no less than one metric ton of weapons-grade plutonium per year. *Id.* 2566(a), (h). The statute also prescribes remedies against DOE for missing these deadlines. *Id.* § 2566(b)(6)(B), (b)(6)(C); *id.* § 2566(c); *id.* § 2461.

Beginning shortly after the enactment of § 2566 and continuing through 2012, DOE shipped significant amounts of defense plutonium to South Carolina for conversion into MOX fuel. Construction began on the MOX Facility on or about August 1, 2007. As the National Academy of Sciences observed, however, "Construction has encountered substantial schedule delays and cost overruns." National Academies of Sciences, Engineering, and Medicine, *Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report* 2 (Washington, DC: The National Academies Press, Oct. 2018) [hereafter cited as NAS Interim Report].[3] Although the MOX Facility originally was supposed to begin operating in 2009, today DOE estimates construction will not be completed until at least 2048. App. 5a. The delay caused DOE to violate, among other statutory requirements, a requirement that it remove not less than one metric ton of weapons-grade plutonium by January 1, 2016. In a prior action, South Carolina successfully sued DOE for this statutory ***7** violation. *South Carolina v. United States,* 907 F.3d 742 (4th Cir. 2018).

II. DOE terminates construction of the MOX Facility with no approved alternative for disposition of the defense plutonium at SRS.

Since 2014, DOE has continuously sought termination of the MOX Project and advocated for its proposed "Dilute and Dispose" concept, under which DOE would prepare "dilute" plutonium at SRS for ultimate "disposition" at the Waste Isolation Pilot Plant (WIPP) in New Mexico. Despite DOE's new idea, Congress has continued to mandate that DOE build the MOX Facility. The current mandate is found in two statutory provisions: Section 3121(a) of the NDAA FY18, and Section 309(a) of the Consolidated Appropriations Act, 2018 (CAA FY18). App. 95a-98a.[4]

Recognizing South Carolina's concerns that it be left as an indefinite repository for defense plutonium, Congress specified that DOE can avoid the statutory mandate to construct the MOX Facility only if the Secretary of Energy obtained a waiver of it. The waiver requirements are prescribed in Section 3121(b) of NDAA FY18, and are incorporated by reference in Section 309(b)

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of CAA ***8** FY18. App. 95a-98a. To get a waiver, the Secretary must "submit to the congressional defense committees" (1) a commitment to remove defense plutonium from South Carolina and (2) a certification regarding certain points, including the existence of a viable and feasible alternative option.[5] This waiver requirement was enacted by Congress to ensure a legally viable and feasible disposition pathway existed to remove defense plutonium from South Carolina.

The Secretary of Energy purported to meet the waiver requirement in a letter dated May 10, 2018 ("May 10 Letter"). The May 10 Letter notified Congress of DOE's decision to permanently abandon construction of the MOX Facility and pursue its "Dilute and Dispose" concept for plutonium disposition. App. 107a-109a. In the May 10 Letter, the Secretary stated, "I confirm that the Department is committed to removing plutonium from South Carolina intended to be disposed of in the MOX facility." App. 107a. The Secretary also certified that "an alternative option for carrying out the plutonium disposition program … exists" - namely, the "Dilute and Dispose Approach." App. 108a. But the Secretary did not address the "many barriers" that the National Academy of Sciences has identified and said "must be addressed … before the dilute and dispose conceptual plans can be implemented." NAS Interim Report, *supra,* at 19. In particular, the Secretary did not address any of the legal barriers that exist, despite the waiver provision's requirement that he identify "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose concept. NDAA FY18, § 3121(b)(1)(C).

***9** Based on the decision reported in the May 10 Letter, the Secretary issued a "partial stop work order" on May 14, 2018. App. 50a (quoting ECF No. 19-1 ¶ 10). The partial stop work order "halted any new contracts or new hires at SRS for the MOX Project." App. 44a, 72a. The order "was issued to minimize cos[t] to the government during the 30 day period leading up to an eventual full stop work order and the termination letter expected to be issued on June 11, 2018." App. 50a (quoting ECF No. 19-1 ¶ 10). South Carolina filed this action before the termination letter issued and obtained a preliminary injunction against its issuance.

Today, South Carolina continues to host about 10 metric tons of weapons-grade plutonium at SRS slated for MOX Facility processing. South Carolina has no reason to believe that this material is going anywhere anytime soon. To the contrary, as discussed above, DOE has repeatedly missed statutory deadlines for construction and operation of the MOX Facility. In the meantime, South Carolina and its people continue to live with the dangers that are associated with this material and that led to the international agreement with Russia and the Act of Congress directing construction of the MOX Facility in the first place.

III. The Proceedings Below.

A. Federal District Court

On May 25, 2018, the State filed a complaint in the United States District Court for the District of South Carolina challenging DOE's final agency action to terminate the Project. The complaint invoked subjectmatter ***10** jurisdiction under the federal-question statute, 28 U.S.C. § 1331. The State asserted two claims of statutory violations, both resting on the cause of action created by the Administrative Procedure Act (5 U.S.C. §§ 702, 704 & 706): DOE violated (1) NEPA by failing to prepare a supplemental Environmental Impact Statement analyzing its decision to terminate the MOX Facility in favor of the Dilute and Dispose approach; and (2) the statutory provisions requiring DOE to obtain a waiver before terminating construction of the MOX Facility (NDAA FY18, § 3121(b) and CAA FY18, § 309(b)). The State sought declaratory relief and a permanent injunction.

The State also moved for a preliminary injunction to maintain the status quo by enjoining DOE from terminating the Project during the pendency of this lawsuit. The district court granted the preliminary injunction on June 7, 2018. App. 34a-82a.

In its preliminary injunction order, the district court comprehensively addressed and rejected DOE's arguments that South Carolina lacks standing and that the May 10 Letter is not final agency action. App. 44a-54a. The court held that South Carolina has standing to assert its procedural rights under NEPA and the statutory waiver provisions "because the State owns extensive property adjoining, and one road traversing the impacted area." App. 47a. The court further held that the decision of the Secretary

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announced in the May 10 Letter is final agency action reviewable under the APA. The Secretary's "execution of the MOX termination waiver" in the May 10 Letter, if allowed to stand, waives the statutory requirements to continue building the MOX Facility. In addition to this legal effect, the May 10 Letter creates the ***11** "practical reality that the full stop order that is planned for June 11, 2018 will shut down the MOX Facility." App. 50a. Furthermore, the court concluded, "[b]ecause the MOX Project is the only legally authorized disposition method for MOXable plutonium at SRS," the "practical effect" of the decision announced in the May 10 Letter "is that the plutonium will remain at SRS indefinitely." App. 54a.[6]

The court also held that South Carolina is likely to succeed on the merits of both its claims.

In analyzing the State's NEPA claim, the court observed that the relevant statutes, and DOE itself, contemplate that NEPA applies "when rendering decisions and taking action related to the disposition of defense plutonium at SRS." App. 60a. DOE relied, however, on an Environmental Impact Statement (EIS) issued in December 1996 that analyzed the storage of weapons-grade plutonium for a period of up to 50 years - *i.e.,* until 2046. App. 63a, 65a. DOE argued that this EIS sufficed because its use of the new Dilute and Dispose approach would remove all the MOXable plutonium before that 50- ***12** year period ended. App. 63a. The district court rejected that argument on two grounds. First, DOE's past actions with regard to the MOX Facility "have called into question the viability" of DOE's timeline for removal using the Dilute and Dispose approach. App. 65a. Second, and in any event, "pursuing the Dilute and Dispose approach" for the MOXable plutonium "would have a significant impact on the environment." App. 65a. Therefore, the court held, DOE must "produce a supplemental EIS that addresses the conceivability, both practically and legally" of its proposed new approach. App. 65a-66a.

The court also held that the State is likely to succeed on its claim that the Secretary violated the statutory requirements for a waiver of the statutory mandate to continue building the MOX Facility. App. 66a-72a. The court identified three flaws in the May 10 Letter announcing the Secretary's decision to terminate the MOX Project. First, there is no basis for the Secretary's commitment to remove the MOXable plutonium from SRS, since it rests on the unauthorized and unanalyzed Dilute and Dispose approach. App. 68a. Second, the Secretary's cost comparison of the MOX Project and the Dilute and Dispose approach does not meet statutory requirements for accuracy. App. 69a-70a. Third, although the statutory waiver provision requires the Secretary to report to Congress "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose alternative, the May 10 letter provides no such details. App. 70a-71a. The district court, however, held that adoption of the Dilute and Dispose approach would require, among other changes, the amendment of two federal statutes. App. 71a-72a.

***13** DOE appealed the district court order granting the preliminary injunction to the Fourth Circuit under 28 U.S.C. § 1291(a)(1).[7]

B. Court of Appeals

The Fourth Circuit vacated and remanded, holding that "South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review." App. 22a.

The court held that South Carolina lacks Article III standing because it cannot establish injury in fact. App. 10a-19a. The State argued that DOE's failure to comply with NEPA and Section 3121's waiver provision "results in increased radiation exposure to the public, increased risk of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." App. 12a (quoting State's brief on appeal). The court concluded that those alleged injuries were "too speculative" because they rest "on a … 'highly attenuated chain of possibilities.' " App. 13a (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013)).

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The court focused on the time frame "[b]etween now and 2046 - when the analysis in the current [EIS] governing the risks associated with long-term storage of ***14** weapons-grade nuclear material at the Savannah River Site expires." App. 15a. The court did not explain how the EIS's time frame bears on South Carolina's standing. Nonetheless, it assigned 2046 as "the year when South Carolina's alleged injur[ies] will mature." App. 19a. On this view, the court reasoned that the EIS gives DOE "twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina." App. 15a. The court observed that DOE has already identified the Dilute and Dispose method as "one potential alternative," and it might come up with more. App. 15a. The court also observed that DOE is under a statutory deadline to remove, by January 1, 2022, any weapons-grade plutonium that have been slated for processing by the MOX Facility but not yet processed by then. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)). If DOE failed to meet that deadline, the court explained, South Carolina could sue it, just as it had for DOE's past failure to meet statutory deadlines. App. 16a.

"For reasons similar to" the ones that led the court of appeals to hold that South Carolina lacks standing, it also held that "the two claims at issue fail on ripeness grounds." App. 19a. The court recognized that " 'ripeness turns on the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " App. 20a (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983)). The court apparently found the problem here to be a lack of fitness. *See* App. 20a-21a (paragraph discussing requirements for a case "[t]o be fit for review"). The court said that a case is fit "when the action is final and not dependent on future uncertainties." App. 21a (internal quotation marks omitted). Despite this reference to ***15** "final[ity]," the court of appeals did not discuss, much less express disagreement with, the district court's conclusion that DOE's decision to terminate the MOX Project was final agency action. *Cf.* App. 21a. Instead, the court of appeals seemed to conclude that neither the NEPA claim nor the statutory-waiver-provision claim is ripe because of "uncertainties" about whether South Carolina will indeed become "the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a.

REASONS FOR GRANTING THE PETITION

There are four compelling reasons for this Court to grant review of the Fourth Circuit's opinion on a writ of certiorari.

First, the Fourth Circuit's decision conflicts with *Massachusetts v. EPA, Lujan v. Defenders of Wildlife,* and other decisions of this Court addressing the justiciability of suits by States and other plaintiffs seeking to compel a federal agency to comply with express statutory directives. Rule 10(c). Instead, the Fourth Circuit rejected the precedent of this Court in favor of a novel standing and ripeness analysis that narrowly interprets and, thus, unduly restricts the ability of a State to seek enforcement of a statute that involves and pertains to its legitimate interests.

Second, the Fourth Circuit's opinion creates a conflict among the circuits in applying this Court's holdings on standing. By circumscribing the State's ability to invoke the federal judicial power in seeking the enforcement of an existing statutory framework, the Fourth Circuit went far ***16** beyond any other circuit in heightening the level of injury sufficient to form the basis for a "case or controversy." This Court's intervention is necessary to address the conflict among the circuits. Rule 10(a).

Third, this case presents important Constitutional issues regarding the justiciability of claims brought by a State seeking to vindicate its sovereign interests. The State has a legitimate interest in protecting its environment and in enforcing its substantive and procedural rights in its relations with the federal government. The Fourth Circuit's opinion denies the State the ability to even adjudicate its claims, which strikes at the heart of the federalism principle accepted by the State and the United States upon the formation of the union.

Fourth, this case provides an excellent opportunity for this Court to provide the clarification of *Massachusetts v. EPA* that the Fourth Circuit's decision and the conflict among the circuits demonstrate is warranted. This case presents fundamental and well-defined questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA,* including how "special solicitude" relates to a State's possession of a "procedural right" and to the apparent limitations on suits against the federal government by States suing as *parens patriae.*

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I. The decision below squarely conflicts with decisions of this Court.

A. The decision below conflicts with *Massachusetts v. EPA*.

The decision below conflicts in approach and result with this Court's decision in *Massachusetts v. EPA* by ***17** failing to give "special solicitude" to South Carolina when analyzing the State's standing. South Carolina met all the requirements for Article III and statutory standing, and had the court below given South Carolina the "special solicitude" required by *Massachusetts v. EPA,* it would have been compelled to uphold South Carolina's standing in this case.

In *Massachusetts v. EPA,* this Court held that Massachusetts was "entitled to special solicitude in [its] standing analysis" because of (1) the State's possession of a "procedural right" and (2) its "stake in protecting its quasi-sovereign interests." 549 U.S. at 520. The State's "procedural right" was the statutory right to seek judicial review "for agency action unlawfully withheld." *Id.* at 517 (quoting 42 U.S.C. § 7607(b)(1)). The "quasi-sovereign interests" at stake were Massachusetts' "desire to preserve its sovereign territory" from harmful effects assertedly imposed on that State by greenhouse gases (GHGs). *Id.* at 519. The latter interests were reinforced by Massachusetts ownership of "a great deal of the territory alleged to be affected" by GHGs. *Id.* (internal quotation marks omitted).

Both conditions for "special solicitude" exist here. First, South Carolina asserts violations of its procedural rights under NEPA and the statutory provisions requiring DOE to get a waiver before terminating the MOX Facility. NEPA's creation of a procedural right was recognized by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992). And the statutory waiver provisions plainly create procedural rights designed to protect South Carolina's interests. *Cf. Maryland People's Counsel v. FERC,* 760 F.2d 318, 320 (D.C. Cir. 1985) (per Scalia, J.) ***18** (stating that statute authorizing state agencies to seek judicial review of FERC orders showed "special solicitude" for States, removing prudential barriers on States' relying on *parens patriae* standing in litigation against federal government). Second, South Carolina asserts its quasi-sovereign interests in protecting its territory against the environmental harms threatened by the DOE's decision to terminate the MOX Facility. *See* App. 12a (quoting South Carolina's allegations that DOE's May 10 decision "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increase threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium"). Here, as in *Massachusetts v. EPA,* the State's quasi-sovereign interests are reinforced by its ownership of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

Given South Carolina's "procedural right[s] and [its] stake in protecting its quasi-sovereign interests," South Carolina was "entitled to special solicitude" in the Fourth Circuit's standing analysis. *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina plainly identified those rights and interests in its brief for the Fourth Circuit, and cited *Massachusetts v. EPA* in its brief. Br. of Pl.-Appellee at 16-17, *South Carolina v. United States,* 912 F.3d 720 (4th Cir. 2019) (No. 18-1684), ECF No. 31. Yet the Fourth Circuit disregarded those rights and interests, and based its standing analysis - not on *Massachusetts v. EPA* - but instead primarily on *Clapper,* a case involving the standing of private plaintiffs. *Id.* at 406; App. 13a-17a (citing *Clapper*).[8]

***19** The Fourth Circuit's disregard of *Massachusetts v. EPA* led to error. South Carolina's argument for standing closely resembles Massachusetts'. Both States attack agency decisions (to deny a rulemaking petition; to terminate the MOX Project) for failure to follow statutory requirements that, if followed, could have led to a different decision. As things stood, the challenged agency decisions exposed the States to increased risk of harms (additional loss of coastal land; additional radiation and risks of accidents and theft). The risks of harm associated with prolonged storage of weapons-grade plutonium are at least as well established and imminent as those associated with greenhouse gases. *See* App. 39a (district court decision quoting federal officials' acknowledgement of dangers posed by storage of weapons-grade plutonium). Thus, South Carolina's standing in this case follows *a fortiori* from this Court's decision upholding Massachusetts' standing in *Massachusetts v. EPA*.

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***20 B. The decision below conflicts with decisions of this Court on ripeness.**

The Fourth Circuit held that South Carolina's claims are not ripe because they are not "fit" for review. App. 19a-21a. They are not fit for review, the Fourth Circuit concluded, because South Carolina might not "become[] the *permanent* repository" of "weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a (emphasis in original). This conclusion, however, conflicts with decisions of this Court.

South Carolina's claims are fit for review under this Court's precedent. That precedent establishes that a claim is generally fit for review when it challenges agency action that is final, the challenge is purely legal, and the court's ability to resolve the challenge will not benefit from further factual development. *E.g., Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 811 (2003). The court of appeals below did not disturb the district court's holding that DOE's decision to terminate the MOX Facility is "final agency action" within the meaning of the federal APA. App. 48a-54a; 5 U.S.C. § 704. Furthermore, South Carolina's claims that DOE violated NEPA and the statutory waiver requirements are purely legal, as is clear from the district court's analysis of these claims. *See* App. 59a-72a. The court of appeals below did not identify any further factual developments that would facilitate the resolution of South Carolina's NEPA and statutory-waiver claims.

As this Court has held, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes ***21** place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 737 (1998). The decision below squarely conflicts with this holding in *Ohio Forestry Ass'n* by finding South Carolina's NEPA claim unripe. *See* App. 19a-21a. Moreover, this Court's holding in *Ohio Forestry Ass'n* also applies to South Carolina's claim that DOE violated the requirements for a waiver of the statutory mandate to continue construction of the MOX Facility: Nothing that happened after the date of the Secretary's May 10 Letter will affect analysis of South Carolina's claim that the DOE violated the requirements for a waiver of that mandate.[9]

Although the Fourth Circuit apparently, erroneously - and in conflict with this Court's precedent - relied on the "fitness" prong of ripeness analysis, its conclusion of unripeness seemed to rest on a supposed lack of hardship. That conclusion, in turn, rested on the Fourth Circuit's belief that only in the year 2046 will "South Carolina's alleged injury mature." App. 19a. The Fourth Circuit cited the year 2046 because it was the end date of the 50-year period analyzed in DOE's 1996 Programmatic EIS (PEIS) on storage of weapons-grade plutonium at SRS. App. 15a, 36a. The 1996 PEIS's 50-year period of analysis arguably *might* bear on the merits of South Carolina's claim that DOE must now prepare a supplemental EIS for its termination of the MOX Project. But it has no bearing on South Carolina's standing or the ripeness of its claims. In concluding otherwise, the Fourth Circuit's ***22** ruling reflects "the familiar confusion between standing and the merits." 13B Charles Alan Wright *et al., Federal Practice and Procedure* § 3531.11.1, at 98 (3d ed. 2008).

Properly understood, South Carolina's standing and hardship stem from the *existing* 10 metric tons of weapons-grade plutonium stored within its borders, plus the additional 20 metric tons that DOE currently plans to ship to South Carolina. The existing plutonium exposes South Carolina's property and its citizens to ongoing radiation and the risks of nuclear accidents and threats. South Carolina reasonably fears that DOE's decision to terminate the MOX Facility to pursue the unstudied, unauthorized "Dilute and Dispose" concept will indefinitely *prolong* the storage of massive amounts of plutonium in South Carolina, and in turn cause South Carolina to incur additional costs associated with protecting against the radiation and risks. South Carolina's fear is well-founded considering DOE's dismal track record in meeting statutory deadlines for construction of the MOX Facility. *See* App. 5a.

The Fourth Circuit dismissed this fear, reasoning that South Carolina can always sue DOE when DOE fails to meet the *next* statutory deadline. App. 16a. But the likelihood that DOE will violate *additional* statutory requirements in the future surely cannot disable South Carolina from suing DOE for current statutory violations arising from its termination of the Project. To the contrary, the possibility that South Carolina will have to sue DOE again in the future represents just another realistic risk of future harm that supports its standing to bring this suit. *Cf. Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 154-55 (2010) (upholding standing based ***23** partly on costs incurred by plaintiffs to mitigate realistic risks); *Texas v. United States,* 497

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F.3d 491, 497 (5th Cir. 2007) (upholding State's standing based partly on realistic risk that State would have to participate in compelled mediation over tribal gaming).

II. The Fourth Circuit's decision creates a conflict among the circuits concerning the justiciability of State suits against the federal government.

The Fourth Circuit's decision conflicts in approach with decisions in at least three other circuits: the Second, Fifth, and Tenth. Courts of appeals in these circuits rely on *Massachusetts v. EPA* to accord "special solicitude" to States in analyzing the States' standing to sue the federal government. The analysis in those decisions strongly suggest that those courts of appeals would have upheld South Carolina's standing to bring the present suit.

A. Second Circuit

The Second Circuit analyzed *Massachusetts v. EPA* in a decision that upheld the standing of eight States to sue electric power companies that allegedly contributed to global warming. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 109 (2d Cir. 2015), *rev'd on other grounds,* 564 U.S. 410 (2011).[10] As the Second Circuit understood ***24** *Massachusetts v. EPA,* in that case this Court "seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land." *Id.* at 338.

The Second Circuit upheld the States' standing using reasoning that, if applied in the present case, would have led it to uphold South Carolina's standing: The Second Circuit emphasized that the States were suffering present harms from the defendants' conduct - just as South Carolina's property and residents are currently exposed to radiation and other threats from the continued storage of plutonium - and the relief sought could incrementally reduce the harm - as could occur here, if DOE's compliance with its statutory obligations reduces the amount of time that massive amounts of weapons-grade plutonium are stored at SRS. *Id.* at 340-43.

Although *Connecticut* was a suit against private defendants, the Second Circuit relied on it, as well as on *Massachusetts v. EPA,* in a later decision upholding several States' standing to sue a federal agency for statutory violations. *Nat. Res. Def Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 103-04 (2d Cir. 2018) (internal citations omitted).

***25** B. Fifth Circuit

The Fifth Circuit accorded "special solicitude" to a State under circumstances close enough to those of this case to indicate that it would have upheld South Carolina's standing in this case.

Texas and other States sued the United States over the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). *Texas v. United States,* 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court,* 136 S. Ct. 2271 (2016). After the federal district court preliminarily enjoined implementation of DAPA, the United States appealed. *Id.* On appeal, the Fifth Circuit affirmed the preliminary injunction and upheld Texas's standing to bring the suit. *Id.* at 151-62.

The Fifth Circuit said, "[O]ur determination that Texas has standing is based in part on the 'special solicitude' we afford it under *Massachusetts v. EPA.* " *Id.* at 162. The court described "special solicitude" as a "presumption," presumably meaning a presumption that favors standing in close cases. *Id.; see also id.* at 159 (relying partly on "special solicitude" in finding traceability). The court afforded "special solicitude" based on the same two conditions that exist in the present case: The State was asserting procedural rights that required interpretation of federal statutes, and the challenged conduct implicated the State's "quasi-sovereign interests." *Id.* at 152-53.

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Moreover, the Fifth Circuit's reasons for concluding that "quasi-sovereign interests" were at stake equally apply here. Texas challenged DAPA, a federal immigration program. The Fifth Circuit observed that "[w]hen the ***26** states joined the union, they surrendered some of their sovereign prerogatives over immigration." *Id.* at 153. Consequently, the Fifth Circuit explained, States must rely on the federal government to protect their interests in immigration matters, just as they must with respect to their interests in the matters involved in *Massachusetts v. EPA:* namely, interstate and international pollution. *Id.* at 153-54. So too here: Because of the federal government's control over nuclear defense material, South Carolina cannot prevent it from storing that material at SRS as long as federal law allows. South Carolina must rely on the federal government to protect its interests and those of its citizens. This reliance warrants consideration when South Carolina sues to enforce the federal executive-branch's compliance with federal statutory requirements enacted, in part, to protect the State's interests. In short, South Carolina's present lawsuit provides at least as compelling a case for "special solicitude" as did the States' lawsuit in *Texas v. United States.*

C. Tenth Circuit

Like the Fifth Circuit, the Tenth Circuit has relied partly on "special solicitude" to uphold State standing.

Illustrative is *New Mexico v. Dep't of Interior,* 854 F.3d 1207 (10th Cir. 2017). In that case, New Mexico sued the Department of Interior (DOI) claiming that DOI lacked statutory authority for regulations on tribal gaming. *Id.* at 1211. Under the challenged regulations, DOI could allow tribal gaming without the State's input unless the State participated in a process that included mediation. *Id.* at 1213. The Tenth Circuit held that New Mexico had standing to challenge the regulations ***27** on two grounds. First, the regulations caused New Mexico procedural injury by depriving it of its asserted statutory right to have a court determine that the State had bargained in bad faith before tribal gaming could be allowed without the State's input. *Id.* at 1216-17. Second, the regulations "injure[d] New Mexico by forcing it to choose between participating in a process it considers unlawful and forgoing any benefit from that allegedly unlawful process - viz., the benefit of being able to offer input, presumably beneficial to its interests, relating to the content of those procedures." *Id.* at 1218. After identifying these two injuries, the Tenth Circuit said, "[T]he Supreme Court's direction that we give states special solicitude in analyzing standing provides further support for each basis establishing New Mexico's standing." *Id.*

In *New Mexico v. Dep't of Interior* and other cases, the Tenth Circuit has, like the Fifth Circuit, apparently treated "special solicitude" as a presumption favoring standing in close cases, or possibly as a "plus factor" applicable in all cases. At the same time, the Tenth Circuit has remarked on " 'the lack of guidance on how lower courts are to apply the special solicitude doctrine to state standing.' " *Id.* at 1219 (quoting *Wyoming v. United States Dep't of Interior,* 674 F.3d 1220, 1238 (10th Cir. 2012); *see also Ariz. State Legisl. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions … are hard to reconcile.") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009)); *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683, 696 n.13 (10th Cir. 2009) ("In determining ***28** that New Mexico has standing because of the threat of environmental damage to lands within its boundaries, we consider that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders."); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States,* 528 F.3d 712, 721 (10th Cir. 2008) (attaching "importan[ce]" to "special solicitude" in analyzing State's standing).

III. This case presents important issues of constitutional justiciability for a State seeking to vindicate its rights under federal law.

The proper handling of weapons-grade plutonium is a public policy matter of exceptional importance, implicating not only issues of national defense and national security but also the United States' obligations under an agreement with Russia. *Cf. New York v. United States.* 505 U.S. 144, 149 (1992). South Carolina does not challenge the federal government's broad authority to regulate this matter or to control operations at the SRS as a federal facility. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983); *Hancock v. Train,* 426 U.S. 167 (1976). But being forced by virtue

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of the Supremacy Clause to host SRS, South Carolina seeks only to ensure federal executive-branch compliance with federal law. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607-08 (1982) ("[T]he State has an interest in securing observance of the terms under which it participates in the federal system.… [A] State does have an interest … in assuring that the benefits of the federal system are not denied to its general population."). This petition thus poses a question of the justiciability of claims by a State against the federal government.

***29** The importance of this question is reflected in the long line of cases in which this Court has addressed it. In addition to *Massachusetts v. EPA, see, e.g., Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995) (addressing State's standing to assert claim against the United States under prior decree); *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (addressing scope of statutory waiver of federal government's sovereign immunity from State's suit); *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966) (addressing standing of State to challenge constitutionality of federal statute); *Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923) (addressing State's standing to challenge constitutionality of federal statute); *Kansas v. United States,* 204 U.S. 331 (1907) (addressing United States' sovereign immunity from suits by States); *Georgia v. Stanton,* 73 U.S. 50 (1867) (addressing justiciability of State's suit to enjoin federal Reconstruction Act).

Although the defense plutonium at issue implicates domestic and international concerns of broad significance, even in these areas, States play an important role. Implementing policies and actions involving defense plutonium necessarily require some degree of state involvement through state regulation of related, collateral matters (such as the issuance of certain environmental permits), the utilization of state infrastructure, and the emissions and impact on state proprietary interests.[11] For ***30** that reason, this case implicates the relationship between the federal government and the States. The Supremacy Clause gives the United States the upper-hand in this relationship. But the federal government's supremacy rests on the rule of law. The federal government's violation of the rule of law generally is objectionable, but for an executive agency to inflict violence upon statutory obligations enacted by the legislature to protect a State without any mechanism of accountability by the state through the judiciary is particularly harmful to our system of government. This Court's review is necessary to ensure a State can remedy that harm, especially when, as here, the harm concerns the State's concrete interests in the proper disposition of the massive amounts of weapons-grade plutonium within its borders.

IV. This case provides an excellent vehicle for clarifying *Massachusetts v. EPA.*

The decision below and the circuit split discussed above show the need for clarification of *Massachusetts v. EPA*. This Court has granted certiorari in two prior cases that offered opportunities to do so that were not subsequently realized. *See United States v. Texas,* 136 S. Ct. 2271; *Connecticut,* 546 U.S. at 420. This case provides an excellent opportunity to provide the needed clarification.

For one thing, the decision below is for all practical and legal purposes final. *Cf., e.g., Trump v. Hawaii,* 138 S. Ct. 2392 (2018) (granting certiorari to review court of appeals decision affirming preliminary injunction on dispositive grounds). Although the Fourth Circuit below addressed an interlocutory appeal from an order granting ***31** a preliminary injunction, its holding that South Carolina lacks standing prevents the case from going forward on the merits. By the same token, this Court's reversal of the decision below will enable South Carolina to pursue legal claims that the district court held, in rulings not disturbed on appeal, are likely to succeed. App. 59a-72a.

For another thing, South Carolina preserved below the arguments that it would advance in this Court. The Fourth Circuit characterized South Carolina as advancing "one theory of injury" (App. 19a n.3) because the State's injuries all arise from the real risk of it becoming the indefinite - and, as a practical matter, the "permanent" - "repository of weapons-grade plutonium." App. 12a (quoting South Carolina's brief for the Fourth Circuit). As the Fourth Circuit's opinion reflects, however, South Carolina argued for standing based on its quasi-sovereign interests and its proprietary interests. App. 9a, 12a. Thus, South Carolina has asserted in the courts below precisely the same claims of injury-in-fact that Massachusetts advanced in *Massachusetts v. EPA,* 549 U.S. at 518-23.[12]

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Finally, this case presents legal claims that crystallize key questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA*. One key question is how "special solicitude" relates to the ***32** State's possession of a "procedural right." That question is cleanly posed here by South Carolina's claim under NEPA, a statute that this Court has recognized creates a procedural right. *See Defenders of Wildlife,* 504 U.S. at 572 n.7. Another key question is how "special solicitude" relates to case law apparently limiting suits against the federal government by States suing as *parens patriae. See Massachusetts v. EPA,* 549 U.S. at 539 (Roberts, C.J. dissenting). That question is posed starkly by South Carolina's claim under SRS-specific statutory provisions that are designed partly for the precise purpose of protecting South Carolina's interests and therefore evince "special solicitude" for the State and a corresponding intention to allow South Carolina to sue for enforcement of those provisions. *Cf. Maryland People's Counsel,* 760 F.2d at 320; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 266 (6th ed. 2009). A decision by this Court addressing those questions would go far toward providing the needed clarification of *Massachusetts v. EPA*.

***33 CONCLUSION**

The petition for a writ of certiorari should be granted.

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June 7, 2019

Footnotes

1 We use "DOE" to refer collectively to the respondents. Among the respondents is the National Nuclear Security Administration (NNSA). NNSA is "established within the Department of Energy [as] a separately organized agency." 50 U.S.C. § 2401(a). The NNSA administers and manages activities related to the MOX Facility. *See id.* §§ 2471(2)(D) & 2481(a).

2 National Defense Authorization Act for Fiscal Year 2018 (NDAA FY18), § 3121(b)(1)(B)(i), 131 Stat. 1283, 1892-93 (2017) (App. 95a); Business Operating Procedure of the National Nuclear Security Administration, "Analysis of Alternatives," dated March 14, 2016 (BOP-03.07), available at https://directives.nnsa.doe.gov/bop/bop-0003-0007.

3 Available at https://www.nap.edu/read/25272/chapter/1.

4 *See* NDAA FY18, § 3121(a); CAA FY18, § 309(a), 132 Stat. 348, 530 (2018). After the district court issued its preliminary injunction and while this case was pending at the Fourth Circuit, Congress reaffirmed this mandate for fiscal year 2019. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, § 3119, 132 Stat. 1636, 2292 (2018) (requiring continued construction of the MOX Facility unless the waiver requirements prescribed in Section 3121(b) of NDAA FY18 are met).

5 NDAA FY18, § 3121(b)(1); CAA FY18, § 309(b), (c).

6 The district court's reference to "MOXable plutonium" (App. 54a) reflects that, as the court explained, "[t]he plutonium at SRS can be divided into two general categories - the plutonium intended for disposition through the MOX Facility and the plutonium not intended for MOX disposition." App. 63a-64a. For the latter, "non-MOXable" plutonium at SRS, DOE has "assign[ed] Dilute and Dispose as the preferred alternative" in a supplemental Environmental Impact Statement published on April 5, 2016. App. 64a. As the district court further explained, "The ongoing Dilute and Dispose approach is limited in resources and legal authority and is not applicable to the plutonium intended for disposition through the MOX Facility." App. 64a.

7 The district court denied DOE's motion for a stay of the preliminary injunction pending appeal. App. 27a-33a. After briefing and oral argument before the Fourth Circuit, however, that court granted DOE's motion for a stay on October 9, 2018. App. 24a. On October 10, 2018, DOE issued a Project termination notice and began terminating employees at the Project.

8 The Fourth Circuit below erred in relying on *Clapper* not only because *Clapper* involved private plaintiffs but also because the plaintiff in *Clapper* did not assert procedural rights. Lacking procedural rights, the plaintiffs in *Clapper* were subject to a determination in an "injury-in-fact" analysis inapplicable to this case. *Massachusetts v. EPA,* 549 U.S. at 517-18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." (citing *Lujan v. Defenders of Wildlife,* 504 U.S. at 572 n.7)). Moreover, the plaintiffs - as "US persons" - did not fall into a class to which the FISA provision in *Clapper* was directed, and that provision did not create any legal rights or protections for the plaintiffs. But, here, through NDAA FY18 and CAA FY18, Congress established statutory protections specifically for South Carolina, and South Carolina also falls within the class entitled to bring claims for NEPA violations. Accordingly - "special solicitude" or not - South Carolina met all the requirements for Article III and statutory standing

9 Nor does South Carolina's lawsuit present a programmatic challenge of the sort that, if addressed now, would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n,* 523 U.S. at 733. South Carolina challenges a highly discrete agency action - DOE's decision to terminate the MOX Facility.

10 The Second Circuit's ruling on standing was affirmed by an equally divided Court. "Four Members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*.... Four Members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing." *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 420 (2011). The Court reversed the Second Circuit's ruling on the merits, holding that the plaintiffs' federal common-law public nuisance claim was displaced by the Clean Air Act and EPA action authorized under the Act. *Id.* at 420-29.

11 All those elements are indisputably present here. South Carolina has and will continue to provide regulatory oversight on certain aspects of the operations at SRS, such as waste disposal. Much of the supporting infrastructure for SRS is provided by the State of South Carolina or its political subdivisions (such as roads and emergency services). *See generally* Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.*; Atomic Energy Act, 42 U.S.C. §§ 2201 *et seq.*

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12 In the decision below, the Fourth Circuit purports to reserve the question "whether other theories of injury would presently confer standing on South Carolina." App. 19a n.3. There are no "other theories" of standing remaining to the State. Accordingly, DOE has given notice of its intent to move for dismissal of the action for lack of jurisdiction if this Court denies further review. Notice, *South Carolina v. United States,* No. 1:18-cv-01431-JMC (D.S.C. May 1, 2019), ECF No. 45.

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EXHIBIT 11

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2019 WL 4730104 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
September 24, 2019.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Reply Brief for Petitioner

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***1 REPLY BRIEF FOR PETITIONER**

In this case, a State sues the federal executive branch for statutory violations that deprive it of procedural rights designed to protect its quasi-sovereign interests. This case thus presents the same situation - and presents the same issue of the State's Article III standing - as presented in *Massachusetts v. EPA,* 549 U.S. 497 (2007). This Court's decision in that case would have accordingly controlled analysis of the State's standing if this case had arisen in the Second, Fifth, or Tenth Circuits. *See* Pet. 23-28. In square conflict with those circuits, however, the Fourth Circuit ignored *Massachusetts v. EPA* and failed to accord South Carolina the "special solicitude" to which it was entitled under that case. *Id.* at 521. Had the Fourth Circuit properly applied *Massachusetts v. EPA,* it would have upheld South Carolina's standing to assert the statutory claims upon which, the district court below determined (in rulings not disturbed on appeal), the State is likely to prevail. Pet. App. 59a-72a.

The United States defends the Fourth Circuit's disregard of *Massachusetts v. EPA* on the ground that *Massachusetts v. EPA* applies only "in a close case." Br. in Opp. 14. Even if this were a close case, which it is not, the United States misreads *Massachusetts v. EPA,* and its defense of the decision below merely highlights the need for "guidance on how lower courts are to apply the special solicitude doctrine to state standing." *New Mexico v. Dep't of Interior,* 854 F.3d 1207, 1219 (10th Cir. 2017). The United States does not dispute the importance and complexity of the issue of the States' standing to sue the federal government. *See, e.g.,* ***2** *United States v. Texas,* 136 S. Ct. 2271 (2016). Nor does the United States impugn South Carolina's showing that this Court's decision in *Massachusetts v. EPA* has bred uncertainty among lower federal courts and that this case provides a good vehicle for clarifying it.

ARGUMENT

I. The Decision Below Conflicts with *Massachusetts v. EPA* and Decisions in at Least Three Circuits.

The United States argues that under *Massachusetts v. EPA,* "a State's status as a plaintiff" affects standing analysis only "in a close case." Br. in Opp. 14. This is not a close case, as discussed in the next section. More fundamentally, the United States misreads *Massachusetts v. EPA,* Under a straightforward reading of that case, the Fourth Circuit erred by failing to accord South Carolina "special solicitude" in analyzing the State's standing, and, in the process, the Fourth Circuit put itself in conflict with decisions in at least three other circuits.

Contrary to the United States' submission, this Court did not hold in *Massachusetts v. EPA* that a State's status as the plaintiff matters only in cases where standing is a close call. The Court broadly said that "States are not normal litigants for purposes of invoking federal jurisdiction," and that it was therefore "of considerable relevance that the party seeking review [there] [wa]s a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. Accordingly, the dissent read the ***3** majority's opinion as "adopt[ing] a new theory of Article III standing for States." *Id.* at 539-540 (Roberts, C.J., dissenting). Thus, the Fourth Circuit below ignored the plain import of *Massachusetts v. EPA* by attaching no significance to South Carolina's status as a sovereign State and failing even to cite this Court's decision. Those failures alone warrant further review. *Cf., e.g.,Horn v. Banks,* 536 U.S. 266, 271 (2002) (summarily reversing because of lower court's failure to apply *Teague v. Lane,* 489 U.S. 288 (1989)); *see also* Stephen M. Shapiro, *Supreme Court Practice* 251 (10th ed. 2013) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari.").

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Moreover, further review is warranted here to clarify that the special solicitude to which States are entitled under *Massachusetts v. EPA* is not limited - as the United States would have it - to "close case[s]." Br. in Opp. 14. Instead, as explained in our petition (at 17-18), special solicitude is required when, as here, the State asserts procedural rights connected with protecting its quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 520. The United States does not directly dispute that South Carolina is asserting procedural rights to protect its quasi-sovereign interests. And the United States' oblique arguments against South Carolina's entitlement to special solicitude are unavailing.

The United States seeks to obscure South Carolina's quasi-sovereign interests by repeatedly referring ***4** only to its general concern about becoming an indefinite repository for weapons-grade plutonium. *See* Br. in Opp. 7, 9, 10, 11, 13 & 15. But that concern stems from "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium," as the Fourth Circuit recognized. Pet. App. 12a (quoting Appellee's Br. at 14). The United States cannot contest that these dangers implicate South Carolina's quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 518-519 ("[I]n its capacity of *quasi*-sovereign … the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.") (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). And here, as in *Massachusetts v. EPA,* those quasi-sovereign interests are reinforced by the State's ownership of property adjacent to, and a road traversing, the Savannah River Site (SRS), all of which property is directly affected by these threats. *See id.* at 519; Pet. App. 47a.

The United States observes that there is no "special statutory right of judicial review" in this case. Br. in Opp. 15. But special solicitude under *Massachusetts v. EPA* does not depend on any such right. What matters is the existence of a "procedural right." *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina has procedural rights under NEPA, which this Court recognized as a source of such rights in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (cited in *Massachusetts v. EPA,* 549 US. at 517-518); and under ***5** statutes enacted expressly and specifically to protect the State's concrete interests in connection with SRS. *See* Pet. 17-18; Br. of *Amicus Curiae* United States Senator Lindsey Graham in Support of Petitioner 4-10 [hereinafter Sen. Graham *Amicus* Br.]. Those procedural rights, together with the quasi-sovereign interests that those rights protect, entitle South Carolina to special solicitude under *Massachusetts v. EPA*.

As shown in our petition (at 23-28), the State would have been accorded this solicitude in, among other courts, the Second, Fifth, and Tenth Circuit. *See also Brackeen v. Bernhardt,* No. 18-11479, 2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019) (relying on *Massachusetts v. EPA* to analyze States' standing to challenge Indian Child Welfare Act and final rule implementing it). The United States argues, however, that precedent from those courts involves different facts from those of this case. Br. in Opp. 16. The argument misses the point. Those other circuits, unlike the Fourth Circuit, would have recognized that it is "of considerable significance that the party seeking review here is a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. By failing to attach any significance to that circumstance, the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and with decisions of other federal courts of appeals. Sup. Ct. R. 10(a) & (c).[1]

6 II. South Carolina Has Article III Standing under *Massachusetts v. EPA.

In holding that South Carolina lacks standing and that its claims are not ripe, the Fourth Circuit reasoned that South Carolina's injuries will not "mature" until 2046, the end date of the period analyzed in a prior Environmental Impact Statement. Pet. App. 19a. Understandably, the United States does not defend this reasoning, which confuses the issue of standing with the issue of the merits of South Carolina's NEPA claim. Pet. 21-22. Instead, the United States argues that South Carolina's injuries will not mature until *2048,* because that is the earliest that the MOX Facility can be completed. Br. in Opp. 11. That argument suffers from the same two flaws that underlay the Fourth Circuit's reasoning.

First, the argument ignores that South Carolina is suffering *current* injuries. Those injuries include the legal wrongs caused by the United States' violations of South Carolina's statutory rights. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action … is entitled to judicial review thereof."). Those legal wrongs create ongoing actual harms and threats ***7** of harm caused by the approximately 10 metric tons of weapons-grade plutonium at SRS. Just as Massachusetts asserted current

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injury in the form of rising sea levels submerging its coast, South Carolina asserts current injuries in the form of excessive radiation contaminating its environment and other dangers associated with the plutonium's continuing (and mounting) presence. *Cf.* *Massachusetts v. EPA,* 549 U.S. at 522-523.

Second, South Carolina also faces imminent *future* injuries traceable to the federal government's May 10 decision to halt construction of the MOX Facility in favor of the unauthorized and untested Dilute and Dispose concept for processing the MOXable plutonium at SRS. There is at least a "reasonable probability" that the May 10 decision to switch horses in midstream will *prolong* the presence of massive amounts of weapons-grade plutonium at SRS, especially considering the federal government's current plan to ship an additional 26 metric tons of plutonium to SRS. Pet. App. 72a. *Clapper v. Amnesty Int'l,* 568 U.S. 398, 432 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 (2010)). This probability exists despite the United States' prediction that "the decision to halt construction of the MOX facility *reduces* the likelihood of injury by allowing the Department to focus its resources on other disposal methods that can begin more quickly and with greater certainty." Br. in Opp. 12 (emphasis in original).

The federal government's prediction partakes of magical thinking. For one thing, it contradicts the ***8** federal government's own prior forecast that the Dilute and Dispose method will not be completed before 2049, a year *after* completion of the MOX Facility is forecast. *See* National Academies of Sciences, Engineering, and Medicine, Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report 17-18 (Washington, D.C.: The National Academies Press, Oct. 2018) [hereinafter NAS Interim Report]. Moreover, the district court below identified multiple legal and practical hurdles that are likely to delay or altogether block implementation of the Dilute and Dispose alternative. Pet. App. 67a (lack of NEPA analysis of alternative); *id.* at 70a-72a (statutory and regulatory changes required before implementation of alternative); *id.* at 75a-76a (lack of congressional approval for alternative); *id.* at 78a (federal government's prior view that alternative violates agreement with Russia); *see also* NAS Interim Report at 2-3, 19-35 (also discussing "barriers" to implementation of Dilute and Dispose alternative). Beyond all this, the federal government's dismal track record strongly suggests that the predicted 2049 completion date for processing all the SRS plutonium under the Dilute and Dispose method is a chimera.[2]

***9** This Court upheld Massachusetts' standing to challenge EPA's failure to address the long-term, global, hard-to-quantify threat of injury assertedly posed by greenhouse gases from new-car engines manufactured in the United States. *Massachusetts v. EPA,* 549 U.S. at 516-526. This case concerns South Carolina's standing to challenge the Department of Energy's failure to address the ongoing, localized, well-established injuries and threat of future injuries posed by the massive and growing amounts of weapons-grade plutonium within South Carolina's borders. Because the injuries asserted here surely are no more speculative or remote than those found sufficient in *Massachusetts v. EPA,* South Carolina's standing follows a fortiori from this Court's decision in that case.

III. South Carolina's Claims Are Ripe.

As discussed in our petition (at 20-23), the Fourth Circuit's ripeness analysis conflicts with this Court's decisions in *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803 (2003), and *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726 (1998). Indeed, the Fourth Circuit failed even to identify clearly why it found a lack of ripeness under this Court's precedent: Its analysis implies that the claims are not "fit" for review, even though the claims (1) challenge discrete agency action that is indisputably final, (2) pose pure questions of law, and (3) do not depend for their resolution on ***10** further factual development. Reflecting the weakness of the Fourth Circuit's ripeness analysis, the United States does not defend it or attempt to reconcile it with this Court's ripeness precedent. Instead, the United States mischaracterizes the Fourth Circuit's decision.

The United States says the Fourth Circuit "understood petitioner to challenge a decision to make South Carolina 'the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site.' " Pet. 13 (quoting Pet. App. 21a). But that is wrong. The Fourth Circuit correctly recognized that South Carolina challenges a much more narrow, discrete decision: the decision to halt construction of the MOX Facility. Pet. App. 2a. And the Fourth Circuit also correctly understood that ripeness analysis applies to South Carolina's legal *claims,* not its assertions of injury. *See id.* at 19a. Where the Fourth

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Circuit erred was in apparently concluding that South Carolina could not satisfy the hardship prong of ripeness analysis. *See* Pet. 21-22. That conclusion rested on "reasons similar to those that" led it to conclude that South Carolina lacks standing (Pet. App. 19a), and is flawed for the same reasons that its conclusion on standing is flawed.

IV. This Case Is an Excellent Vehicle for Addressing an Issue of Exceptional Importance.

The United States does not impugn South Carolina's showing that the Fourth Circuit's decision is ***11** final and that the question presented was properly raised below. *See* note 1 *supra.*

Nor does the United States contest the importance of the question presented, which concerns the justiciability of suits by States against the federal executive branch. The importance of that question is established by the long line of decisions by this Court on that issue. *See* Pet. 29. Its importance is reinforced by the growing number of suits by States against the federal government - many of which have reached this Court[3] - and by uncertainties among lower federal courts and commentators about *Massachusetts v. EPA* and related precedent. *See Ariz. State Legis. v. Ariz. Indep. Redisricting Comm'n,* 135 S. Ct. 2664, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government … are hard to reconcile.") (internal quotation marks omitted).

This case arises in a setting that vividly illustrates the close connection between State standing and federalism. As set forth in the brief of *amicus curiae* U.S. Senator Lindsey Graham in support of South Carolina's Petition, the federal statutes violated by the federal government were intended to protect South Carolina from exactly what is occurring here - the federal government abandoning its statutory obligations and leaving South Carolina to deal with the ***12** consequences. Sen. Graham *Amicus* Br. 3-10. These statutes were enacted after high-level negotiations between the federal government and the State, and were specifically enacted to provide the State with recourse should the federal government fail to construct and begin operations of the MOX project. *Id.* at 5-10.

Allowing the federal government to shirk its statutory responsibilities to the State in an instance where Congress's clear intent was to protect it sets a dangerous precedent for other States and their relations with the federal government. For, if the federal government is free to violate statutes resulting from negotiations between the federal government and a sovereign State and that are specifically designed to protect the State's sovereign interests with no judicial recourse available to the State once protection is necessary, then the practicality of such negotiations becomes obsolete and the State's sovereign interests may never be protected against injuries caused by the federal government. This contravenes the principles of federalism upon which this nation was established.

***13 CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

September 24, 2019

Footnotes

1 The United States admits that, in South Carolina's brief for the Fourth Circuit, South Carolina cited *Massachusetts v. EPA* in support of its standing, but the United States criticizes South Carolina's failure to give *Massachusetts v. EPA* more prominence. Br. in Opp. 14. The criticism is misplaced. South Carolina satisfied this Court's "traditional rule" limiting certiorari to issues "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992). The issue of South Carolina's standing under *Massachusetts v. EPA* was presented to the Fourth Circuit, and the Fourth Circuit's disregard of that decision warrants further review because it creates a split among the circuits over a "significant issue." *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 530 (2002).

2 In holding that South Carolina's threat of future injury was speculative, the Fourth Circuit partly relied on the statutory provision requiring removal by January 1, 2022, of weapons-grade plutonium shipped to SRS between April 15, 2002, and January 1, 2022 for processing at the MOX Facility. Pet. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)); *id.* at 21a. Significantly, the United States does not rely on that provision in defending the Fourth Circuit's holding (Br. in Opp. 11), presumably because if the executive branch has

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its way that provision is not long for this world. After all, the federal government has not altered its plans to ship an additional 26 metric tons of plutonium to SRS, notwithstanding the looming January 1, 2022, deadline. Pet. App. 72a.

3 *E.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 139 S. Ct. 2779 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *see also* Tara L. Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851, 852 (2016) ("State suits against the federal government are on the rise.").

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EXHIBIT 12

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140 S.Ct. 392
Supreme Court of the United States.

SOUTH CAROLINA, Petitioner
v.
UNITED STATES, et al.

No. 18-1531
|
October 15, 2019

Case below, 912 F.3d 720.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

All Citations

140 S.Ct. 392 (Mem), 205 L.Ed.2d 214

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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT C

Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction
South Carolina Public Interest Foundation et al. v. Alan Wilson,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Sept. 25, 2020)

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-04603 **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs hereby move the Court for a temporary restraining order and preliminary injunction pursuant to Rule 65, SCRCP. A temporary restraining order and preliminary injunction are necessary to preserve the status quo during the pendency of this action and to avoid irreparable injury. This motion is supported by the Complaint and Exhibits being filed herewith. Plaintiffs further allege the following:

FACTUAL SUMMARY

On August 31, 2020 Defendant Wilson announced the settlement of a lawsuit against the United States Department of Energy (the "DOE") resolving the DOE's liability for violating of the terms of an agreement brokered by former Governor James H. Hodges regarding the disposition of weapons grade plutonium stored at the Savannah River Site ("SRS"). Compl., Ex. A., Affidavit of James M. Griffin, Sept. 25, 2020 (hereinafter, "Griffin Aff."), Ex. 1, Settlement Agreement. Governor Hodges's brokered settlement is codified at Title 50, United States Code, Section 2566 ("Section 2566"). Under Section 2566, the DOE must pay the State of South Carolina "economic impact and assistance payments" of $100 million per year from appropriated funds starting in 2016

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for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least $400 million in economic impact and assistance payments. Under the terms of the settlement agreement announced by Defendant Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of $600 million. Under the terms of the Settlement Agreement, the DOE is required to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." Griffin Aff., Ex. 1, ¶ 5(a). According to Wilson, this payment is expected on or after October 1, 2020.

Defendant Wilson has announced that he intends to pay two private law firms $75 million from the proceeds of the DOE settlement. Upon learning of the Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

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Plaintiffs have filed this action seeking injunctive relief and a declaratory judgment ruling that Defendant Wilson does not possess authority to use the proceeds from the DOE settlement to pay private law firms because the funds are intended solely for the State of South Carolina. Alternatively, if the Court were to conclude that Defendant Wilson is authorized to use these settlement proceeds to pay the private law firms, Plaintiffs seek an order requiring the Defendant to obtain court approval of the reasonableness of the fee as provided by the terms of the fee agreement with the law firms and South Carolina law.

ARGUMENT

The purpose of a temporary restraining order or preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church,* 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

Plaintiffs are entitled to an injunction to prohibit Defendant Wilson from paying $75 million from a settlement ear-marked exclusively for the benefit of the State of South Carolina. Injunctive relief is necessary to preserve the status quo and prevent Plaintiffs' important constitutional challenge from becoming moot. Moreover, as established below, Plaintiffs have made a sufficient showing that they are entitled to relief.

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I. Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement

Plaintiffs contend that the payment of $75 million to private law firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Accordingly, Section 5(a) clearly requires that payment of the entire $600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges,* 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002)

("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."). Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.* Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act ("Federal Funds Oversight Act") specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et seq.* Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office ("EBO") and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay $75 million to the law firms from the $600 million his agency will receive through this settlement. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

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II. The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order

Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006).

The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this monetary claim,[1] ruling that any such claim must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the lawyers refiled the same claim before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel

[1] The District Court did not dismiss the State's claim for injunctive relief.

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to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

In addition, the express terms of the fee agreement with the law firms states that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7. There is nothing prohibiting the Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.[2] However, the Defendant Wilson seeks to avoid judicial review and intends to pay the law firms $75 million without making any showing of reasonableness.

Furthermore, a payment of $75 million to the law firms exceeds the fee amount that the law firms would be entitled to receive under the contingency fee agreements entered with these firms. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to $150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

[2] Under South Carolina, the following factors are considered to determine whether an award of attorneys' fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

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Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 10. On June 7, 2019 Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.,* Ex.11) and a Reply Brief on September 24, 2019 (*id.*, Ex. 12).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 13.

Thus, Willoughby & Hoefer is purported to be paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

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Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 Million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000. There has been no explanation for Defendant Wilson's decision to pay these firms an additional $24,750,000 for a total payment of $75 million.

Plaintiffs, individually and on behalf of the Citizens of this State, are third party beneficiaries under the fee agreement entered into with the law firms. Plaintiffs seek an order requiring Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs.

III. Plaintiffs Have Public Interest Standing

Plaintiffs have "public interest" standing to pursue the declaratory action and injunctive relief as recognized in the following cases: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); Sloan v Friends of the Hunley, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue,* 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640

S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006*); Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

CONCLUSION

THEREFORE, Plaintiffs request a temporary restraining order and preliminary injunction prohibiting the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Badge Humphries
James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Ste. 300
Columbia, South Carolina 29206
PO Box 999 (29202)
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James G. Carpenter, S.C. Bar No. 1136
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Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083

Attorneys for Plaintiffs

ELECTRONICALLY FILED - 2020 Sep 25 1:41 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT D

John Monk, Should 2 law firms get $75M of SC's $600M plutonium Settlement? This lawsuit says no, The State, Sept. 28, 2020

HOMEPAGE

Should 2 law firms get $75M of SC's $600M plutonium settlement? This lawsuit says no

BY JOHN MONK
SEPTEMBER 28, 2020 05:00 AM

Attorney General Alan Wilson explained why South Carolina will pay $75 million to two law firms that worked on the $500-plus million plutonium settlement. BY JOHN MONK

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COLUMBIA, SC

A lawsuit filed by a government watchdog group and a Columbia lawyer challenges S.C. Attorney General Alan Wilson's proposed $75 million in legal fees to two Columbia law firms for work they did to help obtain a $600 million settlement payment to the State of South Carolina.

John Crangle, a lawyer and longtime observer of state government ethics, and the S.C. Public Interest Foundation allege that the two firms didn't do anywhere near enough work to justify a $75 million fee for their work in a long-running case against the U.S. Department of Energy.

The lawsuit also alleges the $600 million settlement was not a legal settlement — it was a political deal arranged by politicians, and therefore the law firms: Willoughby & Hoefer and Davidson Wren & DeMasters, both of Columbia.

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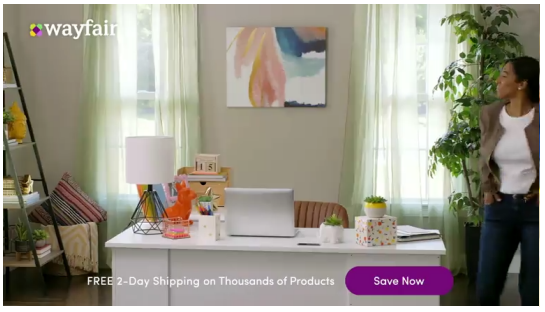

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Along with the lawsuit, attorneys Jim Carpenter, Jim Griffin and Badge Humphries requested an injunction seeking to halt any payment of money to the lawyers until the courts make a final decision on the matter.

"Our only response is this lawsuit has no merit," said Robert Kittle, a spokesman for Wilson's office.

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A judge has not been appointed to hear the case, which was filed Friday in the Richland County Court of Common Pleas, also known as state civil court.

The Buzz on SC Politics Newsletter

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The case involved a 20-year dispute with the Department of Energy over tons of deadly plutonium that wound up in Barnwell County at the Savannah River Site as a result of a failed deal between South Carolina and the federal government to build a plant that would convert the deadly plutonium into a substance that could be used for peaceful nuclear purposes. Plutonium is used for building nuclear bombs.

The lawsuit said that under the settlement agreement, all $600 million in federal money must be deposited into the General Fund and "only the Legislature controls its appropriation." Moreover, the "settlement agreement does not allocate any portion of the $600 million to attorneys' fees," the lawsuit said.

The award of $75 million in legal fees is not only "patently unreasonable," but the private attorneys Wilson hired for the case didn't do anywhere near enough work to justify such a fee, the lawsuit said.

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Wilson's lawyers "engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the Department of Energy is required to pay South Carolina penalties from money that has "been appropriated by Congress," the lawsuit said.

"Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated," the lawsuit said. (The money is to come from a special U.S. Department of Justice pool of fines. Attorney General William Barr signed off on the payment.)

The lawsuit said the settlement had no need for Wilson's lawyers — the "agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham."

Moreover, the lawsuit said, under a fee agreement that the lawyers made with Wilson, the maximum amount they might be entitled to is $50.2 million, not $75 million. The agreement contains a sliding scale percentage provision, in which the lawyers working on the case get increasingly smaller percentages of any settlement amount as the amount awarded in the settlement increases.

As an example of the alleged questionable nature of Wilson's agreement with the lawyers, the lawsuit alleges that one of Wilson's law firms, Willoughby & Hoefer, is to get half a percent of $600 million, or $3 million just for writing a 46-page petition and reply — meaning that Wilson "intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

The lawsuit asks that before any money is given out to private lawyers from the $600 million settlement, that a judge approve the amount. The money is supposed to be paid to South Carolina by early October, Wilson has said.

The lawsuit filed Friday is the latest public challenge to Wilson's $600 million settlement.

Earlier this week, western counties in South Carolina sued Wilson, saying the $600 million South Carolina stands to get for settling the plutonium dispute should go to those counties, especially Barnwell and Allendale, because they suffer the "stigma" of having the plutonium in their area. Those counties allege they have also lost prospective businesses because few want to come to a place with such a potential threat to the environment.

And Gov. McMaster, after learning of the deal, wrote a letter to Wilson objecting to the $75 million fee as too high. McMaster also objected to the terms of the settlement, saying Wilson's deal potentially allowed the federal government to leave plutonium at the Savannah River Site for years longer than necessary.

First Circuit Solicitor David Pascoe also wrote Wilson, objecting to the use of these settlement proceeds for attorneys' fees on the grounds that state law requires the entire amount be deposited into the state's general fund.

On Aug. 31, when Wilson announced the $600 million settlement, he said he knew some people might object to the $75 million fee to two law firms, but they had done excellent work without which the settlement would not have been made and were worth it.

A controversial plan would send plutonium to the Savannah River Site from around the world for keeping indefinitely. SAVANNAH RIVER SITE *FILE*

JOHN MONK 803-771-8344

John Monk has covered courts, crime, politics, public corruption, the environment and other issues in the Carolinas for more than 40 years. A U.S. Army veteran who covered the 1989 American invasion of Panama, Monk is a former Washington correspondent for The Charlotte Observer. He has covered numerous death penalty trials, including those of the Charleston church killer, Dylann Roof, serial killer Pee Wee Gaskins and child killer Tim Jones. Monk's hobbies include hiking, books, languages, music and a lot of other things.

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BY JON GAMBRELL AND ADAM SCHRECK *ASSOCIATED PRESS*
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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

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Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT E

K. Buckley email to M. Blanchfield et al. re Wire Request-AGO (Sept. 28, 2020)

Subject: FW: [External] Fwd: Wire Request-AGO
Date: Thursday, October 1, 2020 at 2:22:34 PM Eastern Daylight Time
From: Jim Griffin <jgriffin@griffinhumphries.com>
To: Badge Humphries <bhumphries@griffinhumphries.com>
Attachments: image003.jpg, image002.jpg, image001.jpg

From: Jeff Young <JYoung@scag.gov>
Sent: Wednesday, September 30, 2020 10:27 AM
To: Jim Griffin <jgriffin@griffinhumphries.com>
Subject: Fwd: [External] Fwd: Wire Request-AGO

Jim, This is a copy of the message sent to Judge McCaslin

Sent from my iPhone

Begin forwarded message:

> **From:** Jeff Young <JYoung@scag.gov>
> **Date:** September 30, 2020 at 10:05:00 AM EDT
> **To:** dmccaslinsc@sccourt.org
> **Subject: FW: [External] Fwd: Wire Request-AGO**
>
> Judge McCaslin,
>
> Attached is the statement from the Treasurer's office confirming that the $75,000,000 was wired to the lawyers at 9:14 EST yesterday 9/29/2020. The process started on 9/17/2020.
>
> Respectfully,
>
> W. Jeffrey Young
>
> **W. Jeffrey Young**
> Chief Deputy Attorney General
> Office: (803) 734-6680
> jyoung@scag.gov
> Rembert C. Dennis Building
> 1000 Assembly Street
> Columbia, SC 29201
>
> ---
>
> **From:** Kim Buckley <KBuckley@scag.gov>
> **Sent:** Wednesday, September 30, 2020 9:08 AM
> **To:** Emory Smith <ESmith@scag.gov>; Jeff Young <JYoung@scag.gov>; Alan Wilson <agwilson@scag.gov>; Bob Cook <RCook@scag.gov>
> **Subject:** FW: [External] Fwd: Wire Request-AGO

Best,

Kimberly Buckley
Finance Director
SC Attorney General's Office
803-734-3771
kbuckley@scag.gov

From: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Sent: Wednesday, September 30, 2020 9:07 AM
To: Kim Buckley <KBuckley@scag.gov>
Cc: Simmons, Melissa <Melissa.Simmons@sto.sc.gov>
Subject: RE: [External] Fwd: Wire Request-AGO

Kim,

The wire processed successfully on 9/29/20 at 9:14am EST according to our online banking wire information. STO also received a verbal confirmation from the beneficiary. Our best practice is that we do not share the details(documents) of transactions initiated on our wire transfers system. Wire processing and book transfer is a normal part of our daily business practice and we monitor those transactions carefully . If you have any additional question, please let me know and I will be happy to assist.

Thank you,
Michelle

Michelle Blanchfield| Cash Desk Manager
South Carolina Treasurer's Office
1200 Senate Street, Suite 214
Wade Hampton Building
Columbia, SC 29201
803-734-0259 | michelle.blanchfield@sto.sc.gov

From: Kim Buckley <KBuckley@scag.gov>
Sent: Wednesday, September 30, 2020 6:27 AM
To: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Cc: Simmons, Melissa <Melissa.Simmons@sto.sc.gov>
Subject: [External] Fwd: Wire Request-AGO

Michelle,

I hope you are doing well. Can you let me know if this wire has been processed and If so the date and time of processing? If there is a document you can send me showing thIs information that would be helpful.

Thank you!

Kim

Sent from my iPhone

Begin forwarded message:

From: Kim Buckley <KBuckley@scag.gov>
Date: September 28, 2020 at 4:37:00 PM EDT
To: "Michelle.Blanchfield@sto.sc.gov" <Michelle.Blanchfield@sto.sc.gov>
Cc: "Simmons, Melissa" <Melissa.Simmons@sto.sc.gov>
Subject: Wire Request-AGO

Michelle,

Please see the request for wire transfer for Willoughby and Hoefer. Please let me know if you need anything additional.

Best,

Kimberly Buckley
Finance Director
SC Attorney General's Office
803-734-3771
kbuckley@scag.gov

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT F

Affidavit of Kimberly Buckley, Memorandum of Attorney General in Opposition to Motion for TRO or Temporary Injunction, Ex. 4
South Carolina Public Interest Foundation et al. v. Alan Wilson, et al.,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Oct. 2, 2020)

EXHIBIT 4
for Memorandum in Opposition to TRO Motion

Buckley Affidavit

ELECTRONICALLY FILED - 2020 Oct 02 8:13 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

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STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF RICHLAND)

Kimberly Buckley, being duly sworn, attests to the following:

1. I am the Finance Director for the Office of the Attorney General.
2. The funds for payment were received on September 15, 2020 and deposited in agency's escrow fund on September 17, 2020.
3. On September 16, 2020 at 2:03 p.m. the Finance Department received the invoice from Willoughby and Hoefer for attorneys' fees and a request that the fees be tendered to the firm trust account as soon as such funds are transferred to the Attorney General's Office.
4. The Finance Department received approval to process the payment for attorney fees from Chief Deputy Attorney General on September 17, 2020.
5. The Finance Department submitted the request for increased budget authorization needed to process the payment to the Executive Budget Office (EBO) for approval on September 17, 2020. Copy attached. EBO emailed its approval of the increased budget authorization request to me at 9:21 a.m. on September 25, 2020. See attached.
6. Following receipt of the above approval of the increased budget authorization from EBO, the Finance Department of the Attorney General's Office began processing the payment. The funds for attorney fees ($75m) was transferred from the agency escrow fund to the litigation fund for processing.
7. The payment was entered into the South Carolina Enterprise Information System (SCEIS) by the Fiscal Analyst on the morning of September 25, 2020. At 11:21 a.m. that day, Accounting Supervisor approved the payment.

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8. At 1:43 p.m. on the September 25, 2020, I reviewed and approved the payment in the State Carolina Enterprise Information System (SCEIS). After my approval, the payment was automatically routed to the Comptroller General's Office for review and final approval.
9. Attached are screenshots of the System Workflow showing the processing of the attorneys' fee payment to Willoughby and Hoefer through the SCEIS System. See attached.
10. My understanding is that Willoughby & Hoefer contacted the Treasurer's Office on September 28. The Director of Treasury Management at the Treasurer's Office offered a wire transfer option to the firm which would be immediate. To do so, the Attorney General's Office had to change the payment terms within the SCEIS payment document. Director of Treasury Management contacted a fiscal analyst at the Attorney General's Office for her to do so. The Director of Treasury Management sent me a wire request form for the payment. I reviewed what the Treasurer's Office sent over and then sent it back on the 28th. See attached email string from Cash Desk Manager at the Treasurer's Office.
11. The Treasurer's Office confirmed that it wired the funds to the law firm on September 29 at 9:14 a.m. See attached Cash Desk Manager email.

Kimberly Buckley

SWORN TO before me this 1st
day of October, 2020
Jammie Wilson
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3/30/2021

admin
THE SOUTH CAROLINA
DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

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This form is used to request an interim increase of Other Funds budget authorization. Approval is subject to the review of the Joint Other Funds Oversight Committee and the approval of the Executive Budget Office. A budget entry in SCEIS should accompany this request.

AGENCY: E200 - Attorney General **DATE:** 9/17/2020

AMOUNT REQUESTED: 75,000,000.00

Please provide responses to the questions below. Attached additional documentation if necessary.

1. Please provide a description of your request.

RESPONSE: One-time other funds authorization increase to support the payment of outside counsel fees and litigation cost in the U.S. Department of Energeny v. State of SC settlment agreement. All supporting documentation is attached.

2. What expenses will be paid with this requested authorization?

RESPONSE: Cost and fees for civil litigation-USDOE v. State of SC settlement agreement

3. What funding source will be used to fulfill this request?

RESPONSE: Other funds received from USDOE settlement agreement

4. Why is the agency's existing Other Funds authorization level not sufficient to cover this request? Why was this authorization not requested during the previous budget cycle?

RESPONSE: This is a very sustancial one time litigation settlement requiring payment far beyond the agency's current level of other funds authorization.

5. Is all or part of the expenditure authorization supported by actual cash received and brought forward from the previous fiscal year?

RESPONSE: No, all current funds

6. Is all or part of the expenditure authorization request supported by an increase in projected revenue? If yes, explain in detail.

RESPONSE: Yes, increase in revenue of other funds due to settlement agreement (600.42m). Agency will be retaining between 10-15m from settlement for cost, fees and fines and all ther funds will be disbursed to outside counsel (75m) and State Litigation Recovery Account (remainder).

7. Is this request for a recurring initiative or a one-time request? ☐ Recurring ☒ One-time

admin
THE SOUTH CAROLINA DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

8. If this is a recurring initiative, has additional authority been requested in the budget cycle for the upcoming fiscal year? ☐ Yes ☒ No

9. **Cabinet Agencies:** Has this request been reviewed with the Governor's Office? ☐ Yes ☒ No

AGENCY CERTIFICATION

The agency certifies that the cash identified is sufficient and available. The agency also acknowledges that, if approved, this adjustment is only in effect until the end of the current fiscal year.

9-17-2020

Authorized Agency Representative / Date

JOINT OTHER FUNDS OVERSIGHT COMMITTEE RECOMMENDATION

APPROVE	DISAPPROVE	MEETING DATE
☐	☐	

EXECUTIVE BUDGET OFFICE RECOMMENDATION

APPROVE	DISAPPROVE	SIGNATURE	DATE
☒	☐		
		ANALYST, EXECUTIVE BUDGET OFFICE	
		Brian J. Gaines	9/25/2020
		DIRECTOR, EXECUTIVE BUDGET OFFICE	

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Emory Smith

From: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Sent: Friday, September 25, 2020 9:13 AM
To: Kim Buckley
Subject: RE: [External] FW: MOX

It has been approved. Per proviso 59.8 the balance should be deposited in the Litigation Recovery Account. Will you let me know when this is done?

Lauren Parker Wright
Budget/Research Analyst, Executive Budget Office

The South Carolina
Department of Administration
1205 Pendleton Street, Suite 529, Columbia, SC 29201
(803) 734-7216 | (803) 734-0645 fax

The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.

-----Original Message-----
From: Kim Buckley <KBuckley@scag.gov>
Sent: Thursday, September 24, 2020 5:17 PM
To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Subject: Re: [External] FW: MOX

Thanks, Lauren. I think the Chief Deputy AG may be reaching out to Brian to check on the status. He asked for his contact info. Just to give a heads up. I know these things take time and relayed that to them. They have been asking me daily. Appreciate your help with this!

Kim

Sent from my iPhone

> On Sep 24, 2020, at 3:32 PM, Parker, Lauren <Lauren.Parker@admin.sc.gov> wrote:
>
> I believe we are waiting on the higher ups- as soon as I hear anything I'll let you know. I have no idea why its taking so long.
>
> Lauren Parker Wright
> Budget/Research Analyst, Executive Budget Office
>
> The South Carolina
> Department of Administration
> 1205 Pendleton Street, Suite 529, Columbia, SC 29201
> (803) 734-7216 | (803) 734-0645 fax
>

> The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.
>
> -----Original Message-----
> From: Kim Buckley <KBuckley@scag.gov>
> Sent: Thursday, September 24, 2020 3:31 PM
> To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
> Subject: [External] FW: MOX
>
> Lauren,
>
> I hope you are doing well. So sorry to bother but has there been any movement on authorization approval?
>
> Best,
>
> Kimberly Buckley
> Finance Director
> SC Attorney General's Office
> 803-734-3771
> kbuckley@scag.gov
>
>

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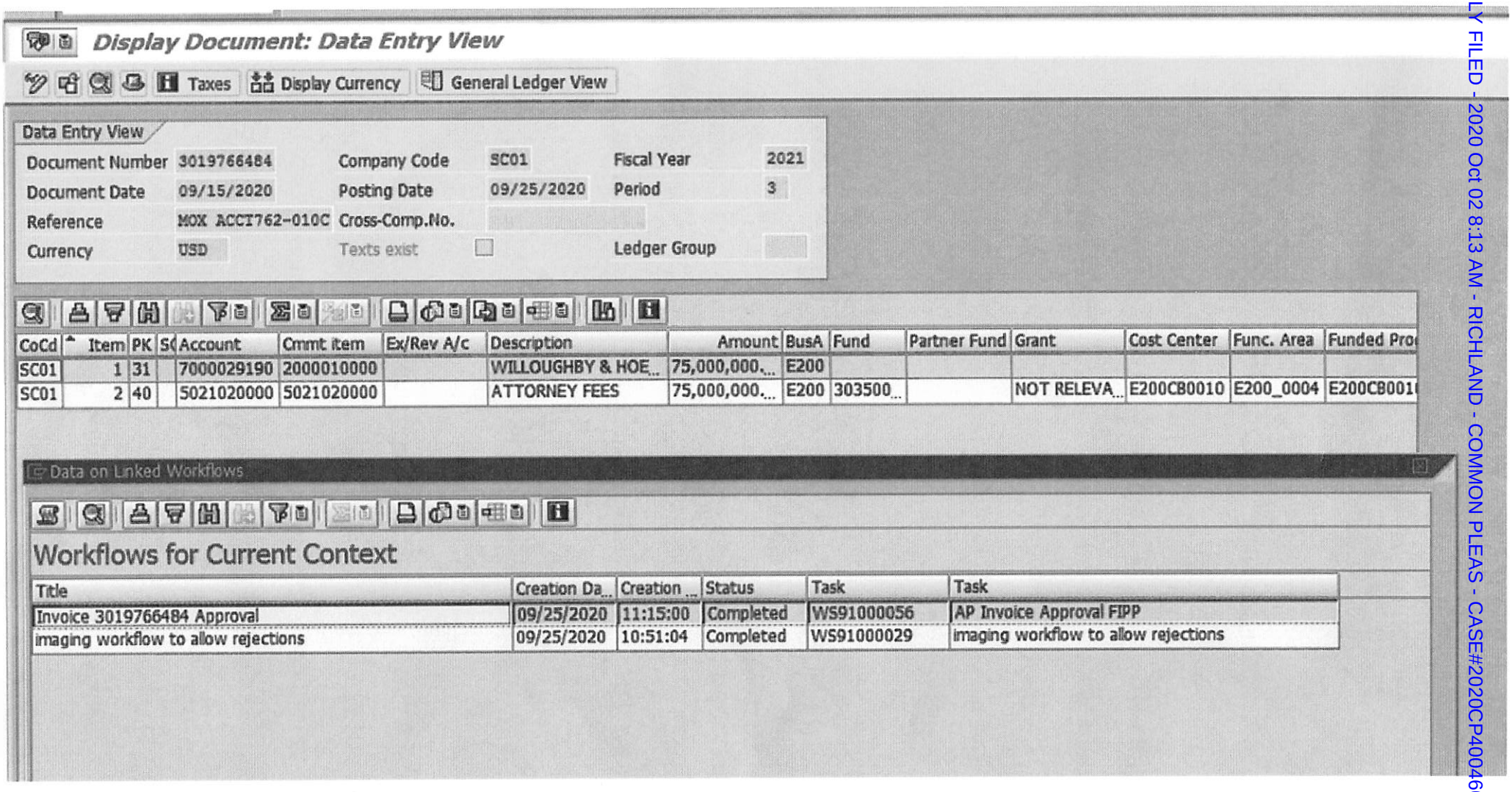
ELECTRONICALLY FILED - 2020 Oct 02 8:13 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603



Display Document: Data Entry View

Taxes | Display Currency | General Ledger View

Data Entry View

Document Number	3019766484	Company Code	SC01	Fiscal Year	2021
Document Date	09/15/2020	Posting Date	09/25/2020	Period	3
Reference	MOX ACCI762-010C	Cross-Comp.No.			
Currency	USD	Texts exist	☐	Ledger Group	

CoCd	Item	PK	S	Account	Cmmt item	Ex/Rev A/c	Description	Amount	BusA	Fund	Partner Fund	Grant	Cost Center	Func. Area	Funded Pro
SC01	1	31		7000029190	2000010000		WILLOUGHBY & HOE...	75,000,000...	E200						
SC01	2	40		5021020000	5021020000		ATTORNEY FEES	75,000,000...	E200	303500...		NOT RELEVA...	E200CB0010	E200_0004	E200CB001

Data on Linked Workflows

Workflows for Current Context

Title	Creation Da...	Creation ...	Status	Task	Task
Invoice 3019766484 Approval	09/25/2020	11:15:00	Completed	WS91000056	AP Invoice Approval FIPP
imaging workflow to allow rejections	09/25/2020	10:51:04	Completed	WS91000029	imaging workflow to allow rejections

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Step name	Status	Result	Creation date/time	End date/time	Agent
check workflows background method	Completed	No	09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Determine Cost Centers for Invoice 3019766484	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Determine AP Supervisor for 3019766484	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Year End Check	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Agents from Role YWF STO APTM-ALL	Completed		09/25/2020 - 11:15:00	09/25/2020 - 11:15:00	Workflow System
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 11:15:00	09/25/2020 - 11:21:32	JOAN POTTS
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 11:21:32	09/25/2020 - 13:43:14	KIMBERLY BUCKLEY
Post an Invoice 3019766484 2021	Completed		09/25/2020 - 13:43:14	09/25/2020 - 13:43:19	Workflow System
Local Check Determination	Completed		09/25/2020 - 13:43:19	09/25/2020 - 13:43:19	Workflow System
Place P Block for WF273	Completed		09/25/2020 - 13:43:19	09/25/2020 - 13:43:49	Workflow System
Determine AP 10K for 3019766484	Completed		09/25/2020 - 13:43:49	09/25/2020 - 13:43:49	Workflow System
Business area E200 and Document 3019766484	Completed	Approve	09/25/2020 - 13:43:49	09/28/2020 - 17:09:15	BRIAN CRONE
STO: E200 Method/Terms = 3 for 3019766484	Completed	Mail sent	09/28/2020 - 17:09:14	09/28/2020 - 17:09:14	Workflow System
Remove P Block for WF273	Completed		09/28/2020 - 17:09:14	09/28/2020 - 17:09:14	Workflow System
3019766484 SC01 2021	Completed		09/28/2020 - 17:09:15	09/28/2020 - 17:09:15	Workflow System

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Emory Smith

From: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Sent: Wednesday, September 30, 2020 9:07 AM
To: Kim Buckley
Cc: Simmons, Melissa
Subject: RE: [External] Fwd: Wire Request-AGO

Kim,

The wire processed successfully on 9/29/20 at 9:14am EST according to our online banking wire information. STO also received a verbal confirmation from the beneficiary. Our best practice is that we do not share the details(documents) of transactions initiated on our wire transfers system. Wire processing and book transfer is a normal part of our daily business practice and we monitor those transactions carefully . If you have any additional question, please let me know and I will be happy to assist.

Thank you,
Michelle

Michelle Blanchfield | Cash Desk Manager
South Carolina Treasurer's Office
1200 Senate Street, Suite 214
Wade Hampton Building
Columbia, SC 29201
803-734-0259 | michelle.blanchfield@sto.sc.gov

From: Kim Buckley <KBuckley@scag.gov>
Sent: Wednesday, September 30, 2020 6:27 AM
To: Blanchfield, Michelle <Michelle.Blanchfield@sto.sc.gov>
Cc: Simmons, Melissa <Melissa.Simmons@sto.sc.gov>
Subject: [External] Fwd: Wire Request-AGO

Michelle,

I hope you are doing well. Can you let me know if this wire has been processed and If so the date and time of processing? If there is a document you can send me showing thIs information that would be helpful.

Thank you!

Kim

Sent from my iPhone

Begin forwarded message:

> **From:** Kim Buckley <KBuckley@scag.gov>
> **Date:** September 28, 2020 at 4:37:00 PM EDT
> **To:** "Michelle.Blanchfield@sto.sc.gov" <Michelle.Blanchfield@sto.sc.gov>
> **Cc:** "Simmons, Melissa" <Melissa.Simmons@sto.sc.gov>
> **Subject: Wire Request-AGO**

Michelle,

Please see the request for wire transfer for Willoughby and Hoefer. Please let me know if you need anything additional.

Best,

Kimberly Buckley
Finance Director
SC Attorney General's Office
803-734-3771
kbuckley@scag.gov

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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT G

Memorandum of Attorney General in Opposition to Motion for TRO
or Temporary Injunction and Exhibits
South Carolina Public Interest Foundation et al. v. Alan Wilson,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Sept. 29, 2020)

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated,	)	C/A No. 2020CP4004603
Plaintiffs,	)	
v.	)	**MEMORANDUM OF ATTORNEY GENERAL IN OPPOSITION TO MOTION FOR A TRO OR TEMPORARY INJUNCTION**
Alan Wilson, Attorney General for the State of South Carolina	)	
Defendant.	)	

Without waiving any other defenses that may exist to this suit, the Attorney General, as named herein, opposes this Motion for injunctive relief for the reasons set forth below. At the outset, the Attorney General wants the Court to be aware that the fees are a part of a binding contract signed with outside counsel several years ago when no one anticipated a settlement anywhere nearly as high as $600 million. The fee at issue is required by the binding contract, and the Attorney General has the authority to withdraw it from the settlement and pay it having obtained Executive Budget Office approval as discussed below. See Plaintiffs' Exs. 7 and 8. The Plaintiffs have not established grounds for this Court to take the extraordinary step of issuing an injunction here.

BACKGROUND

The motion asks that this Court "prohibit[] the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action . . . ." The settlement monies are from an agreement in a suit brought by the State of South Carolina against the United States (U.S. Court of Claims, Fed. Cir. No. 19-2324) for payments due to the

ELECTRONICALLY FILED - 2020 Sep 29 2:05 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

storage of plutonium or plutonium materials at the Savannah River Site for the purpose of MOX facility that has not been built and will not be constructed. Ex. 1 to Complaint. The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the $600 million in settlement money to the State of South Carolina with each party to pay its own costs and attorney fees. Ex. 1, p. 2, ¶5a. The Agreement for Voluntary Dismissal filed today states that the settlement agreement required payment by the United States which is inclusive of amounts for interest, attorneys' fees and costs. Exhibit 1, attached. The statute under which settlement was reached provides for payment of funds to the State of South Carolina. 50 U.S.C. 2566.

Prior to the filing of this action, the Executive Budget Office approved the withdrawal of attorney's fees from the settlement proceeds under S.C. Code Ann. §2-65-10 which states as follows: "[a] state agency may receive and spend unanticipated federal funds, and funds from private foundations or industries, which are not included in the appropriations act, but state agencies must submit expenditure proposals to the board [the Executive Budget Office (§2-65-15(4)] and receive authorization from the board before expenditure of funds." Exhibit 2, attached. I have just been informed this morning that the money for the fees has been transferred to the attorneys. Therefore, this matter is now moot.

A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION SHOULD BE DENIED

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. . . . For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at

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law. . . ." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (2004)(emphasis added). Plaintiffs fail to meet these standards.

A

Plaintiffs Have No Likelihood of Success1**This matter is moot because the Executive Budget Office has approved the withdrawal of fees from the settlement monies and the fees have been transferred to the attorneys**

As noted above, the Executive Budget Office approved the withdrawal of fees before this action was filed, and undersigned counsel was informed this morning that the fees have been transferred to the attorneys. Therefore, this matter is moot and nothing remains for this court to decide. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758-59 (2013) ("A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court."). Although this case is moot, the following arguments are included should this Court, *arguendo*, which to consider them.

2

"The Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case. . ." Order of the Honorable G. Thomas Cooper, *Cephalon. v. Wilson*, Civil Action No. 2012CP4007317, June 6, 2014 (Exhibit 3)

Judge Cooper approved the withdrawal of fees from a settlement in the attached Order recognizing his authority in the above quote which is stated again below:

> In short, the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case. . . .

Order at p. 9. The Court based its ruling on S.C. Code Ann. § 1-7-170 (Approval by AG of engagement of outside counsel for department or agency), §1-7-85 (AG may obtain reimbursement of costs in representing the State) and *Cooley v. S.C. Tax Comm.,* 204 S.C. 10, 28 S.E. 2d 445, 447-48 (AG has authority as State's chief legal officer to appoint and approve private counsel to represent the State) as well as other authority cited therein. Order at pp. 8 and 9. As further stated in the Order, "the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85." Order at p. 14. Accordingly, most significantly, the Order states that §1-7-150(B) "provides that all monies, except investigative costs or the costs of litigation, must be deposited into the general fund. As the costs of litigation include attorneys' fees, this statute expressly provides the Attorney General the authority to pay attorneys' fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund." (emphasis added). Contrary to Plaintiffs contention that this statute does not apply arguing that the fees were not "awarded the State of South Carolina by judgment or settlement . . .," the settlement provides that each party bears its own fees thereby authorizing just what was done. Moreover, as noted above, the Agreement Dismissing the appeal states that the settlement agreement includes amounts for attorneys' fees and costs. See Ex. 1, attached. Moreover, the Executive Budget Office, as noted above, has authorized this payment.

Accordingly, the Attorney General has the authority to withdraw attorney's fees for outside counsel without depositing the money into the general fund. To enjoin him from doing so would be contrary to the above authority. Nothing in the above authority and the statutes

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cited authorize a court to review the reasonableness of the fee, particularly in a collateral action such as this one in which Plaintiffs have no standing. Therefore, this Court lacks authority to review the fee. As noted above, the amount of the fee is controlled by contract.

3

Plaintiffs have no standing and present no justiciable controversy

> Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). No statute confers standing on these Plaintiffs. Constitutional standing and public interest standing also fail.

> The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., *supra*, 380 at 195-96, 669 S.E.2d at 339). "Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006).

Whether Plaintiffs are alleging constitutional standing is not clear from the Complaint, but they cannot succeed because have not alleged a direct injury or the immediate danger that a

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direct injury will be sustained so as to establish standing. As noted, they are not parties to the Federal suit nor are they parties to the settlement agreement. They also lack taxpayer standing. In another suit brought by Plaintiff South Carolina Public Interest Foundation, the Supreme Court found SCPIF and the individual "are unable to show they suffered a concrete and particularized injury distinct from that shared by other taxpayers; therefore, we find Petitioners do not have constitutional standing." *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). Moreover, an "interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019, 140 L. Ed. 2d 210 (1998). With the settlement of the *State v. U.S.* action, Plaintiffs have no standing to challenge the fees and no case or controversy exists.

> For these same reasons, public interest standing is lacking.
>
> > The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341. Although the Court found that a need existed for future guidance in that bridge inspection case, public interest standing is lacking in the instant case because no need exists for "future guidance" in that this settlement is in a non-recurring matter, the matter is moot, and as discussed, *infra*, ample authority supports this payment. As stated by this Court in *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C.

343, 360, 815 S.E.2d 446, 455 (2018) in finding no public interest standing: "we 'must be cautious with this exception, lest it swallow the rule.'"

Standing fails for the above reasons. Accordingly, Plaintiffs have also not alleged a case or controversy. *ACT S, supra; see also Steele, supra.*

Irreparable Harm

Plaintiffs do not state that they will suffer irreparable harm. Therefore, they have failed to satisfy a critical element of the showing needed to obtain a TRO or temporary injunction.

CONCLUSION

Plaintiffs must show both a likelihood of success and irreparable harm. They have shown neither and this matter is moot. Because they fail to meet those requirements, they are not entitled to a TRO or a temporary injunction, and adequacy of a remedy need not be addressed.

Respectfully submitted,

s/ J. Emory Smith, Jr.
S.C. Bar No. 5262
Deputy Solicitor General

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

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Attorneys for the Attorney General

September 29, 2020

ELECTRONICALLY FILED - 2020 Sep 29 2:05 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

EXHIBIT 1

Agreement for Dismissal

State of SC v. U.S.

ELECTRONICALLY FILED - 2020 Sep 29 2:05 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STATE OF SOUTH CAROLINA,	)	
	)	
Appellant,	)	
	)	
v.	)	19-2324
	)	
THE UNITED STATES,	)	
	)	
Appellee.	)	

AGREEMENT TO VOLUNTARY DISMISSAL OF APPEAL

Pursuant to Rule 42 of the Federal Rules of Appellate Procedure, appellant, the State of South Carolina, and appellee, the United States, stipulate and agree that this appeal should be dismissed with prejudice, with each side to bear its own costs.

This dismissal is made as part of an agreement to resolve and settle a number of disputes, including the issue presented on appeal. The settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount, and the State shall have no further claim against the United States for such fees and costs. Such payment has been made, and with this requirement now being satisfied, the parties request dismissal of this appeal with prejudice.

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Respectfully submitted,

Of Counsel:

Alan Wilson
South Carolina Attorney General
Robert D. Cook
Solicitor General
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Columbia, South Carolina 29211-1549
awilson@scag.gov
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Attorney of Record:

/s/Randolph R. Lowell
Randolph R. Lowell
John W. Roberts
WILLOUGHBY & HOEFER, P.A.
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Charleston, South Carolina 29492
rlowell@willoughbyhoefer.com
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Attorneys for Appellant

September 29, 2020

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Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/Tara K. Hogan
TARA K. HOGAN
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
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Telephone: (202) 616-2228
Tara.Hogan@usdoj.gov

Attorneys for Appellee

September 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/Randolph R. Lowell
Randolph R. Lowell
Counsel for Plaintiff-Appellant

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5) and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 155 words, according to the count of Microsoft Word.

/s/Randolph R. Lowell
Randolph R. Lowell

EXHIBIT 2

Executive Budget Office Approval

ELECTRONICALLY FILED - 2020 Sep 29 2:05 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

admin
THE SOUTH CAROLINA
DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

ELECTRONICALLY FILED - 2020 Sep 29 2:05 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

This form is used to request an interim increase of Other Funds budget authorization. Approval is subject to the review of the Joint Other Funds Oversight Committee and the approval of the Executive Budget Office. A budget entry in SCEIS should accompany this request.

AGENCY: E200 - Attorney General **DATE**: 9/17/2020

AMOUNT REQUESTED: 75,000,000.00

Please provide responses to the questions below. Attached additional documentation if necessary.

1. Please provide a description of your request.

   RESPONSE: One-time other funds authorization increase to support the payment of outside counsel fees and litigation cost in the U.S. Department of Energeny v. State of SC settlment agreement. All supporting documentation is attached.

2. What expenses will be paid with this requested authorization?

   RESPONSE: Cost and fees for civil litigation-USDOE v. State of SC settlement agreement

3. What funding source will be used to fulfill this request?

   RESPONSE: Other funds received from USDOE settlement agreement

4. Why is the agency's existing Other Funds authorization level not sufficient to cover this request? Why was this authorization not requested during the previous budget cycle?

   RESPONSE: This is a very sustancial one time litigation settlement requiring payment far beyond the agency's current level of other funds authorization.

5. Is all or part of the expenditure authorization supported by actual cash received and brought forward from the previous fiscal year?

   RESPONSE: No, all current funds

6. Is all or part of the expenditure authorization request supported by an increase in projected revenue? If yes, explain in detail.

   RESPONSE: Yes, increase in revenue of other funds due to settlement agreement (600.42m). Agency will be retaining between 10-15m from settlement for cost, fees and fines and all ther funds will be disbursed to outside counsel (75m) and State Litigation Recovery Account (remainder).

7. Is this request for a recurring initiative or a one-time request? ☐ Recurring ☒ One-time

admin
THE SOUTH CAROLINA DEPARTMENT of ADMINISTRATION

Request for Other Funds Authorization
BD-100
(Est. 09/2019)

8. If this is a recurring initiative, has additional authority been requested in the budget cycle for the upcoming fiscal year? ☐ Yes ☒ No

9. **Cabinet Agencies:** Has this request been reviewed with the Governor's Office? ☐ Yes ☒ No

AGENCY CERTIFICATION

The agency certifies that the cash identified is sufficient and available. The agency also acknowledges that, if approved, this adjustment is only in effect until the end of the current fiscal year.

9-17-2020

Authorized Agency Representative / Date

JOINT OTHER FUNDS OVERSIGHT COMMITTEE RECOMMENDATION

APPROVE	DISAPPROVE	MEETING DATE
☐	☐	

EXECUTIVE BUDGET OFFICE RECOMMENDATION

APPROVE	DISAPPROVE	SIGNATURE	DATE
☒	☐		
		ANALYST, EXECUTIVE BUDGET OFFICE	
		Brian J. Gaines	9/25/2020
		DIRECTOR, EXECUTIVE BUDGET OFFICE	

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Emory Smith

From: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Sent: Friday, September 25, 2020 9:13 AM
To: Kim Buckley
Subject: RE: [External] FW: MOX

It has been approved. Per proviso 59.8 the balance should be deposited in the Litigation Recovery Account. Will you let me know when this is done?

Lauren Parker Wright
Budget/Research Analyst, Executive Budget Office

The South Carolina
Department of Administration
1205 Pendleton Street, Suite 529, Columbia, SC 29201
(803) 734-7216 | (803) 734-0645 fax

The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.

-----Original Message-----
From: Kim Buckley <KBuckley@scag.gov>
Sent: Thursday, September 24, 2020 5:17 PM
To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
Subject: Re: [External] FW: MOX

Thanks, Lauren. I think the Chief Deputy AG may be reaching out to Brian to check on the status. He asked for his contact info. Just to give a heads up. I know these things take time and relayed that to them. They have been asking me daily. Appreciate your help with this!

Kim

Sent from my iPhone

> On Sep 24, 2020, at 3:32 PM, Parker, Lauren <Lauren.Parker@admin.sc.gov> wrote:
>
> I believe we are waiting on the higher ups- as soon as I hear anything I'll let you know. I have no idea why its taking so long.
>
> Lauren Parker Wright
> Budget/Research Analyst, Executive Budget Office
>
> The South Carolina
> Department of Administration
> 1205 Pendleton Street, Suite 529, Columbia, SC 29201
> (803) 734-7216 | (803) 734-0645 fax
>

> The South Carolina Department of Administration (Admin) serves the citizens of South Carolina and agency partners by leading innovative efforts to provide secure, cost-effective, responsive and standardized services.
>
> -----Original Message-----
> From: Kim Buckley <KBuckley@scag.gov>
> Sent: Thursday, September 24, 2020 3:31 PM
> To: Parker, Lauren <Lauren.Parker@admin.sc.gov>
> Subject: [External] FW: MOX
>
> Lauren,
>
> I hope you are doing well. So sorry to bother but has there been any movement on authorization approval?
>
> Best,
>
> Kimberly Buckley
> Finance Director
> SC Attorney General's Office
> 803-734-3771
> kbuckley@scag.gov
>
>

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EXHIBIT 3

Cephalon Order

The Honorable G. Thomas Cooper

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007317

Cephalon Inc
PLAINTIFF(S)

Alan Wilson
South Carolina State Attorney General
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY, SC FILED 2014 JUN -6 PM 12:36

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 6 June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Stephen F. McKinney
I.S. Leevy Johnson
Sarah Patrick Spruill
Brian James Kern
Kenneth M. Suggs
John W. McIntosh
James Todd Rutherford

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
CEPHALON, INC.,)	Civil Action No.: 2012-CP-40-07317
)	
Plaintiff,)	
)	
v.)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
)	
ALAN WILSON, in his capacity as Attorney General for the State of South Carolina,)	
)	
Defendant.)	

RICHLAND COUNTY FILED
2014 JUN -6 P 3:37
JEANETTE W. WALKER C.C.P. & G.S.

THIS CAUSE came before me on cross-motions for summary judgment. Oral argument was heard on April 21, 2014. After considering the arguments of both parties, I hereby **GRANT** the Attorney General's motion for summary judgment and **DENY** Cephalon's motion for summary judgment.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004); Rule 56(c), SCRCP. In the matter before me there are no genuine issues of material fact. The only disputed issues are questions of law.

Having carefully considered the motions and memoranda of law submitted by the parties as well as the arguments of counsel, I find as follows:

FACTUAL BACKGROUND

Following unsuccessful settlement negotiations between Cephalon, Inc. ("Cephalon"), a pharmaceutical company, and the Attorney General's Office, Attorney General Alan Wilson filed suit on behalf of the State of South Carolina on June 2, 2011 seeking damages, equitable remedies and civil penalties under the South Carolina Unfair Trade Practices Act ("SCUTPA"). This complaint was filed

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solely by the Attorney General and his staff. Cephalon answered on July 5, 2011. On July 26, 2011 the Attorney General entered into a Litigation Retention Agreement with outside counsel.[1] On February 13, 2012, the Attorney General, with outside counsel, filed an Amended Complaint that added a claim for damages on behalf of the State Health Plan. The original claims, remedies, and causes of action were unchanged.

Cephalon filed the present Declaratory Judgment action on October 30, 2012. Specifically, Cephalon seeks a declaration that its due process rights are violated by the contingent fee arrangement in place in the Attorney General's enforcement action, a declaration that the allocation of fees violates the separation of powers doctrine, and an injunction barring prosecution of the enforcement action by the Attorney General and outside counsel under the Litigation Retention Agreement. Both parties moved for summary judgment on Cephalon's claims.

Cephalon advances several arguments as to why the Litigation Retention Agreement violates its constitutional rights. First, Cephalon argues that because the enforcement action is akin to a criminal proceeding, any use of contingent fee counsel is a *per se* violation of due process. Second, even if the enforcement action is not akin to a criminal proceeding, outside counsel must be subject to the control of neutral and conflict-free government lawyers, and the Attorney General's financial interest in the litigation's outcome invalidates his neutrality. Finally, Cephalon asserts that both the Attorney General's retention of attorneys' fees and payment of attorneys' fees to outside counsel does not comply with South Carolina law and thus violates separation of powers.

The Attorney General argues that the enforcement action against Cephalon is not a criminal prosecution, as his claims under SCUTPA are designated as civil by the General Assembly and not so punitive in effect as to be deemed criminal. Further, even if the enforcement action is quasi-criminal in nature, the use of contingency fee counsel is not prohibited *per se*, and both the provisions of the

[1] The agreement is entitled, "Litigation Retention Agreement with Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq." Special counsels are Kenneth M. Suggs of Janet, Jenner & Suggs, LLC and J. Todd Rutherford of the Rutherford Law Firm.

Litigation Retention Agreement and the Attorney General's actual control over the litigation satisfy the heightened level of neutrality required in a quasi-criminal case. Finally, the Attorney General maintains that South Carolina law permits the Attorney General to retain attorneys' fees and pay attorneys' fees to outside counsel directly from any recovery, and therefore there is no separation of powers issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the reasons set forth in greater detail below, I agree with the Attorney General that his enforcement action against Cephalon is civil in nature, that he has maintained the requisite control over outside counsel in the handling of that litigation, and that the Attorney General may withhold attorneys' fees from any recovery both for his Office and for outside counsel. I find that based on the facts and the record in this case, there has been no violation of either Cephalon's due process rights under the Federal or State constitutions or the separation of powers doctrine.

A. The Attorney General's Enforcement Action Against Cephalon Is Civil in Nature

Cephalon argues that the underlying case, though nominally civil, is akin to a criminal proceeding because civil penalties are sought pursuant to the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.* The Attorney General maintains that the clear language of the statute demonstrates the General Assembly's intent to provide for civil, not criminal, remedies and the civil penalties available under SCUTPA do not transform the statute into a criminal one.

In determining whether a statutory scheme is criminal or civil, the South Carolina Supreme Court articulated: "a court looks at the face of a statute to determine if it establishes a criminal or civil penalty, and then determines if the statutory scheme is so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty." *State v. Price*, 333 S.C. 267, 271, 510 S.E.2d 215, 218 (1998) (citing *Hudson v. United States*, 522 U.S. 93 (1997)).

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i. The General Assembly clearly and unambiguously intended SCUTPA to be a civil statute.

It is clear that the General Assembly wrote SCUTPA as a civil statute providing civil remedies. The penalties for willful violations of SCUTPA that Cephalon complains about are expressly referred to as civil, not criminal. *See* S.C. Code § 39-5-110(a); *see also Hudson*, 522 U.S. at 103 (finding an action by the Office of the Comptroller of the Currency was civil in nature, in part, because "both [statutes], which authorize the imposition of monetary penalties for violations . . . expressly provide that such penalties are 'civil.'"). These penalties are only awarded where the court finds that an entity either knew or should have known that its conduct was a violation of SCUTPA and the Attorney General petitions the court to award civil penalties. S.C. Code § 39-5-110(a). The injunctive relief available to the Attorney General is sought by filing an action in the court of common pleas. *See* S.C. Code § 39-5-50(a). If such an injunction is violated, the court of common pleas retains jurisdiction to award additional civil penalties. *See* S.C. Code § 39-5-110(b). The Attorney General has the right under SCUTPA to accept assurances of voluntary compliance, as long as those assurances are in writing and filed with and, importantly, subject to the approval of the court of common pleas. *See* S.C. Code § 39-5-60. Actions to enforce or to challenge investigative demands served by the Attorney General are filed in the court of common pleas. *See* S.C. Code §§ 39-5-70; 39-5-100. SCUTPA was codified as part of Title 39, entitled Trade and Commerce, rather than with Title 16, Crime and Offenses. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (the State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State]'s probate code, instead of the criminal code."). These and other provisions of SCUTPA all demonstrate that the General Assembly intended actions brought by the Attorney General under SCUTPA, and the civil penalties available in certain cases, as purely civil in nature.

ii. SCUTPA is not so punitive in purpose and effect as to overrule the General Assembly's clear and unambiguous intent.

Because I find the General Assembly intended SCUTPA to be a civil statute with civil remedies, the question then is whether that statutory scheme is so punitive in purpose and effect that the legislature's

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intent should be overridden. "Only the ***clearest proof*** will suffice to override legislative intent." *In re Justin B.*, 405 S.C. 391, 399, 747 S.E.2d 774, 778 (2013) (citing *Smith v. Doe*, 538 U.S. 84, 92(2003)) (emphasis added). I find that the penalties available under SCUTPA and sought in the underlying case are not so punitive in purpose and effect that the unambiguous legislative intent to create a civil remedy should be overridden.

The Supreme Court has outlined several factors that may be considered in determining whether, subject to the clearest proof, a civil regulatory scheme has been transformed into a scheme that imposes a criminal penalty:

(1) "[w]hether the sanction involves an affirmative disability or restraint";
(2) "whether it has historically been regarded as punishment";
(3) "whether it comes into play only on a finding of *scienter*";
(4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence";
(5) "whether the behavior to which it applies is already a crime";
(6) "whether an alternative purpose to which it may rationally be connected in assignable for it"; and
(7) "whether it appears excessive in relation to the alternative purpose assigned."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). The Supreme Court has instructed that "these factors must be considered in relation to the statute on its face." *Id.* at 169. Further, these factors are neither "exhaustive nor dispositive," but are instead "useful guideposts." *Smith*, 538 U.S. at 97. After carefully considering these factors and the arguments of both parties, I find that Cephalon has not shown by clearest proof that SCUTPA is "so punitive in effect as to negate the intention to deem it civil." *See Justin B.*, 405 S.C. at 405, 747 S.E.2d at 781 (citing *Hendricks*, 521 U.S. at 361).

As to the first factor, SCUTPA does not impose an affirmative disability or restraint. SCTUPA "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100. Regardless of the outcome of the enforcement action against Cephalon, no one will be or can be imprisoned as a result of that litigation. Cephalon argues that the injunctive relief sought in the enforcement action constitutes a disability or restraint. This argument fails for three primary reasons. First, the Attorney General seeks a permanent

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injunction only to prohibit Cephalon from committing further violations of SCUTPA. Second, Cephalon is not subject to any physical restraint, nor does an injunction "'resemble imprisonment,' the archetypal affirmative disability." *Justin B.*, 405 S.C. at 406, 747 S.E.2d at 782. Lastly, the Supreme Court has already ruled that the "sanction[] of occupational debarment" is nonpunitive. *Smith*, 538 U.S. at 86; *see also Hudson*, 522 U.S. at 94 ("While petitioners have been prohibited from further participating in the banking industry, this is 'certainly nothing approaching the "infamous punishment" of imprisonment.'") (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

With regard to the second factor, Cephalon argues that the civil penalties sought by the Attorney General under S.C. Code § 39-5-110 of up to $5,000 per violation have been historically regarded as punishment. Cephalon is incorrect; the Supreme Court has again made clear that "neither money penalties nor debarment has historically been viewed as punishment." *Hudson*, 522 U.S. at 104.

Cephalon is correct that civil penalties can only be assessed upon a finding by the court that it "knew or should have known that [its] conduct was a violation of Section 39-5-20." S.C. Code § 39-5-110. However, *scienter* is not required for a threshold finding that Cephalon violated SCUTPA or the entry of a permanent injunction against Cephalon for future unfair or deceptive acts and practices. As in *Smith*, this factor is "of little weight in this case." *Smith*, 538 U.S. at 87. Analyzing the fifth factor—whether Cephalon's behavior is a crime—I agree that the Attorney General has alleged that Cephalon's marketing and promotion of its drugs for off-label uses is illegal under federal law and resulted in a federal guilty plea. Again however, this factor is of "little weight" and does not rise to the level of clear proof necessary to override the General Assembly's clear intent to craft SCUTPA as a civil statute.

The fourth and sixth *Mendoza-Martinez* factors are closely linked. While Cephalon is correct that the Attorney General's enforcement of SCUTPA may indeed deter individuals and corporations from engaging in unfair or deceptive trade practices, this is far from dispositive. "[T]he mere presence of a deterrent purpose does not render a sanction 'criminal.'" *Justin B.*, 405 S.C. at 398, 747 S.E.2d at 778 (citing *Smith*, 538 U.S. at 102). "Though deterrence may serve criminal goals, the principle may also

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support civil goals." *Justin B.*, 405 S.C. at 407, 747 S.E.2d at 782. Indeed, "to find that the mere presence of a deterrent purpose rendered a sanction 'criminal,' would severely undermine the state's ability to engage in effective regulation." *Justin B.*, 405 S.C. at 398, 747 S.E.2d at 778; *see also Hudson*, 522 U.S. at 105 ("To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation[.]"). The presence of a deterrent purpose in SCUTPA is in support of civil, not criminal, goals.

SCUTPA has an undeniable connection to a clear nonpunitive purpose—protecting the public from unfairness and deception. *See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986) ("The legislature intended in enacting the UTPA to control and eliminate 'the large scale use of unfair and deceptive trade practices within the state of South Carolina.'") (citation omitted). Indeed, the Attorney General is required, prior to commencing an action seeking injunctive relief, to have reasonable cause to believe that such an action "would be in the public interest." S.C. Code § 39-5-50; *see also* S.C. Code § 39-5-70 (authorizing the Attorney General to serve an investigative demand "when he believes it to be in the public interests that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article[.]"). Similarly, a private individual must show, in order to recover under SCUTPA, that the defendant's "unfair or deceptive act affected [the] public interest." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)). The public interest purpose of SCUTPA, as recognized by both the statutes and the courts of this state, is nonpunitive.[2]

[2] Even if SCUTPA is not narrowly drawn to achieve this purpose, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103; *see also Justin B.*, 405 S.C. at 407, 747 S.E.2d at 783 ("Perhaps the General Assembly could have created a scheme more narrow in scope and still accomplished its non-punitive purpose. Perhaps it could not have. In any event, however, a statute is not deemed punitive due to the absence of a 'close or perfect' fit with its non-punitive purpose.") (citing *Smith*, 538 U.S. at 103).

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The last factor, whether the sanction is excessive in relation to the nonpunitive purpose, also does not transform SCUTPA into a criminal statute. SCUTPA provides for a maximum civil penalty of $5,000 per violation. S.C. Code § 39-5-110(a). This penalty only arises for violations which are willful—that is, when the offender knew or should have known that its conduct was an unfair or deceptive trade practice. S.C. Code § 39-5-110(c). While Cephalon is greatly concerned with the magnitude of a penalty award, there is no evidence in the record in this case as to how many violations of SCUTPA may have occurred. While a court may award the maximum penalty per violation, a court may award far less depending on the severity of the conduct. As no penalties have yet to be awarded in the enforcement case against Cephalon, a consideration of the possible total amount of penalty is premature. The injunctive relief available to and sought by the Attorney General in the underlying case is, pursuant to § 39-5-50, is limited to enjoining continued unfair and deceptive acts or practices. Given the importance of the nonpunitive purpose of SCUTPA, these sanctions are not excessive.

The General Assembly drafted SCUTPA with the unambiguous intent that it be a civil, not criminal, statute. Cephalon has not shown, with the clear proof needed, that SCUTPA is so punitive in both purpose and effect that the Attorney General's enforcement action should be treated as a criminal or quasi-criminal case. I find that the enforcement action against Cephalon is a civil proceeding.

B. The Attorney General Has the Authority to Appoint and Compensate Special Counsel on a Contingency Fee Basis

South Carolina Code § 1-7-170 provides that the Attorney General shall approve the engagement of any attorney on a fee basis by any department of agency of state government. The statute further provides that the Attorney General must approve the fee to be paid to an attorney so engaged. S.C. Code § 1-7-170. In addition, § 1-7-85 permits the Attorney General to "obtain reimbursements for its costs . . . in representing the State and its officers and agencies in civil and administrative proceedings." In that statute, costs are defined to include attorneys' fees. S.C. Code § 1-7-85. However, the Attorney General's ability in this regard is not created solely by these statutes. As the South Carolina Supreme

Court recognized in the case of *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445, 447-48 (1943), the Attorney General possesses the authority as the State's chief legal officer to appoint and approve private counsel to represent the State.

While the South Carolina appellate courts have not directly considered the Attorney General's right to appoint special counsel on a contingency fee basis, the appellate courts of other states have expressly approved of such an arrangement. In *West Virginia ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 651 (W.Va. 2013), the Supreme Court of West Virginia held that "the Attorney General has common law authority to provide for compensation to be paid to special assistant attorneys general through a court-approved award of attorney's fees taken directly from the losing opponent in the litigation." Similarly, the Supreme Court of Rhode Island held that,

> [T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters. Indeed, it is our view that the ability of the Attorney General to enter into such relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable.

Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 475 (R.I. 2008) (internal quotes and citations omitted). The Supreme Court of Missouri reached the same conclusion in *Missouri ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000). holding that, "[i]n the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general."

In short, the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case.

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C. Cephalon's Rights to Due Process Are Not Violated by the Attorney General's Use of Outside Counsel on a Contingency Fee Basis.

Although largely abandoned by Cephalon in its briefing on the cross-motions for summary judgment, because Cephalon's complaint raises the issue of whether the Attorney General is constitutionally permitted to use outside counsel on a contingency fee basis in the enforcement action against Cephalon, I address the issue here and find that no due process violation has occurred.

The parties disagree as to the standard of neutrality required of the Attorney General in both civil enforcement actions and quasi-criminal enforcement actions. The Litigation Retention Agreement provides adequate safeguards which require control over the litigation by the Attorney General. Because the Attorney General has exercised actual control over this litigation throughout, I find that the Attorney General's retention of outside counsel on a contingency fee basis does not violate Cephalon's constitutional right to due process.

i. There is no *per se* ban on the use of contingency fee counsel in enforcement actions and such arrangements are proper as long as the Attorney General retains control of the litigation.

Cephalon argues that an Attorney General's contingency fee arrangement with outside counsel in cases that are akin to criminal proceedings is a *per se* violation of due process. I have already ruled that the enforcement action brought by the Attorney General against Cephalon is civil in nature. However, even assuming *arguendo* that the enforcement proceedings are quasi-criminal in nature, Cephalon is incorrect as to what the law requires. Specifically, Cephalon relies on the Supreme Court case of *Young v. U.S. ex rel. Vuitton et. Fils S.A.*, 481 U.S. 787 (1987). *Young* involved an actual criminal contempt proceeding brought by attorneys appointed by the court to prosecute defendants for alleged violations of a court order. *Id.* at 791-92. The appointed attorneys were also the attorneys for the beneficiaries of the court order at issue and civil plaintiffs in a related case against the defendants. *Id.* The court did not decide the case on constitutional grounds, but rather used its inherent supervisory power to hold that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a

contempt action alleging violation of that order." *Id.* at 807. Nowhere did the Supreme Court construct a *per se* bar on the use of contingency fee attorneys in cases akin to criminal prosecutions.

Instead, the courts that have directly considered whether contingency fee counsel may be employed by state Attorneys General, including in cases where civil penalties are sought, have approved of such arrangements provided that the government attorneys retain control of the litigation. The Texas Court of Appeals considered this issue in *International Paper Co. v. Harris County*, __ S.W.3d __, 2013 WL 3864317 (Tex. App. July 25, 2013). Harris County filed an environmental enforcement action relating to contamination of a river and sought "civil penalties of up to $25,000 per day for violations of laws regulating the disposal of industrial waste." *Id.* at *2. The county retained outside counsel on a contingency fee basis. *Id.* The defendants asserted that the use of contingency fee counsel violated their due process right to a fair and neutral prosecution, characterizing the environmental enforcement action as quasi-criminal in nature. *Id.* at *2. The court closely analyzed the case law and rejected the defendants' argument that the due process clause imposed a *per se* bar on a governmental entity's engagement of outside counsel on a contingent fee basis to pursue civil litigation seeking recovery of civil penalties. *Id.* at *7. As the court noted, "[n]o court that Defendants have cited, or that we can find, has interpreted the due process clause in the manner urged by Defendants, *i.e.*, as adopting a blanket prohibition against a governmental entity retaining private counsel on a contingent-fee basis to pursue civil litigation in which the only remedy sought is civil penalties." *Id.* at *15.

In *Merck Sharp & Dohme Corp. v. Conway*, 947 F.Supp.2d 733 (E.D. Ky. 2013), the court addressed a challenge to the Attorney General's use of contingency fee counsel to bring a claim under the Kentucky Consumer Protection Act against Merck relating to Merck's marketing and distribution of a prescription drug—a strikingly similar context. The Attorney General and outside counsel sought the maximum civil penalties of $2,000 per violation and $10,000 per violation targeted to individuals over the age of 65. *Id.* at 735. Merck challenged the use of contingency fee counsel on due process grounds, and both sides filed cross-motions for summary judgment. The court again declined to adopt a *per se*

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prohibition. "An attorney general does not necessarily violate a defendant's due process rights by hiring outside counsel on a contingency-fee basis." *Id.* at 739. "Thus, as long as the required safeguards are in place, a government entity may engage contingency-fee counsel to assist in a civil prosecution without infringing on the defendant's due process rights." *Id.* The key test—according to the judge in *Merck*—was whether the Attorney General retained full control over the litigation. Thus, so long as the retention agreement contained sufficient safeguards to vest control with the Attorney General, and the Attorney General actually controlled the litigation, the use of contingency-fee counsel to assert consumer protection claims against the defendant was constitutionally permissible. *Id.* at 739-740. Because both elements of control were present, the court denied Merck's motion for summary judgment and granted the Attorney General's motion for summary judgment. *Id.* at 752.

ii. The terms of the Litigation Retention Agreement make clear that the Attorney General controls the enforcement action against Cephalon, and the Attorney General has exercised actual control over that action.

After reviewing carefully the terms of the Litigation Retention Agreement, I find that this agreement contains adequate safeguards to ensure that the Attorney General retains control of the enforcement action against Cephalon and serves as the ultimate decision maker. The agreement specifically provides that "[t]he Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General." Furthermore, "[a]ll pleadings, motions, briefs and other material which may be filed with the court shall first be approved by the Attorney General and provided to his office in draft form in a reasonable and timely manner for review." Outside counsel agree to communicate regularly with the Attorney General and his staff to keep them fully informed.

From the record in this case, I find that the Attorney General has exercised actual control over the enforcement action against Cephalon from its inception. Despite taking the depositions of Attorney General Alan Wilson, former Attorney General Henry McMaster, Chief Deputy Attorney General John McIntosh, Assistant Deputy Attorney General Sonny Jones (the head of the consumer protection and

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antitrust division and the Attorney General's "designated assistant" to oversee the litigation) and other members of the Attorney General's office, Cephalon has provided no evidence to suggest otherwise.

Even assuming that a heightened level of neutrality is required because of the nature of the enforcement action against Cephalon, I find that Cephalon's due process rights have not been violated by the Attorney General's retention of outside counsel on a contingency fee basis.

D. The Attorney General Has the Authority to Seek Attorneys' Fees on a Contingency Fee Basis

A key premise of Cephalon's argument is that the Litigation Retention Agreement creates an improper financial interest in the litigation for the Attorney General's office. However, the Attorney General's right to seek attorneys' fees is not created by the Litigation Retention Agreement. Rather, S.C. Code § 1-7-85 provides, in pertinent part:

> Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation awarded by court order or settlement[.]

S.C. Code § 1-7-85. This statute specifically provides that the Attorney General may obtain attorneys' fees and costs for representing the State in civil proceedings. The statute does not limit the ways in which the attorneys' fees for the Attorney General could be calculated. The Attorney General's authority to seek attorneys' fees is inherent in his powers under the South Carolina Constitution and common law.

The terms of the Litigation Retention Agreement do not create the Attorney General's ability to seek attorneys' fees. The fee calculation agreed to by the Attorney General and outside counsel operates as a ceiling to the fees the Attorney General can ultimately seek. In the absence of this language, the Attorney General would have the unfettered right under § 1-7-85 to seek attorneys' fees in the event the enforcement action against Cephalon is settled or a judgment is entered in favor of the State. Similarly, if the Attorney General had continued this action without outside counsel, he would still have the statutory

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authority to seek attorneys' fees calculated in the same manner as set forth in the Litigation Retention Agreement.

I find that the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85. The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees he will ultimately seek the court approve, and provides notice that any fees approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery.

E. Cephalon's Rights to Due Process Are Not Violated by the Attorney General's Retention of a Portion of Outside Counsel's Attorneys' Fees.

Cephalon urges that its constitutional rights are violated because the Attorney General retains a portion of any attorneys' fees awarded to outside counsel on a contingency fee basis.[3] Pursuant to the terms of the Litigation Retention Agreement, the below table breaks down the fees ultimately received by outside counsel and the Attorney General's office in the event of any recovery:

Amount of recovery	Contingent percentage (outside counsel)	Contingent percentage (Attorney General)
From $0.00 to $5,000,000.00	22.5%	2.5%
From $5,000,000.01 to $10,000,000.00	19.8%	2.2%
From $10,000,000.01 to $25,000,000.00	16.2%	1.8%
From $25,000,000.01 to $50,000,000.00	13.5%	1.5%
From $50,000,000.01 to $100,000,000.00	10.8%	1.2%
Greater than $100,000,000.00	9.0%	1.0%

Because of the Attorney General's financial interest in the outcome of the enforcement action, Cephalon argues, the Attorney General cannot satisfy the heightened level of neutrality required in that

[3] Cephalon continually refers to the Attorney General's contingency fee as the "10%." Under the undisputed terms of the Litigation Retention Agreement, the Attorney General receives 10% of outside counsel's fee, not 10% of any settlement or judgment. The Attorney General's fee is thus, at most, 2.5% of the overall recovery. And because the Litigation Retention Agreement operates on a sliding scale, with the contingent fee percentage decreasing as the recovery increases, the Attorney General's ultimate fee as a percentage of the total decreases as well for any settlement or judgment in excess of five million dollars.

action. Although I have already ruled that this enforcement action is civil, not quasi-criminal, in nature, even under that higher standard, the Attorney General's contingency fee interest does not rise to the level of a due process violation.

The Attorney General is "entitled to a presumption that he is pursuing the [enforcement] action in a manner consistent with this duty to seek justice as well as his ethical and professional obligations to the [State]." *Merck*, 947 F.Supp.2d at 744; *see also County of Santa Clara v. Superior Court*, 235 P.3d 21, 38 (Cal. 2010). I find that the Attorney General's contingency fee interest in the enforcement action against Cephalon is constitutionally permissible under the Supreme Court's decision in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

The similarities between the facts in *Marshall* and the present case are readily apparent. In the enforcement action against Cephalon, the Attorney General performs no judicial or quasi-judicial functions. He cannot assess any penalties against Cephalon; any civil penalties would be awarded by a judge after a finding that Cephalon willfully violated SCUTPA. The undisputed evidence before me demonstrates that no salaries are tied to the civil penalties received in this or any other enforcement case. Furthermore, the uncontradicted testimony from the Attorney General's office established that, even where money is received by the Attorney General as a result of a settlement or judgment in an enforcement action under SCUTPA, the Attorney General may not spend that money unless and until the General Assembly appropriates it for the Attorney General's use. Because the Attorney General's office can only spend what the General Assembly has appropriated, any recovery, including penalties, the Attorney General ultimately receives do not increase his budget without authorization by the General Assembly to retain and spend those funds.

Cephalon offers no evidence to the contrary. Indeed, its greatest point of emphasis is that, in the exceptional case, the Attorney General's contingency fee could amount to several million dollars, which could comprise a significant portion of his yearly budget. For that proposition, Cephalon craves reference to the trial court's decision in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 2007-

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CP-42-1438 (June 3, 2011), where the judge imposed civil penalties of over $327,000,000. However, Cephalon's reliance on this decision is misplaced for four principal reasons. First, the civil penalties in that case were imposed by the neutral finder of fact, not the Attorney General. Second, that penalty award is currently on appeal to the South Carolina Supreme Court, which may reduce or eliminate the penalty altogether. Third, even if the South Carolina Supreme Court affirms the ruling of the trial court, the Attorney General must still seek an award of attorneys' fees from the court, which would have the discretion to reduce the fees awarded. Finally, even if the impartial trial court approves the full fee, the Attorney General cannot spend any of it without an appropriation by the General Assembly.

Notably, the concept that a prosecutor may retain a portion of the funds received from a successful prosecution arises in several other contexts under South Carolina law. For example, the Attorney General is permitted to retain the first $750,000 of securities fines imposed by his office in enforcement actions. *See* S.C. Code § 35-1-702(c). Similarly, the Attorney General and SLED share equally the first $500,000 of money recovered in insurance fraud cases. *See* S.C. Code § 38-55-560(D). More generally, prosecuting agencies are statutorily authorized to retain 20% of the value of all real or personal property subject to forfeiture that is seized and forfeited. *See* S.C. Code § 44-53-530(e).

In short, Cephalon has offered no evidence at all that the "[Attorney General]'s contingent-fee interest in this case has caused [the Attorney General] to be overzealous in its prosecution of the underlying lawsuit, to act improperly or with a bias other than that inherent in the adversarial system, or to otherwise act in a manner contrary to the public interest." *See International Paper*, 2013 WL 3864317, at *14. As in *Marshall*, there is no realistic possibility that the Attorney General's contingent interest will affect his judgment in the enforcement action against Cephalon. As the Texas Court of Appeals stated, "[w]e reject the contention that simply because a lawyer will be paid a contingent fee in a civil case means that lawyer will disregard any heightened standards to which a lawyer performing government functions is subject." *International Paper*, 2013 WL 3864317, at *14. If judgment is entered against it,

Cephalon retains the opportunity to challenge the fees awarded to the Attorney General if it believes that this fee is unconstitutionally excessive.

The provisions of the Litigation Retention Agreement pertaining to the retention of attorneys' fees by the Attorney General are not constitutionally defective. As discussed above, there are numerous safeguards that must be satisfied before the Attorney General can actually spend any attorneys' fees it may ultimately acquire from its enforcement action against Cephalon. First, assuming the matter does not settle, the neutral finder of fact must determine that Cephalon violated SCUTPA. Second, with regard to civil penalties, the neutral finder of fact must determine that Cephalon knew or should have known that its conduct violated SCUTPA and, upon petition by the Attorney General, the court must determine both the number of violations and the amount of penalty to impose for each. Third, the court must approve the attorneys' fees to be awarded both to the Attorney General and outside counsel. Finally, the General Assembly must appropriate those funds for use by the Attorney General's office. Consequently, Cephalon has not shown any infringement upon its constitutional due process rights.

F. The Litigation Retention Agreement Does Not Violate Separation of Powers

Cephalon argues that the contingency fee agreement violates the Separation of Powers Doctrine in that it allegedly diverts state funds to the Attorney General's office and to private counsel. I find this argument to be without merit. In support of this argument, Cephalon relies on S.C. Code § 1-7-150(B). This statute provides, in pertinent part,

> All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State, except . . . where some other disposition is required by law.

S.C. Code § 1-7-150(B). According to Cephalon's argument, the Attorney General violates this statute—and therefore the separation of powers doctrine—anytime he hires outside counsel because a portion of the proceeds from the settlement or judgment are paid to outside counsel rather than deposited in the general fund. Further, Cephalon argues that the Attorney General violates this statute by retaining a

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portion of outside counsel's fees as attorneys' fees for his office.

Cephalon's argument, however, ignores the plain language of the statute itself. The statute provides that all monies, except investigative costs or the costs of litigation, must be deposited into the general fund. As the costs of litigation include attorneys' fees, this statute expressly provides the Attorney General the authority to pay attorneys' fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund. And under the clear and unambiguous terms of § 1-7-85, discussed above, the Attorney General has the statutory authority to seek attorneys' fees "[n]otwithstanding any other provision of law." S.C. Code § 1-7-85.

CONCLUSION

For the reasons set forth hereinabove, Cephalon Inc.'s Motion for Summary Judgment is **DENIED**. The Attorney General's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Columbia, South Carolina
June 2, 2014

G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT H

Order Granting Temporary Injunction Pendente Lite
South Carolina Public Interest Foundation et al. v. Alan Wilson,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Sept. 30, 2020)

ELECTRONICALLY FILED - 2020 Sep 30 8:32 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 2020-CP-40-04603 **ORDER GRANTING TEMPORARY INJUNCTION PENDENTE LITE**

This matter comes before the Court on Plaintiffs South Carolina Public Interest Foundation and John Crangle's, et.al., Motion for a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65, SCRCP. The motion was heard by way of a virtual hearing on September 29, 2020. Appearing on behalf of Plaintiffs were James Griffin and Badge Humphries, and on behalf of Defendant Alan Wilson, as Attorney General for the State of South Carolina ("the Defendant"), was Deputy Solicitor General Emory Smith. At the conclusion of the hearing, this Court took Plaintiff's Motion under advisement.

Plaintiffs seek a Preliminary Injunction against the Defendant in order to prevent the disbursement of $75 million ("the disputed funds") which is to be paid to private law firms hired by the Defendant for services rendered in obtaining a $600 million settlement which the Defendant has entered into with the United States Department of Energy (the "DOE"). On August 31, 2020, the Defendant announced the settlement which resolved a lawsuit against the DOE regarding the disposition of weapons grade plutonium stored at

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the Savannah River Site. As a result of this settlement, the Defendant has agreed to pay two private law firms, Willoughby & Hoefer, P.A and Davidson, Wren & DeMasters, P.A. ("the law firms") the disputed funds directly out of the proceeds of the settlement sum of $600 million. Plaintiffs dispute the Defendant's authority to directly disburse these funds and seek a preliminary injunction preventing the disbursement of said funds until this litigation is resolved on the merits.

At the hearing on Plaintiffs' motion, the Defendant informed the Court that the funds had already been distributed to the law firms prior to the hearing, and thus Plaintiff's motion was moot. Immediately after the conclusion of the hearing, Plaintiffs informed the Court that the disputed funds had been distributed from the Defendant to the State Treasurer, but had in fact not yet been distributed to the law firms, and that the State Treasurer was planning to do so imminently. Defendant disputed this assertion and asserts the funds had been received by the law firms today.

The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). Out of an abundance of caution, this Court finds it necessary, in order to preserve the status quo and to prevent irreparable harm to the Plaintiffs, to issue a temporary injunction until this Court issues a full ruling on Plaintiffs' Motion. This Court's ruling on Plaintiff's motion will be issued prior to Friday, October 2, 2020 at 5:00 PM, and thus this Order shall remain in effect no later than such time.

IT IS THEREFORE ORDERED,

The Defendant is hereby enjoined from ordering, approving, or facilitating the distribution of any portion of the disputed funds until this Court issues a ruling on Plaintiff's motion. It is further ordered that the Office of the State Treasurer is hereby

enjoined from disbursing any portion of the disputed funds to any persons until such a ruling is made by this Court. This Order is to remain in effect until Friday, October 2, 2020 at 5:00 PM.

IT SO ORDERED.

_____
Debra R. McCaslin
Circuit Court Judge

September 29, 2020

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Richland Common Pleas

Case Caption:	South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number:	2020CP4004603
Type:	Order/Temporary Injunction

So Ordered

Debra R. McCaslin

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT I

Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction
South Carolina Public Interest Foundation et al. v. Alan Wilson, et al.,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Sept. 30, 2020)

ELECTRONICALLY FILED - 2020 Sep 30 1:01 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	Case No. 2020-CP-40-04603 **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs hereby move the Court for a temporary restraining order and a preliminary injunction pursuant to Rule 65, SCRCP. A temporary restraining order and preliminary injunction are necessary to preserve the status quo during the pendency of this action and to avoid irreparable injury. This motion is supported by the Amended Complaint and Exhibits being filed herewith. Plaintiffs further allege the following:

FACTUAL SUMMARY

On August 31, 2020 Defendant Wilson announced the settlement of a lawsuit against the United States Department of Energy (the "DOE") resolving the DOE's liability for violating of the terms of an agreement brokered by former Governor James H. Hodges regarding the disposition of weapons grade plutonium stored at the Savannah River Site ("SRS"). Compl., Ex. A., Affidavit of James M. Griffin, Sept. 25, 2020 (hereinafter, "Griffin Aff."), Ex. 1, Settlement Agreement. Governor Hodges's brokered settlement is codified at Title 50, United States Code, Section 2566 ("Section 2566"). Under Section 2566, the DOE must pay the State of South Carolina "economic impact and assistance payments" of $100 million per year from appropriated funds starting in 2016

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for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least $400 million in economic impact and assistance payments. Under the terms of the settlement agreement announced by Defendant Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of $600 million. Under the terms of the Settlement Agreement, the DOE is required to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." Griffin Aff., Ex. 1, ¶ 5(a). According to Wilson, this payment is expected on or after October 1, 2020.

Defendant Wilson has announced that he intends to pay two private law firms $75 million from the proceeds of the DOE settlement. Upon learning of the Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

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Plaintiffs have filed this action seeking injunctive relief and a declaratory judgment ruling that Defendant Wilson does not possess authority to use the proceeds from the DOE settlement to pay private law firms because the funds are intended solely for the State of South Carolina. Alternatively, if the Court were to conclude that Defendant Wilson is authorized to use these settlement proceeds to pay the private law firms, Plaintiffs seek an order requiring the Defendant to obtain court approval of the reasonableness of the fee as provided by the terms of the fee agreement with the law firms and South Carolina law.

On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson and filed Plaintiff's motion for a temporary restraining order and preliminary injunction against Defendant Wilson seeking to enjoin Defendant Wilson's payment of $75,000,000 to the law firms ("Plaintiffs' Initial Motion"). On the morning of Friday, September 25, 2020 at 11:10 a.m., Defendant Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") and a representative of the Office of the Attorney General received notice of a hearing set for Wednesday, September 30, 2020 in a related case that likewise sought to enjoin the expenditure of the $600 million in settlement funds. *See id.*, Ex. 13. On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings while requesting that the Court schedule a hearing on Plaintiffs' Initial Motion. *See id.*, Ex. 14.

On the morning of Monday, September 28, 2020, counsel for Defendant Wilson emailed the Court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See id.*, Ex. 15. The Court responded by stating that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Motion over Defendant Wilson's objections. *See id.* Counsel for Defendant agreed to accept service as of the Complaint and Plaintiffs' Initial Motion as of September 28, 2020. *See id.*, Ex. 16.

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On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. In response, counsel for the Attorney General ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17. Immediately prior to that hearing on September 29, 2020, Defendant Wilson filed a memorandum in opposition to Plaintiffs' Initial Motion in which Defendant Wilson claimed that the funds at issue in this dispute had been transferred to the law firms earlier in the day. Based on this purported transfer of the funds, Defendant Wilson claimed that this matter is now moot. *See* Mem. Atty. General in Opp'n. to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3.

Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds have not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See* Griffin Aff., Ex. 18. Thereafter, the Court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the law firm of Willoughby & Hoefer had received the disputed funds. *See id.* During the hearing, the Court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. That order expires at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020 Plaintiffs received confirmation from the State Treasurer that the proceeds were in fact wired to the law firm hours before the 3 p.m. hearing on September 29, 2020. According to Treasurer Loftis: "The Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]. We processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account. This was a

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standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires." *See id.*, Ex. 19.

Plaintiffs bring the instant motion to preserve the status quo now that the funds in dispute have been transferred from the State of South Carolina to the Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters. To preserve the status quo while this case is litigated on the merits, Plaintiffs seeks a temporary restraining order requiring Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters to return the disputed funds to the State of South Carolina or, in the alternative, enjoining them from further dispersing or encumbering the funds and, instead, holding them in trust for the benefit of the State of South Carolina while this dispute is litigated to its conclusion.

ARGUMENT

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church,* 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). Without the equitable relief requested herein, Plaintiffs will be irreparably harmed.

In *Sloan v. School Dist. of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000), the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that "'[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.'" *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). In *South Carolina Department of Rev. v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court's

refusal to grant an injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Department of Rev. v. Richland County*, 422 S.C. at 311, 811 S.E.2d at 768.

Plaintiffs have shown it will succeed on the merits of this case by making a prima facie showing that Plaintiffs are entitled to the injunctive relief sought. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

Plaintiffs have no adequate remedy at law because the equitable relief sought herein is necessary to preserve the subject of controversy in the condition which it is until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. *See Peek*, 367 S.C. at 457, 626 S.E.2d at 37-38. Injunctive relief is necessary to preserve the status quo and prevent Plaintiffs' important constitutional challenge from becoming moot. Moreover, as established below, Plaintiffs have made a sufficient showing that they are entitled to relief.

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I. Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement

Plaintiffs contend that the payment of $75 million to private law firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Accordingly, Section 5(a) clearly requires that payment of the entire $600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges,* 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002)

("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."). Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.* Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act ("Federal Funds Oversight Act") specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et seq.* Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office ("EBO") and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay $75 million to the law firms from the $600 million his agency will receive through this settlement. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

II. The Amount of the Fee Is Patently Unreasonable and Should Not Have Been Paid Until Approved by Court Order

Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in

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this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006).

The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this monetary claim,[1] ruling that any such claim must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the lawyers refiled the same claim before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

[1] The District Court did not dismiss the State's claim for injunctive relief.

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In addition, the express terms of the fee agreement with the law firms states that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7. There is nothing prohibiting the Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.[2] However, the Defendant Wilson seeks to avoid judicial review and intends to pay the law firms $75 million without making any showing of reasonableness.

Furthermore, a payment of $75 million to the law firms exceeds the fee amount that the law firms would be entitled to receive under the contingency fee agreements entered with these firms. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to $150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on

[2] Under South Carolina, the following factors are considered to determine whether an award of attorneys' fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019 Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.,* Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Thus, Willoughby & Hoefer is purported to be paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 Million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages,

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for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000. There has been no explanation for Defendant Wilson's decision to pay these firms an additional $24,750,000 for a total payment of $75 million.

Plaintiffs, individually and on behalf of the Citizens of this State, are third party beneficiaries under the fee agreement entered into with the law firms. Plaintiffs seek an order requiring Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs.

III. Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters Have Received an Unauthorized Payment of Funds, and a Constructive Trust Should Be Deemed to Exist Over the Disputed Funds.

As noted above, Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters have received a disbursement of funds in dispute in this litigation. For the reasons explained above and in more detail in Plaintiffs' Amended Complaint, these law firms are not entitled to the disputed funds that they have received. Accordingly, the disputed funds should be returned to the State of South Carolina or Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters should be enjoined from distributing or encumbering the disputed funds pending a determination of this lawsuit on the merits. *See SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990); *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 334–35, 577 S.E.2d 468, 472–73 (Ct. App. 2003).

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IV. Plaintiffs Have Public Interest Standing

Plaintiffs have "public interest" standing to pursue the declaratory action and injunctive relief as recognized in the following cases: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); Sloan v Friends of the Hunley, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue,* 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006*); Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

CONCLUSION

THEREFORE, Plaintiffs request a temporary restraining order and preliminary injunction prohibiting the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Badge Humphries

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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT J

Ex Parte Temporary Restraining Order,
South Carolina Public Interest Foundation et al. v. Alan Wilson, et al.,
Case No. 2020-CP-40-04603 (Richland Cnty. Ct. Comm. Pleas Sept. 30, 2020)

ELECTRONICALLY FILED - 2020 Oct 01 8:01 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendant.	Civil Action No. 2020-CP-40-04603 **EX PARTE** **TEMPORARY RESTRAINING ORDER**

This matter comes before the Court on Plaintiffs' Motion for a Temporary Restraining Order prohibiting the law firm Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., from transferring, spending, pledging or otherwise encumbering the proceeds of a $75 Million wire transfer received from the State of South Carolina on September 29, 2020. The transfer was completed prior to a hearing before Judge McCaslin[1] to consider Plaintiffs' motion for a temporary and/or preliminary order enjoining the Defendant Wilson from paying the law firms.

Plaintiffs have now amended their Complaint to add the law firm defendants, thus bringing the current recipients of these disputed proceeds before this Court. Plaintiffs seek an *ex parte* temporary restraining order preventing Defendants from any disbursement of the funds prior to a hearing on their Motion for Preliminary Injunction. The purpose of a preliminary injunction is to

[1] The hearing was scheduled in consultation with counsel for Plaintiffs and Defendant Wilson before Judge McCaslin.

preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

Thus, to prevent transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina and to prevent irreparable harm to the Plaintiffs, the Court hereby grants Plaintiffs' motion for an *ex parte* temporary restraining order.

IT IS THEREFORE ORDERED, Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., members of their respective firms and anyone acting in concert with these Defendants, are hereby enjoined from transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina on September 29, 2020.

IT IS FURTHER ORDERED that the Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., shall appear before this Court on **October 7th, 2020 at 9:30am, via Webex Events – Hon. Alison Renee Lee Virtual Courtroom**, to show cause why Plaintiffs' motion for a preliminary injunction should not be granted. Defendant Law Firms should be served no later than 12pm noon, Friday, October 2, 2020.

AND IT SO ORDERED.

[Electronic Signature to Follow]

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Richland Common Pleas

Case Caption:	South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number:	2020CP4004603
Type:	Order/Temporary Injunction

IT IS SO ORDERED!

s/ Alison Renee Lee

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT K

Willoughby & Hoefer Petition for Writ of Supersedeas
South Carolina Public Interest Foundation et al. v. Alan Wilson, et al.,
(S.C. Ct. Appeals Oct. 2, 2020)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Debra R. McCaslin, Circuit Court Judge
Alison R. Lee, Circuit Court Judge

Appellate Case No. _____

Case No. 2020-CP-40-04603

South Carolina Public Interest Foundation and John Crangle,
Individually and on behalf of all others similarly situated, ... Respondents,

v.

Alan Wilson, Attorney General for the State of South Carolina,
Willoughby & Hoefer, P.A., and Davidson, Wren & Demasters, P.A., ... Appellant.

PETITION FOR SUPERSEDEAS OF APPELLANT WILLOUGHBY & HOEFER, P.A.

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Willoughby & Hoefer, P.A. ("Appellant"), pursuant to Rules 240(a) and 241(c), of the South Carolina Appellate Court Rules ("SCACR"), respectfully submits this petition for a writ of supersedeas ("Petition") to dissolve the facially deficient October 1, 2020, *Ex Parte* Temporary Restraining Order ("*Ex Parte* Order"), *see* Ex. 1, entered by the circuit court in this matter below, with instructions on remand regarding the continued proceedings seeking injunctive relief against Appellant.

INTRODUCTION

Appellant comes to the Court seeking immediate relief from the entry of an *Ex Parte* Order of the circuit court that, on its face, does not comply with any of the mandatory provisions of Rule 65, of the South Carolina Rules of Civil Procedure ("SCRCP") and is effecting, and will continue to effect, a miscarriage of justice and deprivation of Appellant's due process rights to defend itself in the noticed hearing on Plaintiffs' motion for preliminary injunction. In contravention of Rule 65 and this Court's recent holdings in *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 609, 790 S.E.2d 430, 434 (Ct. App. 2016), the *Ex Parte* Order:

- Requires the new Defendants to appear at a virtual hearing scheduled for 9:30 a.m. on October 7, 2020 and "***show cause why Plaintiffs' motion for a preliminary injunction should not be granted***," thereby improperly purporting to place the burden of proof on the Defendants. (Emphasis supplied);
- Fails to require any security or bond whatsoever, *see* Rule 65(c), SCRCP;
- Was issued *ex parte* with no supporting affidavit alleging specific facts supporting the allegations raised in the *Ex Parte* Motion for Temporary Restraining Order, which were proven to be demonstrably false by prior submissions of the Attorney

General, and where the Amended Complaint was unverified, *see* Rule 65(b), SCRCP;

- Fails to define the injury suffered by Plaintiffs or state why it is irreparable, *id.*;
- Fails to state why the *Ex Parte* Order was granted without notice to Appellant, *id.*;
- Fails to state when the *Ex Parte* Order expires, *id.*;
- Makes no findings regarding the elements of a temporary restraining order, *see* Rule 65(d), SCRCP; and
- Effectively suspended the general and ordinary business of Appellant without notice, *see* Rule 65(e), SCRCP.

In short, the *Ex Parte* Order fails every fundamental requirement set forth in Rule 65 which is applicable to this case and the circumstances in which the order was sought, while purporting to place Appellant at a significant legal disadvantage in the noticed hearing on the underlying motion for temporary injunction.

As set forth herein, correction of this cascading miscarriage of justice under these exigent circumstances is warranted. Consistent with Rule 241(d)(1), SCACR, this Petition is ripe because the Order being appealed was issued *ex parte* and did not afford Appellant its fundamental right of due process; therefore, it is not required to first seek a stay or supersedeas of the lower court which entered the order prior to filing the concurrently-filed Notice of Appeal and the within Petition. Rule 241(d)(1), SCACR; *also see* Toal, J.H., Walker, A.W., Baker, M.E., *Appellate Practice in South Carolina*, 347 (3d ed., 2016) (same).

UNDERLYING LAWSUIT AND CLAIMS

The lower court does not have jurisdiction to entertain any of the claims asserted by Plaintiffs, as discussed below. At bottom, Plaintiffs seek to insert themselves as third parties,

without any cognizable legal justification or standing, into a private retention agreement in an attempt to disgorge Appellant of a contractual payment that it has lawfully earned and has already been paid, under a valid and enforceable contract entered into and fulfilled by South Carolina's Chief Legal Officer. The lawsuit and the *Ex parte* Order appealed from are based on a number of demonstrably incorrect facts and abject misrepresentations of the record and proceedings in which the attorneys' fee was earned. Stripped of its hyperbole, Plaintiffs allege that the attorney fee paid to Appellant and co-Defendant Davidson, Wren & DeMasters, P.A. ("Davidson") (collectively "Law Firms") is "unreasonable" and "unconscionable," advancing claims based on the Rules of Professional Conduct that are non-cognizable by the circuit court. However, given the fact that the *Ex parte* Order is patently deficient on its face in a number of respects and does not comply with ***any*** of the strictures of Rule 65, and further purports to deprive Appellant of its due process rights in the upcoming hearing on Plaintiffs' motion for preliminary injunction, the analysis of this supersedeas does require significant inquiry into the merits of the lawsuit and an order superseding these miscarriages of justice is warranted.

PROCEDURAL BACKGROUND

The subject of this appeal and Petition is the *Ex Parte* Temporary Restraining Order electronically signed and entered by the Honorable Alison R. Lee At 3:43 on September 30, 2020 (electronically filed on October 1, 2020, at 8:01 a.m.) without notice to any party, even though the Attorney General already was a party to the case and had participated in a hearing the previous day and even though Appellant, with offices located in Columbia known to Plaintiffs and their counsel and the Court, could have certainly been available through a virtual hearing. Ex. 1.

The underlying action was originally commenced upon the filing of the initial Summons and Complaint on September 25, 2020, at 11:58 a.m., as well as a concurrently-filed Motion for

Temporary Restraining Order and Preliminary Injunction following at 1:41 p.m. that same day, against the Attorney General (but not the Appellant or Davidson). *See* Exs. 2 and 3. The State of South Carolina made a wire transfer to Willoughby & Hoefer, P.A. of $75 million in attorneys' fees before noon on September 29, 2020, a process that had been initiated in the normal course as provided by law on September 17, 2020. *See* discussion *infra*. At 3:00 p.m. on September 29, a virtual hearing was held on Plaintiffs' motion before the Honorable Debra McCaslin. On information and belief, a second virtual hearing was held at 7:00 p.m. on that same day, following which[1] Judge McCaslin issued an O"rder Granting Temporary Injunction Pendente Lite," enjoining the Attorney General from "ordering, approving, or facilitating the distribution of any portion of the disputed funds until this Court issues a ruling on Plaintiffs' motion." Ex. 4. The Order also purported to enjoin the State Treasurer from "disbursing any portion of the disputed funds to any persons until such a ruling is made by this Court," even though the Treasurer was not—and is not—a party to the action and there were no provisions for notifying the Treasurer of the Order. No bond was required by the Order. *Id.*

Plaintiffs filed an Amended Summons and Complaint the next day, September 30, 2020, at approximately 12:58 p.m., adding Willoughby & Hoefer, P.A. and Davidson, Wren & Demasters, P.A. as additional defendants. Ex. 5. At 1:01 p.m. on September 30, Plaintiffs also filed a motion for Temporary Restraining Order and Preliminary Injunction and, as discussed above the *Ex Parte* Order was entered by the circuit court without notice to Appellant. Ex. 6. Service was made on Willoughby & Hoefer, P.A. through delivery of the Amended Summons and Complaint and *Ex Parte* Order on the morning of October 1, 2020.

[1] The first Temporary Injunction Order was electronically signed at 9:21 p.m. on September 29, 2020, and electronically filed on September 30, 2020, at 8:32 a.m.

FACTUAL BACKGROUND

Plaintiffs are challenging the payment of private attorneys' fees paid as required by contract that were earned through the prosecution of a number of cases in federal court, including the ultimate settlement of a closed case filed by the State of South Carolina in the Court of Federal Claims. The misinformation on these fundamental points has been rampant since the settlement was announced on August 31, 2020, and now is aided and abetted by the many demonstrably false and defamatory allegations advanced in this lawsuit.

In March of 2014, Law Firms (or their predecessors) were hired to file an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests with respect to the mixed oxide fuel fabrication facility ("MOX Facility") at the Savannah River Site ("SRS"). At that time, the U.S. Department of Energy ("DOE") (through the National Nuclear Security Administration) was seeking to place the MOX Facility into "cold standby" status, which would have effectively terminated the MOX project. At the time, the Congressional delegation wrote to then-Governor Haley, to ask that she work with the Attorney General to explore any legal avenues the state may have to address the pending injustice to the State. After being briefed on a legal strategy to achieve that result, the State retained the Law Firms to represent it, and they filed a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14. Speed was of the essence given other factors at play in Congress. On April 30, 2014, DOE capitulated and directed the contractor to continue the MOX Facility construction, a win for South Carolina.

However, the State understood the war was far from over. Remaining engaged and following the associated issues with the MOX Facility, Law Firms developed a comprehensive strategy focusing on litigation with DOE and briefed the Governor's Office and the Attorney

General regarding that proposed and recommended strategy, which included a draft complaint completed by Law Firms. This strategy included a multi-front approach that would assert claims for injunctive relief seeking the removal of the weapons-grade plutonium, while simultaneously advancing monetary claims against the federal government seeking to apply financial pressure against it in an effort to incentivize continuation of the MOX Facility or removal of the material from the State.

With political overtures by South Carolina having been rebuffed, and DOE missing the January 1, 2016 statutory deadlines, Governor Haley sent a letter to the office of the Attorney General on January 26, 2016, transmitting a formal request that the Attorney General's office initiate litigation on behalf of the State of South Carolina against DOE. In accordance with that direction, the Attorney General hired Appellant and Davidson to represent the State in litigation against the federal government related to the MOX Facility at SRS. At the recommendation and with the approval of the Attorney General, the litigation retention agreement ("Fee Agreement") with the Law Firms took the form of a contingency fee arrangement, using the Attorney General's standard fee scale and litigation retention agreement (modeled on the original fee agreement developed by then-Attorney General McMaster). The Fee Agreement provided that the Law Firms would assume 100% of the risk involved in the litigation, requiring them to advance all costs and work the hours necessary to execute the complex legal strategy without compensation.[2] The State bore no risk under this arrangement; if the lawsuit(s) were successful, then the Law Firms would be paid according to the terms effective on February 8, 2016, as amended. If the lawsuit(s) were

[2] This, of course, presented a clear risk to the Law Firms as the State could, for instance, have been successful in the injunctive relief litigation but fail to recover any monies, leaving its counsel with having brought about a successful result in litigation for the State and receiving no payment.

unsuccessful, the Law Firms could not seek reimbursement for either their costs or the time worked on behalf of the State.

On February 9, 2016, Law Firms filed a complaint on behalf of the State against the federal government in federal District Court in South Carolina seeking the removal of one metric ton of defense plutonium from South Carolina and payment of the economic and impact assistance monies pursuant to 50 U.S.C.A. § 2566. After substantial briefing and argument on multiple issues and motions, the District Court issued several orders (1) dismissing the economic and impact assistance payment claim for lack of jurisdiction, directing the claim to be made in the United States Court of Federal Claims as the proper forum, and (2) granting the State's injunctive relief claim and ordering the federal government to remove one metric ton of defense plutonium from the State. The District Court requested additional briefing on the appropriate remedy for the removal claim, and on December 20, 2017, adopted the State's proposal to require removal of the defense plutonium within two years and also required the federal government to provide ongoing status reports on its removal progress. On February 2, 2018, the federal government appealed the judgment to the Court of Appeals for the Fourth Circuit. After briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (*i.e.*, by December 31, 2019).

On November 30, 2018, the State of Nevada filed a lawsuit against the federal government seeking to prevent the relocation of the one metric ton of defense plutonium from South Carolina to Nevada in the federal District Court in Nevada. This was a significant issue, as there are less than a handful of sites in the United States capable of storing defense plutonium and if Nevada was successful, the federal government could attempt to use that as the basis for an "impossibility" defense or other tactic to delay the removal of the one metric ton from South Carolina and for

future removal obligations. It was imperative that South Carolina protect its interest in the removal. Accordingly, on January 3, 2019, the Attorney General requested Appellant to move to intervene in the Nevada case on behalf of the State of South Carolina. The State of Nevada opposed South Carolina's participation in the case, and after further briefing by Appellant, the court granted the State's motion. Nevada sought a preliminary injunction to halt the shipment of defense plutonium to Nevada from SRS, and indicated that if the defense plutonium had left SRS, it could be returned. Appellant filed briefs on the motion on behalf of South Carolina. An evidentiary hearing was held requiring further participation and, on January 30, 2019, the court denied the motion for a preliminary injunction to stop the defense plutonium shipment. Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019.

During the pendency of the appeal, Nevada indicated that it believed the trial of this matter would take 14 days and sought unrestricted discovery rights. It also stated it had 15 witnesses to present. Appellant, on behalf of South Carolina, was prepared to litigate this matter in a full trial. The district court ultimately stayed the case pending the appeal. After briefing at the Ninth Circuit, including briefing by Appellant, the court dismissed the appeal as moot on August 13, 2019. The stay at the district court was lifted, and additional motions were filed and briefing began anew. In December 2019, South Carolina's participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE in 2020.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the federal District Court in South Carolina ordered its removal, the federal government filed a declaration with the court that it had completed the removal of the one metric ton of defense plutonium from SRS. During this time, South Carolina learned that the federal government was taking active steps to halt construction of the MOX Facility and planned to terminate the program.

Once the construction was halted, there would be no turning back and hundreds of South Carolina jobs would be lost. In consultation with South Carolina's Congressional delegation and Governor, the strategy was developed for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position regarding the continuation of construction of the MOX Facility and maintenance of the status quo, which would provide the Governor an opportunity to zealously advocate to the Trump Administration for the MOX Facility to remain open. Appellant was again directed by the Attorney General to move expeditiously on behalf of South Carolina, filing a complaint and requesting a preliminary injunction on May 25, 2018 in the federal District Court in South Carolina, along with a request for an expedited hearing. On June 7, 2018, the court granted the preliminary injunction and ordered the federal government to continue constructing the MOX Facility.

The federal government then appealed the injunction regarding the continuation of the MOX Facility construction to the Fourth Circuit Court of Appeals. During this time, political efforts were made to obtain a solution that, unfortunately, never materialized and, on October 26, 2018, the Fourth Circuit ruled against South Carolina. The federal government quickly terminated the MOX Facility construction, justifying South Carolina's efforts to try and maintain the status quo, which was at least temporarily successful. It is worth reiterating that none of the foregoing lawsuits regarding injunctive relief described above had a monetary or damages component to their undertaking, meaning that, although Appellant agreed to take on these actions under the Fee Agreement with the State, as amended, those actions did not provide an avenue for a corresponding increase in the possibility of damages to the State on which the attorney fee is based.

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to

recover $100 million. On January 8, 2018, the State filed its second complaint seeking to recover another $100 million. These claims were consolidated into a single case. Briefing ensued but, on October 24, 2018, the case was stayed pending settlement discussions between the State, led by Appellant, and the Department of Justice ("DOJ") on behalf of DOE and the federal government. These efforts were not successful and, in June 2019, South Carolina informed the court that the federal government had failed to engage in good faith discussions and the court needed to resolve the outstanding legal issues. On August 20, 2019, the Court of Federal Claims ruled against the State, finding the lack of an appropriation by Congress to be fatal to South Carolina's claims for the economic and assistance payments.

Appellant, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. After briefing and beginning in January 2020, promising discussions were held between the respective counsels for DOE and the State, which over time developed into a workable framework for possible resolution. While the political representatives of South Carolina were updated on the progress of these discussions, these talks were led by South Carolina's legal counsel, including the Attorney General and Appellant. Oral argument was held on May 5, 2020, in the Federal Circuit, and settlement discussions continued in earnest due in part to the perceived receptiveness of the appellate panel to Appellant's arguments. Accordingly, the case was stayed pending additional settlement discussions. After several additional productive meetings, all stemming from and following on the heels of the Federal Circuit oral argument, settlement discussions culminated in an agreement in principle reached on July 1, 2020, subject to further approvals and consultation with stakeholders including, on South Carolina's side, its political representatives. Governor McMaster, Senator Graham, and Congressman Wilson also indicated approval and acceptance of the agreement in principle.

On August 28, 2020, a settlement agreement was executed providing for a payment of $600 million—the largest single recovery ever by the State—from the federal government's litigation "Judgment Fund."[3] The settlement further provided the federal government with a grace period to comply with an obligation to remove additional defense plutonium from the State while still maintaining the ability of the State to force removal[4] and receive additional payments[5] should the federal government not comply. The federal government submitted the settlement payment to the State, and the agreement for voluntary dismissal was jointly filed by the State and the federal government with the Federal Circuit on September 29, 2020.

For the fees in this case, the Fee Agreement between the Attorney General and the Law Firms—which was first entered into in 2016 and was later amended to account for the additional litigation matters that were requested of Appellant to be brought on behalf of the State—utilizes a decreasing percentage scale based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. In calculating the attorneys' fee under the agreement, the earned

[3] The Judgment Fund is a permanent, indefinite appropriation of the federal government which is available to pay judicially- and administratively-ordered monetary awards against the United States, including amounts owed under compromise agreements negotiated by the DOJ in settlement of claims arising under actual or imminent litigation under appropriate circumstances. 31 C.F.R. § 256.1.

[4] The 15-year removal period for the remaining 9.5 metric tons of defense plutonium–an amount that is now known and was declassified as a result of the litigation–was calculated by multiplying 9.5 times the 19 months it took to remove the one metric ton DOE was ordered to remove.

[5] The rationale for the grace period on payment was that the source of funds for the economic and impact assistance payments changes beginning in 2022 from "available appropriations" to "funds available to the Secretary," which likely meant that the payments to the State would have to be made from the appropriated operating budget for SRS, which would be detrimental to SRS's operations and contrary to the State's desire to improve, rather than impair, missions at SRS.

fee, inclusive of costs and expenses, is $75,000,000. In calculating the "effective" percentage, this fee represents 12.5% of the recovery.[6]

In strict accordance with the applicable statutory provisions, the State Attorney General submitted the request for approval of payment of the attorneys' fees owed pursuant to the Fee Agreement on September 17, 2020. As required by law, and in direct contravention of the contrary and false allegations advanced by Plaintiffs in the Motion, the State Treasurer, the State Comptroller General, and the Executive Budget Office ("EBO") of the Department of Administration each approved and authorized the payment request, and on September 29, 2020, the State made a wire transfer to Appellant for the $75 million, inclusive of attorneys' fees and costs, owed under the Fee Agreement.

STANDARD

A supersedeas is an extraordinary writ, which appellate courts use only when necessary to preserve the fruits of a meritorious appeal, to avoid irreparable harm, or to prevent a miscarriage of justice. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) ("[T]he purpose … of a supersedeas … is to … preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." (quoting 4A C.J.S. APPEAL & ERROR § 662 at 494-95 (1957)); *Andrews v. Sumter Commercial & Real Estate Co.*, 69 S.E. 604, 606 (S.C. 1910)

[6] Belying any claim that such arrangement is "unreasonable" or "unconscionable," 12.5% is on the low end of standard contingency fee recovery percentages, and certainly less than an innumerable amount of recovery percentages approved by Court orders of this state including, for instances, the attorneys' fee percentages approved recently by South Carolina courts in the two recent settlements involving the V.C. Summer nuclear plant litigation, including one *against* the South Carolina Public Service Authority. *See also Condon v. State*, 354 S.C. 634, 643, 583 S.E.2d 430, 435 (2003) (finding competent evidence to support an award of attorneys' fees on a common fund created *against* the State in the amount of 28% of the fund in a "case that took 10 months to settle [and] achieved a good result … including securing prospective enforcement of a tax exemption" in circumstances where counsel "took the risk of not earning any fee at all.").

(explaining that a supersedeas is appropriate "to the extent clearly made to appear to be necessary to prevent irreparable injury or a miscarriage of justice").

The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *City of Columbia v. Pic–A–Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000). An abuse of discretion occurs where the trial court is controlled by an error of law or where the trial court's order is based on factual conclusions without evidentiary support. *Id.* Orders granting temporary injunctive relief that are deficient on their face and fail to comply with even one of the requirements of Rule 65, are clearly erroneous and subject to immediate dissolution and/or reversal. *Spartanburg Buddhist Ctr.*, *supra*.

ARGUMENT

The *Ex Parte* Order entered by the circuit court suffers from a multitude of procedural and substantive deficiencies that render it reversible, if not void *ab initio* on its face. Indeed, none of the findings required of a Court to issue an *ex parte* temporary restraining order have been fulfilled or are present in the *Ex Parte* Order. Nor are the Plaintiffs ordered to post the required bond or surety for depriving Appellant of their right to make use of the attorney fee that they have earned and been paid. Finally, and perhaps most egregiously, the *Ex Parte* Order preemptively, and improperly, attempts to reverse the burden of proof required of the parties in the upcoming hearing on Plaintiffs' motion for temporary injunction, rendering this immediate appeal and Petition paramount, and a matter of exigent circumstances, to Appellant's ability to adequately protect its interests and avoid a miscarriage of justice in the hearing set for next Wednesday, October 7, 2020. For any or all of the reasons discussed herein, Appellant respectfully requests that this Court supersede and dissolve the *Ex Parte* Order.

I. The *Ex Parte* Order purports to alter the burden of proof required of Plaintiffs' to seek a temporary injunction at the scheduled October 7, 2020, hearing, imposing on

Appellant the legally impermissible burden to "show cause why Plaintiffs' motion for a preliminary injunction should not be granted."

Of the many facial deficiencies of the *Ex Parte* Order, the issue that causes the real exigency and need for immediate relief by Appellant is the *Ex Parte* Order's holding that unilaterally purports to alter the burden of proof required of Plaintiffs to achieve a temporary injunction during the noticed hearing on October 7, 2020. Specifically, the order provides that the Law Firms must appear and "show cause why Plaintiffs' motion for a preliminary injunction should not be granted." This holding is contrary to Black Letter Law, as discussed below, is unsupported by any legal authority or justification, and, if left unaltered will fundamentally and improperly disadvantage Appellant's rights and cause a substantial miscarriage of justice to the Law Firms and their due process rights in their upcoming hearing.

The law on this point is clear, and the appellate courts of this State have been unequivocal in their assignment of the burden on a motion for temporary injunction as between the movant and the non-movant: "[f]or a preliminary injunction to be granted, ***the plaintiff must establish*** that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (emphasis supplied). "***The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction***." *Id.* (emphasis supplied) (citing *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984)). "The remedy of an injunction is a drastic one and ought to be applied with caution." *Id.* (citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950)).

The fact that the *Ex Parte* Order purports to unilaterally overrule the foregoing precedent and impose a burden on Appellant that does not exist is breathtaking in its inattentiveness. As discussed herein throughout, the *Ex Parte* Order is deficient on its face for a number of reasons,

but the shifting of the burden for the upcoming hearing on Plaintiffs' motion for temporary injunction is the clearest exposition of that point. It also has the most potential to result in a significant miscarriage of justice, forcing Appellant to meet a non-existent burden and then potentially appeal from the circuit court's failure to apply the burden to Plaintiffs, as required by the precedent of this Court and the Supreme Court. Such an effort would constitute an extreme waste of judicial resources that could be rendered unnecessary by an order of this Court, not only dissolving the deficient and void *Ex Parte* Order, but also providing specific instructions to the circuit court as to the burden that Plaintiffs carry to achieve a temporary injunction, in addition to the other requirements of Rule 65 as set forth herein.

Accordingly, Appellant respectfully requests this Court for dissolution of the *Ex Parte* Order on this basis with specific instruction to the circuit court on remand to comply with this requirement of the Rule.

II. The *Ex Parte* Order fails to require any security or bond in contravention of Rule 65(c), SCRCP.

Rule 65(c) provides that "no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The "provisions of Rule 65" are "mandatory" and require more than "a 'nominal security bond [because] it does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper.'" *See Spartanburg Buddhist Center*, 417

S.C. at 609, 790 S.E.2d at 434 (citations omitted).[7] Despite the mandatory language of Rule 65(c), the *Ex Parte* Order does not require Plaintiffs to secure a bond or other security or surety, despite the fact that the order enjoins the use by the Law Firms of $75 Million in earned attorney fees. The failure of the circuit court in this regard is inexplicable under the circumstances, as it has wholly disregarded the plain language of the Rule. *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced."). No exception to the rule exists except for the State, State officers, and State agencies. Plaintiffs are none of those, so no restraining order could have lawfully been entered in their favor without the Court requiring them to post an appropriate security, which it did not.[8]

Here, a significant security is both mandated (*see Spartanburg Buddhist*, *supra*,) and warranted. This lawsuit is a frivolous money grab that lacks any merit whatsoever. Plaintiffs have intentionally interfered in a private attorney fee agreement between the Attorney General and the Law Firms without any legal justification for doing so, opening itself up to legal and equitable counterclaims that will be asserted and pursued. Those counterclaims, in addition to sanctions Appellant intends to seek for the filing of a frivolous complaint, malicious prosecution, abuse of process, tortious interference with a contract, among others, which incur statutory prejudgment interest and the recovery of attorneys' fees and costs. Moreover, Plaintiffs' success in achieving an *ex parte* TRO has caused the Law Firms to not be able to access their lawfully earned attorneys'

[7] This assumption is similar to the error below of imposing upon Appellants a burden of demonstrating cause as to why an injunction should not issue against them, and the failure to require that Plaintiffs post security is clear legal error.

[8] While the Rule allows for the giving of a security "in such sum as the court deems proper," no security is not an option under the mandatory requirement of the Rule, and the *Ex Parte* Order does not even mention a security, much less make any affirmative finding with respect to what it deems sufficient.

fees and to put those funds to their highest and best use. That deprivation supports its own counterclaim, but pertinent to this discussion and in light of the unlikelihood of success on the merits by Plaintiffs, that deprivation is also a claim that Plaintiffs should be forced to account for in the giving of a security in support of this TRO or any future injunction entered by the Court.

Accordingly, while the failure to require Plaintiffs to post a bond or security as a condition of the entry of the *Ex Parte* Order is reversible error and cause for dissolution of the TRO standing alone, Appellant respectfully requests the Court provide instructions on remand to the circuit court requiring it to comply with the plain language of Rule 65(c), and provide a bond or security in an amount not less than the amount at issue in this lawsuit, including the opportunity costs which Appellant and the affected non-parties have been unable to realize as a result of the TRO.

III. The *Ex Parte* Order did not comply with *any* of the requirements of Rule 65(b), SCRCP for the issuance of an *ex parte* temporary restraining order.

The *Ex Parte* Order is facially deficient in that it fails to comply with ***any*** of the strictures set forth in Rule 65(b), SCRCP, that serve as absolute requirements for a Court to issue a temporary restraining order against a party without notice. In pertinent part, Rule 65(b) provides:

> No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it **clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant** before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall … **define the injury** and **state why it is irreparable** and **why the order was granted without notice**; and shall expire **by its terms** within such time after entry, not to exceed 10 days, **as the court fixes** ….

Rule 65(b), SCRCP (emphasis supplied). Where the Supreme Court has stated that a circuit court must comply with ***all*** of the express requirements of Rule 65(c) in order to grant such extraordinary

relief, *e.g., Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001), the *Ex Parte* Order's shortcomings are egregious in their flouting of the parameters required by law.[9]

a. Plaintiffs' motion for *ex parte* temporary restraining order was not supported by an affidavit and neither the Original nor Amended Complaint were verified.

Rule 65(b) provides that "[n]o temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint." (Emphasis supplied). The *Ex Parte* Order was issued in error based on the fact the Plaintiffs did not supply an affidavit in support of their Motion, from which specific facts clearly appear which support Plaintiffs' claims for relief.[10] Nor is the Amended Complaint verified. Accordingly, the *Ex Parte* Order was issued in contravention of the plain language of Rule 65(b). That shortcoming constitutes reversible error, and the supersedeas should be dissolved for this reason with specific instruction to the circuit court on remand to comply with this requirement of the Rule.

b. The *Ex Parte* Order does not define the injury that it finds Plaintiffs have suffered or why the failure to grant a TRO would cause irreparable harm to that undefined injury.

Rule 65(b) provides that "[e]very temporary restraining order granted without notice … shall define the injury and state why it is irreparable." (Emphasis supplied). The *Ex Parte* Order is facially deficient for this additional reason in that it does not define Plaintiffs' interest in the

[9] Each of the following deficiencies are plain from the face of the *Ex Parte* Order and require no real or further analysis of the points. "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) (citing *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 443 S.E.2d 906 (1994)). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Id.* (citing *Knotts v. S.C. Dep't of Natural Resources*, 348 S.C. 1, 558 S.E.2d 511 (2002). Accordingly, it is enough to simply quote the requirements of the Rule and highlight the abject shortcomings of the order.

[10] Plaintiffs submitted only an affidavit of their counsel with their Amended Complaint attesting that the exhibits attached to the Amended Complaint were "true and correct copies."

earned attorney fee of Appellant. Nor does it state any particularized injury suffered by Plaintiff, much less one that would be irreparably harmed in the absence of an *ex parte* TRO.

To be clear, however, Plaintiffs are incapable of sustaining that burden with respect to any claim against the earned attorney fee of Appellant that would provide the court with jurisdiction over its claims. As an initial matter, Plaintiffs' first cause of action alternatively seeking to require the Attorney General to comply with State law in the processing and payment of the attorney fee to the Law Firms is non-justiciable on the basis of mootness, as the undisputed facts before the circuit court and this Court are that the State approvals of the Executive and Legislative branches were expressly followed, including the very approval by the EBO which Plaintiffs allege is required here.

Moreover, Plaintiffs misapprehend the law in asserting a violation of separation of powers under Article I, § 8 of the South Carolina Constitution. Indeed, because the proper procedures for processing the payment under South Carolina law were expressly followed by the Attorney General and the EBO, and Plaintiffs do not allege otherwise, the Amended Complaint's request that the judicial branch invalidate the Attorney General's ability to request payment through the lawful procedures set forth in the law, and the EBO's (a non-party to this lawsuit) ability to process same, itself implicates a violation of separation of powers, including weighing in on what amounts to a nonjusticiable political question. *E.g.*, *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 121–22, 691 S.E.2d 453, 460 (2010) ("The nonjusticiability of a political question is primarily a function of the separation of powers.") (quoting *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n,* 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) ("SCPIF"); citing *Baker v. Carr,* 369 U.S. 186 (1962)). "The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of

government." *SCPIF*, 369 S.C. at 142–43, 632 S.E.2d at 278 (citing *U.S. v. Munoz–Flores*, 495 U.S. 385, 393–94 (1990)).

On the attorney fee question, Plaintiffs are categorically incapable of satisfying their burden of demonstrating a cognizable injury that would justify their standing to assert this challenge. The underlying lawsuit is fundamentally a collateral attack on the Law Firms' fee agreement that is non-justiciable by any state court in South Carolina, as the fee results from the processing of payment for a valid and enforceable contract entered into by the State's Chief Legal Officer, the Attorney General. Moreover, the attorney fee derives from the settlement of a federal case, asserting federal claims, against the federal government, with judgment paid out of the federal Judgement Fund, in a case that has been finally resolved and dismissed. *See* Ex. 7, Agreement to Voluntary Dismissal of Appeal (wherein DOJ agreed and stipulated as a condition of dismissal that "[t]he settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount, and the State shall have no further claim against the United States for such fees and costs.").

First, Plaintiffs unquestionably may not be accorded taxpayer standing under our State's jurisprudence, so to the extent that they have made such an argument, any alleged injury based on their status as taxpayers does not confer standing upon them. *See Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012) (finding that alleged harm to a "taxpayer is common to all citizens and taxpayers" and this "feature of commonality defeats the constitutional requirement of a concrete and particularized injury"). "For a plaintiff to have taxpayer standing, the party must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of her

fellow taxpayers." *Beaufort Cnty. v. Trask*, 349 S.C. 522, 529, 563 S.E.2d 660, 664 (Ct. App. 2002); *Crews v. Beattie*, 197 S.C. 32, 49, 14 S.E.2d 351, 357–58 (1941) ("The general rule is that a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer."). Lest there by any doubt, "[i]n *ATC*, [the Supreme Court] unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer [asserting harm shared by all taxpayers in the State]." *Bodman v. State*, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) (citing *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 669 S.E.2d 337 (2008)).

Nor do Plaintiffs obtain refuge under the public importance exception. The Supreme Court has recognized it "must be cautious with this exception, lest it swallow the rule." *Jowers v. S.C. Dep't Health & Envtl. Control*, 423 S.C. 343, 360, 815 S.E.2d 446, 455 (2018) (quoting *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)). Indeed, "standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). The general importance of an issue, without more, is insufficient to invoke the exception because "the same may be said of most legislative and executive actions. For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." *ATC S., Inc.*, 380 S.C. at 199, 669 S.E.2d at 341.

Here, the challenge asserted by Plaintiffs with respect to the earned attorney fee is specific to Appellant, a non-public entity or official. Moreover, Plaintiffs' spurious assertion is that ***this particular fee*** paid to Appellant is "unreasonable" and "unconscionable." In terms of baseline

justiciability by the circuit court, Plaintiffs' claim, which stems entirely from the allegation that Appellant's fee agreement with the Attorney General violates of the Rule 1.5, RPC, is non-cognizable by the circuit court, as (1) no private right of action exists to assert such a violation, *see Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124, 634 S.E.2d 5, 8 2006 ("*Linder* explicitly precludes a private right of action [based on alleged violations of the Rules of Professional Conduct]."), and (2) that the circuit court lacks jurisdiction to entertain allegations of violations of the Rules of Professional Conduct, which jurisdiction resides exclusively with the Supreme Court. *See In re Dickey*, 395 S.C. 336, 353–54, 718 S.E.2d 739, 748 (2011) ("[The Supreme Court] has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.") (citing *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003)); *In re Unauthorized Practice of Law Rules Proposed by South Carolina Bar*, 422 S.E.2d 123, 124, 309 S.C. 304, 305 (1992) ("The Constitution commits to [the Supreme Court] the duty to regulate the practice of law in South Carolina.").

Setting those infirmities aside, however, Plaintiffs' claim of public importance standing fails because the claim is limited to Appellant's fee, with no allegation generally that the Attorney General is unable to retain private counsel on a fee agreement to represent the State of South Carolina, or that the standard contingency litigation retention agreement used in this and every other similar representation is beyond the Attorney General's statutory authority or otherwise impermissible.[11] Thus, Plaintiffs claim amounts to little more than an assertion of public interest,

[11] Nor could they make such an assertion in good faith, as the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified and affirmed by a circuit court. *See* S.C. Code Ann. §§ 1-7-85, 170; *Cephalon v. Wilson*, Civil Action No. 2012-CP-40-07317, Order Granting Def's Mot. for Summ. Judg. (June 6, 2014) ("As the Supreme Court recognized in the case of *Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28, 28 S.E.2d 445, 447-48

rather than public importance,[12] and there can be no showing of a need for future guidance under these facts and circumstances. *Vicary v. Town of Awendaw*, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018) (holding that "the need for 'future guidance' is the key to transcending a purely private matter and rising to the level of public importance.") (quoting *ATC*, 380 S.C. 191, 199, 669 S.E.2d 337, 341). "Stated precisely, '[f]or a court to relax general standing rules, the matter of importance must, *in the context of the case*, be inextricably connected to the public need for court resolution for future guidance.'" *Id.* (emphasis in original).

Thus, in addition to being deficient on its face in terms of defining Plaintiffs' injury and articulating why harm would be irreparable, the *Ex Parte* Order fails and Plaintiffs are incapable of showing that they have alleged a justiciable claim. Having failed to do so, the *Ex Parte* Order does not comply with Rule 65(b) for this additional reason, which constitutes independent reversible error, and the supersedeas should be dissolved with specific instruction to the circuit court on remand to comply with this requirement of the Rule.

c. The *Ex Parte* Order fails to state why it was granted without notice to Appellant.

Rule 65(b) provides that "[e]very temporary restraining order granted without notice … shall … state … why the order was granted without notice." (Emphasis supplied). It is undisputed

(1943), the Attorney General possesses the authority as the State's chief legal officer to appoint and approve private counsel to represent the State."). As the circuit court in *Cephalon* further found, "the Attorney General possesses the authority to associate attorneys … and to pay those outside attorneys on a contingency fee basis with money received in any settlement…." *Id.*; *see also South Carolina v. Eli Lilly*, 2007-CP-42-1855, Order Denying Mot. To Disqualify (Sept. 22, 2009) (same, and rejecting a similar separation of powers argument as alleged by Plaintiffs here).

[12] *But see Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014) (expressly rejecting an attempt to meld the two standards, holding that "[w]hile the Court may exercise original jurisdiction under Rule 245, SCACR, "[i]f the public interest is involved," the "public interest" standard of Rule 245 is not synonymous with the public importance necessary for the public importance exception to standing to apply."). In reality, there is no public interest here either, as this lawsuit is nothing more than a private interest in seeking to take the attorneys' fees earned by others.

that no notice was provided to Appellant regarding the *ex parte* motion for temporary restraining order or a hearing thereon and the *Ex Parte* Order does not state a reason why notice was not capable of being provided to Appellant. That fact alone is an independent basis for dissolution of the order and renders void on its face. However, Appellant would point out that it is a known entity in the practice of law in the City of Columbia and more broadly in the State. It has a website providing multiple telephone numbers and email addresses of its attorneys for ease of contact, which website is accessible with the simplest of Google searches. Appellant would be remiss not to note that it is also a known quantity to Plaintiffs' counsel. Contact information for Appellant's personnel is also available through the Judicial Branch's Attorney Information System ("AIS") and its Columbia offices are less than two blocks from the Richland County Judicial Center. In fact, certain of Appellant's attorneys are engaged in active litigation as opposing counsel to Plaintiffs' counsel and were in telephone and E-mail communication with partners to Plaintiffs' counsel on the very day that Plaintiffs' counsel could not be bothered to provide notice to Appellant of this lawsuit and *ex parte* motion for TRO.

Moreover, effective as a result of the Coronavirus, and still effective today, the Supreme Court has authorized service and notice of all civil and appellate matters on all South Carolina lawyers admitted to practice law in this state by virtue of the lawyer's primary email address listed in the Attorney Information System. Supreme Court Order 2020-04-22-01, RE: Operation of the Trial Courts During the Coronavirus Emergency (As Amended April 22, 2020).[13] It cannot be reasonably stated with any degree of veracity that neither Plaintiffs' counsel nor the Court were able to search the Supreme Court's AIS system and locate contact information for Appellant. The

[13] Service of the Summons and Complaint may not be served by E-mail, but that is beside the point, which is notice of this *ex parte* hearing and the lack of any effort by Plaintiff's counsel to provide such notice to Appellant.

effort to exclude Appellant was not accomplished out of any sense of urgency or lack or wherewithal to provide notice to Appellant; this effort by Plaintiffs' counsel was purposeful and intentional.

Having failed to provide notice, provide any explanation for the failure to do so, and because any purported reason for the failure to do so would be specious and patently frivolous under the circumstances, the *Ex Part*e Order does not comply with Rule 65(b) for this additional reason. Because this this failure is reversible error, and the supersedeas should be dissolved for this additional reason with specific instruction to the circuit court on remand to comply with this requirement of the Rule.

d. The *Ex Parte* Order fails to state when the order expires.

Rule 65(b) provides that "[e]very temporary restraining order granted without notice … shall expire *by its terms* within such time after entry, not to exceed 10 days, *as the court fixes.*" (Emphasis supplied). The *Ex Parte* Order is facially deficient for this additional reason in that it does not provide or fix any term for the duration and expiration of the order. While all TROs expire within 10 days under Rule 65, the issuing court is nevertheless required by the plain language of the Rule to set or fix such term and expiration expressly. Having failed to do so, the *Ex Parte* Order does not comply with Rule 65(b) for this final reason, is reversible error, and the supersedeas should be dissolved for this additional reason with specific instruction to the circuit court on remand to comply with this requirement of the Rule.

IV. The *Ex Parte* Order fails to make any findings regarding the elements of a temporary injunction in contravention of Rule 65(d), SCRCP.

Rule 65(d) provides that "[e]very restraining order shall set forth the reasons for its issuance [and] shall be specific in terms." The *Ex Parte* Order is once again facially deficient under the Rule, as it does not contain any specific terms setting forth the reasons for its issuance.

The order simply recounts that Plaintiffs have amended their complaint to bring Appellant, the recipient of the earned attorney fee, into this litigation states that Plaintiffs have requested that Appellant be enjoined from making any disbursements prior to a hearing on the motion for temporary injunction. The order then provides a case citation for the entry of a temporary injunction, which motion was not even being considered by the court, and set out its holding that the Motion was granted "to prevent transferring, spending, pledging or otherwise encumbering the proceeds" of the earned attorney fee "to prevent irreparable harm to the Plaintiffs." The lack of any specific findings in the *Ex Parte* Order does not comply with the strictures of Rule 65(d) and does not afford Appellant its due process. This failure constitutes reversible error on its own and the order should be dissolved for this additional reason with specific instruction to the circuit court on remand to comply with this requirement of the Rule.

V. The *Ex Parte* Order suspends the general and ordinary business of Appellant without notice in contravention of Rule 65(e), SCRCP.

Rule 65(e) provides that "[n]o temporary restraining order shall be granted to suspend the general and ordinary business of an individual, partnership, association or corporation. Same may be suspended only by injunction *after notice*." (Emphasis supplied). As discussed above, there is no question that this order was issued *ex parte* without notice to Appellant. But this order is particularly egregious in its overbreadth, purporting "to prevent transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina" of not only Appellant, but also expressly purports to enjoin conduct of non-parties to this litigation, including "members of their respective firms and anyone acting in concert with these Defendants." This overbreadth is demonstrated by the fact that the Law Firms have each incurred – and fronted – substantial costs on behalf of the State of South Carolina during the course of this litigation. These costs have been carried by the Law Firms with the expectation that upon

the successful resolution of the State's claims against the federal government, it is contractually entitled to recoup those costs. The Law Firms have also engaged third party consultants on the State's behalf whom Appellant was obligated to pay upon the settlement of the case and receipt of its earned attorney fee.

Consequently, the practical and real effect of the Court's unlawful *Ex Parte* Order, amounting to a miscarriage of justice, is that it has effectively suspended the general and ordinary business of Appellant. *Contra Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601–02, 553 S.E.2d 110, 121 (2001) (holding that it was error for the trial court to issue an *ex parte* order enjoining a partnership from accessing funds in its account and making lawful disbursements absent a hearing, stating that where "the factual basis for the TRO was not fully developed … a hearing on the matter was imperative."). And because the order was issued *ex parte* without notice to Appellant, such suspension of Appellant's general and ordinary business is expressly contrary to the strictures of Rule 65(e), SCRCP.

This additional infirmity constitutes reversible error on its own and the order should be dissolved for this additional reason with specific instruction to the circuit court on remand to comply with this requirement of the Rule.

CONCLUSION

Appellant respectfully requests an Order of this Court superseding and dissolving the *Ex Parte* Order entered by the circuit court, with the following specific instructions as to the conduct of the noticed hearing on Plaintiffs' underlying motion for temporary injunction, to include that:

i. The burden of satisfying the legal standard required for the entry of any injunction shall rest solely with the moving party, and the non-moving party is not required "to show cause" why an injunction should not be granted;

ii. Any order granting Plaintiffs' temporary injunction shall require the posting of a security or surety, as required by Rule 65(c), SCRCP, in an amount not less than the amount at issue in this lawsuit and enjoined;

iii. Any order granting an injunction shall set forth the reasons for its issuance under the appropriate standards set forth in the opinions of the Appellate Courts of this state, shall be specific in its terms, shall describe in reasonable detail the act or acts sought to be restrained and the basis therefore, as all required by Rule 65(c), SCRCP; and

iv. To include such just and reasonable relief as order by the Court.

Respectfully submitted,

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Columbia, South Carolina
October 2, 2020

EXHIBIT 1

ELECTRONICALLY FILED - 2020 Oct 01 8:01 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendant.	Civil Action No. 2020-CP-40-04603 **EX PARTE** **TEMPORARY RESTRAINING ORDER**

This matter comes before the Court on Plaintiffs' Motion for a Temporary Restraining Order prohibiting the law firm Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., from transferring, spending, pledging or otherwise encumbering the proceeds of a $75 Million wire transfer received from the State of South Carolina on September 29, 2020. The transfer was completed prior to a hearing before Judge McCaslin[1] to consider Plaintiffs' motion for a temporary and/or preliminary order enjoining the Defendant Wilson from paying the law firms.

Plaintiffs have now amended their Complaint to add the law firm defendants, thus bringing the current recipients of these disputed proceeds before this Court. Plaintiffs seek an *ex parte* temporary restraining order preventing Defendants from any disbursement of the funds prior to a hearing on their Motion for Preliminary Injunction. The purpose of a preliminary injunction is to

[1] The hearing was scheduled in consultation with counsel for Plaintiffs and Defendant Wilson before Judge McCaslin.

preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

Thus, to prevent transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina and to prevent irreparable harm to the Plaintiffs, the Court hereby grants Plaintiffs' motion for an *ex parte* temporary restraining order.

IT IS THEREFORE ORDERED, Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., members of their respective firms and anyone acting in concert with these Defendants, are hereby enjoined from transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina on September 29, 2020.

IT IS FURTHER ORDERED that the Defendants Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., shall appear before this Court on **October 7th, 2020 at 9:30am, via Webex Events – Hon. Alison Renee Lee Virtual Courtroom**, to show cause why Plaintiffs' motion for a preliminary injunction should not be granted. Defendant Law Firms should be served no later than 12pm noon, Friday, October 2, 2020.

AND IT SO ORDERED.

[Electronic Signature to Follow]

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Richland Common Pleas

Case Caption:	South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number:	2020CP4004603
Type:	Order/Temporary Injunction

IT IS SO ORDERED!

s/ Alison Renee Lee

EXHIBIT 2

ELECTRONICALLY FILED - 2020 Sep 25 11:58 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-_____ **SUMMONS**

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the Plaintiffs or their attorney, James M. Griffin of Griffin Humphries LLC, 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206-3135, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Badge Humphries
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Attorneys for Plaintiffs

Columbia, South Carolina
September 25, 2020

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-_____ **COMPLAINT**

NOW COME the Plaintiffs, by their undersigned attorneys, and as a Complaint against the Defendant, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation ("SCPIF") is a corporation, not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest including the upholding of the Constitution and laws of the State of South Carolina.

2. Plaintiff John Crangle is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated.

3. Defendant Alan Wilson is the Attorney General for the State of South Carolina.

4. This Court possesses jurisdiction under S.C. Constitution, Art. I, § 8, under S.C. Code Ann. § 15-53-10 *et seq.,* known as the Uniform Declaratory Judgment Act, and under the following decisions, which address public importance standing and citizen or taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina*

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Public Interest Foundation v. Lucas, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Friends of the Hunley,* 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

5. This action raises constitutional and statutory issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the issues this action raises.

FACTS

6. On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade

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plutonium at the Savannah River Site ("SRS"). Affidavit of James M. Griffin, Sept. 25, 2020 (attached hereto as Exhibit A and hereinafter referenced as "Griffin Aff."), Ex. 1.

7. The agreement brokered by Governor Hodges is codified at Title 50, United States Code, Section 2566 ("Section 2566").

8. Section 2566 provides for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility at the SRS (the "MOX Facility") to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors. The MOX Facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019.

9. If the DOE did not meet the MOX production objective by January 1, 2014, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2016, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to SRS between April 15, 2002 and January 1, 2022, no later than January 1, 2022.

10. The statute further provides that "[i]f the MOX production objective is not achieved as of January 1, 2016, the Secretary [of the DOE] shall, subject to the availability of appropriations, pay to the State of South Carolina . . . for economic and impact assistance an amount equal to $1 million per day for each day, not to exceed $100 million per year." 50 U.S.C. § 2566(d)(1).

11. The DOE has never met the milestones set forth in 50 USC § 2566.

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12. Under the terms of the Settlement Agreement, Defendant Wilson agreed on behalf of the Citizens of South Carolina to forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of violations of 50 USC § 2566 until 2037. Griffin Aff., Ex. 1, ¶ 5(b).

13. In exchange, the United States agreed to an immediate payment to the State of South Carolina in the amount of $600 million. *Id.* ¶ 5(a).

14. The Settlement Agreement resolves "all claims relating to economic assistance payments or removal of plutonium that have arisen, or will arise." *Id.* ¶ 13.

15. Defendant Wilson announced at a press conference that he intends to pay two private law firms $75 million from the $600 million economic impact and assistance payment for their legal services in representing the State.

16. Upon learning of Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." Griffin Aff., Ex. 2.

17. Governor McMaster concluded the letter stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.*

18. First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that State law requires the entire amount be deposited into the State's General Fund. Griffin Aff., Ex. 3.

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Attorney General Wilson Does Not Possess Authority to Use Proceeds from the U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to South Carolina to Pay Private Law Firms

19. The payment of $75 million to private law firms from a settlement of economic impact and assistance payments owed by the DOE to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution.

20. When money under a settlement agreement is payable directly to the State, as in the case with the Settlement Agreement, the proceeds must be deposited in the General Fund, and only the Legislature controls its appropriation.

21. Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement.

22. In this matter, neither the court order nor the settlement exception applies.

23. There is not any order awarding attorneys' fees.

24. The Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees.

25. Rather, the United States expressly disclaims any liability for attorneys' fees in Section 5(a) of the Settlement Agreement, which provides for "[i]mmediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1, § 5(a) (emphasis added).

26. Section 5(a) of the Settlement Agreement clearly requires that payment of the entire $600 million be made directly to the State of South Carolina.

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27. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million, which is required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.

28. The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act ("Federal Funds Oversight Act") specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et. seq.*

29. Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office ("EBO") and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30.

30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay $75 million to the law firms from the $600 million his agency will receive through this settlement.

31. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

32. Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.")

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33. Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.*

34. Defendant Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order

35. Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in this case appears to be patently unreasonable.

36. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3.

37. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

38. The lawyers brought suit to collect a statutory payment for economic impact and assistance of $100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.

39. The DOE never contested that it failed to comply with federal law.

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40. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.

41. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 Million assistance payment for failing to comply with the statute.

42. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4.

43. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.

44. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5.

45. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.

46. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

47. Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6.

48. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated. The Settlement

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Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *Id.*, Ex. 2.

49. In apparent recognition that contingency fee agreements entered into with the State of South Carolina may produce an unreasonable fee award, the fee agreement entered into with the law firms expressly provides that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7.

50. There is nothing prohibiting Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.

51. Furthermore, a payment of $75 million to the law firms exceeds the amount of fee that they would be entitled to receive under the contingency fee agreements entered with these firms.

52. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to$150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

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53. Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

54. The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019, the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9.

55. On June 7, 2019, Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

56. Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court.

57. The amended fee agreement was executed on June 13, 2019, by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

58. Under the terms of the amended contingency fee agreement, Willoughby & Hoefer is being paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina.

59. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

60. Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court.

61. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

62. The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000.

63. The fee agreement was entered into by Defendant Wilson on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract.

64. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

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WHEREFORE, Plaintiffs pray the Court:

1. Declare that Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit $600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;
2. Declare that Section 2-65-30 prohibits the Attorney General from spending any portion of the $600 million in federal funds unless and until he receives authorization from the EBO;
3. Declare that the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;
4. Declare that the Attorney General's intended payment of $75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause;
5. Declare, in the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable;
6. Enjoin, temporarily and permanently, the payment of attorneys' fees;
7. Grant Plaintiffs their costs and attorneys' fees under Section 15-77-300 of the South Carolina Code of Laws; and in the alternative, grant Plaintiffs their reasonable attorneys' fees and costs from the funds preserved through this action for the people of South Carolina, commonly known as the common fund doctrine; and
8. Grant Plaintiffs such other and further relief as the Court deems just and proper.

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Respectfully submitted,

s/ Badge Humphries

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Attorneys for Plaintiffs

September 25, 2020

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Exhibit A

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-_____ **AFFIDAVIT OF JAMES M. GRIFFIN**

Comes James M. Griffin and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.

2. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in the Complaint filed concurrently herewith.

Exhibit 1	Settlement Agreement, *South Carolina v. United States*, Fed. Cir. No. 19-2324 (Aug. 28, 2020)
Exhibit 2	Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General (Aug. 30, 2020)
Exhibit 3	Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General (Sept. 10, 2020)
Exhibit 4	Order, *South Carolina v. United States et al.*, Civil Action No. 1:16-cv-00391-JMC (D.S.C. Feb. 7, 2017), ECF No. 76
Exhibit 5	Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32
Exhibit 6	Federal Court Docket Sheets for *South Carolina v. United States*, Case Nos. 1:16-cv-00391-JMC, 1:17-cv-01068-MMS, and 1:18-cv-00038-MMS

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Exhibit 7	Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility
Exhibit 8	Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility (June 13, 2019)
Exhibit 9	*South Carolina v. United States*, 912 F.3d 720 (2019)
Exhibit 10	Petition for Writ of Certiori, *South Carolina v. United States*, No. 18-1531, 2019 WL 2464930 (4th Cir. June 7, 2019)
Exhibit 11	Reply Brief of Petitioner, *South Carolina v. United States*, No. 18-1531 (4th Cir. Sept. 24, 2019)
Exhibit 12	*South Carolina v. United States*, 140 S. Ct. 392 (2019)

Further Affiant sayeth naught.

Dated this 25 day of September, 2020.

James M. Griffin (S.C. Bar No. 9995)
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Subscribed and sworn to before me
by James M. Griffin on this
the 25 day of September 2020.

Notary Public, State at Large, South Carolina
My Commission Expires September 12, 2029

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EXHIBIT 1

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Fed. Cir. No. 19-2324
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiff's claims, without any further judicial proceedings and without there being any further trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, the parties stipulate and agree as follows:

1. In early 2000, the Department of Energy elected to construct a MOX fabrication facility (MOX Facility) at the Savannah River Site (SRS), Aiken, South Carolina. Since April 15, 2002, and through the present, the Department of Energy transferred defense plutonium or defense plutonium materials into the State of South Carolina in anticipation of disposition into MOX fuel or otherwise. For purposes of this agreement, the parties agree that the amount of defense plutonium or defense plutonium materials remaining at SRS amounts to nine and one-half (9.5) metric tons and will be referenced as the "subject defense plutonium or defense plutonium materials" in this agreement.

2. 50 U.S.C. § 2566, entitled "Disposition of Weapons-Usable Plutonium at Savannah River Site," provides a detailed plan for the MOX Facility, including a schedule for meeting the MOX production objective, defined as the average rate at which the MOX Facility converts defense plutonium into MOX fuel over a given period of time. Should the MOX

production objective not be achieved by certain dates, the statute requires the Department of Energy to make specified economic and assistance payments and to remove certain defense plutonium or defense plutonium materials transferred to the Savannah River Site but not processed by the MOX facility – referenced in this agreement as the subject defense plutonium or defense plutonium materials – from the State of South Carolina by certain deadlines.

3. The MOX production objective has not been met and will not be met.

4. On March 3, 2018, the State of South Carolina filed an amended complaint in the Court of Federal Claims, seeking economic and impact assistance payments for the years 2016 and 2017.

5. The parties subsequently entered into negotiations designed to resolve amicably all of the State of South Carolina's present and future claims relating to obligations of the Department of Energy imposed pursuant to 50 U.S.C. § 2566(c) and (d). The State of South Carolina has offered to settle this case based upon the following terms:

a. Immediate payment by the United States to the State of South Carolina in the amount of $600 Million (Six Hundred Million Dollars), inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.

b. The State of South Carolina shall forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of 50 U.S.C. § 2566(c) or 2566(d) until January 1, 2037.

c. After January 1, 2037, the State of South Carolina's rights and remedies under 50 U.S.C. § 2566(c) and 2566(d) will be governed solely by the terms of this agreement, as set forth below.

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d. If, on January 1, 2037, 9.5 metric tons of the subject defense plutonium or defense plutonium materials have not been removed from the State of South Carolina, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during the time period from the signing of this Agreement to January 1, 2037, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be multiplied $1.5 Billion (One Billion Five Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy to the State of South Carolina by April 1, 2037. This payment shall be in full satisfaction of any claim for economic and impact assistance payments pursuant to 50 U.S.C. § 2566(d)(2) owed to the State of South Carolina from 2022 through 2036.

e. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during that calendar year, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be

multiplied by a sum of money representing $1 Million (One Million Dollars) per day for each day during that said year in which there remains a portion of the said 9.5 metric tons, with said sum of money to be capped for any given year at $100 Million (One Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy by December 31 of that particular calendar year, for which any of the 9.5 metric tons remains in the State of South Carolina, beginning with the year 2037.

f. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, the Department of Energy shall continue to remove from the State of South Carolina such remaining subject defense plutonium or defense plutonium materials. If, after December 31, 2036, the Department of Energy has removed less than 4.75 metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may immediately institute legal action to enforce this paragraph 5(f) removal requirement. If, after December 31, 2036, the Department of Energy has removed 4.75 or more metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may only institute legal action to enforce this paragraph 5(f) removal requirement after January 1, 2042.

6. The parties agree that the United States retains sole discretion in the method of removal of the subject defense plutonium or defense plutonium materials. The parties further agree that the determination of the amount of total material removed from the State shall be by certification of the Department of Energy, through a declaration by an appropriate Department official, pursuant to the provisions of 28 U.S.C. § 1746.

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7. The terms of this agreement will remain in effect until the United States removes 9.5 metric tons of the subject defense plutonium or defense plutonium material from the State of South Carolina, or until Congress amends 50 U.S.C. § 2566(c) or (d) with respect to the obligations of the Department of Energy for the removal of defense plutonium or defense plutonium material or payments to the State of South Carolina in a manner that is inconsistent with the terms and conditions of this agreement, whichever is earlier.

8. The State of South Carolina's offer has been accepted on behalf of the United States Attorney General.

9. Upon satisfaction of the terms set forth in paragraph 5(a), the State of South Carolina agrees to join with the United States in stipulating to dismissal, with prejudice, of the appeal pending in the Court of Appeals for the Federal Circuit.

10. Upon removal of the 9.5 metric tons of subject defense plutonium or defense plutonium materials, the State of South Carolina releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related or otherwise involved in: (a) this case, regardless of whether they were included in the complaint, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and (b) any and all outstanding obligations of the Department of Energy arising under 50 U.S.C. § 2566(c) or (d).

11. This agreement is in no way related to or concerned with any taxes for which the State of South Carolina is now liable or may become liable in the future as a result of this agreement.

12. The State of South Carolina warrants and represents that no other action or suit with respect to the claims advanced in this suit or otherwise referenced in paragraph 10 is

pending or will be filed in or submitted to any other court, administrative agency, or legislative body by the State of South Carolina. The State of South Carolina further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit. Should there be now or in the future any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement shall be refunded promptly by the State of South Carolina, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

13. This agreement is for the purpose of settling this case and all claims that the State of South Carolina may or could bring arising from obligations imposed on the Department of Energy pursuant to 50 U.S.C. § 2566(c) or 2566(d). The parties intend that this agreement will resolve all claims relating to economic and assistance payments or removal of plutonium that have arisen, or will arise, between 2016 and the date on which the Department of Energy completes removal of the subject 9.5 metric tons of defense plutonium or defense plutonium materials. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this agreement.

14. The Attorney General for the State of South Carolina represents that he is authorized to enter into this agreement on behalf of the State of South Carolina.

15. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

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AGREED TO:

UNITED STATES OF AMERICA

WILLIAM P. BARR
Attorney General
United States of America

CLAIRE MCCUSKER MURRAY
Principal Deputy Associate Attorney General

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director, National Courts Section

TARA K. HOGAN
Assistant Director
Department of Justice
Civil Division
Commercial Litigation Branch
Washington, DC

DATED: August 28, 2020

STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General
State of South Carolina
Columbia, SC

DATED: August 21, 2020

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EXHIBIT 2

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HENRY MCMASTER
GOVERNOR

August 30, 2020

The Honorable Alan M. Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Attorney General Wilson:

I recently received a copy of the Settlement Agreement you executed with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). As you know, I did not receive the Settlement Agreement until late last week, at which point you had already signed it on behalf the State. Having carefully reviewed the document and your outside counsel's responses to my immediate questions regarding the same, I am compelled to express my concerns regarding the Settlement Agreement.

First, I am not convinced that this long-term arrangement provides sufficient assurances that DOE will remove the plutonium from our State in a timely manner. Currently, federal law provides that all defense plutonium transported into the State between 2002 and the present must be removed from SRS by January 1, 2022. However, under the Settlement Agreement, it appears that DOE will not be required to remove this plutonium until January 1, 2037. And if DOE only removes half of the total amount currently at SRS by this new deadline, the State of South Carolina will be forced to forgo legal action until January 1, 2042. I understand that settlement negotiations are inherently fluid in nature and that the transfer of defense plutonium is not an expeditious process, but the Settlement Agreement does not appear to align with previous discussions. At bottom, I cannot support a compromise that extends the existing removal deadline by up to twenty years.

Second, after reviewing your counsel's responses to my questions regarding the anticipated use of the settlement proceeds, I must note my concerns regarding the payment of attorneys' fees. After years of DOE repeatedly ignoring its obligations and abandoning the MOX project, President Trump and his Administration have demonstrated their commitment to removing surplus plutonium from our State. Secretary Brouillette's willingness to address these inherited issues is

noted and most appreciated. However, the federal government's relatively recent attention to this important issue is due in no small part to our zealous advocacy and coordination with members of the congressional delegation. Accordingly, while I recognize that this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims, I simply cannot endorse the payment of $75 million in attorneys' fees under the circumstances.

To be clear, I appreciate your efforts to recover the economic and impact assistance payments owed to the State and your pursuit of this litigation more generally. However, as I have repeatedly conveyed, it is of paramount importance that South Carolina not become a permanent plutonium waste repository. Therefore, I cannot support a Settlement Agreement that extends DOE's existing removal deadlines by up to twenty years and potentially sidelines South Carolina's future leadership by restricting the State's ability to enforce its legal rights.

Yours very truly,

Henry McMaster

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EXHIBIT 3

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The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

140 N. Main St., Suite 102
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DAVID M. PASCOE
Solicitor

September 10, 2020

The Honorable Alan M. Wilson
S. C. Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear Attorney General Wilson:

I write to raise serious concerns about your intent to pay two law firms $75 Million from the proceeds of a $600 Million settlement with the United States Department of Energy (DOE). I believe such payment is prohibited by South Carolina law and appears to violate the canons of ethics which govern licensed attorneys. I request that you, Governor McMaster, and our legislative leaders get together to resolve these issues to avoid potential litigation.

South Carolina law prohibits the appropriation of State funds by any officer in the Executive Branch of government. The $600 Million allocated in the Settlement Agreement with DOE are public funds allocated to South Carolina. You, of all people, know that an Attorney General has no authority to direct how those public funds are spent. Recently, you filed a Brief in the South Carolina Supreme Court emphasizing the very point that executive officers do not have authority to direct funds from a settlement agreement.

The following is a specific quote from your Brief:

> Executive officers...possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund...See, *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623 (2002)["...there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation powers. Art. I, § 8.

State v. Quinn, Attorney General's Memorandum In Response to Court's Order of March 12 pg. 25.

This above quote is one of the few points I agree with in your Brief. When money is directed to go to the State's General Fund as in the case with the DOE Settlement Agreement, you nor the Governor have the authority to transfer those funds. Only the Legislature controls what happens with the $600 million.

The Legislature has spoken through S.C. Code Section 1-7-150. This statute requires you to deposit all funds received by judgment or settlement into the State's General Fund, and the exception for investigative costs and litigation costs awarded by court order or settlement in this statute clearly does not apply. There was not any order awarding attorneys' fees. The Settlement Agreement does not allocate any portion of the $600 Million to attorneys' fees. In fact, DOE specifically carved out attorneys' fees in the Settlement Agreement. Section 5(a) provides for:

> Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses*.

Section 5(a) clearly requires that payment of the entire $600 Million be made directly to the State of South Carolina, and S.C. Code Section 1-7-150 directs you to deposit $600 Million into the State's General Fund. These are public funds, not a slush fund to dole out money to private law firms.

Your agreement to pay private law firms also raises ethical concerns. Based upon the information I have been able to review, the agreement that you entered with these firms on behalf of the State appears to violate the South Carolina Rules of Professional Conduct. Rule 1.5 of the Rules of Professional Conduct, S.C. App Ct. Rule 407 states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Contingency fees are not exempt from this reasonable standard. *Id.* at Note 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. See, *Getzen v. L. Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006). At the very least, I believe it would be prudent to seek an opinion from the South Carolina Bar Ethics Advisory Committee regarding the fee amount.

The payment of a $75 Million fee for the services performed by the law firms in this matter seems arbitrary and unreasonable. This is public money. It belongs to the Citizens of South Carolina, and awarding private law firms $75 Million is unconscionable when one considers it is almost 13 times the total amount every Solicitor's Office in the State receives in annual state judicial circuit support. This is more than the State funding received by all 32 of the Solicitors' Offices and Public Defenders' Offices combined. It is more than our State provides our entire Judiciary in annual funding. In fact, it is even 5 times more than the annual base budget for the Attorney General's Office. Perhaps most egregious is your attempt to award more money to

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private law firms than will probably be received by the counties directly impacted by the storage of plutonium.

These law firms unsuccessfully filed suit to enforce a settlement reached by Governor Hodges which is codified in the United States Code at 50 USC § 2566. The federal statute requires DOE to pay South Carolina $100 Million per year for each year it fails to meet certain deadlines relating to the processing and disposition of surplus defense plutonium stored at the Savannah River Site (SRS). DOE never contested that it failed to comply with federal law. Rather, DOE took the position in federal court that Congress had not appropriated money from which DOE could pay the penalty.

Your lawyers first sued in federal court in South Carolina to collect the $100 Million penalty for failing to comply with the statute in 2017. The federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Claims. Subsequently, your lawyers refiled the same suit before the Court of Claims, this time seeking $200 Million because DOE had not complied with the statute for 2018. Once again, your lawyers lost the case. The Court of Claims ruled with DOE. Your lawyers then appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit. While the appeal was pending, you reached this settlement with DOE.

From court records, it does not appear your lawyers engaged in any discovery whatsoever. I can't find any record of them serving interrogatories; taking depositions; hiring experts; or obtaining documents from DOE. Instead, your lawyers only drafted pleadings and wrote briefs to address the legal question of whether DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. Quite frankly, I do not understand why our State felt the need to bring in private counsel in the first place to deal with a relatively straightforward issue that government leaders were ultimately able to negotiate among themselves.

Under the terms of the settlement, you have agreed on behalf of the people of South Carolina to forgo enforcing their federal rights to have the plutonium removed or processed for another 15 years. In exchange, DOE has agreed to pay South Carolina a substantially reduced penalty of $600 Million. As you acknowledged in your press release, this was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. Yet, you now plan to pay private lawyers a contingency fee on the entire $600 Million when they only sued for $200 Million. This makes absolutely no sense, and I agree with Governor McMaster's objection to your intention to pay $75 Million to these law firms.

The contingency fee agreement that you entered with these law firms is more favorable to the lawyers than your standard contingency fee agreements entered in other cases. Under the payment terms of your standard agreements, these law firms would have been entitled to receive approximately $25 Million, not $75 Million. Curiously, you have never posted the fee agreement for this matter on your office's official website, yet you have other contingency fee agreements posted: http://www.scag.gov/litigation-retention-agreements.

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Finally, this deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.[1]

$75 Million is an enormous amount of money that can be used to make a real difference in the lives of South Carolinians. You cannot lawfully give funds directed to go into the State General Fund to your political friends and even if you could, you should not. I request that you do the right thing as a constitutional officer of our State and seek approval from our General Assembly before you make any attempt to pay public funds to private law firms.

Respectfully yours,

David M. Pascoe, Jr.
First Circuit Solicitor

cc: The Honorable Henry D. McMaster, Governor
The Honorable Curtis M. Loftis, Jr., Treasurer
The Honorable Richard A. Eckstrom, Comptroller General
President Pro Tem Hugh K. Leatherman, Sr., South Carolina Senate
Minority Leader Nikki G. Setzler, South Carolina Senate
The Honorable James H. "Jay" Lucas, Speaker of the S. C. House of Representatives
The Honorable James T. Rutherford, Minority Leader of S. C. House of Representatives
The Honorable G. Murrell Smith, Jr., Chairman of S. C. House Ways and Means

[1] https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

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EXHIBIT 4

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

State of South Carolina, Plaintiff, v. United States; United States Department Of Energy; Dr. Ernest Moniz, *in his official Capacity as Secretary of Energy*; National Nuclear Security Administration; *and* Lt. General Frank G. Klotz, *in his official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security*, Defendants.	Civil Action No. 1:16-cv-00391-JMC **ORDER**

On April 25, 2016, Defendants United States, the United States Department of Energy ("DOE"), Dr. Ernest Moniz, the National Nuclear Security Administration ("NNSA"), and Lieutenant General Frank G. Klotz (collectively "Defendants") filed a motion to dismiss the complaint filed by Plaintiff, the State of South Carolina (the "State"), arguing, among other things, that the third cause of action in the complaint, seeking review of Defendants' alleged failure to act in compliance with 50 U.S.C. § 2566(d), should be dismissed because the court lacked subject-matter jurisdiction over it. (ECF No. 17.) Specifically, Defendants contended that sovereign immunity had not been waived with respect to the third cause of action because the only potential waiver applicable to that cause of action—that found in the Administrative Procedures Act, 5

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U.S.C. § 701, *et seq.*—is not available where, as here, another court, such as the Court of Federal Claims ("CFC") provides an adequate remedy for the challenged agency action at issue. (*See id.* at 30-34.)

By order entered October 31, 2016, the court agreed with Defendants that the court lacked subject matter jurisdiction over the State's third cause of action because, pursuant to its jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346, 1491, the CFC provides an adequate remedy for the agency action challenged in that cause of action and, therefore, Defendants had not waived sovereign immunity from suit in this court with respect to the complaint's third cause of action. (*See* ECF No. 56.) The court subsequently denied the State's motion for reconsideration of its rulings in the October 31, 2016 order. (*See* ECF No. 75.) Because the court was uncertain whether it should dismiss the third cause of action without prejudice to the State's ability to prosecute it in an original action filed with the CFC or instead should transfer the cause of action to the CFC, pursuant to 28 U.S.C. § 1631, the court directed the parties to file supplemental briefing on the issue and declined to decide Defendants' motion to dismiss the third cause of action until the briefs had been submitted. (*See* ECF No. 56 at 24-31.)

The parties have since filed their supplemental briefs. (ECF Nos. 63, 64.) The parties agree that the court should dismiss the cause of action without prejudice to the State's ability to prosecute it in an original action filed in the CFC rather than transfer it. (*See* ECF Nos. 63, 64.) Accordingly, for the reasons stated in the court's October 31, 2016 order (ECF No. 56), as well as in its order denying the State's motion for reconsideration (ECF No. 75) and in the parties' supplemental briefs, Defendants' motion to dismiss the complaint (ECF No. 17) is hereby **GRANTED IN**

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PART.[1] The third cause of action in the State's complaint (ECF No. 1 ¶¶ 97-112) is hereby **DISMISSED** without prejudice to the State's ability to prosecute it an original action filed in the Court of Federal Claims.

IT IS SO ORDERED.

J. Michelle Childs

United States District Court Judge

February 7, 2017
Columbia, South Carolina

[1] The court notes that Defendants' motion to dismiss is not fully disposed by this order. Defendants have moved to dismiss the first and second causes of action in the State's complaint on grounds that the court has yet to address. (*See* ECF No. 17.)

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EXHIBIT 5

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In the United States Court of Federal Claims

No. 18-38C
(Filed: August 20, 2019)

STATE OF SOUTH CAROLINA,	*	
	*	
Plaintiff,	*	50 U.S.C. § 2566; Appropriations;
	*	Cross-Motions for Summary Judgment;
v.	*	Economic and Impact Assistance Payments;
	*	Judgment Fund; RCFC 56
THE UNITED STATES,	*	
	*	
Defendant.	*	

Randolph R. Lowell, Columbia, SC, for plaintiff.

Tara K. Hogan, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff, the State of South Carolina, seeks an award of economic and impact assistance payments for 2016 and 2017 pursuant to 50 U.S.C. § 2566, which directs such payments if the United States Department of Energy ("DOE") fails to meet certain deadlines related to the processing and disposition of surplus defense plutonium stored at the DOE's Savannah River Site ("SRS").[1] Specifically, plaintiff contends that 50 U.S.C. § 2566(d) requires the DOE to pay it $1 million per day, up to a statutory cap of $100 million per year, for a total of $200 million. Both plaintiff and defendant move for summary judgment. For the reasons set forth below, the court grants defendant's motion and denies plaintiff's motion.

I. BACKGROUND

A. Facts

Following the end of the Cold War, the United States was challenged with finding a safe, secure method to dispose of large amounts of weapons-grade nuclear material, including weapons-grade plutonium, from both foreign and domestic nuclear weapons production

[1] The SRS is a federally owned and operated facility that processes and stores nuclear material in support of national defense, nonproliferation, research, and environmental missions. Pl.'s Mot. App. 145.

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facilities. Am. Compl. Ex. 3 at 2. The need to securely store these materials in a safe environment was paramount; however, there was also great promise in reprocessing this material into fuel for nuclear reactors. Id. at 3. If possible, enriched nuclear material would be repurposed into lower-grade fuel, and if the material was not suitable for conversion into fuel, it would be "immobilized" to render it difficult to use as a weapon.[2] Pl.'s Mot. App. 10. To comply with the terms of an agreement with the Russian Federation, which required irradiation to dispose of the material, the DOE determined that the best option would be irradiating the material in a nuclear reactor to degrade it. Id. at 9-10, 13, 19. See generally Am. Compl. Ex. 7.

In early 2000, the DOE selected the SRS to reprocess the material. Pl.'s Mot. App. 68, 77. Simultaneously, the DOE, interested in cost savings through facility closures, wanted to move the plutonium from the Rocky Flats DOE facility near Denver, Colorado, to the SRS. Id. at 82-86. While legislation for these activities was being considered, the governor of South Carolina expressed concern to the DOE regarding the storage of large amounts of weapons-grade nuclear material within the state's borders. Id. at 93-94 (letter from South Carolina Governor Jim Hodges to DOE Secretary Spencer Abraham, dated April 10, 2002). The governor's primary concern was that an agreement brokered between the state and the DOE to remove or reprocess the material would not be legally enforceable:

> I must insist on an ironclad agreement that is fully enforceable in a court of law. The stakes are too high to accept mere political assurances. I will not risk the health and welfare of South Carolina by allowing the enforceability of any agreement to be bound only by federal departmental policy that changes according to political considerations beyond our control.

Id. at 93; see also id. at 103-09 (agreement enclosed in April 11, 2002 letter from DOE Secretary Spencer Abraham to South Carolina Governor Jim Hodges).

Ultimately, on December 2, 2002, Congress enacted a statute, later codified at 50 U.S.C. § 2566, addressing the disposition of weapons-grade plutonium stored at the SRS. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3182, 116 Stat. 2458, 2747-50 (2002) (codified at 50 U.S.C. § 2566 (Supp. III 2004)). The statute provided for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility ("MOX facility") at the SRS to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors, id.; the MOX facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually, Pl.'s Mot. App. 146. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019. § 3182(a)(1)-(2), (g)(1), 116 Stat. at 2747-50. If the DOE did not meet the MOX production objective by

[2] Immobilization is a process of encasing fissile material in glass or ceramics, making it stable for storage and difficult to recover for use in a nuclear weapon. Pl.'s Mot. App. 16. Defense plutonium that was converted into fuel would be "irradiated" in a nuclear reactor. Id. Both methods render nuclear material difficult to transport, conceal, and process into a nuclear weapon. Id.

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January 1, 2011, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2011, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to the site between April 15, 2002 and January 1, 2017, by January 2017. Id. § 3182(c)(1)-(2), 116 Stat. at 2749. The DOE would also be required to remit economic and impact assistance payments to plaintiff in the amount of $1 million per day for each day that certain milestones went unmet, up to a maximum of $100 million per year. Id. § 3182(d)(1), 116 Stat. at 2749. These payments would come "from funds available to the Secretary [of the DOE] . . . ." Id.

In subsequent enactments of the statute, Congress changed deadlines for both MOX processing and material removal, and also changed the funding source for payment of economic and impact assistance. In 2005, Congress amended 50 U.S.C. § 2566 to make payment of economic and impact assistance "subject to the availability of appropriations." See Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 313(4)(A)(ii), 119 Stat. 2247, 2280-81 (2005). This language was retained in the versions of the statute reenacted in 2013 and 2014. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3116, 126 Stat. 1632, 2172-73; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3142(f), 128 Stat. 3292, 3900 (2014). The current version of 50 U.S.C. § 2566 provides that if the MOX production objective was not met, the DOE would be required to remove from South Carolina at least one metric ton of plutonium by January 1, 2016, and an amount of plutonium equal to all unprocessed plutonium shipped to the site from April 15, 2002, to January 1, 2022, no later than January 1, 2022. See 50 U.S.C. § 2566(c) (2012 & Supp. II 2015). It further provides that if the DOE missed the January 1, 2016 deadline, the DOE would be required to make economic and impact assistance payments to plaintiff beginning in 2016. Id. § 2566(d)(1).

In 2002, the DOE began shipping plutonium to the SRS. Am. Compl. ¶ 41; Answer ¶ 41. In 2016 and 2017, the DOE failed to achieve the MOX production objective, did not remove one ton of plutonium from South Carolina, and did not provide economic and impact assistance payments to plaintiff as specified in 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45.

B. Procedural History

On January 8, 2018, plaintiff filed a complaint in the United States Court of Federal Claims, seeking $100 million in economic and impact assistance payments it alleges it is owed for 2016, prejudgment and postjudgment interest, costs and attorneys' fees, and any further relief deemed proper. On March 6, 2018, plaintiff amended its complaint to add a claim for the $100 million of economic and impact assistance payments it alleges is owed for 2017.

Ten days after defendant filed its answer, plaintiff moved for summary judgment. Defendant then cross-moved for summary judgment. Briefing is now complete and, deeming oral argument unnecessary, the court is prepared to rule.

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II. STANDARD OF REVIEW

Both plaintiff and defendant move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. Id. at 324. Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1).

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the court must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Contessa Food Prods., Inc. v. Conagra, Inc., 282 F.3d 1370, 1376 (Fed. Cir. 2002) ("On summary judgment, the question is not the 'weight' of the evidence, but instead the presence of a genuine issue of material fact . . . .") (abrogated on other grounds by Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008) (en banc)); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment."); Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) ("[T]he Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues."). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. However, if neither party satisfies this burden on the filing of cross-motions for summary judgment, then the court must deny both motions. See First Commerce Corp. v. United States, 335 F.3d 1373, 1379 (Fed. Cir. 2003) ("When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration."); Bubble Room, Inc. v. United States, 159 F.3d 553, 561 (Fed. Cir. 1998) ("The fact that both the parties have moved for summary judgment does not mean that the court must grant summary judgment to one party or the other.").

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III. DISCUSSION

The parties have differing views concerning the issue now pending before the court. Plaintiff states that the issue is whether the United States is liable to make economic and impact assistance payments for 2016 and 2017 under 50 U.S.C. § 2566(d)(1), and suggests that the funds to satisfy the liability may come from appropriations already authorized or the Judgment Fund. Pl.'s Mot. Summ. J. 12, 15-16. Defendant argues that the issue is whether the United States is liable to make economic and impact assistance payments if Congress did not appropriate funds for the payments. Def.'s Cross-Mot. Summ. J. 7-8.

The parties agree that the DOE has not met critical milestones to process or dispose of plutonium as required by 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45. Defendant also agrees that had Congress appropriated funds for economic and impact assistance payments, the DOE would be required to remit those funds to plaintiff in accordance with the statute. See Def.'s Cross-Mot. Summ. J. 8. However, the parties disagree as to whether economic and impact assistance payments may be made from: (1) certain appropriated funds for activities already authorized or funds reprogrammed from those activities; or (2) the Judgment Fund. See id. at 11-22; Pl.'s Mot. Summ. J. 12, 15-16. Because these questions turn on the interpretation of law rather than findings of fact, this case is properly before the court on summary judgment.

A. Relevant Legal Standards

Central to the parties' competing contentions is the meaning of 50 U.S.C. § 2566(d)(1). Thus, the court turns to the text of that statute to ascertain how it should be construed. As originally enacted, this section provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2011, the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina each year beginning on or after that date through 2016 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of--
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. III 2004) (emphasis added).

In 2005, the background of 50 U.S.C. § 2566 and the purpose of the economic and impact assistance payments in 50 U.S.C. § 2566(d)(1) was discussed in the United States Senate:

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> In a sign of good faith to the State of South Carolina, language was negotiated . . . that required the [DOE] to convert one metric ton of defense plutonium into fuel for commercial nuclear reactors by 2011 or face penalties of $1 million per day up to $100 million per year until the plutonium is either converted into the fuel or removed from the State. It has never been the intention of South Carolina to receive penalty payments; the residents . . . simply sought reassurances that weapons-grade plutonium would not remain at [the] SRS indefinitely. South Carolina would not have accepted [the defense] plutonium without this statute.

151 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). Later in that session, a "technical correction" to 50 U.S.C. § 2566(d)(1) was proposed:

> It is also my intention to make a technical correction, in the future, to language contained in the conference report to the Fiscal Year 2006 Energy and Water Appropriations Act. This conference report contains a change to important authorizing language that would make these penalty payments "subject to the availability of appropriations."

Id. (statement of Sen. Graham).

The technical correction was made to the version of 50 U.S.C. § 2566 enacted in 2005; subsection (d) of that statute provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2014, the Secretary shall, subject to the availability of appropriations, pay to the State of South Carolina each year beginning on or after that date through 2019 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of–
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. V 2006) (emphasis added).

Subsequent versions of 50 U.S.C. § 2566 enacted on January 2, 2013, and December 19, 2014, retained the phrase "subject to the availability of appropriations" in subsection (d)(1). See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). Notably, other

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parts of the statute remained essentially unchanged from the version originally enacted, with the exception of the deadlines. For example, 50 U.S.C. § 2566(d)(2)(A) has consistently provided:

> (A) If, as of January 1, 2022, the MOX facility has not processed mixed-oxide fuel from defense plutonium and defense plutonium materials in the amount of not less than—
>
> (i) one metric ton, in each of any two consecutive calendar years; and
>
> (ii) three metric tons total,
>
> the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the removal by the Secretary from the State of South Carolina of an amount of defense plutonium or defense plutonium materials equal to the amount of defense plutonium or defense plutonium materials transferred to the Savannah River Site between April 15, 2002, and January 1, 2022, but not processed by the MOX facility.

50 U.S.C. § 2566(d)(2)(A) (2012 & Supp. II 2015) (emphasis added).

If defendant is liable to plaintiff under 50 U.S.C. § 2566(d)(1), funds to satisfy the obligation in the statute must come from a congressionally sanctioned source because, pursuant to the Appropriations Clause of the United States Constitution, the federal government may only spend money that Congress has appropriated. See U.S. Const. art. I, § 9 cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Congress may also require that funds only be used for specific programs or purposes. See Nutt v. United States, 837 F.3d 1292, 1295 (Fed. Cir. 2016) ("According to the Constitution's Appropriations Clause, 'funds may be paid out [by the Treasury] only on . . . the express terms of a specific statute.'" (quoting Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990) (alteration in original))). If Congress specifies a purpose for appropriated funds, "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2012).

If Congress elects to provide unrestricted, or "lump-sum," appropriations to an agency, those appropriations are normally allocated at the agency's discretion. See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); see also U.S. Government Accountability Office, Principles of Appropriations Law—Vol. II ("GAO Redbook") 6-5 (3d ed. 2006) ("A lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object

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described.").[3] The normally broad agency discretion to direct lump-sum appropriations may be limited when an agency is bound by a contract; in such circumstances, an agency may not avoid contractually obligated payments if unrestricted, i.e., lump-sum, funds are available. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 636-38 (2005). Agency discretion is also limited by line-item appropriations, in which Congress places conditions on how an appropriation may be spent. To determine whether an expenditure is permitted for a particular line item, agencies perform a "necessary expense" analysis. See GAO Redbook, supra, at 3-14 to 3-15. "Under the necessary expense doctrine, '[a]n appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.'" U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quoting GAO Redbook, supra, at 4-20). For an expense to be found necessary, (1) there must be a logical relationship between the expenditure and the appropriation; (2) the expenditure must not be prohibited; and (3) the expenditure must not be provided for in another appropriation. GAO Redbook, supra at 3-14 to 3-17.

B. Plaintiff May Not Receive Economic and Impact Assistance Absent a Congressional Appropriation for That Purpose

Although plaintiff and defendant agree that the DOE did not comply with the statute, they disagree as to whether any funds are available to satisfy the DOE's statutory obligation. See Pl.'s Mot. Summ. J. 12, 15-16; Def.'s Cross-Mot. Summ. J. 11-22. Defendant argues that, absent an appropriation, the DOE is not liable to plaintiff for any payments and, alternatively, that any liability that flows from the statute is limited to the amount Congress appropriated for economic and impact assistance. Def.'s Reply 1-2, 12. Plaintiff appears to concede that no funds were specifically appropriated for economic and impact assistance. See Pl.'s Reply 3. However, the lack of a specific appropriation does not per se remove the DOE's liability for economic and impact assistance payments. Rather, defendant's obligation to make economic and impact assistance payments manifested when it failed to comply with the terms of 50 U.S.C. § 2566. See Greenlee Cty. v. United States, 487 F.3d 871, 880 (Fed. Cir. 2007) ("We conclude that defendant's liability for . . . payments was limited to the amounts appropriated by Congress." (emphasis added)). The question remaining is the extent of defendant's liability, a question that is purely legal in nature.

Plaintiff advances two theories under which the DOE could remit economic and impact assistance payments without an additional congressional appropriation to the DOE: (1) the DOE could use existing lump-sum appropriations or (2) the DOE could reprogram funds Congress appropriated for other purposes. Pl.'s Mot. Summ. J. 15-25. The court examines them in turn.

[3] The first three chapters of the GAO Redbook are in the GAO Redbook's fourth edition, while the remaining chapters are in the third edition. Citations to the GAO Redbook are to the most recent version.

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1. Congress Did Not Provide Lump-Sum Appropriations in the Consolidated Appropriations Acts of 2016 and 2017

Under its first theory, plaintiff initially contends that there are lump-sum appropriations available to made the economic and impact assistance payments for 2016 and 2017. Pl.'s Mot. Summ. J. 15, 22. It primarily relies on the observation in Greenlee County that the United States Supreme Court ("Supreme Court") addressed the question of "what appropriation amounts are available?" in Cherokee Nation–in the context of a contract case–"that the presence of sufficient unrestricted lump-sum appropriations (not specifically appropriated for the program at issue) to meet the government's contractual obligation qualified as available appropriations." 487 F.3d at 880 & n.3, quoted in Pl.'s Mot. Summ. J. 15. In essence, plaintiff is suggesting that the principle espoused in Cherokee Nation–that a court can order an agency to use its lump-sum appropriations to satisfy a contractual obligation–should be extended to situations in which the government's obligation is only statutory in nature. See Pl.'s Reply 6.

Both Greenlee County and a related case, Prairie County, concern a government benefits program enacted to reimburse local governments for lost property tax revenues caused by the federal government's ownership of large amounts of land in their communities. See Prairie Cty. v. United States, 782 F.3d 685 (Fed. Cir. 2015); Greenlee Cty., 487 F.3d at 871. Because the federal government does not pay property taxes to local communities, Congress created a "Payment in Lieu of Taxes" ("PILT") program to compensate local governments for lost tax revenue. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 873-74. Although Congress designated a formula for reimbursing local governments, appropriations for the PILT program were insufficient to reimburse all qualifying communities to the amount yielded by the formula. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 874. Greenlee County and Prairie County, whose compensation fell short when appropriations for PILT were exhausted, separately filed suits in the United States Court of Federal Claims, followed by appeals to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Prairie Cty., 782 F.3d at 687-88; Greenlee Cty., 487 F.3d at 874-75.

In Greenlee County, the Federal Circuit observed that obligations in contractual relationships were distinguishable from obligations flowing from benefits programs. 487 F.3d at 878-79. While contractual obligations could not be avoided if unrestricted appropriations were available for payment, noncontractual statutory obligations, i.e., benefits, could be avoided if Congress circumscribed its liability in the statute itself. See id. at 879 ("The conclusion that [the statute] limits defendant's liability to the amount appropriated is particularly appropriate because [the statute] . . . involves a benefits program not a contract, and 'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated." (emphasis added)). Eight years later, the Federal Circuit in Prairie County again focused on the plain language of the statute: "Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability . . . or whether [the statute] imposes a statutory obligation to pay the full amount . . . regardless of appropriations by Congress." 782 F.3d at 690 (quoting Star-Glo Assocs., LP v. United States, 414 F.3d 1349, 1355 (Fed. Cir. 2005)). Even in a contractual relationship, however, payment requires an appropriation. See Greenlee Cty., 487 F.3d at 878 ("The Supreme Court has noted that, even in the contract context, the 'subject to the availability of appropriations' language means that the government is not contractually bound except to the extent that appropriations are available."

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(citing Cherokee Nation, 543 U.S. at 643)); see also id. ("[A] statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress. . . . [I]t is undisputed that if [a statute] use[s] the phrase 'subject to the availability of appropriations,' [plaintiff's] right to recover would be limited to the amount appropriated.").

The Federal Circuit has also distinguished between the analysis of language limiting liability in contractual relationships from the analysis of similar language in benefit payment statutes, concluding in the latter that congressional intent plays a larger role:

> [When] the government is not seeking to limit contractual liability, but to limit benefit payments, . . . considerations of predictability are far less significant, and . . . there is greater room to rely on other indicia of Congressional intent, such as legislative history, to ascertain the congressional purpose.

Star-Glo Assocs., LP, 414 F.3d at 1355.

The relationship between the plaintiff and the government in Cherokee Nation was contractual, unlike the relationship between the plaintiff and the government here. Compare Cherokee Nation, 543 U.S. at 639, with 28 U.S.C § 2566 (2012 & Supp. II 2015). Plaintiff concedes that defendant's liability in this case is based upon a statute and not a contract. See Pl.'s Reply 6-7 ("The State has not (yet) asserted a contract claim against the United States. . . . [T]his case is only about DOE's failure to meet its statutory obligation to provide the economic and impact assistance payments. . . ."). In the absence of any binding precedent or other legal support for extending the holding of Cherokee Nation to a purely statutory obligation, the court declines to do so. Nevertheless, it is necessary to examine whether 50 U.S.C. § 2566 allows for the use of lump-sum appropriations for economic and impact assistance and, if so, whether Congress made such appropriations in the pertinent Consolidated Appropriations Acts.

When a statute creates a right to compensation, but also limits the government's liability to the amount appropriated, the court must determine "whether there are appropriations available to satisfy the government's liability by considering whether the statute in fact limits the government's liability to the amount appropriated," and "what appropriations are available . . . to satisfy that liability." Greenlee Cty., 487 F.3d at 878. In this case, the statute conditions defendant's payments to plaintiff as "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). This language was first enacted in 2005, well before the DOE's violation of the statute in 2016. See § 313, 119 Stat. at 2280-81. Moreover, this specific language is directly addressed in Greenlee County: "'[S]ubject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." 487 F.3d at 878. Also important is the fact that the less restrictive "from funds available to the Secretary" in the originally enacted version of 50 U.S.C. § 2566(d)(1) was later changed to the more restrictive "subject to the availability of appropriations." Compare 50 U.S.C. § 2566(d)(1) (Supp. V 2006), with 50 U.S.C. § 2566(d)(1) (Supp. III 2004).

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"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978) (collecting cases). Here, Congress twice reenacted 50 U.S.C. § 2566 following the 2005 addition of the "subject to the availability of appropriations" language and the Federal Circuit's 2007 explanation of that language in Greenlee County, retaining that verbiage each time. See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). The court therefore may presume that Congress was aware that courts interpreted the phrase "subject to the availability of appropriations" as limiting the government's liability to the amount appropriated, and purposely retained this more restrictive language in subsequent reenactments.

Given the above, a plain reading of 50 U.S.C. § 2566(d)(1) evidences Congress's intent that payments for economic and impact assistance can only be made if (1) there is a specific appropriation for that purpose, or (2) there is a lump-sum appropriation that the DOE could use for that purpose. The parties do not dispute that Congress did not appropriate funds for the specific purpose of economic and impact assistance payments. Pl.'s Reply 9; Def.'s Reply 2. Plaintiff argues, however, that funds were available through lump-sum appropriations "legally available" to satisfy statutory obligations. Pl.'s Reply 3.

As plaintiff notes, "Congress appropriated approximately $18.59 billion and $19.69 billion to DOE for its 'Atomic Energy Defense Activities' for fiscal years 2016 and 2017, respectively." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 248-50 (fiscal year 2017). Of those amounts, "Congress directed that approximately $1.9 billion would be for 'Defense Nuclear Nonproliferation' each year." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 250-51 (fiscal year 2017). Congress further directed that the $1.9 billion be allocated to certain, specified programs, including:

- Global Material Security
- Material Management and Minimization
  - Nuclear Material Removal
  - Material Disposition
- Nonproliferation and Arms Control
- Defense Nuclear Nonproliferation R&D
- Nonproliferation Construction

Pl.'s Mot. Summ. J. 19-20; Pl.'s Mot. App. 195. Plaintiff asserts that the funds Congress allocated to these programs were lump-sum appropriations that the DOE could use to make economic and impact assistance payments. Pl.'s Mot. Summ. J. 19-20.

Defendant contends that the funds Congress provided for these programs were not lump sums. See Def.'s Cross-Mot. Summ. J. 13-14. In support of its argument, defendant relies on the 2016 and 2017 Consolidated Appropriations Acts, id., which incorporate, by reference, tables allocating funds for specific programs (as plaintiff recognizes). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 301(d), 129 Stat. 2242, 2417 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 301(d), 131 Stat. 135, 320; Pl.'s Mot. App. 166; see also Pl.'s Mot. App. 166, 186-201 (containing the tables). Defendant contends that the

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"DOE's appropriated funds are limited to the specific purposes and amounts provided in the tables contained within the explanatory statements accompanying the relevant [Consolidated Appropriations Acts]." Def.'s Cross-Mot. Summ. J. 14; see also id. at 15 ("'When an appropriation specifies the purpose for which funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds for the specified purpose.'" (quoting GAO Redbook, supra, at 4-11)).

Defendant is correct. The tables incorporated by reference into the Consolidated Appropriations Acts specify funding for specific programs, evidencing that the appropriations for Defense Nuclear Nonproliferation and its constituent programs were not lump-sum appropriations, which, by definition, fund multiple programs. GAO Redbook, supra, at 6-5. Plaintiff fails to acknowledge the import of the tables. See Pl.'s Reply 12 ("[T]hese subprogram appropriations are 'lump-sum' appropriations because they 'cover a number of specific programs, projects, or items.'"). Because of Congress's level of precision, the court is not persuaded that these appropriations were in fact "lump-sum appropriations." Consequently, the appropriations could not be used for economic and impact assistance payments.

2. Reprogramming Is Not Available for Economic and Impact Assistance Payments

Plaintiff alternatively argues that the economic and impact assistance payments could be provided from other funds that Congress appropriated to the DOE via a discretionary reallocation known as "reprogramming." Id. at 16-17. "Reprogramming" refers to "the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation." GAO Redbook, supra, at 2-44. Reprogramming, however, is subject to guidelines to prevent abuse or the allocation of funds to activities that are too far removed from Congress's intended purpose in providing the funds. See id. at 2-44 ("[A]gencies generally are free to reprogram, even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation."); see also id. at 2-45 ("Though agencies generally have authority to reprogram funds, Congress may limit this authority."). These limitations accord with the principle that funds appropriated for a particular purpose may not be used for any other purpose. See 31 U.S.C. § 1301(a)-(b).

Defendant argues that reprogramming funds for economic and impact assistance would effectively create a new program or activity because the purpose of economic and impact assistance is substantially different from the purposes of programs identified in the 2016 and 2017 Consolidated Appropriations Acts. Def.'s Reply 11. Defendant notes that those Acts "prohibit DOE from reprogramming funds to create, initiate, or eliminate a 'program, project, or activity.'" Id. (quoting § 301(f)(1), 129 Stat. at 2417; § 301(f)(1), 131 Stat. at 320). Defendant also observes that § 301(d) of each of these Acts incorporates, by reference, a table that specifically allocates appropriations to individual programs, projects, and activities. Def.'s Cross-Mot. Summ. J. 15. Defendant argues that because the purpose of economic and impact assistance payments are not reasonably related to the purposes for which Congress made appropriations in the 2016 and 2017 Consolidated Appropriations Acts, the funds appropriated in those Acts are not available to pay plaintiff or to be reprogrammed to pay plaintiff. Id. at 15-17.

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As an initial matter, plaintiff provides no legal support for the proposition that this court has the authority to direct an agency to reprogram funds appropriate for one purpose to another purpose. Nor is the court aware of any.[4] Moreover, even if the court could review an agency's decision to reprogram, or not to reprogram, appropriated funds, the record lacks any evidence indicating whether the DOE considered reprogramming funds or conducted an analysis to determine the feasibility of reprogramming funds. In other words, the court lacks the necessary administrative record to review the propriety of the DOE's decision.

Plaintiff also argues that a "necessary expense" analysis supports its contention that economic and impact assistance payments may be made from appropriations in the 2016 and 2017 Consolidated Appropriations Acts. See Pl.'s Reply at 13-14 ("The determinative issue in this case is whether the statutorily-mandated economic and impact assistance payments have a 'logical,' 'reasonable,' or 'sufficient' relationship to, and therefore constitute a necessary expense of, any of DOE's appropriations."). Id. But plaintiff gets ahead of itself. As noted above, an agency performs a "necessary expense" analysis to determine whether a prospective expenditure comports with appropriations Congress has provided. GAO Redbook, supra, at 3-17. As with its request that the court direct the DOE to reprogram funds to make economic and impact assistance payments, plaintiff provides no legal support for the proposition that the court has the authority to conduct a "necessary expense" analysis, and the court is unable to locate any. Moreover, even if the court could conduct such an analysis, the record lacks evidence that would be necessary for the court to proceed. Thus, the court declines to conduct the analysis.

Ultimately, to the extent that the DOE could exercise its discretion to make economic and impact assistance payments, the payments would need to be consistent with the purpose restrictions in the appropriation to be charged because the DOE is required to obey the restrictions Congress places on appropriations. See Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation . . . .'" (quoting UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984))). In the 2016 and 2017 Consolidated Appropriations Acts, the DOE was restricted from using appropriations to create or initiate a program, project, or activity. Thus, the DOE's reprogramming authority was limited to shifting funds within programs, projects, or activities that already existed. And both parties admit that no appropriations for economic and impact assistance were made in the 2016 and 2017 Appropriations Acts. Consequently, Congress provided the DOE with no mechanism through which it could reprogram funds to make economic and impact assistance payments.

Congress could have appropriated money for economic and impact assistance, or it could have broadened the DOE's discretion to reprogram funds. But it did neither. The court cannot ignore the limiting language in the statute–"subject to the availability of appropriations"–which courts have consistently held to limit government liability. The unique mention of economic and impact assistance payments in 50 U.S.C. § 2566, as well as the detail in the appropriations

[4] To the extent that reprogramming decisions are subject to judicial review, they would be reviewable under the Administrative Procedure Act ("APA"), see 5 U.S.C. § 702 (2012), but this court lacks jurisdiction to adjudicate APA claims, see Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

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Congress provided in 2016 and 2017, persuade the court that had Congress intended to appropriate funds for these payments, it would have made a specific appropriation. There is also evidence in the record that the purpose of the economic and impact assistance payments was to assure plaintiff that weapons-grade plutonium would not be stored at the SRS indefinitely. See Pl.'s Mot. App. 93, 100; see also 51 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). These facts support the DOE's failure to use existing appropriations to satisfy the obligation resulting from its failure to meet the MOX production objective.

Agencies must comply with the law and, where Congress has given direction on how to do so, agencies are not free to improvise. Although Congress originally provided that the DOE was required to make economic and impact assistance payments "from funds available to the Secretary [of the DOE]," 50 U.S.C. § 2566(d)(1) (Supp. III 2004), it subsequently narrowed the DOE's discretion, providing that economic and impact assistance payments were "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (Supp. IV 2006); 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). When Congress originally enacted 50 U.S.C. § 2566, the DOE arguably could have had discretion to reprogram funds to make economic and impact assistance payments, but the court cannot ignore that Congress has since intentionally and consistently restricted the DOE's discretion.

C. The Judgment Fund Is Not Available for Economic and Impact Assistance Payments

Finally, plaintiff argues that the economic and impact assistance payments could be paid from the Judgment Fund if there are no legally available appropriations. Pl.'s Mot. Summ. J. 12. Plaintiff is incorrect. Pursuant to the Appropriations Clause, "no money can be paid out of the Treasury unless it has been appropriated by Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). "The Judgment Fund is a permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States." 31 C.F.R. § 256.1(a) (2015); accord 31 U.S.C. § 1304 (providing that the Judgment Fund can be used "to pay final judgments, award compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law"). Significantly, the Judgment Fund may only be used when "payment is not otherwise provided for . . . ." 31 U.S.C. § 1304(a)(1). "Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment." GAO Redbook, supra, at 14-39.

The Judgment Fund was designed to expedite the administration of justice by enabling courts to issue awards without the need to obtain separate appropriations. Slattery v. United States, 635 F.3d 1298, 1316-17 (Fed. Cir. 2011) (en banc); see also United States v. Maryland ex rel. Meyer, 349 F.2d 693, 695 (D.C. Cir. 1965) ("The obvious purposes of the [Judgment Fund] are (1) to enable . . . prompt payment without awaiting a special appropriation, and (2) to relieve the United States of the obligation of paying interest, or of a bad conscience as it were for not doing so, while the principal remains unpaid.").

Plaintiff effectively seeks to exploit the flexibility of the Judgment Fund to circumvent Congress's failure to appropriate funds for economic and impact assistance. But, "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990).

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Two facts are fatal to plaintiff's argument: First, there is clear statutory language limiting the DOE's liability to the amount appropriated, and no funds were subsequently appropriated. Second, there is no contractual relationship available to complement the statutory language and thereby overcome the lack of an appropriation and that limiting language. Given these facts, to resort to the Judgment Fund would ignore the apparent Congressional intent not to appropriate for economic and impact assistance payments.

Congress created a benefit of economic and impact assistance in 50 U.S.C. § 2566 and outlined the circumstances under which plaintiff could receive payment. Congress then did not appropriate funds to make payments, choosing instead to fund other priorities. The record indicates that Congress did make restricted appropriations to the DOE that not only reserved funds for particular purposes, but also prohibited those funds from being used for other, unrelated purposes.

The Judgment Fund is a separate appropriation which is available to furnish awards when other appropriations are not legally available. But plaintiff is not merely asking for a damages award. Plaintiff is effectively asking for the Judgment Fund to be used to create an appropriation where none was made by Congress. Resorting to the Judgment Fund, however, bypasses the case's central question, answered above: Did Congress make any appropriations available to pay economic and impact assistance? The answer is clearly "no." The Judgment Fund cannot be manipulated to change the answer to this question from "no" to "yes." To hold otherwise would enable courts to circumvent congressional decisions not to act. Most importantly, allowing resort to the Judgment Fund in a case where Congress has also clearly limited the government's liability entangles the court in decisions reserved to Congress by the United States Constitution. The court declines to become so entangled.

Under the circumstances of this case, plaintiff's proper course to obtain economic and impact assistance is to request an appropriation from Congress.

IV. CONCLUSION

As set forth in more detail above, the court **DENIES** plaintiff's motion for summary judgment and **GRANTS** defendant's cross-motion for summary judgment. Plaintiff's complaint is **DISMISSED**. Each party shall bear its own costs. The clerk of court shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

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EXHIBIT 6

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U.S. District Court
District of South Carolina (Aiken)
CIVIL DOCKET FOR CASE #: 1:16-cv-00391-JMC

State of South Carolina v. United States et al
Assigned to: Honorable J Michelle Childs
Cause: 05:702 Administrative Procedure Act

Date Filed: 02/09/2016
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

State of South Carolina

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Defendant

Dr Ernest Moniz
in his official capacity as Secretary of Energy

represented by

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(See above for address)
LEAD ATTORNEY
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TERMINATED: 02/13/2017
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Defendant

National Nuclear Security Administration

represented by **Barbara Murcier Bowens**
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TERMINATED: 02/13/2017
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Defendant

Dr General Frank G Klotz
in his official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security

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Defendant

United States Department of Energy

represented by **Barbara Murcier Bowens**
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Martin Mason Tomlinson

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Date Filed	#	Docket Text
02/09/2016	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0420−6390222.), filed by State of South Carolina. Service due by 5/12/2016 (Attachments: # 1 Table of Exhibits to Complaint, # 2 Exhibit 1 (Am. Interim Action Determination), # 3 Exhibit 2 (SPD Supplemental EIS Factsheet), # 4 Exhibit 2 (SPD Supplemental EIS Factsheet), # 5 Exhibit 4 (Final Surplus Plutonium Disposition Supplemental Environmental Impact, # 6 Exhibit 5 (Excerpt from History of the U.S. Weapons−Usable Plutonium Disposition, # 7 Exhibit 6 (Report to Congress: Disposition of Surplus Defense Plutonium at Savan, # 8 Exhibit 7 (Record of Decision for PEIS), # 9 Exhibit 7 (Record of Decision for PEIS), # 10 Exhibit 9 (Excerpt from Surplus Plutonium Disposition Final EIS, Summary), # 11 Exhibit 10 (Record of Decision for SPD EIS), # 12 Exhibit 11 (PMDA), # 13 Exhibit 12 (Congressional Research Serv., Mem., U.S.−Russia Plutonium Management, # 14 Exhibit 13 Exhibit NRC EIS, # 15 Exhibit 14 (Press Release, No. PR−02−007), # 16 Exhibit 15 (Am. ROD for PEIS & SPD EIS), # 17 Exhibit 16 (Am. SPD EIS ROD), # 18 Exhibit 17 (Storage of Surplus Plutonium Materials at the Savannah River Site Su, # 19 Exhibit 18 (NRC Construction Authorization No. CAMOX−001), # 20 Exhibit 19 (DOE/NNSA Report to Congress), # 21 Exhibit 20 (Excerpt from Draft SPD Supp. EIS), # 22 Exhibit 21 (PMDA as amended by 2010 Protocol), # 23 Exhibit 22 (Letter to Secretary Moniz), # 24 Exhibit 22 (Letter to Secretary Moniz), # 25 Exhibit 24 (Letter of Atty General Wilson to Secretary Moniz), # 26 Exhibit 25 (FY2015 Budget Justification))(asni,) (Entered: 02/09/2016)
02/09/2016	2	Summons Issued as to United States Department of Energy, Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, U.S. Attorney and U.S. Attorney General. (asni,) Modified to edit text on 2/10/2016 (asni,). (Entered: 02/09/2016)
02/09/2016	3	Local Rule 26.01 Answers to Interrogatories by State of South Carolina.(asni,) (Entered: 02/09/2016)
02/18/2016	5	NOTICE of Appearance by William Henry Davidson, II on behalf of State of South Carolina (Davidson, William) (Entered: 02/18/2016)
03/31/2016	6	MOTION to Intervene by Southern Carolina Regional Development Alliance. Response to Motion due by 4/18/2016. (Attachments: # 1 Exhibit A − Complaint, # 2 Exhibit 1 to Complaint (Affidavit of Danny Black), # 3 Exhibit 2 to Complaint (South Carolina Promise Zone Fact Sheet))No proposed order.(Shealy, Samuel) (Entered: 03/31/2016)
04/06/2016	7	MOTION for Extension of Time to File Answer re 1 Complaint by Frank G Klotz, Ernest Moniz, United States, United States Department of Energy and National Nuclear Security Administration. Response to Motion due by 4/25/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) Modified to add filers on 4/7/2016 (asni,). (Entered: 04/06/2016)

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04/06/2016	8	**ORDER granting 7 Motion for Extension of Time to Answer Frank G Klotz answer due 4/25/2016; Ernest Moniz answer due 4/25/2016; United States answer due 4/25/2016; United States Department of Energy answer due 4/25/2016, National Nuclear Security Administration answer due 4/25/2016. Signed by Honorable J Michelle Childs on 4/6/2016.(asni,)** (Main Document 8 replaced on 4/6/2016) (asni,). Modified to edit text on 4/7/2016 (asni,). (Entered: 04/06/2016)
04/06/2016	9	SUMMONS Returned Executed by State of South Carolina. All Defendants. (Attachments: # 1 Summons Service on DOE, # 2 Summons Service on NNSA, # 3 Summons Service on Moniz, # 4 Summons Service on Klotz, # 5 Summons Service on Lynch, # 6 Summons Service on Nettles)(Lowell, Randy) (Entered: 04/06/2016)
04/06/2016	10	MOTION for Summary Judgment by State of South Carolina. Response to Motion due by 4/25/2016. (Attachments: # 1 Memo in Support, # 2 Exhibit Table of Exhibits, # 3 Exhibit 1 (Excerpt from D.J. Spellman et al., History of the U.S. Weapons–Usable Plutonium Disposition Program Leading to DOEs Record of Decision), # 4 Exhibit 2 (Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site), # 5 Exhibit 3 (Record of Decision (ROD) for Storage and Disposition of Weapons–Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS)), # 6 Exhibit 4 (Excerpt from Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS), Vol. I Part A), # 7 Exhibit 5 (ROD for SPD EIS), # 8 Exhibit 6 (Plutonium Management and Disposition Agreement (PMDA)), # 9 Exhibit 7 (Release No. PR–02–007), # 10 Exhibit 8 (Aff. of Jessie Hill Roberson (ECF No. 10), 1:02–cv–01426–CMC), # 11 Exhibit 9 (Ltr. of Hodges to Abraham (Apr. 6, 2001)), # 12 Exhibit 10 (Ltr. of Hodges to Abraham (Apr. 24, 2001)), # 13 Exhibit 11 (Ltr. of Hodges to Abraham (Jun. 13, 2001)), # 14 Exhibit 12 (Ltr. of Abraham to Hodges (Jun. 26, 2001)), # 15 Exhibit 13 (Ltr. of Card to Hodges, Peeler, and Wilkins (Aug. 27, 2001)), # 16 Exhibit 14 (Ltr. of Hodges and Condon to Abraham (Aug. 30, 2001)), # 17 Exhibit 15 (Ltr. of Abraham to Hodges (Sept. 21, 2001)), # 18 Exhibit 16 (Ltr. of Hodges to Abraham (Oct. 26, 2001)), # 19 Exhibit 17 (Ltr. of Hodges to Abraham (Apr. 10, 2002)), # 20 Exhibit 18 (Ltr. of Abraham to Hodges (Apr. 11, 2002)), # 21 Exhibit 19 (Ltr. of Hodges to Abraham (Apr. 11, 2002)), # 22 Exhibit 20 (Ltr. of Bates to Otis (Apr. 11, 2002)), # 23 Exhibit 21 (Am. ROD for SPD EIS), # 24 Exhibit 22 (Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis), # 25 Exhibit 23 (Ltr. of Trice to Congressman Wilson (Oct. 9, 2015)), # 26 Exhibit 24 (Amended PMDA), # 27 Exhibit 25 (CRS PMDA Report), # 28 Exhibit 26 (Excerpt from Draft SPD Supplemental EIS), # 29 Exhibit 27 (Excerpt from FY 2014 DOE Budget Justification), # 30 Exhibit 28 (Excerpt from FY 2015 DOE Budget Justification), # 31 Exhibit 29 (Ltr. to Moniz (Mar. 6, 2014)), # 32 Exhibit 30 (Excerpt from Consolidated Appropriations Act 2016), # 33 Exhibit 31 (Consolidated Appropriations Act FY 2016 Explanatory Statement), # 34 Exhibit 32 (Excerpt from FY 2017 DOE Budget Justification), # 35 Exhibit 33 (High Bridge Associates, Inc., Independent Assessment of the Impact of Disposing of Surplus Plutonium at WIPP), # 36 Exhibit 34 (Excerpt from Senate Armed Services Strategic Forces Subcommittee Hearing Transcript (Feb. 24, 2016)), # 37 Exhibit 35 (Excerpt from Senate Appropriations Subcommittee Hearing Transcript (March 16, 2016)), # 38 Exhibit 36 (Ltr. of Wilson to Moniz (Sept. 4, 2015)), # 39 Exhibit 37 (Ltr. of Haley to Moniz (Dec. 14, 2015)), # 40 Exhibit 38 (Ltr. of Moniz to Haley (Jan. 19, 2016)), # 41 Exhibit 39 (DOE/NNSA Report to Congress (Oct. 3, 2011)), # 42 Exhibit 40 (Environmental Assessment for Gap Material Plutonium Transport, Receipt, and Processing))No proposed order.(Lowell, Randy) (Entered: 04/06/2016)
04/18/2016	11	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by State of South Carolina.Reply to Response to Motion due by 4/28/2016 (Attachments: # 1 Exhibit)(Lowell, Randy) (Entered: 04/18/2016)
04/18/2016	12	MOTION for Extension of Time to File Response/Reply as to 6 MOTION to Intervene by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/18/2016)
04/19/2016	13	**TEXT ORDER granting 12 Motion for Extension of Time to File Response/Reply re 6 MOTION to Intervene Response to Motion due by 5/2/2016. Signed by Honorable J Michelle Childs on 4/19/2016.(asni,)** (Entered: 04/19/2016)

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04/21/2016	14	MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/9/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/21/2016)
04/21/2016	15	RESPONSE in Opposition re 14 MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment Response filed by State of South Carolina.Reply to Response to Motion due by 5/2/2016 (Lowell, Randy) (Entered: 04/21/2016)
04/22/2016	16	**ORDER granting 14 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment Response to Motion due by 5/25/2016. Signed by Honorable J Michelle Childs on 4/22/2016.(asni,)** (Entered: 04/22/2016)
04/25/2016	17	MOTION to Dismiss by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/12/2016. (Attachments: # 1 Exhibit A, MOX February 2013−14 Report, # 2 Exhibit B, HQ Signed Report 2015)No proposed order.(Bowens, Barbara) (Entered: 04/25/2016)
04/28/2016	19	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 04/28/2016)
05/02/2016	20	MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/19/2016. No proposed order.(Bowens, Barbara) (Entered: 05/02/2016)
05/02/2016	21	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 5/12/2016 (Bowens, Barbara) (Entered: 05/02/2016)
05/10/2016	25	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 05/11/2016)
05/11/2016	24	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 5/31/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/11/2016)
05/11/2016	26	**ORDER granting 24 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/11/2016.(asni,)** (Entered: 05/11/2016)
05/12/2016	27	RESPONSE in Opposition re 17 MOTION to Dismiss Response filed by State of South Carolina.Reply to Response to Motion due by 5/23/2016 (Attachments: # 1 Table of Exhibits, # 2 Exhibit 1 (Deadlines Table), # 3 Exhibit 2 (Hodges Ltr), # 4 Exhibit 3 (COA Table), # 5 Exhibit 4 (Transcript Excerpt))(Lowell, Randy) (Entered: 05/12/2016)
05/17/2016	28	Joint MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment , 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by State of South Carolina. Response to Motion due by 6/3/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/17/2016)
05/18/2016	29	**ORDER granting 28 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment, 20 MOTION to Stay Proceedings on Plaintiff's Motion for Summary Judgment Response to Motion to Stay due by 5/24/2016, Response to Motion for Summary Judgment due by 6/10/2016. Signed by Honorable J Michelle Childs on 5/18/2016.(asni,)** (Entered: 05/18/2016)
05/23/2016	31	Consent MOTION for Leave to File Excess Pages by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 6/9/2016. No proposed order.(Bowens, Barbara) (Entered: 05/23/2016)

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05/23/2016	32	**TEXT ORDER granting 31 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/23/2016.(asni,)** (Entered: 05/23/2016)
05/23/2016	33	REPLY to Response to Motion re 17 MOTION to Dismiss Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/23/2016)
05/24/2016	34	NOTICE of Hearing on Motion 10 MOTION for Summary Judgment, 6 MOTION to Intervene, 20 MOTION to Stay, 17 MOTION to Dismiss : Motion Hearing set for 6/30/2016 10:00 AM in Columbia # 3, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable J Michelle Childs. ***Please note this hearing will include all pending motions not ruled upon prior to the date of the hearing***(asni,) (Entered: 05/24/2016)
05/24/2016	35	RESPONSE in Opposition re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by State of South Carolina.Reply to Response to Motion due by 6/3/2016 (Lowell, Randy) (Entered: 05/24/2016)
05/25/2016	36	**ORDER AND OPINION denying 6 Motion to Intervene. Signed by Honorable J Michelle Childs on 5/25/2016.(asni,)** (Entered: 05/25/2016)
05/25/2016	37	REPLY to Response to Motion re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/25/2016)
06/10/2016	38	RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Exhibit 1, Record of Decision, Surplus Plutonium Disposition, 81 Fed. Reg. 19588 (Apr. 5, 2016), # 2 Exhibit 2, Declaration of Henry A. Gunter, # 3 Exhibit 3, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No., # 4 Exhibit 4, Department of Energy, Preferred Alternative for Certain Quantities of Plutonium, 80 Fed. Reg. 80348 (Dec. 24, 2015), # 5 Exhibit 5, Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, div. D, tit. III, Dec. 18, 2015, # 6 Exhibit 6, Explanatory Table, 114 Cong. Rec. 161, H10108–H10123 (daily ed. Dec. 17, 2015), # 7 Exhibit 7, Explanatory Statement, 114 Cong. Rec. 161, H10056, H10102–H10107 (daily ed. Dec. 17, 2015), # 8 Exhibit 8, Declaration of Peter H. Hanlon, # 9 Addendum Table of Exhibits)(Bowens, Barbara) (Entered: 06/10/2016)
06/15/2016	39	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 7/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 06/15/2016)
06/16/2016	40	**ORDER granting 39 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 6/16/2016.(asni,)** (Entered: 06/16/2016)
06/20/2016	42	REPLY to Response to Motion re 10 MOTION for Summary Judgment Response filed by State of South Carolina. (Attachments: # 1 Exhibit, # 2 Exhibit 1 (Ltr. of Del Vecchio), # 3 Exhibit 2 (Moniz Senate Test.), # 4 Exhibit 3 (Fact Sheet), # 5 Exhibit 4 (Rpt. to Congress), # 6 Exhibit 5 (DOE FY16 Budget Excerpt))(Lowell, Randy) (Entered: 06/20/2016)
06/20/2016	41	CORRECTED RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Corrected Memorandum in Opposition) Re–filed by Clerk to correct event type.(mdea) Modified on 6/21/2016 to correct entry number (mdea,). (Entered: 06/21/2016)
06/21/2016	43	**TEXT ORDER denying 20 Motion to Stay: This matter is before the court on Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20) seeking to stay all proceedings on Plaintiffs pending Motion for Summary Judgment (ECF No. 10) until the court adjudicates Defendants pending Motion to Dismiss (ECF No. 17). In support of their Motion to Stay, Defendants assert that all Plaintiffs claims are subject to dismissal on jurisdictional or other legal grounds and, therefore, concerns for judicial**

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		economy and litigation efficiency make it appropriate for the [c]ourt to resolve [D]efendants Motion to Dismiss before proceeding to summary judgment. (ECF No. 20 at 4.) Plaintiff opposes the Motion to Stay arguing that Defendants have not met their burden to demonstrate a need for a stay, and both judicial economy and the prejudice to South Carolina if such stay is granted weigh heavily in favor of denying the stay request. (ECF No. 35 at 1.) When considering a motion to stay, the district court should consider three factors: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non–moving party. Johnson v. DePuy Orthopaedics, Inc., No. 3:12–cv–2274, 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012) (granting stay pending a transfer of the case to MDL) (citation omitted). In view of these factors, the court finds that a stay would not serve the interests of judicial economy and could cause prejudice to Plaintiff. In this regard, the court understands that it will first have to address the merits of Defendants Motion to Dismiss asserting a lack of subject matter jurisdiction. In re Bulldog Trucking, Inc., 147 F.3d 347, 352 (4th Cir. 1998) (A federal court is required, sua sponte, to determine if a valid basis for its jurisdiction exists, and to dismiss the action if no such ground appears.) (citation omitted). However, the court is also persuaded that judicial economy will be best served by allowing the parties to proceed with their arguments relevant to Plaintiffs Motion for Summary Judgment at the June 30, 2016 hearing (ECF No. 34), even if the court has to allow for discovery and additional briefing subsequent to the hearing. Accordingly, the court DENIES Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20). Signed by Honorable J Michelle Childs on 6/21/16.(alew,) (Entered: 06/21/2016)
06/22/2016	44	MOTION to Appear Pro Hac Vice by Raphael Ortega Gomez by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/22/2016)
06/24/2016	45	MOTION to Appear Pro Hac Vice by Spencer Elijah Wittmann Amdur by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/24/2016)
06/27/2016	46	**TEXT ORDER granting 44 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/27/2016	47	**TEXT ORDER granting 45 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/30/2016	50	**Minute Entry. Proceedings held before Honorable J Michelle Childs: taking under advisement 10 Motion for Summary Judgment; 17 Motion to Dismiss. Motion Hearing held on 6/30/2016. Written order forthcoming. Court Reporter Kathleen Richardson. (mbro,)** (Entered: 06/30/2016)
08/18/2016	51	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Motion hearing held on June 30, 2016, before Judge J. Michelle Childs. Court Reporter/Transcriber Kathleen Richardson, RMR, CRR, Telephone number/E–mail Kathleen_Richardson@scd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction.. Redaction Request due 9/8/2016. Redacted Transcript Deadline set for 9/19/2016. Release of Transcript Restriction set for 11/16/2016. (kari,) (Entered: 08/18/2016)
09/15/2016	53	Letter from Counsel for the State. (Lowell, Randy) (Entered: 09/15/2016)
10/03/2016	55	Letter from Spencer E. Amdur. (Attachments: # 1 Letter, # 2 Press Release)(Bowens, Barbara) (Entered: 10/03/2016)
10/31/2016	56	**ORDER AND OPINION: The court declines to rule on Defendants' Motion to Dismiss 17 for failure to state a claim for which relief could be granted as to the**

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		removal claim under Fed. R. Civ. P. 12(b)(6) until supplemental briefs, herein described are submitted. The parties are DIRECTED to file briefs that address the following issues: 1. Whether the court should transfer the monetary claim to the CFC, pursuant to 28 U.S.C. § 1631. 2. Whether the court should dismiss the monetary claim without prejudice to the State's ability to refile the claim in an action in the CFC. The briefs shall comply with rules governing memoranda in Local Civ. Rule 7 (D.S.C.) and must be filed by November 30, 2016. Signed by Honorable J Michelle Childs on 10/31/2016.(asni,) (Entered: 10/31/2016)
11/18/2016	59	Consent MOTION for Extension of Time by State of South Carolina. Response to Motion due by 12/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 11/18/2016)
11/21/2016	60	**ORDER granting in part and denying in part 59 Motion for Extension of Time. The parties are directed to file their supplemental briefs in response to the court's October 31, 2016 order on or before December 5, 2016. The State is given no additional time by this order in which to file a memorandum in support of a motion to reconsider under Rules 59(e) or 60(b). Signed by Honorable J Michelle Childs on 11/21/2016.(asni,)** (Entered: 11/21/2016)
11/28/2016	62	MOTION for Reconsideration re 56 Order on Motion to Dismiss by State of South Carolina. Response to Motion due by 12/15/2016. (Attachments: # 1 Memo in Support)No proposed order.(Lowell, Randy) (Entered: 11/28/2016)
12/05/2016	63	REPLY by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 56 Order on Motion to Dismiss,,, *Defendants' Supplemental Brief.* (Bowens, Barbara) (Entered: 12/05/2016)
12/05/2016	64	REPLY by State of South Carolina to 56 Order on Motion to Dismiss,,, *State of South Carolina's Supplemental Brief.* (Roberts, John) (Entered: 12/05/2016)
12/16/2016	66	Joint MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 1/3/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 12/16/2016)
12/16/2016	67	RESPONSE in Opposition re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 12/28/2016 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Bowens, Barbara) (Entered: 12/16/2016)
12/19/2016	68	**ORDER granting 66 Motion for Extension of Time. Signed by Honorable J Michelle Childs on 12/19/2016.(mbro,)** (Entered: 12/19/2016)
01/11/2017	70	MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 1/25/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 01/11/2017)
01/11/2017	71	**TEXT ORDER granting 70 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 1/11/2017.(asni,)** (Entered: 01/11/2017)
01/13/2017	72	REPLY to Response to Motion re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by State of South Carolina. (Roberts, John) (Entered: 01/13/2017)
02/07/2017	75	**ORDER AND OPINION denying 62 Motion for Reconsideration re 56 Order on Motion to Dismiss. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,)** (Entered: 02/07/2017)
02/07/2017	76	**ORDER AND OPINION granting in part 17 Motion to Dismiss. The third cause of action in the State's complaint (ECF No. 1 97–112) is hereby DISMISSED without prejudice to the State's ability to prosecute it an original action filed in**

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		the Court of Federal Claims. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,) (Entered: 02/07/2017)
02/08/2017	77	**CONFERENCE AND SCHEDULING ORDER Rule 26(f) Conference Deadline 2/28/2017, 26(a) Initial Disclosures due by 3/14/2017, Rule 26 Report due by 3/14/2017, Motions to Amend Pleadings due by 4/24/2017, Plaintiffs ID of Expert Witness due by 5/24/2017, Defendants ID of Expert Witnesses Due by 6/23/2017, Records Custodian Affidavit due by 6/23/2017, Discovery due by 7/24/2017, Motion in Limine due by 11/3/2017, Motions due by 8/7/2017, Rule 26(a)(3) Disclosures due by 11/3/2017, Pretrial Briefs due by 11/28/2017, Bench Trial Deadline 12/5/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/08/2017	78	**MEDIATION ORDER Mediation Due by 7/31/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/13/2017	79	NOTICE of Appearance by Barbara Murcier Bowens on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Bowens, Barbara) (Entered: 02/13/2017)
03/10/2017	81	ADR STATEMENT/CERTIFICATION by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	82	Rule 26(f) Report by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	83	**AMENDED SCHEDULING ORDER Mediation concluded by 7/31/2017, Signed by Honorable J Michelle Childs on 3/10/2017. (asni,)** (Entered: 03/10/2017)
03/14/2017	84	**ORDER AND OPINION Defendants' motion to dismiss the State's complaint 17 is hereby GRANTED IN PART, with respect to the complaint's first cause of action, and DENIED IN PART, with respect to the complaint's second cause of action. The first cause of action in the State's complaint (ECF No. 1 at 84–88) is hereby DISMISSED. Signed by Honorable J Michelle Childs on 3/14/2017. (asni,)** (Entered: 03/14/2017)
03/20/2017	86	**ORDER AND OPINION granting in part and denying in part 10 Motion for Summary Judgment. Parties shall submit a joint written statement to the court on or before April 21, 2017, and, after reviewing the statement, the court will determine the need for further submissions or hearings. Signed by Honorable J Michelle Childs on 3/20/2017.(asni,)** Modified to edit text on 3/24/2017 (asni,). (Entered: 03/20/2017)
04/20/2017	88	NOTICE of Appearance by Jennifer J Aldrich on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	89	Consent MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/4/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.(Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	90	**TEXT ORDER granting 89 Motion for Extension of Time for the parties to submit the joint written statement. Signed by Honorable J Michelle Childs on 4/20/2017.(asni,)** (Entered: 04/20/2017)
07/31/2017	96	STATUS REPORT *(Joint Statement)* by State of South Carolina. (Lowell, Randy) supplement 97 added on 8/1/2017 (asni,). supplement added 100 added on 8/14/2017 (asni,). supplements added 103 104 8/22/2017 (asni,). (Entered: 07/31/2017)
07/31/2017	97	SUPPLEMENT by State of South Carolina *Proposing Injunctive Relief.* (Lowell, Randy) (Entered: 07/31/2017)
08/01/2017	98	**TEXT ORDER: By a March 20, 2017 order, the court granted in part the State of South Carolina's (the "State") motion for summary judgment in this matter,**

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specifically granting the State's requested relief for an injunctive order compelling the Secretary of Energy (the "Secretary") to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the State's summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties "to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]." (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that "[i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy." (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant "is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017," and that (2) one of the four attorneys representing them in this matter is "out of the office" on a scheduled one–week vacation in August and is "out of the office" for another week in August and five days in September while "handling depositions in another matter." (Id.) The State objects to Defendants' proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the State's consideration until July 20, and arguing that Defendant's proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the court's March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the court's March 20, 2017 order. (Id. at 2.) In the court's view, Defendants' April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants' proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the court's previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants' April 20, 2017 motion also contemplated that the parties would "propose" deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants' proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be "out of the office" for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants' proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the State's unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a lackadaisical approach on Defendants' part to complying with the court's order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly,

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Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017.: By a March 20, 2017 order, the court granted in part the State of South Carolinas (the State) motion for summary judgment in this matter, specifically granting the States requested relief for an injunctive order compelling the Secretary of Energy (the Secretary) to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the States summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]. (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that [i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy. (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017, and that (2) one of the four attorneys representing them in this matter is out of the office on a scheduled one–week vacation in August and is out of the office for another week in August and five days in September while handling depositions in another matter. (Id.) The State objects to Defendants proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the States consideration until July 20, and arguing that Defendants proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the courts March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the courts March 20, 2017 order. (Id. at 2.) In the courts view, Defendants April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the courts previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants April 20, 2017 motion also contemplated that the parties would propose deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be out of the office for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the States unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a

		lackadaisical approach on Defendants part to complying with the courts order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly, Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017. (Specific Document due by 8/11/2017.) Signed by Honorable J Michelle Childs on 8/1/2017. (asni,) (Entered: 08/01/2017)
08/11/2017	100	SUPPLEMENT by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 98 Order, Set Deadlines,,,

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CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:17-cv-01068-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Cause: 28:1491 Tucker Act

Date Filed: 08/07/2017
Date Terminated: 03/05/2018
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
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ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
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Date Filed	#	Docket Text
08/07/2017	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4115693) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 10/6/2017.** (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9

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		Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Civil Cover Sheet, # 16 Exh. List)(ac7) (Entered: 08/07/2017)
08/07/2017	2	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 08/07/2017)
08/07/2017	3	NOTICE of Designation of Electronic Case. (ac7) (Entered: 08/07/2017)
08/18/2017	4	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 08/18/2017)
10/06/2017	5	MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Hogan, Tara) (Entered: 10/06/2017)
10/06/2017	6	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/06/2017)
10/18/2017	7	MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA.**Response due by 11/1/2017.**(Hogan, Tara) (Entered: 10/18/2017)
10/24/2017	8	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/7/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/24/2017)
10/30/2017	9	RESPONSE to 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/6/2017.** (Lowell, Randolph) (Entered: 10/30/2017)
10/31/2017	10	REPLY to Response to Motion re 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA. (Hogan, Tara) (Entered: 10/31/2017)
11/07/2017	11	REPLY to Response to Motion re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA. (Hogan, Tara) (Entered: 11/07/2017)
11/20/2017	12	MOTION for Leave to File Surreply , filed by STATE OF SOUTH CAROLINA.**Response due by 12/4/2017.** (Attachments: # 1 Exhibit A)(Lowell, Randolph) (Entered: 11/20/2017)
11/28/2017	13	ORDER granting 7 Motion to Stay; granting 12 Motion for Leave to File Surreply. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/28/2017)
11/28/2017	14	SUR-REPLY re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 11/28/2017)
02/15/2018	15	SCHEDULING ORDER: **Defendant's Supplemental Brief due by 3/8/2018. Plaintiff's Supplemental Response Brief due by 3/29/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/15/2018)
03/05/2018	16	NOTICE of Voluntary Dismissal without prejudice, filed by STATE OF SOUTH CAROLINA (Lowell, Randolph) (Entered: 03/05/2018)
03/05/2018		Complaint dismissed pursuant to Rule 41(a)(1)(A)(i) this day. (ac7) (Entered: 03/06/2018)

PACER Service Center

Transaction Receipt			
09/01/2020 12:08:29			
PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:17-cv-01068-MMS
Billable Pages:	2	**Cost:**	0.20

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APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18-cv-00038-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Case in other court: 19-02324
Cause: 28:1491 Tucker Act

Date Filed: 01/08/2018
Date Terminated: 08/20/2019
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
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Date Filed	#	Docket Text

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01/08/2018	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4403717) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 3/9/2018.** (Attachments: # 1 Exh. List, # 2 Exhibit 1-13, # 3 Civil Cover Sheet)(ac7) (Entered: 01/08/2018)
01/08/2018	2	NOTICE of Directly Related Case(s) [17-1068C], filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 01/08/2018)
01/08/2018	3	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 01/08/2018)
01/08/2018	4	NOTICE of Designation of Electronic Case. (ac7) (Entered: 01/08/2018)
01/25/2018	5	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 01/25/2018)
03/05/2018	6	MOTION to Amend Pleadings - Rule 15 , filed by STATE OF SOUTH CAROLINA.**Response due by 3/19/2018.** (Attachments: # 1 Exhibit A - Proposed Amended Complaint)(Lowell, Randolph) (Entered: 03/05/2018)
03/06/2018	7	ORDER granting 6 Motion to Amend Pleadings - Rule 15(b). **Amended Complaint due by 3/9/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 03/06/2018)
03/06/2018	8	AMENDED COMPLAINT against USA, filed by STATE OF SOUTH CAROLINA. , filed by STATE OF SOUTH CAROLINA.Answer due by 3/20/2018. (Attachments: # 1 Exhibit Exhibit List, # 2 Exhibit Exhibits 1-14)(Lowell, Randolph) (Entered: 03/06/2018)
03/20/2018	9	ANSWER to 8 Amended Complaint , filed by USA.**JPSR due by 5/8/2018.**(Hogan, Tara) (Entered: 03/20/2018)
03/30/2018	10	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 4/27/2018.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 03/30/2018)
04/23/2018	11	Unopposed MOTION for Extension of Time until 5/18/18 to File Response as to 10 MOTION for Summary Judgment , filed by USA.**Response due by 5/7/2018.**(Hogan, Tara) (Entered: 04/23/2018)
04/24/2018	12	ORDER granting 11 Motion for Extension of Time to File Response re 10 MOTION for Summary Judgment. **Response due by 5/18/2018. Reply due by 6/8/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 04/24/2018)
05/08/2018	13	JOINT PRELIMINARY STATUS REPORT . (Hogan, Tara) (Entered: 05/08/2018)
05/16/2018	14	Unopposed MOTION for Extension of Time until 5/23/18 to File Response , filed by USA.**Response due by 5/30/2018.**(Hogan, Tara) (Entered: 05/16/2018)
05/17/2018	15	ORDER granting 14 Motion for Extension of Time to File Response re: 10 Motion for Summary Judgment. **Response due 5/23/2018. Reply due 6/13/2018.** Signed by Judge Margaret M. Sweeney. (pp) Service on parties made. (Entered: 05/17/2018)
05/23/2018	16	CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA, filed by USA.**Response due by 6/20/2018.**(Hogan, Tara) (Entered: 05/23/2018)
06/12/2018	17	Unopposed MOTION for Extension of Time to File Reply , filed by STATE OF SOUTH CAROLINA.**Response due by 6/26/2018.**(Lowell, Randolph) (Entered:

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		06/12/2018)
06/13/2018	18	ORDER granting 17 Motion for Extension of Time to File Combined Reply in Support of 10 MOTION for Summary Judgment and Response to 16 CROSS MOTION for Summary Judgment. **Plaintiff's Reply and Response due by 6/20/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 06/13/2018)
06/20/2018	19	REPLY to Response to Motion re 10 MOTION for Summary Judgment , 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 06/20/2018)
07/05/2018	20	REPLY to Response to Motion re 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by USA. (Hogan, Tara) (Entered: 07/05/2018)
10/24/2018	21	ORDER Staying Further Consideration of 10 MOTION for Summary Judgment filed by STATE OF SOUTH CAROLINA and 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA filed by USA., ORDER STAYING CASE **Status Report due by 11/26/2018** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 10/24/2018)
11/26/2018	22	JOINT STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 11/26/2018)
01/25/2019	23	JOINT STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 01/25/2019)
03/26/2019	24	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 03/26/2019)
05/28/2019	25	JOINT STATUS REPORT , filed by All Defendants. (Hogan, Tara) (Entered: 05/28/2019)
05/29/2019	26	STATUS REPORT ORDER **Status Report due by 6/28/2019** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 05/29/2019)
06/24/2019		**IMPORTANT NOTICE:** On **Monday, August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e-filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e-filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two-step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e-file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800-676-6856 or the Clerk's Office CM/ECF Help Desk at (202)357-6402.. (dh) (ADI) (Entered: 06/24/2019)

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06/28/2019	27	STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Exhibit Ltr of McMaster to Trump, # 2 Exhibit Ltr of Wilson to Barr)(Lowell, Randolph) (Entered: 06/28/2019)
06/28/2019	28	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 06/28/2019)
07/01/2019	29	ORDER LIFTING STAY and ORDER to file supplemental briefs. The stay on proceedings in this case is lifted. **The parties shall file supplemental briefs by Wednesday, July 31, 2019.** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 07/01/2019)
07/20/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after **August 26, 2019**. To link your upgraded PACER account **on or after August 26, 2019**, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357-6402. (dh) (ADI) (Entered: 07/20/2019)
07/31/2019	30	SUPPLEMENTAL BRIEF , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix to Supplemental Brief)(Lowell, Randolph) (Entered: 07/31/2019)
07/31/2019	31	RESPONSE to *Court's order*, filed by USA. (Hogan, Tara) (Entered: 07/31/2019)
08/16/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. **Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account**on or after August 26, 2019**. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you **MUST** know your CM/ECF login and password---do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk **immediately** at (202) 357-6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/20/2019	32	REPORTED OPINION denying 10 Motion for Summary Judgment; granting 16 Cross Motion. The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 08/20/2019)

08/20/2019	33	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of defendant. Plaintiff' complaint is dismissed. Each party shall bear its own costs. (Service on parties made.) (ac7) (Entered: 08/20/2019)
08/23/2019	34	NOTICE OF APPEAL as to 33 Judgment, filed by STATE OF SOUTH CAROLINA. Filing fee $ 505, receipt number 9998-5597681. Copy to CAFC. (Lowell, Randolph) (Entered: 08/23/2019)
08/26/2019		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 34 Notice of Appeal. (ac7) (Entered: 08/26/2019)
08/28/2019		CAFC Case Number 2019-2324 for 34 Notice of Appeal filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 08/28/2019)

PACER Service Center

Transaction Receipt

09/01/2020 12:04:02

PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:18-cv-00038-MMS
Billable Pages:	4	**Cost:**	0.40

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EXHIBIT 7

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LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A. and Davidson and Lindemann, P.A. ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of radioactive material at the Savannah River Site; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

ARTICLE I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016, and terminates on January 4, 2019, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the termination date, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

ARTICLE II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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1. Special Counsel assumes joint responsibility with the Attorney General's Office for the representation of the State in this litigation. However, the Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion shall appoint a designated assistant or assistants ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General's Office for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must identify the Attorney General or his designated assistant as counsel of record.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Attorney General's Office, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be provided to the Attorney General's Office in draft form in a reasonable and timely manner for review and approval. Special Counsel shall copy the Attorney General's Office on all case-related correspondence. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Attorney General's Office unless otherwise authorized by the Attorney General.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

7. The scope of Special Counsel's retention under this Agreement shall include appellate proceedings in this litigation.

8. The scope of Special Counsel's retention under this Agreement shall include any litigation initiated by the defendant(s) against the Attorney General or the State relating to this litigation.

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B. Non-Delegation of Work

Special Counsel may not, without the express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

C. Employment Status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

ARTICLE III. CASE MANAGEMENT

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within five business days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

At a minimum, status reports must include a description of the current status of the litigation, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

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Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com

Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

Special Counsel agrees to consult in advance, in person, by telephone, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

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Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings;
2. Dispositive motions;
3. Hearings;
4. Rulings;
5. Trials;
6. Settlement negotiations;
7. Appeals or Notice of Appeals;
8. Briefs filed by any party or entity;
9. Appellate arguments or decisions; and
10. Enforcement efforts.

Special Counsel agrees to meet with Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Should Special Counsel receive any public records request which seeks records related to this litigation, Special Counsel shall within one business day email that public records request to the Attorney General and obtain his approval before responding to that request. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from

destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

G. Settlement or Judgment Proceeds

All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's Office, which shall distribute them or have them distributed.

ARTICLE IV. COMPENSATION

A. Contingent Status

Notwithstanding any other term of this Agreement, Special Counsel shall receive no compensation of any kind for any services rendered unless the State of South Carolina receives a settlement or judgment in connection with this litigation.

B. Fee Schedule and Division

If the State receives a settlement or award in connection with this litigation, Special Counsel will be compensated from the litigation's gross recovery (any final settlement or judgment received by the State, including any post-judgment interest) for their services as follows:

1. The Attorney General's Office shall be reimbursed for all costs and expenses incurred in the litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit. Compensation under this Section IV.B.1 shall be deducted from the litigation's gross recovery before any further distribution is made. However, any attorneys' fees retained by the Attorney General's Office are not subtracted from the gross recovery for purposes of calculating Special Counsel's fee.

2. Special Counsel shall be reimbursed for certain costs and expenses incurred in this litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit, pursuant to Article V below. Compensation under this Section IV.B.2 shall be deducted from the litigation's gross recovery before any further distribution is made.

3. After any deduction from the gross recovery pursuant to Section IV.B.1 and IV.B.2, if the defendant(s) filed a separate suit against the Attorney General or the State regarding this litigation or this Agreement, Special Counsel shall be compensated for time spent defending against such suit at the following rates: $190 per hour for attorneys with 10 or more years of experience, $130 per hour for attorneys with more than 6 but less than 10 years of experience, $110 per hour for attorneys with more than 3 but less than 6 years of experience, $100 per hour for attorneys with less than 3 years of experience, and $60 per hour for paralegals. This applies only to time spent defending a

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lawsuit against the Attorney General or the State, and not to time spent on the litigation brought by the Attorney General against the defendant(s). Compensation under this Section IV.B.3 shall be deducted from the net recovery that remains after any deduction pursuant to Section IV.B.1 and IV.B.2 and before any further distribution is made.

4. After any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	24%
$25,000,000.01 to $50,000,000.00	21%
$50,000,000.01 to $75,000,000.00	18%
$75,000,000.01 to $100,000,000.00	16%
$100,000,000.01 to $125,000,000.00	13%
$125,000,000.01 to $150,000,000.00	10%
$150,000,000.01 to $250,000,000.00	5%
Greater than $250,000,000.00	2%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

6. If Special Counsel's fee is to be divided among lawyers who are not in the same firm, all lawyers receiving a fee must jointly submit (a) a declaration that the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and (b) the share each lawyer will receive, for written approval by the Attorney General's Office prior to the disbursement of any fee.

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C. Early Settlement

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees shall be one half of that specified in Section IV.B.4 above.

D. Non-Monetary Relief

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General in his sole discretion shall determine the monetary value to the State and attorneys' fees awarded based on such monetary value. Should the litigation be favorably resolved by solely non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), in consultation with the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee, Special Counsel is entitled to attorneys' fees at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2016 and not to exceed $100,000 for every calendar year thereafter; in such event the obligation for such attorneys' fees shall be upon the opposing party in the litigation or as appropriated by the General Assembly.

E. Compensation upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys' fees as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

F. No Other Payment Source

Special Counsel shall be reimbursed solely from the litigation's recovery. Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for their work in this litigation other than as set forth in Articles IV and V herein. Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

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G. Court Approval of Fees and Costs

When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

B. Expert Expenses

Special Counsel shall seek prior approval from the Attorney General for the retention of experts before incurring expenses related to such expert. Provided that the Attorney General has approved the retention of an expert, Special Counsel shall be reimbursed for the expert's retainer and fees incurred on an hourly basis. Other expert expenses will be reimbursed in accordance with the provisions of Section V.C.

C. Other Expenses

Special Counsel shall be reimbursed for other certain reasonable expenses and costs enumerated below.

1. Overnight lodging shall be reimbursed at actual cost up to a maximum of the rate published by the United States General Services Administration as of the date of the lodging exclusive of taxes and fees. There is no reimbursement for in-room internet, room service, business center services, gratuity, or any other hotel services or upgrades.

2. There is no reimbursement for meals.

3. Automobile travel shall be reimbursed at the rate per mile published by the Internal Revenue Service for business miles driven as of the date of the automobile travel. Special Counsel must document the date of the travel, the address of the departure location, the address of the arrival location, and the purpose of the travel in order to be eligible for reimbursement. Automobile travel reimbursement must not exceed the commercial coach fare available for the same travel. There is no reimbursement for gas.

4. All other travel or travel-related expenses, including airfare, train, bus, taxi, shuttle, parking, and baggage fees, will be reimbursed at actual cost. Airfare reimbursements must be for commercial coach fares. There is no reimbursement for seat upgrades, preferred seating, preferred boarding, internet access, or any other transportation related upgrade.

5. Actual expenses for court fees and both offensive and defensive discovery, including but not limited to filing fees, service of process, motions fees, document productions, transcripts, and witness fees, as well as mailing costs related thereto. Charges for priority or overnight mail services shall be reimbursed only if use of such services is necessary. Should the cost of printing and copying any particular item under this section exceed $100, such expense shall be reimbursed.

6. If Special Counsel determines that the hiring of an Outside Vendor for any discovery, electronic discovery, or printing related project is reasonably necessary to the litigation, Special Counsel shall assess and select an appropriate Outside Vendor based on objective criteria, including but not limited to expertise, experience, professional certifications, capacity, geographic location, and cost. The Attorney General retains the right to veto the selection of any Outside Vendor, and the Attorney General must give written approval prior to the use of or contracting with any Outside Vendor by Special Counsel.

7. There will be no reimbursement for printing, copying or mailing costs other than under Section C.5, secretarial, paralegal, or other staff costs or overtime, Westlaw, LexisNexis, PACER, or other research expenses, or any telephone calls, or any other expense, unless prior approval is obtained in writing from the Attorney General.

Any deviation from these rules, such as a hotel room higher than GSA rate, must be approved by the Attorney General's Office prior to Special Counsel incurring the expense. Should a significant, unusual, and unexpected expense arise that is necessary and germane to the litigation, Special Counsel may request approval from the Attorney General for such expense. The Attorney General shall, in his sole discretion, determine whether Special Counsel shall be reimbursed for such expenses.

D. Hourly Fee

Where Special Counsel seeks payment of an hourly fee for defending litigation brought against the Attorney General or the State under the terms of this Agreement, in accordance with Section IV.B.3, Special Counsel is required to submit detailed time records on a monthly basis for time worked over the previous month. The Attorney General's Office is not obligated to approve or reject any requests for hourly fees until after the conclusion of the litigation. Each monthly time record must clearly identify, by name or initials, the attorney or paralegal who performed the work, the date of the work, a detailed description of the work, and the number of hours or fraction thereof worked to the nearest tenth of an hour. When initials are used, the submission must identify all persons whose initials appear on the invoice and indicate whether each is an attorney or paralegal.

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No time records shall be submitted or paid for work occurring either prior to the effective date of this Agreement or after its termination.

To the extent time was spent working on both the case brought by the Attorney General and the case where the Attorney General or the State is a defendant, it is Special Counsel's duty to separate the time based on the proportion fairly allocated to each case and only seek payment of an hourly fee for time fairly spent defending the Attorney General or the State in a case brought by the defendant(s). The Attorney General, in his sole discretion, may decline to pay an hourly fee for time determined to be unnecessary, unreasonable, and/or not submitted in accordance with the requirements of this Agreement.

E. Form and Timing of Submission

Special Counsel shall submit invoices every 90 days for any expenses incurred over the previous 90 days for which Special Counsel seeks reimbursement; however, the Attorney General's Office is not obligated to approve or reject any expenses until after the conclusion of the litigation.

For an expense to be reimbursed, Special Counsel must provide an original receipt reflecting the charges. Credit card statements are not sufficient unless approved by the Attorney General's Office. The receipts will be scanned and submitted to the Attorney General's Office as a single PDF document.

In addition, Special Counsel will provide an Excel spreadsheet that contains, at a minimum, the following information:

1. Date of expense;
2. Amount of expense;
3. Amount of expense for which reimbursement is sought;
4. Description of expense; and
5. Page reference to the PDF document of receipts.

To the extent prior written approval of the Attorney General's Office was given for a particular expense, such approval shall be included with the invoice.

Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following the termination of this Agreement. All expenses must be itemized and no reimbursement will be granted for "miscellaneous" listings. The Attorney General may, in his sole discretion, decline to reimburse Special Counsel for any expenses determined to be unnecessary, unreasonable, improperly documented, or improperly submitted.

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ARTICLE VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform their duties

required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that it has no conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time for this representation. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment that may impact this representation.

F. Equal Opportunity

Special Counsel hereby represents that neither they nor their law firms discriminate on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Right to Contact

To clarify, nothing in this Agreement shall be construed to prohibit defendant(s) from discussing this case with the Attorney General without the presence of Special Counsel if the Attorney General agrees to such discussion.

H. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

I. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

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J. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

K. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

L. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

SPECIAL COUNSEL

Davidson & Lindemann, P.A.
By:
Its: Shareholder

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EXHIBIT 8

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AMENDMENT TO THE LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

Pursuant to Article VII.J of the Litigation Retention Agreement for Special Counsel Appointed by the Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility, the Litigation Retention Agreement is hereby amended as follows, effective as of January 1, 2019. Except as set forth in this Amendment, the Agreement is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between this amendment and the Agreement or any earlier amendment, the terms of this Amendment will prevail.

1. **The title of the Agreement is deleted in its entirety and replaced with the following:**

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO VIOLATIONS OF 50 U.S.C.A. § 2566 AND OTHER CLAIMS RELATED TO NEPA, CERTIFICATION, AND WAIVER CLAIMS REGARDING THE MIXED OXIDE (MOX) FACILITY AND PLUTONIUM DISPOSITION

2. **The preamble of the Agreement after the title and prior to the recitals is deleted in its entirety and replaced with the following:**

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A., for certain causes of action and claims as set forth herein, and Davidson, Wren & Plyler, P.A., for certain causes of action and claims as set forth herein, each respectively "Special Counsel" for the matters for which each law firm has been engaged.

3. **The recitals of the Agreement are deleted in their entirety and replaced with the following:**

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual

litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of defense plutonium at the Savannah River Site; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's attempts to terminate the MOX Project at the Savannah River Site without compliance with applicable law; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

4. Article I of the Agreement is deleted in its entirety and replaced with the following:

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016 and terminates at the completion of these litigation matters, unless the Attorney General or Special Counsel terminates this appointment earlier pursuant to Article VI of this Agreement. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

5. Article II.D is added to the Agreement as follows:

D. Legal Services

Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are retained as Special Counsel for litigation matters to enforce claims for injunctive relief under 50 U.S.C.A. § 2566(c) and for monetary claims under 50 U.S.C.A. § 2566(d). Willoughby & Hoefer, P.A., is further retained as Special Counsel for litigation matters: arising from and related to all other matters under 50 U.S.C.A. § 2566; in venues outside of the State of South Carolina arising from or related to any claim under 50 U.S.C.A. § 2566 or defense plutonium disposition at the Savannah River Site; and arising from NEPA, waiver, or certification claims regarding the MOX Facility project termination.

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6. Article III.B is deleted in its entirety and replaced with the following:

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); or (5) by email.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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Name: Kenneth P. Woodington
Davidson, Wren & Plyler, P.A.
Address: 1611 Devonshire Drive, Second Floor
Columbia, SC 29204
Phone: 803-806-8222
Email: kwoodington@dml-law.com

7. Article III.F is deleted in its entirety and replaced with the following:

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Public records requests are to be handled by the Attorney General's Office, and any public records requests received by Special Counsel shall be emailed to the Attorney General's Office within one business day of receipt. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

8. Article IV.B.4 is deleted in its entirety and replaced with the following:

4.i. For the matters for which Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are jointly engaged as Special Counsel in the District Court of South Carolina and Court of Federal Claims, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

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4.ii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of South Carolina related to the MOX Facility and its termination, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

4.iii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of Nevada related to the transport and storage of defense plutonium from South Carolina and its disposition, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating the claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court in the Ninth Circuit	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

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9. Article IV.B.5 is deleted in its entirety and replaced with the following:

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings for any matter under the ambit of Section IV.B.4.i only, Special Counsel shall receive the following in additional attorneys' fees for each individual appellate matter, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	3%
$25,000,000.00 to $50,000,000.00	3%
$50,000,000.00 to $75,000,000.00	3%
$75,000,000.00 to $100,000,000.00	2%
$100,000,000.00 to $125,000,000.00	2%
$125,000,000.00 to $150,000,000.00	1%
$150,000,000.00 to $250,000,000.00	1%
Greater than $250,000,000.00	1%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. These fees are not awarded for any matter for which Special Counsel receives additional attorneys' fees under Section IV.B.4.ii or iii. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

10. Article IV.C is deleted in its entirety and replaced with the following:

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees may be reduced to one half of that specified in Section IV.B.4 above, in the sole discretion of the Attorney General.

11. Article IV.D is deleted in its entirety and replaced with the following:

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Except as otherwise set forth and contemplated in the compensation and fee recovery provisions in Article IV.B.4 and 5 for those actions and the requested relief, should the litigation be favorably resolved solely by other non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), Special Counsel shall engage in best efforts to recover attorneys' fees from the opposing party in the litigation. If attorneys' fees cannot be recovered from the opposing party, the

Attorney General shall seek an appropriation of attorneys' fees from the General Assembly at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2017 and not to exceed $100,000 for every calendar year thereafter. In no event shall Special Counsel be entitled to attorneys' fees directly from the Attorney General's office except out of a monetary recovery as specified in Article IV.B.

[Signatures on following page.]

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ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

Date: 6/13/19

SPECIAL COUNSEL

Davidson, Wren & Plyler, P.A.
By: William H. Davidson, II
Its: Shareholder

Date: 6/2/19

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EXHIBIT 9

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912 F.3d 720
United States Court of Appeals, Fourth Circuit.

State of SOUTH CAROLINA,
Plaintiff – Appellee,
v.
UNITED STATES of America; United States Department of Energy; Rick Perry, in His Official Capacity as Secretary of Energy; National Nuclear Security Administration; Lisa E. Gordon-Hagerty, in Her Official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants – Appellants.

No. 18-1684
|
Argued: September 27, 2018
|
Decided: January 8, 2019

Synopsis

Background: State brought action against United States Department of Energy (DOE) and National Nuclear Security Administration (NNSA) and their officials challenging termination of mixed oxide fuel fabrication facility project in state. The United States District Court for the District of South Carolina, No. 1:18-cv-01431-JMC, J. Michelle Childs, J., 329 F.Supp.3d 214, granted state's motion for preliminary injunction, and defendants appealed.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

[1] state did not suffer sufficiently concrete injury-in-fact to support standing to bring action, and

[2] state's claims were not ripe for adjudication.

Vacated and remanded.

West Headnotes (12)

[1] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears burden of establishing standing to assert each of its claims.

1 Cases that cite this headnote

[2] **Federal Courts** Standing

Court of Appeals reviews question of whether plaintiff possesses standing de novo.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must show that: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to defendant's challenged action; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

To satisfy injury-in-fact requirement for standing, plaintiff must establish realistic danger of sustaining direct injury.

2 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

While it is true that threatened rather than actual injury can satisfy Article III standing requirements, not all threatened injuries constitute injury-in-fact; rather, injury-in-fact

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must be concrete in both qualitative and temporal sense. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[6] **Environmental Law** Government entities, agencies, and officials

State did not suffer sufficiently concrete injury-in-fact to support standing to bring action alleging that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state, despite state's contention that DOE's decision meant that it would become permanent repository of weapons-grade plutonium and be subject to environmental, health, and safety risks that entailed, where current environmental impact statement provided that DOE had 28 years to identify alternative method for disposing of nuclear material or otherwise removing it from state, Secretary of Energy had already certified that one potential alternative to MOX program existed, and Congress had put in place contingency plans for removal of plutonium shipped to site to forestall indefinite storage of plutonium in state. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[7] **Constitutional Law** Nature and scope in general

Federal Civil Procedure In general; injury or interest

Standing doctrine is built on separation-of-powers principles, and serves to prevent judicial process from being used to usurp political branches' powers.

1 Cases that cite this headnote

[8] **Federal Courts** Ripeness; Prematurity

Ripeness is question of subject matter jurisdiction.

10 Cases that cite this headnote

[9] **Federal Courts** Fitness and hardship

Question of whether claim is ripe turns on fitness of issues for judicial decision and hardship to parties of withholding court consideration.

4 Cases that cite this headnote

[10] **Administrative Law and Procedure** Ripeness; prematurity

In context of claims challenging agency actions, ripeness doctrine's purpose is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties.

5 Cases that cite this headnote

[11] **Administrative Law and Procedure** What constitutes finality in general

To be fit for judicial review, controversy should be presented in clean-cut and concrete form, which occurs when action is final and not dependent on future uncertainties or intervening agency rulings.

5 Cases that cite this headnote

[12] **Environmental Law** Ripeness

State's claims that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state were not ripe for adjudication, where state based its claims on premise that it would be permanent repository of weapons-grade nuclear material currently stored in state, but numerous contingent future events would have to occur before that would occur, including DOE's failure to identify alternative method of disposal and breach its commitment

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to dispose of waste, and failure by Congress and courts to set aside or refuse to enforce statutory mechanisms currently in place to ensure timely removal of nuclear material. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

***722** Appeal from the United States District Court for the District of South Carolina, at Aiken. J. Michelle Childs, District Judge. (1:18-cv-01431-JMC)

Attorneys and Law Firms

ARGUED: Andrew Alperin Rohrbach, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Randolph R. Lowell, WILLOUGHBY & HOEFER, PA, Columbia, South Carolina, for Appellee. ON BRIEF: Chad A. Readler, Acting Assistant Attorney General, Mark B. Stern, Daniel Tenny, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellants.

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Opinion

Vacated and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Niemeyer and Judge King joined.

WYNN, Circuit Judge:

The State of South Carolina brought this action to enjoin the United States of America and other Defendants[1] (collectively, "the United States") from terminating the construction of a mixed-oxide fuel nuclear processing facility located at the Savannah River Site in South Carolina. South Carolina alleges that the United States Department of Energy unlawfully failed to (1) prepare a supplemental Environmental Impact Statement analyzing the long-term storage of plutonium in the state; and (2) follow statutory waiver provisions for terminating construction of the facility. We conclude that South Carolina ***723** has not established standing to pursue either of these claims. Accordingly, we vacate the preliminary injunction imposed by the district court.

I.

Following the collapse of the Soviet Union and the end of the Cold War, the United States of America and the Russian Federation began a worldwide nuclear nonproliferation effort that included developing plans for the safe disposition of nuclear weapons material. As part of this nonproliferation pact, the Department of Energy began studying the effects of various nuclear waste storage and disposal strategies. In its initial 1996 study, the Department of Energy prepared an Environmental Impact Statement in accordance with Section 4332 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., analyzing the potential environmental consequences associated with the long-term storage of weapons-grade plutonium and highly enriched uranium prior to disposition. The Environmental Impact Statement addressed storage of these materials for a period of up to fifty years.

Ultimately, the Department of Energy determined that the best approach to nuclear waste disposal was a dual strategy involving (1) immobilization of a portion of the surplus plutonium in glass or ceramic; and (2) irradiation of the remaining plutonium in mixed oxide fuel (the "MOX process"). Both strategies would convert the surplus nuclear material into forms that would meet the National Academy of Science's Spent Fuel Standard, meaning that the material would be "inaccessible and unattractive for weapons" use. J.A. 78.

In 1997, the Department of Energy announced its intention to build a new mixed oxide fuel fabrication facility (the "MOX facility") to dispose of some of the nuclear material using the MOX process. Following completion of a supplemental Environmental Impact Statement and a Record of Decision in January of 2000, the Department of Energy announced that the MOX facility would be located at the Savannah River Site along South Carolina's border with Georgia. The facility's original production goals included disposition of up to thirty-three metric tons of nuclear material using the MOX process and immobilization of up to seventeen metric tons of additional nuclear material. As part of its supplemental Environmental Impact Statement, the Department of Energy continued to look at the environmental impacts of long-term plutonium storage.

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In 2002, the Department of Energy decided to drop the immobilization portion of the disposition strategy, leaving the MOX process as the sole plutonium disposal method. That same year, Congress directed the Secretary of Energy to submit a plan for the construction and operation of the MOX facility at the Savannah River site. Pub. L. No. 107-314, § 3182 (2002), *subsequently codified* as 50 U.S.C. § 2566. Congress further authorized the Secretary to take corrective actions if the construction timetable and operation schedule for the MOX facility were not being met. Additionally, Congress also required that in the event the MOX facility failed to achieve its production goals, the Department of Energy remove plutonium shipped to South Carolina for processing. *See* 50 U.S.C. § 2566(c), § 2566(e). Finally, as part of its findings, Congress mentioned the economic benefit that the MOX facility would bring to the State of South Carolina, noting that the economic benefit would not be fully realized unless the facility was built. *See* Pub. L. No. 107-314 at § 3181.

Three years later, in 2005, the Department of Energy began transferring plutonium to the Savannah River Site for conversion, and in 2007, construction began on ***724** the MOX facility. The original cost estimate for construction of the facility was $4.8 billion, with completion anticipated in 2016. And the original production goal estimate for the facility was to have thirty-four metric tons of defense plutonium processed no later than January 1, 2019. 50 U.S.C. § 2566(a)(2)(B).

These original estimates proved grossly inaccurate due to delays and cost overruns in the construction of the MOX facility. The Department of Energy now estimates cost for construction of the facility to be $17.17 billion, with completion now anticipated to be in 2048, over thirty years beyond the original estimated schedule.

Since 2014, the Department of Energy has sought to terminate the MOX program and pursue an alternative method of plutonium disposal known as "Dilute and Dispose," which it contends is less costly, faster, and safer. Under the Dilute and Dispose method, nuclear material would be "downblended" with inhibitor materials to reduce the plutonium content to less than ten percent by weight. Upon completion of the downblending process, the material would then be shipped from the Savannah River Site to the Waste Isolation Pilot Plant near Carlsbad, New Mexico, for permanent disposal.

Thus far, Congress has continued to fund construction of the MOX facility and has, to date, restricted the Department of Energy from utilizing MOX-related appropriations to begin termination of the program. To that end, in 2017, Congress enacted a statute providing that the Secretary of Energy "shall carry out construction and project support activities relating to the MOX facility." Pub. L. 115-91, § 3121(a), 131 Stat. 1283, 1892.

However, Section 3121(b) of that statute allows the Secretary of Energy to discontinue construction of the MOX facility if certain conditions have been met. Specifically, the Secretary of Energy must submit to the Congressional defense committees:

> (A) the commitment of the Secretary [of Energy] to remove plutonium intended to be disposed of in the MOX facility from South Carolina and ensure a sustainable future for the Savannah River Site;
>
> (B) a certification that—
>
> (i) an alternative option for carrying out the plutonium disposition program for the same amount of plutonium as the amount of plutonium intended to be disposed of in the MOX facility exists, meeting the requirements of the Business Operating Procedure of the National Nuclear Security Administration entitled "Analysis of Alternatives" and dated March 14, 2016 (BOP-03.07); and
>
> (ii) the remaining lifecycle cost, determined in a manner comparable to the cost estimating and assessment best practices of the Government Accountability Office ["GAO"], as found in the document of the Government Accountability Office entitled "GAO Cost Estimating and Assessment Guide" (GAO-09-3SP), for the alternative option would be less than approximately half of the estimated remaining lifecycle costs of the mixed oxide fuel program; and
>
> (C) the details of any statutory or regulatory changes necessary to complete the alternative option.

§ 3121(b)(1).

Additionally, in exercising his authority to discontinue construction of the MOX facility, the Secretary of Energy

> (1) shall concurrently submit to the Committees on Appropriations of both Houses of Congress the lifecycle

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cost estimate used to make the certification under section 3121(b) of such Act; and

***725** (2) may not use funds provided for the Project to eliminate such Project until the date that is 30 days after the submission of the lifecycle cost estimate required under paragraph (1).

Pub. L. No. 115-141, § 309(c), 132 Stat. 348, 530 (2018).

Pursuant to these provisions, on May 10, 2018, the Secretary of Energy submitted a letter to the Chairman of the House Armed Services Committee that purported to execute the authority of the Secretary of Energy under Section 3121(b) to discontinue construction of the MOX facility. The Secretary of Energy certified, *inter alia*, that (1) the Department of Energy is committed to removing plutonium from South Carolina; (2) an alternative option for carrying out the plutonium disposition, the Dilute and Dispose method, exists and has a lifecycle cost of less than approximately half of the remaining lifecycle cost for the MOX program; (3) the Department of Energy estimated the cost of the Dilute and Dispose approach in a manner compatible with the best practices of the GAO; and (4) the Department of Energy is committed to ensuring a sustainable future for the Savannah River Site. The Secretary of Energy further reported that the Department of Energy expected the total cost of disposition via the Dilute and Dispose method to be $19.9 billion, compared to $49.4 billion for the total cost of construction of the MOX facility and conversion of all the plutonium into MOX fuel.

In accordance with the Secretary of Energy's letter, the Department of Energy and the National Nuclear Security Administration issued a Partial Stop Work Order on May 14, 2018, ending all new contracts and hiring related to the MOX program. The Department of Energy further indicated its intent to issue a Full Stop Work Order and begin winding down the MOX program, including terminating employees currently working on the project, on or about June 11, 2018.

On May 25, 2018, before the Department of Energy issued a full stop work order, South Carolina brought this action in the United States District Court for the District of South Carolina and moved for a preliminary injunction barring the federal government from terminating the MOX program. In its complaint, South Carolina asserted that the United States (1) violated NEPA by failing to prepare a supplemental Environmental Impact Statement covering a period of more than fifty years and (2) failed to satisfy Section 3121(b) because of the alleged insufficiency of the Secretary of Energy's certifications.[2]

On June 7, 2018, the district court granted South Carolina's motion for preliminary injunction. The district court first found that South Carolina had standing due to environmental risks associated with long-term storage at the Savannah River Site, which abuts property owned by South Carolina. As to the merits, the district court held, in pertinent part, that South Carolina was likely to succeed on the merits of its NEPA claim and its claim that the Secretary of Energy's certifications were insufficient. The district court further found that South Carolina would be irreparably harmed absent a preliminary injunction and that the balance of equities tilted in South Carolina's favor. Thus, the district court enjoined the federal government from ceasing construction of the MOX facility and issuing the full stop work order. The United States timely appealed.

***726** After careful review, we dispositively hold that South Carolina failed to establish standing and therefore we do not reach the district court's determination on the merits of this matter.

II.

A.

On appeal, the United States contends that the district court erred in concluding that South Carolina established standing to pursue the two claims that serve as the basis of the district court's preliminary injunction order—the NEPA claim and the claim premised on the alleged insufficiency of the Secretary's certifications. The standing doctrine derives from "the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.' " *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 750–51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Standing implicates the court's subject matter jurisdiction. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 230 (4th Cir. 2008).

[1] **[2]** Here, South Carolina, as plaintiff, bears the burden of establishing standing to assert each of its claims. *See id.*;

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see also Lewis v. Casey, 518 U.S. 343, 359 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." (internal quotation marks omitted)). We review the question of whether South Carolina possesses standing de novo. *Frank Krasner Enters.*, 401 F.3d at 234.

[3] To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The United States contends South Carolina failed to show it has suffered an injury-in-fact sufficient to give rise to Article III standing.

[4] **[5]** To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "[W]hile it is true 'that threatened rather than actual injury can satisfy Article III standing requirements,' ... not all threatened injuries constitute an injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc)). "Rather, as the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.' " *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The requirement that an alleged injury be palpable and imminent ensures that the injury "is not too speculative for Article III purposes." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564–65 n.2, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[6] On appeal, South Carolina contends that it has suffered an injury-in-fact sufficient ***727** to support standing because "[South Carolina] is harmed by being rendered the permanent repository of weapons-grade plutonium as a result of [the Department of Energy's] decision to terminate the MOX Facility without first complying with NEPA or following the congressional mandates of § 3121." Appellee's Br. at 15–16. According to South Carolina, this "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 14. But this alleged injury is too speculative and thus, does not give rise to a concrete injury-in-fact sufficient to support either of South Carolina's claims.

The Supreme Court has repeatedly held that an alleged harm is too "speculative" to support Article III standing when the harm lies at the end of a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *see also*, *e.g.*, *Beck*, 848 F.3d at 275 (holding that plaintiffs, who received treatment at a medical center that suffered a data breach and alleged that they were at risk of experiencing identity theft, failed to establish standing because their theory of injury rested on an "attenuated chain of possibilities").

Illustratively in *Clapper*, the Supreme Court considered a challenge to Section 702 of the Foreign Intelligence Surveillance Act, which "authoriz[es] the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." 568 U.S. at 401, 133 S.Ct. 1138. The plaintiffs—a group of "attorneys and human rights, labor, legal, and media organizations"—alleged that their work demanded that they "engage in sensitive international communication with individuals who they believe are likely targets of surveillance under" Section 702, rendering it reasonably likely that the government would target and intercept the plaintiffs' communications. *Id.* at 401, 406, 133 S.Ct. 1138.

The Supreme Court held that the plaintiffs failed to establish a concrete injury-in-fact based on the possibility that their communications would be intercepted, explaining that a series of hypothetical events would have to occur before the government would intercept any particular plaintiff's communications. *Id.* at 1148–50, 133 S.Ct. 1138. The Court held that among other steps, the government would have to decide to invoke its Section 702 authority to target a non-U.S. person with whom a plaintiff communicated, a panel of federal judges would have to "conclude that the Government's proposed surveillance procedures satisfy [the statute's] many safeguards and are consistent with the Fourth Amendment," and the government would have to succeed in intercepting one of the target's communications with the plaintiff. *Id.* Thus, the Court held that that the "highly attenuated chain of possibilities, d[id] not satisfy

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the requirement that threatened injury must be certainly impending." *Id.* at 1148, 133 S.Ct. 1138 (citation omitted).

Applying *Clapper*, this Court reached a similar conclusion in *Beck*, in which a putative class of veterans who received medical treatment at a veterans' medical center alleged that they had been injured when two sets of records were stolen from the center. 848 F.3d at 262, 267. Although none of the named plaintiffs alleged any actual or attempted misuse of the personal information contained in their stolen records, they alleged that they suffered cognizable injuries-in-fact because they faced "(1) [an] increased risk of future identity theft, and (2) the costs of protecting against the same." *Id.* at 273. We concluded ***728** that both alleged injuries were too speculative to confer standing. *Id.* at 275–77. As to the alleged increased risk of identity theft, in particular, we explained that plaintiffs' theory of injury required us to "assume that the thie[ves] targeted the stolen items for the personal information they contained" and that the thieves would "then select, from thousands of others, the personal information of the named plaintiffs, and attempt successfully to use that information to steal their identities." *Id.* at 275. "This 'attenuated chain' cannot confer standing," we held. *Id.* We likewise rejected the plaintiffs' costs of mitigation theory of standing as a "repackaged" version of their first theory of standing, amounting to an effort to recoup "costs they incurred in response to a *speculative threat*." *Id.* at 276 (emphasis added) (quoting *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138).

Here, South Carolina's theory of standing—that it will become "the permanent repository of weapons-grade plutonium" and all the environmental, health, and safety risks that entails, Appellee's Br. at 15–16—rests on a similarly "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138. Between now and 2046—when the analysis in the current Environmental Impact Statement governing the risks associated with long-term storage of weapons-grade nuclear material at the Savannah River Site expires—the Department of Energy has twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina. The Secretary of Energy already has certified that one potential alternative to the MOX program exists, the Dilute and Dispose method. And the Department of Energy may identify and develop other methods during that twenty-eight-year period. Or the Department of Energy may decide to transfer the plutonium out of South Carolina to another location.

Furthermore, Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina. A federal statute requires that, by 2022, all additional plutonium transferred into South Carolina to the MOX facility, but not processed, must be removed. 50 U.S.C. § 2566(c)(2). Notably, because the Department of Energy already has failed to meet certain statutory time limits for disposing of nuclear material at the site, South Carolina has successfully brought suit pursuant to the Administrative Procedure Act to enforce these congressionally mandated deadlines via a mandatory injunction. *See id.* § 2566(c)(1) (requiring removal of one metric ton of plutonium no later than January 1, 2016); *South Carolina v. United States*, 243 F.Supp.3d 673 (D.S.C. 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018) (ordering the Department of Energy to remove one metric ton of plutonium within two years).

In sum, for South Carolina's alleged injury—becoming "the permanent repository of weapons-grade plutonium," Appellee's Br. at 15–16—to occur: (1) the proposed Dilute and Dispose method must fail; (2) the Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and (3) the Department of Energy must breach its statutory obligation to remove the nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation. At this juncture, before the Department of Energy has even had an opportunity to finish analyzing the Dilute and Dispose method, this "chain of possibilities" is too speculative to give rise to a sufficiently concrete injury-in-fact.

[7] That several of the links in this "chain of possibilities" the State's standing ***729** theory contemplates require our coordinate branches to either breach or abandon their existing commitments to ensure timely removal of the nuclear material at the Savannah River Site further weighs against treating the South Carolina's alleged injury as conferring standing. As *Clapper* recognized, the standing doctrine is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408, 133 S.Ct. 1138 (citations omitted); *see also Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315 (1984) ("[Article] III standing is built on a single basic idea—the idea of separation of powers."). To confer standing on South Carolina at this juncture based on an alleged injury —becoming the permanent repository of nuclear material— that the political branches already have made written and legally binding commitments to forestall would improperly

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"usurp the powers of the political branches." *Clapper*, 568 U.S. at 408, 133 S.Ct. 1138.

The "highly attenuated chain of possibilities" that must occur for South Carolina to become the permanent repository of nuclear material also sets this case apart from this Court's decision in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), upon which South Carolina principally relies.

Like the instant case, *Hodges* dealt with the storage of plutonium at the Savannah River Site. *Id.* at 436. In 2002, the Department of Energy issued a Record of Decision authorizing the immediate shipment of six metric tons of plutonium from a nuclear facility in Colorado to the Savannah River Site. *Id.* The Governor of South Carolina sought to enjoin shipment of the plutonium into South Carolina, alleging that the Department of Energy's *existing* Environmental Impact Statement, and its supplemental analyses to the Environmental Impact Statement, related to storage of plutonium at the Savannah River Site violated NEPA in several ways. *Id.* at 445. This Court held that the Governor adequately alleged an injury-in-fact to support his NEPA claims because the South Carolina owned property adjacent to the Savannah River Site. *Id.* "[T]he Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage" as a result of the Department of Energy's shipment of plutonium to the Savannah River Site and storage of that plutonium there, we explained. *Id.*

Here, unlike in *Hodges*, South Carolina does not argue that its injury, as a neighboring landowner, is attributable to the *current* storage of nuclear material at the Savannah River Site or the inadequacy of the Environmental Impact Statement pursuant to which the nuclear material is *currently* stored—a question that *Hodges* already resolved in the federal government's favor. *Id.* at 446–49. Rather, South Carolina contends it is injured because the termination of the MOX program renders it the *permanent* repository of the nuclear material when the Department of Energy has not issued an Environmental Impact Statement analyzing the environmental impact of the storage of the material at the Savannah River Site *beyond the year 2046*, the year when the existing Environmental Impact Statement's analysis terminates, or, allegedly, satisfies its statutory obligations in terminating the MOX program. There is a meaningful distinction between the alleged *immediate* environmental injuries associated with storing plutonium at the Savannah River Site, which were at issue in *Hodges*, and the alleged *future* adverse environmental impacts on South Carolina as a neighboring landowner if the Department of Energy continues to store the plutonium at the Savannah River Site *decades in the future*. That distinction is particularly meaningful because, as explained ***730** above, numerous contingencies must occur in order for the plutonium to remain in South Carolina after 2046, the year when South Carolina's alleged injury will mature.

In sum, the single theory of injury[3] that South Carolina relies on to support both of its claims is too speculative at this juncture to support Article III standing. The district court, therefore, was without jurisdiction to enter its preliminary injunction premised on those two claims.

B.

[8] For reasons similar to those that lead us to find that South Carolina lacks standing, we also find that the two claims at issue fail on ripeness grounds. Like standing, the ripeness doctrine "originates in the 'case or controversy' constraint of Article III." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 269 (4th Cir. 2013) (citations omitted). "Analyzing ripeness is similar to determining whether a party has standing." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). "Although the phrasing makes the questions of who may sue and when they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness." *Id.* (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)). As with standing, ripeness is a question of subject matter jurisdiction. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (citation omitted).

[9] **[10]** The question of whether a claim is ripe "turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) (citation omitted). In the context of claims challenging agency actions, like the two at issue, the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136,

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148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[11] To be fit for judicial review, a controversy should be presented in a "clean-cut and concrete form." *Miller*, 462 F.3d at 319 (citation omitted). This occurs when the action is "final and not dependent on future uncertainties or intervening agency rulings." *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (citation omitted). On the other hand, just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, a plaintiff's claim is not ripe for judicial review "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

[12] The two claims that South Carolina advances before this Court rest on the premise that South Carolina will be the permanent repository of the weapons-grade ***731** nuclear material currently stored at the Savannah River Site. But, numerous "contingent future events," *id.*, must occur before South Carolina becomes the *permanent* repository of the nuclear material, *see supra* Part II.A. In particular, the Dilute and Dispose method must prove unworkable. The Department of Energy must fail to identify an alternative method of disposal and breach its commitment to dispose of the waste. And Congress or the courts must set aside or refuse to enforce the statutory mechanisms currently in place to ensure timely removal of the nuclear material. All of these "future uncertainties," *Franks*, 313 F.3d at 195, lead us to conclude that the two claims at issue are not ripe for review at this time —at least as presented by South Carolina. Accordingly, the ripeness doctrine provides an additional basis for our holding that the district court was without jurisdiction to enter the preliminary injunction.

III.

In sum, the only theory of injury advanced by South Carolina —that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site—rests upon a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270. In such circumstances, we must conclude that South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review.

That the two claims are not currently justiciable does not mean that they never will be so. If uncertainty as to several links in the chain of possibilities is resolved, then South Carolina's alleged injury may move from the speculative to the concrete, and therefore the two claims also may become ripe for review. But until that uncertainty is lifted, the Constitution demands that we withhold judicial review.

Accordingly, we vacate the preliminary injunction imposed by the district court and remand the case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED

All Citations

912 F.3d 720

Footnotes

1 The other Defendants are the United States Department of Energy; Rick Perry, in his official capacity as Secretary of Energy; the National Nuclear Security Administration; and Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration.

2 South Carolina further claimed that the United States violated 50 U.S.C. § 2567 by failing to consult with the governor before deciding to terminate the MOX facility. The district court held that South Carolina failed to establish that that claim was likely to succeed on the merits, and therefore that claim is not before this Court.

3 Because South Carolina has advanced only one theory of injury to support the two claims before this Court—that South Carolina is harmed by becoming the permanent repository of weapons-grade nuclear material—we cannot and do not take any position on whether other theories of injury would presently confer standing on South Carolina to support either of the two claims before us on appeal.

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EXHIBIT 10

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2019 WL 2464930 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
June 7, 2019.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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***i** QUESTION PRESENTED

The U.S. Department of Energy (DOE) shipped massive amounts of weapons-grade plutonium to South Carolina for a decade in anticipation of building a facility there - the "MOX Facility" - to process it. After running way behind schedule and far over budget, DOE sought to mothball the still-uncompleted MOX Facility. In response, Congress enacted a statute requiring DOE to keep building the MOX Facility unless DOE gets a "waiver" of that requirement. This lawsuit arose from DOE's decision to halt construction of the MOX Facility permanently after purportedly satisfying the statute's requirements for a waiver. South Carolina claims in this suit that DOE's decision violates the statute, which was specifically designed to protect South Carolina's interests, and the National Environmental Policy Act.

The question presented is whether the United States Court of Appeals for the Fourth Circuit erred in holding that South Carolina lacked standing to challenge the DOE's final action and that the challenge is not ripe.

***ii** PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. State of South Carolina, Plaintiff and Petitioner;

2. United States of America, Defendant and Respondent;

3. United States Department of Energy, Defendant and Respondent;

4. Rick Perry, in his official capacity as Secretary of Energy, Defendant and Respondent;

5. National Nuclear Security Administration, Defendant and Respondent;

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6. Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendant and Respondent.

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner State of South Carolina (South Carolina or State) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.3d 720. App. 1a-22a. The opinion of the district court is reported at 329 F. Supp. 3d 214. App. 34a-82a. The decision of the United States Secretary of Energy is unreported but is reproduced in the appendix. App. 107a-109a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on January 8, 2019. On March 29, 2019, the Chief Justice extended the time to file a petition for a writ of certiorari up to and including June 7, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the U.S. Constitution provides in relevant part, "[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 83a-106a.

*2 INTRODUCTION

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This case involves the justiciability of a State's claims against the federal government for statutory violations, including violations of provisions expressly designed to protect the State's concrete interests. The decision below, which denied the justiciability of those claims, conflicts with this Court's decision in *Massachusetts v. EPA,* 549 U.S. 497 (2007), and provides an excellent vehicle for dispelling continuing confusion among the lower courts about the standing of States to sue the federal government.

South Carolina is home to the Savannah River Site (SRS), where Congress directed the U.S. Department of Energy (DOE) to build a facility to convert weapons-grade plutonium (also known as "defense plutonium") into mixedoxide (MOX) fuel for use in commercial nuclear reactors. App. 3a-4a, 83a.[1] In the statute directing DOE to build this facility - known as the MOX Facility or Project - Congress included multiple provisions designed to address South Carolina's concern about becoming a permanent dumping ground for multiple tons of this admittedly dangerous material. 50 U.S.C. § 2566. Starting in 2014, DOE sought to terminate construction of the MOX Facility after its construction had fallen way behind schedule and gone way over budget.

On May 10, 2018, the Secretary of DOE announced his decision to permanently abandon construction of the ***3** MOX Facility and to pursue a new concept for processing weapons-grade plutonium called "Dilute and Dispose" or "downblending." In the letter announcing this decision, the Secretary purported to comply with the statutory requirements for a "waiver" of the statutory mandate to continue construction of the MOX Facility. DOE made this decision without any analysis under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA), or complying with the analysis requirements of the governing statute.[2]

To remedy these statutory violations, South Carolina brought this action against DOE. The district court granted a preliminary injunction to prevent DOE from terminating construction of the MOX Facility, but the Fourth Circuit reversed. Without reaching the merits, the Fourth Circuit held that South Carolina lacked Article III standing and that its claims are not ripe. The Fourth Circuit characterized South Carolina's standing argument as resting on its fear of being "the permanent repository of weapons-grade plutonium." App. 12a. The Fourth Circuit believed that this fear was "too speculative" to constitute injury in fact or present ripe claims. App. 12a. The Fourth Circuit did not cite *Massachusetts v. EPA* despite its obvious relevance and South Carolina's citation of that decision in its brief.

The Fourth Circuit's decision conflicts with this Court's decision in *Massachusetts v. EPA* and misreads ***4** other decisions of this Court on Article Ill's standing and ripeness requirements. The decision warrants this Court's review because it could hamper South Carolina's ability to enforce statutory provisions that relate to the weapons-grade plutonium at SRS, and other States' ability to enforce statutory rights enacted to protect their interests.

STATEMENT OF THE CASE

South Carolina is home to 10 metric tons of weapons-grade plutonium, which are stored at SRS. If the decision below stands and DOE has its way, South Carolina will be forced to host at least an additional 20 metric tons indefinitely, while DOE tries to turn a new concept for processing it into a reality. DOE's track record in dealing (more accurately, in failing to deal) with the existing 10 metric tons does not inspire confidence that the proposed total of more than 30 metric tons, and their associated dangers, will be going anywhere any time soon. Remarkably, after the district court held that South Carolina was likely to succeed on the merits of its claims in this action, the Fourth Circuit foreclosed the State from even being able to question executive-branch compliance with statutory requirements that Congress specifically and expressly designed to protect South Carolina's interests.

I. Congress enacts statutory protections to prevent South Carolina from becoming the permanent repository of weapons-grade plutonium put there by the federal government.

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In September 2000, the United States and Russia entered an agreement under which each country ***5** would dispose of 34 metric tons of weapons-grade plutonium. App. 35a, 76a. To meet its obligations under this agreement, Congress in 2003 enacted legislation authorizing the construction of the MOX Facility at SRS. App. 39a, 76a-77a. The legislation included a finding that the "agreement with Russia is a significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists." Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), § 3181(1), 116 Stat. 2458, 2747 (2002). Another finding stated that DOE planned - quite optimistically in hindsight - for the MOX Facility to begin operating in 2009 and to convert 34 metric tons of weapons-grade plutonium into mixed-oxide fuel "before the end of 2019." *Id.* § 3181(3) & (4).

South Carolina had protested selection of SRS as the site for the MOX Facility. In addition to the concern that weapons-grade plutonium could fall into the wrong hands, South Carolina worried about its citizens' prolonged exposure to multiple tons of this admittedly hazardous material. Indeed, the Nuclear Regulatory Commission (NRC) recognized, when it issued the construction license for the MOX Facility in 2005, that the primary benefit of the Facility's operation would be to reduce the supply of weapons-grade plutonium "available for unauthorized use." App. 62a. The NRC also recognized that "continued storage [of the plutonium] would result in higher annual impacts" of public radiation exposure than implementation of the Project. App. 62a. Besides concerns for its citizens, South Carolina had concerns as the owner of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

***6** Congress addressed some of South Carolina's concerns in the 2003 statute authorizing the MOX Facility. NDAA FY03, § 3182, *subsequently codified* as 50 U.S.C.A. § 2566 (Section 2566). Section 2566 prescribes deadlines for construction of the Facility and for its processing of the plutonium. *E.g., id.* § 2566. The key deadline provided that, as of January 1, 2012, the MOX Facility would be processing no less than one metric ton of weapons-grade plutonium per year. *Id.* 2566(a), (h). The statute also prescribes remedies against DOE for missing these deadlines. *Id.* § 2566(b)(6)(B), (b)(6)(C); *id.* § 2566(c); *id.* § 2461.

Beginning shortly after the enactment of § 2566 and continuing through 2012, DOE shipped significant amounts of defense plutonium to South Carolina for conversion into MOX fuel. Construction began on the MOX Facility on or about August 1, 2007. As the National Academy of Sciences observed, however, "Construction has encountered substantial schedule delays and cost overruns." National Academies of Sciences, Engineering, and Medicine, *Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report* 2 (Washington, DC: The National Academies Press, Oct. 2018) [hereafter cited as NAS Interim Report].[3] Although the MOX Facility originally was supposed to begin operating in 2009, today DOE estimates construction will not be completed until at least 2048. App. 5a. The delay caused DOE to violate, among other statutory requirements, a requirement that it remove not less than one metric ton of weapons-grade plutonium by January 1, 2016. In a prior action, South Carolina successfully sued DOE for this statutory ***7** violation. *South Carolina v. United States,* 907 F.3d 742 (4th Cir. 2018).

II. DOE terminates construction of the MOX Facility with no approved alternative for disposition of the defense plutonium at SRS.

Since 2014, DOE has continuously sought termination of the MOX Project and advocated for its proposed "Dilute and Dispose" concept, under which DOE would prepare "dilute" plutonium at SRS for ultimate "disposition" at the Waste Isolation Pilot Plant (WIPP) in New Mexico. Despite DOE's new idea, Congress has continued to mandate that DOE build the MOX Facility. The current mandate is found in two statutory provisions: Section 3121(a) of the NDAA FY18, and Section 309(a) of the Consolidated Appropriations Act, 2018 (CAA FY18). App. 95a-98a.[4]

Recognizing South Carolina's concerns that it be left as an indefinite repository for defense plutonium, Congress specified that DOE can avoid the statutory mandate to construct the MOX Facility only if the Secretary of Energy obtained a waiver of it. The waiver requirements are prescribed in Section 3121(b) of NDAA FY18, and are incorporated by reference in Section 309(b)

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of CAA ***8** FY18. App. 95a-98a. To get a waiver, the Secretary must "submit to the congressional defense committees" (1) a commitment to remove defense plutonium from South Carolina and (2) a certification regarding certain points, including the existence of a viable and feasible alternative option.[5] This waiver requirement was enacted by Congress to ensure a legally viable and feasible disposition pathway existed to remove defense plutonium from South Carolina.

The Secretary of Energy purported to meet the waiver requirement in a letter dated May 10, 2018 ("May 10 Letter"). The May 10 Letter notified Congress of DOE's decision to permanently abandon construction of the MOX Facility and pursue its "Dilute and Dispose" concept for plutonium disposition. App. 107a-109a. In the May 10 Letter, the Secretary stated, "I confirm that the Department is committed to removing plutonium from South Carolina intended to be disposed of in the MOX facility." App. 107a. The Secretary also certified that "an alternative option for carrying out the plutonium disposition program … exists" - namely, the "Dilute and Dispose Approach." App. 108a. But the Secretary did not address the "many barriers" that the National Academy of Sciences has identified and said "must be addressed … before the dilute and dispose conceptual plans can be implemented." NAS Interim Report, *supra,* at 19. In particular, the Secretary did not address any of the legal barriers that exist, despite the waiver provision's requirement that he identify "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose concept. NDAA FY18, § 3121(b)(1)(C).

***9** Based on the decision reported in the May 10 Letter, the Secretary issued a "partial stop work order" on May 14, 2018. App. 50a (quoting ECF No. 19-1 ¶ 10). The partial stop work order "halted any new contracts or new hires at SRS for the MOX Project." App. 44a, 72a. The order "was issued to minimize cos[t] to the government during the 30 day period leading up to an eventual full stop work order and the termination letter expected to be issued on June 11, 2018." App. 50a (quoting ECF No. 19-1 ¶ 10). South Carolina filed this action before the termination letter issued and obtained a preliminary injunction against its issuance.

Today, South Carolina continues to host about 10 metric tons of weapons-grade plutonium at SRS slated for MOX Facility processing. South Carolina has no reason to believe that this material is going anywhere anytime soon. To the contrary, as discussed above, DOE has repeatedly missed statutory deadlines for construction and operation of the MOX Facility. In the meantime, South Carolina and its people continue to live with the dangers that are associated with this material and that led to the international agreement with Russia and the Act of Congress directing construction of the MOX Facility in the first place.

III. The Proceedings Below.

A. Federal District Court

On May 25, 2018, the State filed a complaint in the United States District Court for the District of South Carolina challenging DOE's final agency action to terminate the Project. The complaint invoked subjectmatter ***10** jurisdiction under the federal-question statute, 28 U.S.C. § 1331. The State asserted two claims of statutory violations, both resting on the cause of action created by the Administrative Procedure Act (5 U.S.C. §§ 702, 704 & 706): DOE violated (1) NEPA by failing to prepare a supplemental Environmental Impact Statement analyzing its decision to terminate the MOX Facility in favor of the Dilute and Dispose approach; and (2) the statutory provisions requiring DOE to obtain a waiver before terminating construction of the MOX Facility (NDAA FY18, § 3121(b) and CAA FY18, § 309(b)). The State sought declaratory relief and a permanent injunction.

The State also moved for a preliminary injunction to maintain the status quo by enjoining DOE from terminating the Project during the pendency of this lawsuit. The district court granted the preliminary injunction on June 7, 2018. App. 34a-82a.

In its preliminary injunction order, the district court comprehensively addressed and rejected DOE's arguments that South Carolina lacks standing and that the May 10 Letter is not final agency action. App. 44a-54a. The court held that South Carolina has standing to assert its procedural rights under NEPA and the statutory waiver provisions "because the State owns extensive property adjoining, and one road traversing the impacted area." App. 47a. The court further held that the decision of the Secretary

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announced in the May 10 Letter is final agency action reviewable under the APA. The Secretary's "execution of the MOX termination waiver" in the May 10 Letter, if allowed to stand, waives the statutory requirements to continue building the MOX Facility. In addition to this legal effect, the May 10 Letter creates the ***11** "practical reality that the full stop order that is planned for June 11, 2018 will shut down the MOX Facility." App. 50a. Furthermore, the court concluded, "[b]ecause the MOX Project is the only legally authorized disposition method for MOXable plutonium at SRS," the "practical effect" of the decision announced in the May 10 Letter "is that the plutonium will remain at SRS indefinitely." App. 54a.[6]

The court also held that South Carolina is likely to succeed on the merits of both its claims.

In analyzing the State's NEPA claim, the court observed that the relevant statutes, and DOE itself, contemplate that NEPA applies "when rendering decisions and taking action related to the disposition of defense plutonium at SRS." App. 60a. DOE relied, however, on an Environmental Impact Statement (EIS) issued in December 1996 that analyzed the storage of weapons-grade plutonium for a period of up to 50 years - *i.e.,* until 2046. App. 63a, 65a. DOE argued that this EIS sufficed because its use of the new Dilute and Dispose approach would remove all the MOXable plutonium before that 50- ***12** year period ended. App. 63a. The district court rejected that argument on two grounds. First, DOE's past actions with regard to the MOX Facility "have called into question the viability" of DOE's timeline for removal using the Dilute and Dispose approach. App. 65a. Second, and in any event, "pursuing the Dilute and Dispose approach" for the MOXable plutonium "would have a significant impact on the environment." App. 65a. Therefore, the court held, DOE must "produce a supplemental EIS that addresses the conceivability, both practically and legally" of its proposed new approach. App. 65a-66a.

The court also held that the State is likely to succeed on its claim that the Secretary violated the statutory requirements for a waiver of the statutory mandate to continue building the MOX Facility. App. 66a-72a. The court identified three flaws in the May 10 Letter announcing the Secretary's decision to terminate the MOX Project. First, there is no basis for the Secretary's commitment to remove the MOXable plutonium from SRS, since it rests on the unauthorized and unanalyzed Dilute and Dispose approach. App. 68a. Second, the Secretary's cost comparison of the MOX Project and the Dilute and Dispose approach does not meet statutory requirements for accuracy. App. 69a-70a. Third, although the statutory waiver provision requires the Secretary to report to Congress "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose alternative, the May 10 letter provides no such details. App. 70a-71a. The district court, however, held that adoption of the Dilute and Dispose approach would require, among other changes, the amendment of two federal statutes. App. 71a-72a.

***13** DOE appealed the district court order granting the preliminary injunction to the Fourth Circuit under 28 U.S.C. § 1291(a)(1).[7]

B. Court of Appeals

The Fourth Circuit vacated and remanded, holding that "South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review." App. 22a.

The court held that South Carolina lacks Article III standing because it cannot establish injury in fact. App. 10a-19a. The State argued that DOE's failure to comply with NEPA and Section 3121's waiver provision "results in increased radiation exposure to the public, increased risk of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." App. 12a (quoting State's brief on appeal). The court concluded that those alleged injuries were "too speculative" because they rest "on a … 'highly attenuated chain of possibilities.' " App. 13a (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013)).

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The court focused on the time frame "[b]etween now and 2046 - when the analysis in the current [EIS] governing the risks associated with long-term storage of ***14** weapons-grade nuclear material at the Savannah River Site expires." App. 15a. The court did not explain how the EIS's time frame bears on South Carolina's standing. Nonetheless, it assigned 2046 as "the year when South Carolina's alleged injur[ies] will mature." App. 19a. On this view, the court reasoned that the EIS gives DOE "twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina." App. 15a. The court observed that DOE has already identified the Dilute and Dispose method as "one potential alternative," and it might come up with more. App. 15a. The court also observed that DOE is under a statutory deadline to remove, by January 1, 2022, any weapons-grade plutonium that have been slated for processing by the MOX Facility but not yet processed by then. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)). If DOE failed to meet that deadline, the court explained, South Carolina could sue it, just as it had for DOE's past failure to meet statutory deadlines. App. 16a.

"For reasons similar to" the ones that led the court of appeals to hold that South Carolina lacks standing, it also held that "the two claims at issue fail on ripeness grounds." App. 19a. The court recognized that " 'ripeness turns on the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " App. 20a (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983)). The court apparently found the problem here to be a lack of fitness. *See* App. 20a-21a (paragraph discussing requirements for a case "[t]o be fit for review"). The court said that a case is fit "when the action is final and not dependent on future uncertainties." App. 21a (internal quotation marks omitted). Despite this reference to ***15** "final[ity]," the court of appeals did not discuss, much less express disagreement with, the district court's conclusion that DOE's decision to terminate the MOX Project was final agency action. *Cf.* App. 21a. Instead, the court of appeals seemed to conclude that neither the NEPA claim nor the statutory-waiver-provision claim is ripe because of "uncertainties" about whether South Carolina will indeed become "the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a.

REASONS FOR GRANTING THE PETITION

There are four compelling reasons for this Court to grant review of the Fourth Circuit's opinion on a writ of certiorari.

First, the Fourth Circuit's decision conflicts with *Massachusetts v. EPA, Lujan v. Defenders of Wildlife,* and other decisions of this Court addressing the justiciability of suits by States and other plaintiffs seeking to compel a federal agency to comply with express statutory directives. Rule 10(c). Instead, the Fourth Circuit rejected the precedent of this Court in favor of a novel standing and ripeness analysis that narrowly interprets and, thus, unduly restricts the ability of a State to seek enforcement of a statute that involves and pertains to its legitimate interests.

Second, the Fourth Circuit's opinion creates a conflict among the circuits in applying this Court's holdings on standing. By circumscribing the State's ability to invoke the federal judicial power in seeking the enforcement of an existing statutory framework, the Fourth Circuit went far ***16** beyond any other circuit in heightening the level of injury sufficient to form the basis for a "case or controversy." This Court's intervention is necessary to address the conflict among the circuits. Rule 10(a).

Third, this case presents important Constitutional issues regarding the justiciability of claims brought by a State seeking to vindicate its sovereign interests. The State has a legitimate interest in protecting its environment and in enforcing its substantive and procedural rights in its relations with the federal government. The Fourth Circuit's opinion denies the State the ability to even adjudicate its claims, which strikes at the heart of the federalism principle accepted by the State and the United States upon the formation of the union.

Fourth, this case provides an excellent opportunity for this Court to provide the clarification of *Massachusetts v. EPA* that the Fourth Circuit's decision and the conflict among the circuits demonstrate is warranted. This case presents fundamental and well-defined questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA,* including how "special solicitude" relates to a State's possession of a "procedural right" and to the apparent limitations on suits against the federal government by States suing as *parens patriae.*

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I. The decision below squarely conflicts with decisions of this Court.

A. The decision below conflicts with *Massachusetts v. EPA*.

The decision below conflicts in approach and result with this Court's decision in *Massachusetts v. EPA* by ***17** failing to give "special solicitude" to South Carolina when analyzing the State's standing. South Carolina met all the requirements for Article III and statutory standing, and had the court below given South Carolina the "special solicitude" required by *Massachusetts v. EPA,* it would have been compelled to uphold South Carolina's standing in this case.

In *Massachusetts v. EPA,* this Court held that Massachusetts was "entitled to special solicitude in [its] standing analysis" because of (1) the State's possession of a "procedural right" and (2) its "stake in protecting its quasi-sovereign interests." 549 U.S. at 520. The State's "procedural right" was the statutory right to seek judicial review "for agency action unlawfully withheld." *Id.* at 517 (quoting 42 U.S.C. § 7607(b)(1)). The "quasi-sovereign interests" at stake were Massachusetts' "desire to preserve its sovereign territory" from harmful effects assertedly imposed on that State by greenhouse gases (GHGs). *Id.* at 519. The latter interests were reinforced by Massachusetts ownership of "a great deal of the territory alleged to be affected" by GHGs. *Id.* (internal quotation marks omitted).

Both conditions for "special solicitude" exist here. First, South Carolina asserts violations of its procedural rights under NEPA and the statutory provisions requiring DOE to get a waiver before terminating the MOX Facility. NEPA's creation of a procedural right was recognized by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992). And the statutory waiver provisions plainly create procedural rights designed to protect South Carolina's interests. *Cf. Maryland People's Counsel v. FERC,* 760 F.2d 318, 320 (D.C. Cir. 1985) (per Scalia, J.) ***18** (stating that statute authorizing state agencies to seek judicial review of FERC orders showed "special solicitude" for States, removing prudential barriers on States' relying on *parens patriae* standing in litigation against federal government). Second, South Carolina asserts its quasi-sovereign interests in protecting its territory against the environmental harms threatened by the DOE's decision to terminate the MOX Facility. *See* App. 12a (quoting South Carolina's allegations that DOE's May 10 decision "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increase threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium"). Here, as in *Massachusetts v. EPA,* the State's quasi-sovereign interests are reinforced by its ownership of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

Given South Carolina's "procedural right[s] and [its] stake in protecting its quasi-sovereign interests," South Carolina was "entitled to special solicitude" in the Fourth Circuit's standing analysis. *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina plainly identified those rights and interests in its brief for the Fourth Circuit, and cited *Massachusetts v. EPA* in its brief. Br. of Pl.-Appellee at 16-17, *South Carolina v. United States,* 912 F.3d 720 (4th Cir. 2019) (No. 18-1684), ECF No. 31. Yet the Fourth Circuit disregarded those rights and interests, and based its standing analysis - not on *Massachusetts v. EPA* - but instead primarily on *Clapper,* a case involving the standing of private plaintiffs. *Id.* at 406; App. 13a-17a (citing *Clapper*).[8]

***19** The Fourth Circuit's disregard of *Massachusetts v. EPA* led to error. South Carolina's argument for standing closely resembles Massachusetts'. Both States attack agency decisions (to deny a rulemaking petition; to terminate the MOX Project) for failure to follow statutory requirements that, if followed, could have led to a different decision. As things stood, the challenged agency decisions exposed the States to increased risk of harms (additional loss of coastal land; additional radiation and risks of accidents and theft). The risks of harm associated with prolonged storage of weapons-grade plutonium are at least as well established and imminent as those associated with greenhouse gases. *See* App. 39a (district court decision quoting federal officials' acknowledgement of dangers posed by storage of weapons-grade plutonium). Thus, South Carolina's standing in this case follows *a fortiori* from this Court's decision upholding Massachusetts' standing in *Massachusetts v. EPA*.

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***20 B. The decision below conflicts with decisions of this Court on ripeness.**

The Fourth Circuit held that South Carolina's claims are not ripe because they are not "fit" for review. App. 19a-21a. They are not fit for review, the Fourth Circuit concluded, because South Carolina might not "become[] the *permanent* repository" of "weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a (emphasis in original). This conclusion, however, conflicts with decisions of this Court.

South Carolina's claims are fit for review under this Court's precedent. That precedent establishes that a claim is generally fit for review when it challenges agency action that is final, the challenge is purely legal, and the court's ability to resolve the challenge will not benefit from further factual development. *E.g., Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 811 (2003). The court of appeals below did not disturb the district court's holding that DOE's decision to terminate the MOX Facility is "final agency action" within the meaning of the federal APA. App. 48a-54a; 5 U.S.C. § 704. Furthermore, South Carolina's claims that DOE violated NEPA and the statutory waiver requirements are purely legal, as is clear from the district court's analysis of these claims. *See* App. 59a-72a. The court of appeals below did not identify any further factual developments that would facilitate the resolution of South Carolina's NEPA and statutory-waiver claims.

As this Court has held, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes ***21** place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 737 (1998). The decision below squarely conflicts with this holding in *Ohio Forestry Ass'n* by finding South Carolina's NEPA claim unripe. *See* App. 19a-21a. Moreover, this Court's holding in *Ohio Forestry Ass'n* also applies to South Carolina's claim that DOE violated the requirements for a waiver of the statutory mandate to continue construction of the MOX Facility: Nothing that happened after the date of the Secretary's May 10 Letter will affect analysis of South Carolina's claim that the DOE violated the requirements for a waiver of that mandate.[9]

Although the Fourth Circuit apparently, erroneously - and in conflict with this Court's precedent - relied on the "fitness" prong of ripeness analysis, its conclusion of unripeness seemed to rest on a supposed lack of hardship. That conclusion, in turn, rested on the Fourth Circuit's belief that only in the year 2046 will "South Carolina's alleged injury mature." App. 19a. The Fourth Circuit cited the year 2046 because it was the end date of the 50-year period analyzed in DOE's 1996 Programmatic EIS (PEIS) on storage of weapons-grade plutonium at SRS. App. 15a, 36a. The 1996 PEIS's 50-year period of analysis arguably *might* bear on the merits of South Carolina's claim that DOE must now prepare a supplemental EIS for its termination of the MOX Project. But it has no bearing on South Carolina's standing or the ripeness of its claims. In concluding otherwise, the Fourth Circuit's ***22** ruling reflects "the familiar confusion between standing and the merits." 13B Charles Alan Wright *et al., Federal Practice and Procedure* § 3531.11.1, at 98 (3d ed. 2008).

Properly understood, South Carolina's standing and hardship stem from the *existing* 10 metric tons of weapons-grade plutonium stored within its borders, plus the additional 20 metric tons that DOE currently plans to ship to South Carolina. The existing plutonium exposes South Carolina's property and its citizens to ongoing radiation and the risks of nuclear accidents and threats. South Carolina reasonably fears that DOE's decision to terminate the MOX Facility to pursue the unstudied, unauthorized "Dilute and Dispose" concept will indefinitely *prolong* the storage of massive amounts of plutonium in South Carolina, and in turn cause South Carolina to incur additional costs associated with protecting against the radiation and risks. South Carolina's fear is well-founded considering DOE's dismal track record in meeting statutory deadlines for construction of the MOX Facility. *See* App. 5a.

The Fourth Circuit dismissed this fear, reasoning that South Carolina can always sue DOE when DOE fails to meet the *next* statutory deadline. App. 16a. But the likelihood that DOE will violate *additional* statutory requirements in the future surely cannot disable South Carolina from suing DOE for current statutory violations arising from its termination of the Project. To the contrary, the possibility that South Carolina will have to sue DOE again in the future represents just another realistic risk of future harm that supports its standing to bring this suit. *Cf. Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 154-55 (2010) (upholding standing based ***23** partly on costs incurred by plaintiffs to mitigate realistic risks); *Texas v. United States,* 497

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F.3d 491, 497 (5th Cir. 2007) (upholding State's standing based partly on realistic risk that State would have to participate in compelled mediation over tribal gaming).

II. The Fourth Circuit's decision creates a conflict among the circuits concerning the justiciability of State suits against the federal government.

The Fourth Circuit's decision conflicts in approach with decisions in at least three other circuits: the Second, Fifth, and Tenth. Courts of appeals in these circuits rely on *Massachusetts v. EPA* to accord "special solicitude" to States in analyzing the States' standing to sue the federal government. The analysis in those decisions strongly suggest that those courts of appeals would have upheld South Carolina's standing to bring the present suit.

A. Second Circuit

The Second Circuit analyzed *Massachusetts v. EPA* in a decision that upheld the standing of eight States to sue electric power companies that allegedly contributed to global warming. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 109 (2d Cir. 2015), *rev'd on other grounds,* 564 U.S. 410 (2011).[10] As the Second Circuit understood ***24** *Massachusetts v. EPA,* in that case this Court "seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land." *Id.* at 338.

The Second Circuit upheld the States' standing using reasoning that, if applied in the present case, would have led it to uphold South Carolina's standing: The Second Circuit emphasized that the States were suffering present harms from the defendants' conduct - just as South Carolina's property and residents are currently exposed to radiation and other threats from the continued storage of plutonium - and the relief sought could incrementally reduce the harm - as could occur here, if DOE's compliance with its statutory obligations reduces the amount of time that massive amounts of weapons-grade plutonium are stored at SRS. *Id.* at 340-43.

Although *Connecticut* was a suit against private defendants, the Second Circuit relied on it, as well as on *Massachusetts v. EPA,* in a later decision upholding several States' standing to sue a federal agency for statutory violations. *Nat. Res. Def Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 103-04 (2d Cir. 2018) (internal citations omitted).

***25** B. Fifth Circuit

The Fifth Circuit accorded "special solicitude" to a State under circumstances close enough to those of this case to indicate that it would have upheld South Carolina's standing in this case.

Texas and other States sued the United States over the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). *Texas v. United States,* 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court,* 136 S. Ct. 2271 (2016). After the federal district court preliminarily enjoined implementation of DAPA, the United States appealed. *Id.* On appeal, the Fifth Circuit affirmed the preliminary injunction and upheld Texas's standing to bring the suit. *Id.* at 151-62.

The Fifth Circuit said, "[O]ur determination that Texas has standing is based in part on the 'special solicitude' we afford it under *Massachusetts v. EPA.* " *Id.* at 162. The court described "special solicitude" as a "presumption," presumably meaning a presumption that favors standing in close cases. *Id.; see also id.* at 159 (relying partly on "special solicitude" in finding traceability). The court afforded "special solicitude" based on the same two conditions that exist in the present case: The State was asserting procedural rights that required interpretation of federal statutes, and the challenged conduct implicated the State's "quasi-sovereign interests." *Id.* at 152-53.

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Moreover, the Fifth Circuit's reasons for concluding that "quasi-sovereign interests" were at stake equally apply here. Texas challenged DAPA, a federal immigration program. The Fifth Circuit observed that "[w]hen the ***26** states joined the union, they surrendered some of their sovereign prerogatives over immigration." *Id.* at 153. Consequently, the Fifth Circuit explained, States must rely on the federal government to protect their interests in immigration matters, just as they must with respect to their interests in the matters involved in *Massachusetts v. EPA:* namely, interstate and international pollution. *Id.* at 153-54. So too here: Because of the federal government's control over nuclear defense material, South Carolina cannot prevent it from storing that material at SRS as long as federal law allows. South Carolina must rely on the federal government to protect its interests and those of its citizens. This reliance warrants consideration when South Carolina sues to enforce the federal executive-branch's compliance with federal statutory requirements enacted, in part, to protect the State's interests. In short, South Carolina's present lawsuit provides at least as compelling a case for "special solicitude" as did the States' lawsuit in *Texas v. United States.*

C. Tenth Circuit

Like the Fifth Circuit, the Tenth Circuit has relied partly on "special solicitude" to uphold State standing.

Illustrative is *New Mexico v. Dep't of Interior,* 854 F.3d 1207 (10th Cir. 2017). In that case, New Mexico sued the Department of Interior (DOI) claiming that DOI lacked statutory authority for regulations on tribal gaming. *Id.* at 1211. Under the challenged regulations, DOI could allow tribal gaming without the State's input unless the State participated in a process that included mediation. *Id.* at 1213. The Tenth Circuit held that New Mexico had standing to challenge the regulations ***27** on two grounds. First, the regulations caused New Mexico procedural injury by depriving it of its asserted statutory right to have a court determine that the State had bargained in bad faith before tribal gaming could be allowed without the State's input. *Id.* at 1216-17. Second, the regulations "injure[d] New Mexico by forcing it to choose between participating in a process it considers unlawful and forgoing any benefit from that allegedly unlawful process - viz., the benefit of being able to offer input, presumably beneficial to its interests, relating to the content of those procedures." *Id.* at 1218. After identifying these two injuries, the Tenth Circuit said, "[T]he Supreme Court's direction that we give states special solicitude in analyzing standing provides further support for each basis establishing New Mexico's standing." *Id.*

In *New Mexico v. Dep't of Interior* and other cases, the Tenth Circuit has, like the Fifth Circuit, apparently treated "special solicitude" as a presumption favoring standing in close cases, or possibly as a "plus factor" applicable in all cases. At the same time, the Tenth Circuit has remarked on " 'the lack of guidance on how lower courts are to apply the special solicitude doctrine to state standing.' " *Id.* at 1219 (quoting *Wyoming v. United States Dep't of Interior,* 674 F.3d 1220, 1238 (10th Cir. 2012); *see also Ariz. State Legisl. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions … are hard to reconcile.") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009)); *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683, 696 n.13 (10th Cir. 2009) ("In determining ***28** that New Mexico has standing because of the threat of environmental damage to lands within its boundaries, we consider that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders."); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States,* 528 F.3d 712, 721 (10th Cir. 2008) (attaching "importan[ce]" to "special solicitude" in analyzing State's standing).

III. This case presents important issues of constitutional justiciability for a State seeking to vindicate its rights under federal law.

The proper handling of weapons-grade plutonium is a public policy matter of exceptional importance, implicating not only issues of national defense and national security but also the United States' obligations under an agreement with Russia. *Cf. New York v. United States.* 505 U.S. 144, 149 (1992). South Carolina does not challenge the federal government's broad authority to regulate this matter or to control operations at the SRS as a federal facility. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983); *Hancock v. Train,* 426 U.S. 167 (1976). But being forced by virtue

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of the Supremacy Clause to host SRS, South Carolina seeks only to ensure federal executive-branch compliance with federal law. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607-08 (1982) ("[T]he State has an interest in securing observance of the terms under which it participates in the federal system.… [A] State does have an interest … in assuring that the benefits of the federal system are not denied to its general population."). This petition thus poses a question of the justiciability of claims by a State against the federal government.

***29** The importance of this question is reflected in the long line of cases in which this Court has addressed it. In addition to *Massachusetts v. EPA, see, e.g., Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995) (addressing State's standing to assert claim against the United States under prior decree); *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (addressing scope of statutory waiver of federal government's sovereign immunity from State's suit); *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966) (addressing standing of State to challenge constitutionality of federal statute); *Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923) (addressing State's standing to challenge constitutionality of federal statute); *Kansas v. United States,* 204 U.S. 331 (1907) (addressing United States' sovereign immunity from suits by States); *Georgia v. Stanton,* 73 U.S. 50 (1867) (addressing justiciability of State's suit to enjoin federal Reconstruction Act).

Although the defense plutonium at issue implicates domestic and international concerns of broad significance, even in these areas, States play an important role. Implementing policies and actions involving defense plutonium necessarily require some degree of state involvement through state regulation of related, collateral matters (such as the issuance of certain environmental permits), the utilization of state infrastructure, and the emissions and impact on state proprietary interests.[11] For ***30** that reason, this case implicates the relationship between the federal government and the States. The Supremacy Clause gives the United States the upper-hand in this relationship. But the federal government's supremacy rests on the rule of law. The federal government's violation of the rule of law generally is objectionable, but for an executive agency to inflict violence upon statutory obligations enacted by the legislature to protect a State without any mechanism of accountability by the state through the judiciary is particularly harmful to our system of government. This Court's review is necessary to ensure a State can remedy that harm, especially when, as here, the harm concerns the State's concrete interests in the proper disposition of the massive amounts of weapons-grade plutonium within its borders.

IV. This case provides an excellent vehicle for clarifying *Massachusetts v. EPA.*

The decision below and the circuit split discussed above show the need for clarification of *Massachusetts v. EPA.* This Court has granted certiorari in two prior cases that offered opportunities to do so that were not subsequently realized. *See United States v. Texas,* 136 S. Ct. 2271; *Connecticut,* 546 U.S. at 420. This case provides an excellent opportunity to provide the needed clarification.

For one thing, the decision below is for all practical and legal purposes final. *Cf., e.g., Trump v. Hawaii,* 138 S. Ct. 2392 (2018) (granting certiorari to review court of appeals decision affirming preliminary injunction on dispositive grounds). Although the Fourth Circuit below addressed an interlocutory appeal from an order granting ***31** a preliminary injunction, its holding that South Carolina lacks standing prevents the case from going forward on the merits. By the same token, this Court's reversal of the decision below will enable South Carolina to pursue legal claims that the district court held, in rulings not disturbed on appeal, are likely to succeed. App. 59a-72a.

For another thing, South Carolina preserved below the arguments that it would advance in this Court. The Fourth Circuit characterized South Carolina as advancing "one theory of injury" (App. 19a n.3) because the State's injuries all arise from the real risk of it becoming the indefinite - and, as a practical matter, the "permanent" - "repository of weapons-grade plutonium." App. 12a (quoting South Carolina's brief for the Fourth Circuit). As the Fourth Circuit's opinion reflects, however, South Carolina argued for standing based on its quasi-sovereign interests and its proprietary interests. App. 9a, 12a. Thus, South Carolina has asserted in the courts below precisely the same claims of injury-in-fact that Massachusetts advanced in *Massachusetts v. EPA,* 549 U.S. at 518-23.[12]

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Finally, this case presents legal claims that crystallize key questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA*. One key question is how "special solicitude" relates to the ***32** State's possession of a "procedural right." That question is cleanly posed here by South Carolina's claim under NEPA, a statute that this Court has recognized creates a procedural right. *See Defenders of Wildlife,* 504 U.S. at 572 n.7. Another key question is how "special solicitude" relates to case law apparently limiting suits against the federal government by States suing as *parens patriae. See Massachusetts v. EPA,* 549 U.S. at 539 (Roberts, C.J. dissenting). That question is posed starkly by South Carolina's claim under SRS-specific statutory provisions that are designed partly for the precise purpose of protecting South Carolina's interests and therefore evince "special solicitude" for the State and a corresponding intention to allow South Carolina to sue for enforcement of those provisions. *Cf. Maryland People's Counsel,* 760 F.2d at 320; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 266 (6th ed. 2009). A decision by this Court addressing those questions would go far toward providing the needed clarification of *Massachusetts v. EPA*.

***33 CONCLUSION**

The petition for a writ of certiorari should be granted.

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June 7, 2019

Footnotes

1 We use "DOE" to refer collectively to the respondents. Among the respondents is the National Nuclear Security Administration (NNSA). NNSA is "established within the Department of Energy [as] a separately organized agency." 50 U.S.C. § 2401(a). The NNSA administers and manages activities related to the MOX Facility. *See id.* §§ 2471(2)(D) & 2481(a).

2 National Defense Authorization Act for Fiscal Year 2018 (NDAA FY18), § 3121(b)(1)(B)(i), 131 Stat. 1283, 1892-93 (2017) (App. 95a); Business Operating Procedure of the National Nuclear Security Administration, "Analysis of Alternatives," dated March 14, 2016 (BOP-03.07), available at https://directives.nnsa.doe.gov/bop/bop-0003-0007.

3 Available at https://www.nap.edu/read/25272/chapter/1.

4 *See* NDAA FY18, § 3121(a); CAA FY18, § 309(a), 132 Stat. 348, 530 (2018). After the district court issued its preliminary injunction and while this case was pending at the Fourth Circuit, Congress reaffirmed this mandate for fiscal year 2019. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, § 3119, 132 Stat. 1636, 2292 (2018) (requiring continued construction of the MOX Facility unless the waiver requirements prescribed in Section 3121(b) of NDAA FY18 are met).

5 NDAA FY18, § 3121(b)(1); CAA FY18, § 309(b), (c).

6 The district court's reference to "MOXable plutonium" (App. 54a) reflects that, as the court explained, "[t]he plutonium at SRS can be divided into two general categories - the plutonium intended for disposition through the MOX Facility and the plutonium not intended for MOX disposition." App. 63a-64a. For the latter, "non-MOXable" plutonium at SRS, DOE has "assign[ed] Dilute and Dispose as the preferred alternative" in a supplemental Environmental Impact Statement published on April 5, 2016. App. 64a. As the district court further explained, "The ongoing Dilute and Dispose approach is limited in resources and legal authority and is not applicable to the plutonium intended for disposition through the MOX Facility." App. 64a.

7 The district court denied DOE's motion for a stay of the preliminary injunction pending appeal. App. 27a-33a. After briefing and oral argument before the Fourth Circuit, however, that court granted DOE's motion for a stay on October 9, 2018. App. 24a. On October 10, 2018, DOE issued a Project termination notice and began terminating employees at the Project.

8 The Fourth Circuit below erred in relying on *Clapper* not only because *Clapper* involved private plaintiffs but also because the plaintiff in *Clapper* did not assert procedural rights. Lacking procedural rights, the plaintiffs in *Clapper* were subject to a determination in an "injury-in-fact" analysis inapplicable to this case. *Massachusetts v. EPA,* 549 U.S. at 517-18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." (citing *Lujan v. Defenders of Wildlife,* 504 U.S. at 572 n.7)). Moreover, the plaintiffs - as "US persons" - did not fall into a class to which the FISA provision in *Clapper* was directed, and that provision did not create any legal rights or protections for the plaintiffs. But, here, through NDAA FY18 and CAA FY18, Congress established statutory protections specifically for South Carolina, and South Carolina also falls within the class entitled to bring claims for NEPA violations. Accordingly - "special solicitude" or not - South Carolina met all the requirements for Article III and statutory standing

9 Nor does South Carolina's lawsuit present a programmatic challenge of the sort that, if addressed now, would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n,* 523 U.S. at 733. South Carolina challenges a highly discrete agency action - DOE's decision to terminate the MOX Facility.

10 The Second Circuit's ruling on standing was affirmed by an equally divided Court. "Four Members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*.... Four Members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing." *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 420 (2011). The Court reversed the Second Circuit's ruling on the merits, holding that the plaintiffs' federal common-law public nuisance claim was displaced by the Clean Air Act and EPA action authorized under the Act. *Id.* at 420-29.

11 All those elements are indisputably present here. South Carolina has and will continue to provide regulatory oversight on certain aspects of the operations at SRS, such as waste disposal. Much of the supporting infrastructure for SRS is provided by the State of South Carolina or its political subdivisions (such as roads and emergency services). *See generally* Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.*; Atomic Energy Act, 42 U.S.C. §§ 2201 *et seq.*

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12 In the decision below, the Fourth Circuit purports to reserve the question "whether other theories of injury would presently confer standing on South Carolina." App. 19a n.3. There are no "other theories" of standing remaining to the State. Accordingly, DOE has given notice of its intent to move for dismissal of the action for lack of jurisdiction if this Court denies further review. Notice, *South Carolina v. United States,* No. 1:18-cv-01431-JMC (D.S.C. May 1, 2019), ECF No. 45.

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EXHIBIT 11

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2019 WL 4730104 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
September 24, 2019.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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*1 REPLY BRIEF FOR PETITIONER

In this case, a State sues the federal executive branch for statutory violations that deprive it of procedural rights designed to protect its quasi-sovereign interests. This case thus presents the same situation - and presents the same issue of the State's Article III standing - as presented in *Massachusetts v. EPA,* 549 U.S. 497 (2007). This Court's decision in that case would have accordingly controlled analysis of the State's standing if this case had arisen in the Second, Fifth, or Tenth Circuits. *See* Pet. 23-28. In square conflict with those circuits, however, the Fourth Circuit ignored *Massachusetts v. EPA* and failed to accord South Carolina the "special solicitude" to which it was entitled under that case. *Id.* at 521. Had the Fourth Circuit properly applied *Massachusetts v. EPA,* it would have upheld South Carolina's standing to assert the statutory claims upon which, the district court below determined (in rulings not disturbed on appeal), the State is likely to prevail. Pet. App. 59a-72a.

The United States defends the Fourth Circuit's disregard of *Massachusetts v. EPA* on the ground that *Massachusetts v. EPA* applies only "in a close case." Br. in Opp. 14. Even if this were a close case, which it is not, the United States misreads *Massachusetts v. EPA,* and its defense of the decision below merely highlights the need for "guidance on how lower courts are to apply the special solicitude doctrine to state standing." *New Mexico v. Dep't of Interior,* 854 F.3d 1207, 1219 (10th Cir. 2017). The United States does not dispute the importance and complexity of the issue of the States' standing to sue the federal government. *See, e.g.,* ***2** *United States v. Texas,* 136 S. Ct. 2271 (2016). Nor does the United States impugn South Carolina's showing that this Court's decision in *Massachusetts v. EPA* has bred uncertainty among lower federal courts and that this case provides a good vehicle for clarifying it.

ARGUMENT

I. The Decision Below Conflicts with *Massachusetts v. EPA* and Decisions in at Least Three Circuits.

The United States argues that under *Massachusetts v. EPA,* "a State's status as a plaintiff" affects standing analysis only "in a close case." Br. in Opp. 14. This is not a close case, as discussed in the next section. More fundamentally, the United States misreads *Massachusetts v. EPA,* Under a straightforward reading of that case, the Fourth Circuit erred by failing to accord South Carolina "special solicitude" in analyzing the State's standing, and, in the process, the Fourth Circuit put itself in conflict with decisions in at least three other circuits.

Contrary to the United States' submission, this Court did not hold in *Massachusetts v. EPA* that a State's status as the plaintiff matters only in cases where standing is a close call. The Court broadly said that "States are not normal litigants for purposes of invoking federal jurisdiction," and that it was therefore "of considerable relevance that the party seeking review [there] [wa]s a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. Accordingly, the dissent read the ***3** majority's opinion as "adopt[ing] a new theory of Article III standing for States." *Id.* at 539-540 (Roberts, C.J., dissenting). Thus, the Fourth Circuit below ignored the plain import of *Massachusetts v. EPA* by attaching no significance to South Carolina's status as a sovereign State and failing even to cite this Court's decision. Those failures alone warrant further review. *Cf., e.g.,Horn v. Banks,* 536 U.S. 266, 271 (2002) (summarily reversing because of lower court's failure to apply *Teague v. Lane,* 489 U.S. 288 (1989)); *see also* Stephen M. Shapiro, *Supreme Court Practice* 251 (10th ed. 2013) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari.").

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Moreover, further review is warranted here to clarify that the special solicitude to which States are entitled under *Massachusetts v. EPA* is not limited - as the United States would have it - to "close case[s]." Br. in Opp. 14. Instead, as explained in our petition (at 17-18), special solicitude is required when, as here, the State asserts procedural rights connected with protecting its quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 520. The United States does not directly dispute that South Carolina is asserting procedural rights to protect its quasi-sovereign interests. And the United States' oblique arguments against South Carolina's entitlement to special solicitude are unavailing.

The United States seeks to obscure South Carolina's quasi-sovereign interests by repeatedly referring ***4** only to its general concern about becoming an indefinite repository for weapons-grade plutonium. *See* Br. in Opp. 7, 9, 10, 11, 13 & 15. But that concern stems from "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium," as the Fourth Circuit recognized. Pet. App. 12a (quoting Appellee's Br. at 14). The United States cannot contest that these dangers implicate South Carolina's quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 518-519 ("[I]n its capacity of *quasi*-sovereign … the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.") (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). And here, as in *Massachusetts v. EPA,* those quasi-sovereign interests are reinforced by the State's ownership of property adjacent to, and a road traversing, the Savannah River Site (SRS), all of which property is directly affected by these threats. *See id.* at 519; Pet. App. 47a.

The United States observes that there is no "special statutory right of judicial review" in this case. Br. in Opp. 15. But special solicitude under *Massachusetts v. EPA* does not depend on any such right. What matters is the existence of a "procedural right." *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina has procedural rights under NEPA, which this Court recognized as a source of such rights in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (cited in *Massachusetts v. EPA,* 549 US. at 517-518); and under ***5** statutes enacted expressly and specifically to protect the State's concrete interests in connection with SRS. *See* Pet. 17-18; Br. of *Amicus Curiae* United States Senator Lindsey Graham in Support of Petitioner 4-10 [hereinafter Sen. Graham *Amicus* Br.]. Those procedural rights, together with the quasi-sovereign interests that those rights protect, entitle South Carolina to special solicitude under *Massachusetts v. EPA.*

As shown in our petition (at 23-28), the State would have been accorded this solicitude in, among other courts, the Second, Fifth, and Tenth Circuit. *See also Brackeen v. Bernhardt,* No. 18-11479, 2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019) (relying on *Massachusetts v. EPA* to analyze States' standing to challenge Indian Child Welfare Act and final rule implementing it). The United States argues, however, that precedent from those courts involves different facts from those of this case. Br. in Opp. 16. The argument misses the point. Those other circuits, unlike the Fourth Circuit, would have recognized that it is "of considerable significance that the party seeking review here is a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. By failing to attach any significance to that circumstance, the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and with decisions of other federal courts of appeals. Sup. Ct. R. 10(a) & (c).[1]

6 II. South Carolina Has Article III Standing under *Massachusetts v. EPA.

In holding that South Carolina lacks standing and that its claims are not ripe, the Fourth Circuit reasoned that South Carolina's injuries will not "mature" until 2046, the end date of the period analyzed in a prior Environmental Impact Statement. Pet. App. 19a. Understandably, the United States does not defend this reasoning, which confuses the issue of standing with the issue of the merits of South Carolina's NEPA claim. Pet. 21-22. Instead, the United States argues that South Carolina's injuries will not mature until *2048,* because that is the earliest that the MOX Facility can be completed. Br. in Opp. 11. That argument suffers from the same two flaws that underlay the Fourth Circuit's reasoning.

First, the argument ignores that South Carolina is suffering *current* injuries. Those injuries include the legal wrongs caused by the United States' violations of South Carolina's statutory rights. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action … is entitled to judicial review thereof."). Those legal wrongs create ongoing actual harms and threats ***7** of harm caused by the approximately 10 metric tons of weapons-grade plutonium at SRS. Just as Massachusetts asserted current

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injury in the form of rising sea levels submerging its coast, South Carolina asserts current injuries in the form of excessive radiation contaminating its environment and other dangers associated with the plutonium's continuing (and mounting) presence. *Cf. Massachusetts v. EPA,* 549 U.S. at 522-523.

Second, South Carolina also faces imminent *future* injuries traceable to the federal government's May 10 decision to halt construction of the MOX Facility in favor of the unauthorized and untested Dilute and Dispose concept for processing the MOXable plutonium at SRS. There is at least a "reasonable probability" that the May 10 decision to switch horses in midstream will *prolong* the presence of massive amounts of weapons-grade plutonium at SRS, especially considering the federal government's current plan to ship an additional 26 metric tons of plutonium to SRS. Pet. App. 72a. *Clapper v. Amnesty Int'l,* 568 U.S. 398, 432 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 (2010)). This probability exists despite the United States' prediction that "the decision to halt construction of the MOX facility *reduces* the likelihood of injury by allowing the Department to focus its resources on other disposal methods that can begin more quickly and with greater certainty." Br. in Opp. 12 (emphasis in original).

The federal government's prediction partakes of magical thinking. For one thing, it contradicts the ***8** federal government's own prior forecast that the Dilute and Dispose method will not be completed before 2049, a year *after* completion of the MOX Facility is forecast. *See* National Academies of Sciences, Engineering, and Medicine, Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report 17-18 (Washington, D.C.: The National Academies Press, Oct. 2018) [hereinafter NAS Interim Report]. Moreover, the district court below identified multiple legal and practical hurdles that are likely to delay or altogether block implementation of the Dilute and Dispose alternative. Pet. App. 67a (lack of NEPA analysis of alternative); *id.* at 70a-72a (statutory and regulatory changes required before implementation of alternative); *id.* at 75a-76a (lack of congressional approval for alternative); *id.* at 78a (federal government's prior view that alternative violates agreement with Russia); *see also* NAS Interim Report at 2-3, 19-35 (also discussing "barriers" to implementation of Dilute and Dispose alternative). Beyond all this, the federal government's dismal track record strongly suggests that the predicted 2049 completion date for processing all the SRS plutonium under the Dilute and Dispose method is a chimera.[2]

***9** This Court upheld Massachusetts' standing to challenge EPA's failure to address the long-term, global, hard-to-quantify threat of injury assertedly posed by greenhouse gases from new-car engines manufactured in the United States. *Massachusetts v. EPA,* 549 U.S. at 516-526. This case concerns South Carolina's standing to challenge the Department of Energy's failure to address the ongoing, localized, well-established injuries and threat of future injuries posed by the massive and growing amounts of weapons-grade plutonium within South Carolina's borders. Because the injuries asserted here surely are no more speculative or remote than those found sufficient in *Massachusetts v. EPA,* South Carolina's standing follows a fortiori from this Court's decision in that case.

III. South Carolina's Claims Are Ripe.

As discussed in our petition (at 20-23), the Fourth Circuit's ripeness analysis conflicts with this Court's decisions in *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803 (2003), and *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726 (1998). Indeed, the Fourth Circuit failed even to identify clearly why it found a lack of ripeness under this Court's precedent: Its analysis implies that the claims are not "fit" for review, even though the claims (1) challenge discrete agency action that is indisputably final, (2) pose pure questions of law, and (3) do not depend for their resolution on ***10** further factual development. Reflecting the weakness of the Fourth Circuit's ripeness analysis, the United States does not defend it or attempt to reconcile it with this Court's ripeness precedent. Instead, the United States mischaracterizes the Fourth Circuit's decision.

The United States says the Fourth Circuit "understood petitioner to challenge a decision to make South Carolina 'the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site.' " Pet. 13 (quoting Pet. App. 21a). But that is wrong. The Fourth Circuit correctly recognized that South Carolina challenges a much more narrow, discrete decision: the decision to halt construction of the MOX Facility. Pet. App. 2a. And the Fourth Circuit also correctly understood that ripeness analysis applies to South Carolina's legal *claims,* not its assertions of injury. *See id.* at 19a. Where the Fourth

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Circuit erred was in apparently concluding that South Carolina could not satisfy the hardship prong of ripeness analysis. *See* Pet. 21-22. That conclusion rested on "reasons similar to those that" led it to conclude that South Carolina lacks standing (Pet. App. 19a), and is flawed for the same reasons that its conclusion on standing is flawed.

IV. This Case Is an Excellent Vehicle for Addressing an Issue of Exceptional Importance.

The United States does not impugn South Carolina's showing that the Fourth Circuit's decision is ***11** final and that the question presented was properly raised below. *See* note 1 *supra.*

Nor does the United States contest the importance of the question presented, which concerns the justiciability of suits by States against the federal executive branch. The importance of that question is established by the long line of decisions by this Court on that issue. *See* Pet. 29. Its importance is reinforced by the growing number of suits by States against the federal government - many of which have reached this Court[3] - and by uncertainties among lower federal courts and commentators about *Massachusetts v. EPA* and related precedent. *See Ariz. State Legis. v. Ariz. Indep. Redisricting Comm'n,* 135 S. Ct. 2664, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government … are hard to reconcile.") (internal quotation marks omitted).

This case arises in a setting that vividly illustrates the close connection between State standing and federalism. As set forth in the brief of *amicus curiae* U.S. Senator Lindsey Graham in support of South Carolina's Petition, the federal statutes violated by the federal government were intended to protect South Carolina from exactly what is occurring here - the federal government abandoning its statutory obligations and leaving South Carolina to deal with the ***12** consequences. Sen. Graham *Amicus* Br. 3-10. These statutes were enacted after high-level negotiations between the federal government and the State, and were specifically enacted to provide the State with recourse should the federal government fail to construct and begin operations of the MOX project. *Id.* at 5-10.

Allowing the federal government to shirk its statutory responsibilities to the State in an instance where Congress's clear intent was to protect it sets a dangerous precedent for other States and their relations with the federal government. For, if the federal government is free to violate statutes resulting from negotiations between the federal government and a sovereign State and that are specifically designed to protect the State's sovereign interests with no judicial recourse available to the State once protection is necessary, then the practicality of such negotiations becomes obsolete and the State's sovereign interests may never be protected against injuries caused by the federal government. This contravenes the principles of federalism upon which this nation was established.

*13 CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 24, 2019

Footnotes

1 The United States admits that, in South Carolina's brief for the Fourth Circuit, South Carolina cited *Massachusetts v. EPA* in support of its standing, but the United States criticizes South Carolina's failure to give *Massachusetts v. EPA* more prominence. Br. in Opp. 14. The criticism is misplaced. South Carolina satisfied this Court's "traditional rule" limiting certiorari to issues "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992). The issue of South Carolina's standing under *Massachusetts v. EPA* was presented to the Fourth Circuit, and the Fourth Circuit's disregard of that decision warrants further review because it creates a split among the circuits over a "significant issue." *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 530 (2002).

2 In holding that South Carolina's threat of future injury was speculative, the Fourth Circuit partly relied on the statutory provision requiring removal by January 1, 2022, of weapons-grade plutonium shipped to SRS between April 15, 2002, and January 1, 2022 for processing at the MOX Facility. Pet. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)); *id.* at 21a. Significantly, the United States does not rely on that provision in defending the Fourth Circuit's holding (Br. in Opp. 11), presumably because if the executive branch has

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its way that provision is not long for this world. After all, the federal government has not altered its plans to ship an additional 26 metric tons of plutonium to SRS, notwithstanding the looming January 1, 2022, deadline. Pet. App. 72a.

3 *E.g., Dep't of Homeland Sec. v. Regents of the Univ. of Calif.,* 139 S. Ct. 2779 (2019); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); *see also* Tara L. Grove, *When Can a State Sue the United States?,* 101 Cornell L. Rev. 851, 852 (2016) ("State suits against the federal government are on the rise.").

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EXHIBIT 12

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140 S.Ct. 392
Supreme Court of the United States.

SOUTH CAROLINA, Petitioner
v.
UNITED STATES, et al.

No. 18-1531
|
October 15, 2019

Case below, 912 F.3d 720.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

All Citations

140 S.Ct. 392 (Mem), 205 L.Ed.2d 214

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EXHIBIT 3

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant	Case No. 2020-CP-40-04603 **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs hereby move the Court for a temporary restraining order and preliminary injunction pursuant to Rule 65, SCRCP. A temporary restraining order and preliminary injunction are necessary to preserve the status quo during the pendency of this action and to avoid irreparable injury. This motion is supported by the Complaint and Exhibits being filed herewith. Plaintiffs further allege the following:

FACTUAL SUMMARY

On August 31, 2020 Defendant Wilson announced the settlement of a lawsuit against the United States Department of Energy (the "DOE") resolving the DOE's liability for violating of the terms of an agreement brokered by former Governor James H. Hodges regarding the disposition of weapons grade plutonium stored at the Savannah River Site ("SRS"). Compl., Ex. A., Affidavit of James M. Griffin, Sept. 25, 2020 (hereinafter, "Griffin Aff."), Ex. 1, Settlement Agreement. Governor Hodges's brokered settlement is codified at Title 50, United States Code, Section 2566 ("Section 2566"). Under Section 2566, the DOE must pay the State of South Carolina "economic impact and assistance payments" of $100 million per year from appropriated funds starting in 2016

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for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least $400 million in economic impact and assistance payments. Under the terms of the settlement agreement announced by Defendant Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of $600 million. Under the terms of the Settlement Agreement, the DOE is required to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." Griffin Aff., Ex. 1, ¶ 5(a). According to Wilson, this payment is expected on or after October 1, 2020.

Defendant Wilson has announced that he intends to pay two private law firms $75 million from the proceeds of the DOE settlement. Upon learning of the Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

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Plaintiffs have filed this action seeking injunctive relief and a declaratory judgment ruling that Defendant Wilson does not possess authority to use the proceeds from the DOE settlement to pay private law firms because the funds are intended solely for the State of South Carolina. Alternatively, if the Court were to conclude that Defendant Wilson is authorized to use these settlement proceeds to pay the private law firms, Plaintiffs seek an order requiring the Defendant to obtain court approval of the reasonableness of the fee as provided by the terms of the fee agreement with the law firms and South Carolina law.

ARGUMENT

The purpose of a temporary restraining order or preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church,* 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

Plaintiffs are entitled to an injunction to prohibit Defendant Wilson from paying $75 million from a settlement ear-marked exclusively for the benefit of the State of South Carolina. Injunctive relief is necessary to preserve the status quo and prevent Plaintiffs' important constitutional challenge from becoming moot. Moreover, as established below, Plaintiffs have made a sufficient showing that they are entitled to relief.

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I. Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement

Plaintiffs contend that the payment of $75 million to private law firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Accordingly, Section 5(a) clearly requires that payment of the entire $600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges,* 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002)

("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."). Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.* Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act ("Federal Funds Oversight Act") specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et seq.* Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office ("EBO") and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay $75 million to the law firms from the $600 million his agency will receive through this settlement. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

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II. The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order

Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006).

The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this monetary claim,[1] ruling that any such claim must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the lawyers refiled the same claim before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel

[1] The District Court did not dismiss the State's claim for injunctive relief.

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to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

In addition, the express terms of the fee agreement with the law firms states that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7. There is nothing prohibiting the Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.[2] However, the Defendant Wilson seeks to avoid judicial review and intends to pay the law firms $75 million without making any showing of reasonableness.

Furthermore, a payment of $75 million to the law firms exceeds the fee amount that the law firms would be entitled to receive under the contingency fee agreements entered with these firms. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to $150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

[2] Under South Carolina, the following factors are considered to determine whether an award of attorneys' fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

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Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 10. On June 7, 2019 Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.,* Ex.11) and a Reply Brief on September 24, 2019 (*id.*, Ex. 12).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 13.

Thus, Willoughby & Hoefer is purported to be paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

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Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 Million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000. There has been no explanation for Defendant Wilson's decision to pay these firms an additional $24,750,000 for a total payment of $75 million.

Plaintiffs, individually and on behalf of the Citizens of this State, are third party beneficiaries under the fee agreement entered into with the law firms. Plaintiffs seek an order requiring Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs.

III. Plaintiffs Have Public Interest Standing

Plaintiffs have "public interest" standing to pursue the declaratory action and injunctive relief as recognized in the following cases: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); Sloan v Friends of the Hunley, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue,* 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640

S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006*); Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

CONCLUSION

THEREFORE, Plaintiffs request a temporary restraining order and preliminary injunction prohibiting the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Badge Humphries
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Attorneys for Plaintiffs

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EXHIBIT 4

ELECTRONICALLY FILED - 2020 Sep 30 8:32 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina, Defendant.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 2020-CP-40-04603 **ORDER GRANTING TEMPORARY INJUNCTION PENDENTE LITE**

This matter comes before the Court on Plaintiffs South Carolina Public Interest Foundation and John Crangle's, et.al., Motion for a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65, SCRCP. The motion was heard by way of a virtual hearing on September 29, 2020. Appearing on behalf of Plaintiffs were James Griffin and Badge Humphries, and on behalf of Defendant Alan Wilson, as Attorney General for the State of South Carolina ("the Defendant"), was Deputy Solicitor General Emory Smith. At the conclusion of the hearing, this Court took Plaintiff's Motion under advisement.

Plaintiffs seek a Preliminary Injunction against the Defendant in order to prevent the disbursement of $75 million ("the disputed funds") which is to be paid to private law firms hired by the Defendant for services rendered in obtaining a $600 million settlement which the Defendant has entered into with the United States Department of Energy (the "DOE"). On August 31, 2020, the Defendant announced the settlement which resolved a lawsuit against the DOE regarding the disposition of weapons grade plutonium stored at

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the Savannah River Site. As a result of this settlement, the Defendant has agreed to pay two private law firms, Willoughby & Hoefer, P.A and Davidson, Wren & DeMasters, P.A. ("the law firms") the disputed funds directly out of the proceeds of the settlement sum of $600 million. Plaintiffs dispute the Defendant's authority to directly disburse these funds and seek a preliminary injunction preventing the disbursement of said funds until this litigation is resolved on the merits.

At the hearing on Plaintiffs' motion, the Defendant informed the Court that the funds had already been distributed to the law firms prior to the hearing, and thus Plaintiff's motion was moot. Immediately after the conclusion of the hearing, Plaintiffs informed the Court that the disputed funds had been distributed from the Defendant to the State Treasurer, but had in fact not yet been distributed to the law firms, and that the State Treasurer was planning to do so imminently. Defendant disputed this assertion and asserts the funds had been received by the law firms today.

The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). Out of an abundance of caution, this Court finds it necessary, in order to preserve the status quo and to prevent irreparable harm to the Plaintiffs, to issue a temporary injunction until this Court issues a full ruling on Plaintiffs' Motion. This Court's ruling on Plaintiff's motion will be issued prior to Friday, October 2, 2020 at 5:00 PM, and thus this Order shall remain in effect no later than such time.

IT IS THEREFORE ORDERED,

The Defendant is hereby enjoined from ordering, approving, or facilitating the distribution of any portion of the disputed funds until this Court issues a ruling on Plaintiff's motion. It is further ordered that the Office of the State Treasurer is hereby

enjoined from disbursing any portion of the disputed funds to any persons until such a ruling is made by this Court. This Order is to remain in effect until Friday, October 2, 2020 at 5:00 PM.

IT SO ORDERED.

_____
Debra R. McCaslin
Circuit Court Judge

September 29, 2020

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Richland Common Pleas

Case Caption:	South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number:	2020CP4004603
Type:	Order/Temporary Injunction

So Ordered

Debra R. McCaslin

EXHIBIT 5

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	Case No. 2020-CP-40-04603 **AMENDED SUMMONS**

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the Plaintiffs or their attorney, James M. Griffin of Griffin Humphries LLC, 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206-3135, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Badge Humphries
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Attorneys for Plaintiffs

Columbia, South Carolina
September 30, 2020

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	Case No. 2020-CP-40-04603 **AMENDED COMPLAINT**

NOW COME the Plaintiffs, by their undersigned attorneys, and as a Complaint against the Defendants, would show unto the Court:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff South Carolina Public Interest Foundation ("SCPIF") is a corporation, not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest including the upholding of the Constitution and laws of the State of South Carolina.

2. Plaintiff John Crangle is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated.

3. Defendant Alan Wilson is the Attorney General for the State of South Carolina.

4. Defendant Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") is a law firm organized and existing under the laws of the State of South Carolina with its principal offices located in Columbia, Richland County, South Carolina.

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5. Defendant Davidson, Wren & DeMasters, P.A. ("Davidson, Wren & DeMasters") is a law firm organized and existing under the laws of the State of South Carolina with its principal offices located in Columbia, Richland County, South Carolina.

6. This Court possesses jurisdiction under S.C. Constitution, Art. I, § 8, under S.C. Code Ann. § 15-53-10 *et seq.,* known as the Uniform Declaratory Judgment Act, and under the following decisions, which address public importance standing and citizen or taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

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7. This action raises constitutional and statutory issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the issues this action raises.

FACTS

8. On August 28, 2020, Defendant Wilson entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the failure by the United States Department of Energy ("DOE") to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site ("SRS"). Affidavit of James M. Griffin, Sept. 25, 2020 (attached hereto as Exhibit A and hereinafter referenced as "Griffin Aff."), Ex. 1.

9. The agreement brokered by Governor Hodges is codified at Title 50, United States Code, Section 2566 ("Section 2566").

10. Section 2566 provides for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility at the SRS (the "MOX Facility") to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors. The MOX Facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019.

11. If the DOE did not meet the MOX production objective by January 1, 2014, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2016, and (2) an amount of plutonium equal to the amount of all

unprocessed plutonium shipped to SRS between April 15, 2002 and January 1, 2022, no later than January 1, 2022.

12. The statute further provides that "[i]f the MOX production objective is not achieved as of January 1, 2016, the Secretary [of the DOE] shall, subject to the availability of appropriations, pay to the State of South Carolina . . . for economic and impact assistance an amount equal to $1 million per day for each day, not to exceed $100 million per year." 50 U.S.C. § 2566(d)(1).

13. The DOE has never met the milestones set forth in 50 USC § 2566.

14. Under the terms of the Settlement Agreement, Defendant Wilson agreed on behalf of the Citizens of South Carolina to forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of violations of 50 USC § 2566 until 2037. Griffin Aff., Ex. 1, ¶ 5(b).

15. In exchange, the United States agreed to an immediate payment to the State of South Carolina in the amount of $600 million. *Id.* ¶ 5(a).

16. The Settlement Agreement resolves "all claims relating to economic assistance payments or removal of plutonium that have arisen, or will arise." *Id.* ¶ 13.

17. Defendant Wilson announced at a press conference that he intends to pay two private law firms $75 million from the $600 million economic impact and assistance payment for their legal services in representing the State.

18. Upon learning of Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous

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advocacy and coordination with members of [the State's] Congressional delegation." Griffin Aff., Ex. 2.

19. Governor McMaster concluded the letter stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.*

20. First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that State law requires the entire amount be deposited into the State's General Fund. Griffin Aff., Ex. 3.

Attorney General Wilson Does Not Possess Authority to Use Proceeds from the U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to South Carolina to Pay Private Law Firms

21. The payment of $75 million to private law firms from a settlement of economic impact and assistance payments owed by the DOE to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution.

22. When money under a settlement agreement is payable directly to the State, as in the case with the Settlement Agreement, the proceeds must be deposited in the General Fund, and only the Legislature controls its appropriation.

23. Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement.

24. In this matter, neither the court order nor the settlement exception applies.

25. There is not any order awarding attorneys' fees.

26. The Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees.

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27. Rather, the United States expressly disclaims any liability for attorneys' fees in Section 5(a) of the Settlement Agreement, which provides for "[i]mmediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1, § 5(a) (emphasis added).

28. Section 5(a) of the Settlement Agreement clearly requires that payment of the entire $600 million be made directly to the State of South Carolina.

29. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million, which is required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.

30. Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.")

31. Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.*

32. Defendant Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

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The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order

33. Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in this case appears to be patently unreasonable.

34. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3.

35. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

36. The lawyers brought suit to collect a statutory payment for economic impact and assistance of $100 million for each year that the DOE failed to meet the deadlines set forth in Section 2566.

37. The DOE never contested that it failed to comply with federal law.

38. Rather, the DOE contended that Congress had not appropriated money from which the DOE could make the economic assistance payments to the State of South Carolina.

39. The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 Million assistance payment for failing to comply with the statute.

40. On February 7, 2017, the federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4.

41. Subsequently, the lawyers refiled the same suit before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with the statute for 2017.

42. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5.

43. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit.

44. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

45. Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6.

46. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *Id.*, Ex. 2.

47. In apparent recognition that contingency fee agreements entered into with the State of South Carolina may produce an unreasonable fee award, the fee agreement entered into with the law firms expressly provides that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7.

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48. There is nothing prohibiting Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.

49. Furthermore, a payment of $75 million to the law firms exceeds the amount of fee that they would be entitled to receive under the contingency fee agreements entered with these firms.

50. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to$150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

51. Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

52. The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019, the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9.

53. On June 7, 2019, Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

54. Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court.

55. The amended fee agreement was executed on June 13, 2019, by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

56. Under the terms of the amended contingency fee agreement, Willoughby & Hoefer is being paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina.

57. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

58. Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court.

59. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

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60. The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000.

61. The fee agreement was entered into by Defendant Wilson on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract.

62. Plaintiffs, individually and on behalf of the Citizens of this State, hereby demand that Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

Plaintiff Files Suit, and Defendant Wilson Apparently Disburses the Disputed Fund Before a Hearing Can Be Held on the Propriety of Defendant Wilson's Conduct

63. On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson and filed Plaintiffs' motion for a temporary restraining order and preliminary injunction against Defendant Wilson seeking to enjoin Defendant Wilson's payment of $75,000,000 to the law firms ("Plaintiffs' Initial Motion").

64. On Friday, September 25, 2020 at 11:10 a.m., Defendant Willoughby & Hoefer and a representative of the Office of the Attorney General received notice of a hearing set for Wednesday, September 30, 2020 in a related case that likewise sought to enjoin the expenditure of the $600 million in settlement funds. *See* Griffin Aff. Ex. 13.

65. On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings while requesting that the Court schedule a hearing on Plaintiffs' Initial Motion. *See* Griffin Aff., Ex. 14.

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66. On the morning of Monday, September 28, 2020, counsel for Defendant Wilson emailed the Court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See id.*, Ex. 15.

67. The Court responded by stating that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Motion over Defendant Wilson's objections. *See id.*

68. Counsel for Defendant agreed to accept service as of the Complaint and Plaintiffs' Initial Motion as of September 28, 2020. *See id.*, Ex. 16.

69. On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. In response, counsel for the Attorney General ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17.

70. Immediately prior to that hearing on September 29, 2020, Defendant Wilson filed a memorandum in opposition to Plaintiffs' Initial Motion in which Defendant Wilson claimed that the funds at issue in this dispute had been transferred to the law firms earlier in the day. Based on this purported transfer of the funds, Defendant Wilson claimed that this matter is now moot. *See* Mem. Atty. General in Opp'n. to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3.

71. Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds have not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See id.*, Ex. 18.

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72. Thereafter, the Court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the law firm of Willoughby & Hoefer had received the disputed funds. *See id.*

73. During the hearing, the Court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. That order expires at 5:00 p.m. on Friday, October 2, 2020.

74. On the morning of September 30, 2020 Plaintiffs received confirmation from the State Treasurer that the proceeds were in fact wired to the law firm hours before the 3 p.m. hearing on September 29, 2020. According to Treasurer Loftis: "The Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]. We processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account. This was a standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires." *See id.*, Ex. 19.

CLAIMS FOR RELIEF

COUNT I
(Declaratory Judgment)

75. Plaintiffs reallege each and every allegation set forth above as if repeated verbatim herein.

76. Pursuant to Section 15-53-30 of the South Carolina Code of Laws, Plaintiffs request declaratory relief from this Court.

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77. Plaintiffs are entitled to seek, and do hereby seek, an order of this Court declaring the rights, obligations, and status of the parties to this proceeding, and, in particular, as follows:

a. That Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit $600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;

b. That the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;

c. That the Attorney General's intended payment of $75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause; and

d. In the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable.

COUNT II
(Constructive Trust)

78. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.

79. The disputed funds have been transferred to and received by Willoughby & Hoefer and/or Davidson, Wren & DeMasters in an attempt to deprive the Court of jurisdiction to determine whether the Defendant Wilson is authorized to make the payment from the settlement proceeds.

80. Willoughby & Hoefer and Davidson, Wren & DeMasters, as special counsel to the Attorney General for the State of South Carolina, owe fiduciary duties to the Attorney

General and the State of South Carolina and are bound to act in good faith and with due regard to the interests of the State of South Carolina.

81. Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters have received the disputed funds with full knowledge that Plaintiffs commenced a lawsuit in this Court seeking a declaration that the Defendant Wilson does not have authority to pay the intended fees from the settlement proceeds and knowing that this Court had scheduled a hearing to enjoin the transfer of these funds.

82. Defendant Wilson's payment of funds to Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters was an *ultra vires* action and is *void ab initio*.

83. The State of South Carolina retains equitable title to those funds because those funds do not equitably belong to these law firms and these law firms cannot in good conscience retain or withhold these funds from the State of South Carolina, who is beneficially entitled to them.

84. Accordingly, Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters hold those funds as trustees for the ultimate benefit of the State of South Carolina for the reasons set forth above.

85. Accordingly, Plaintiffs ask this Court to declare a resulting trust in favor of Plaintiffs.

86. Plaintiffs thus request this Court order possession and ownership to be transferred from Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters to the State of South Carolina

87. In the alternative, Plaintiffs request that the Court enjoin Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters from further distributing the disputed funds and to

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continue to hold the disputed funds in trust until this dispute is ultimately resolved on its merits.

COUNT III
(Receipt of Unauthorized Payment/Restitution/Money Had and Received)

88. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.

89. Defendant Wilson lacked authorization to pay attorneys' fees to Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters from the settlement proceeds.

90. Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters are therefore required to return the fees received to the State of South Carolina, together with pre-judgment interest.

COUNT IV
(Injunctive Relief)

91. Plaintiff Crangle realleges each and every allegation set forth above as if repeated verbatim herein.

92. Without the equitable relief requested herein, Plaintiffs will be irreparably harmed.

93. In *Sloan v. School Dist. of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000) the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that "'[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.'" *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)).

94. In *South Carolina Department of Rev. v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court's refusal to grant an

injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Department of Rev. v. Richland County*, 422 S.C. at 311, 811 S.E.2d at 768.

95. Plaintiffs have shown it will succeed on the merits of this case by making a prima facie showing that Plaintiffs are entitled to the injunctive relief sought. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005).

96. Plaintiffs have no adequate remedy at law because the equitable relief sought herein is necessary to preserve the subject of controversy in the condition which it is until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. *See id.*, 367 S.C. at 457, 626 S.E.2d at 37-38.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court:

1. Declare that Section 1-7-150 of the South Carolina Code of Laws requires the Attorney General to deposit $600 million in economic impact and assistance proceeds from the DOE settlement into the State's General Fund;
2. Declare that the General Assembly has exclusive authority to appropriate moneys from the General Fund of South Carolina, and the Attorney General has no such authority;
3. Declare that the Attorney General's intended payment of $75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause;

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4. Declare, in the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable;

5. Enjoin, temporarily and permanently, the disbursement of the funds at issue in this dispute:

   a. Ordering the funds be maintained by or returned to the State of South Carolina until this dispute is resolved on its merits; or

   b. In the alternative, ordering that the funds be maintained by the Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters without further disbursement until this dispute is resolved on its merits.

6. Grant Plaintiffs their costs and attorneys' fees under Section 15-77-300 of the South Carolina Code of Laws; and in the alternative, grant Plaintiffs their reasonable attorneys' fees and costs from the funds preserved through this action for the people of South Carolina, commonly known as the common fund doctrine; and

7. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/Badge Humphries
James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
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James.carpenter@carpenterlawfirm.net

Attorneys for Plaintiffs

Columbia, South Carolina
September 30, 2020

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Exhibit A

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiff, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No. 2020-CP-40-04603 **AFFIDAVIT OF JAMES M. GRIFFIN**

Comes James M. Griffin and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.

2. That the Willoughby & Hoefer firm were notified on Friday, September 25 at 11:10 a.m. that an injunction had been set in Barnwell for today.

3. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in the Amended Complaint filed concurrently herewith.

Exhibit 1	Settlement Agreement, *South Carolina v. United States*, Fed. Cir. No. 19-2324 (Aug. 28, 2020)
Exhibit 2	Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General (Aug. 30, 2020)
Exhibit 3	Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General (Sept. 10, 2020)
Exhibit 4	Order, *South Carolina v. United States et al.*, Civil Action No. 1:16-cv-00391-JMC (D.S.C. Feb. 7, 2017), ECF No. 76

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Exhibit 5	Opinion & Order, *South Carolina v. United States*, Case No. 1:18-cv-00038-MMS (Fed. Ct. Aug. 20, 2019), ECF No. 32
Exhibit 6	Federal Court Docket Sheets for *South Carolina v. United States*, Case Nos. 1:16-cv-00391-JMC, 1:17-cv-01068-MMS, and 1:18-cv-00038-MMS
Exhibit 7	Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility
Exhibit 8	Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility (June 13, 2019)
Exhibit 9	*South Carolina v. United States*, 912 F.3d 720 (2019)
Exhibit 10	Petition for Writ of Certiori, *South Carolina v. United States*, No. 18-1531, 2019 WL 2464930 (4th Cir. June 7, 2019)
Exhibit 11	Reply Brief of Petitioner, *South Carolina v. United States*, No. 18-1531 (4th Cir. Sept. 24, 2019)
Exhibit 12	*South Carolina v. United States*, 140 S. Ct. 392 (2019)
Exhibit 13	Email from V. Ware to Willoughby Hoefer counsel re Injunction Hearing Sept. 30 at 10:00 A.M. Barnwell County et al. v. Alan Wilson (Sept. 25, 2020)
Exhibit 14	Email from J. Carpenter to Judge Lee regarding Hearing on Temporary and Preliminary Injunction (Sept. 25, 2020) (requesting hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 15	Email thread between Judge McCaslin law clerk and counsel for all parties re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (scheduling hearing on Motion for Temporary Restraining Order and Preliminary Injunction)
Exhibit 16	Email thread between B. Humphries, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (agreement to accept service of Summons and Complaint)
Exhibit 17	Email thread between J. Griffin, counsel for Plaintiffs, and E. Smith, counsel for Defendants re SCPIF v. Wilson 2020CP4004603 (Sept. 28, 2020) (discussing temporary hold on payment to counsel)
Exhibit 18	Email thread between counsel for Defendant, counsel for Plaintiffs, and Judge McCaslin re SCPIF v. Wilson 2020CP4004603 (Sept. 29, 2020)

(following WebEx hearing and discussing status of payment of attorneys' fees to law firms)

Exhibit 19 Email thread between J. Griffin and Judge McCaslin and counsel re SCPIF v. Wilson 2020CP4004603 (Sept. 30, 2020) (discussing confirmation from State Treasurer that funds were wired to Willoughby & Hoefer just hours prior to hearing)

Further Affiant sayeth naught.

Dated this 30th day of September, 2020.

James M. Griffin (S.C. Bar No. 9995)
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Subscribed and sworn to before me
by James M. Griffin on this
the 30th day of September 2020.

Notary Public, State at Large, South Carolina
My Commission Expires September 12, 2029

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EXHIBIT 1

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Fed. Cir. No. 19-2324
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiff's claims, without any further judicial proceedings and without there being any further trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, the parties stipulate and agree as follows:

1. In early 2000, the Department of Energy elected to construct a MOX fabrication facility (MOX Facility) at the Savannah River Site (SRS), Aiken, South Carolina. Since April 15, 2002, and through the present, the Department of Energy transferred defense plutonium or defense plutonium materials into the State of South Carolina in anticipation of disposition into MOX fuel or otherwise. For purposes of this agreement, the parties agree that the amount of defense plutonium or defense plutonium materials remaining at SRS amounts to nine and one-half (9.5) metric tons and will be referenced as the "subject defense plutonium or defense plutonium materials" in this agreement.

2. 50 U.S.C. § 2566, entitled "Disposition of Weapons-Usable Plutonium at Savannah River Site," provides a detailed plan for the MOX Facility, including a schedule for meeting the MOX production objective, defined as the average rate at which the MOX Facility converts defense plutonium into MOX fuel over a given period of time. Should the MOX

production objective not be achieved by certain dates, the statute requires the Department of Energy to make specified economic and assistance payments and to remove certain defense plutonium or defense plutonium materials transferred to the Savannah River Site but not processed by the MOX facility – referenced in this agreement as the subject defense plutonium or defense plutonium materials – from the State of South Carolina by certain deadlines.

3. The MOX production objective has not been met and will not be met.

4. On March 3, 2018, the State of South Carolina filed an amended complaint in the Court of Federal Claims, seeking economic and impact assistance payments for the years 2016 and 2017.

5. The parties subsequently entered into negotiations designed to resolve amicably all of the State of South Carolina's present and future claims relating to obligations of the Department of Energy imposed pursuant to 50 U.S.C. § 2566(c) and (d). The State of South Carolina has offered to settle this case based upon the following terms:

a. Immediate payment by the United States to the State of South Carolina in the amount of $600 Million (Six Hundred Million Dollars), inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.

b. The State of South Carolina shall forego any legal action to enforce any rights, or to seek any relief whatsoever, whether declaratory, injunctive, or monetary, arising out of 50 U.S.C. § 2566(c) or 2566(d) until January 1, 2037.

c. After January 1, 2037, the State of South Carolina's rights and remedies under 50 U.S.C. § 2566(c) and 2566(d) will be governed solely by the terms of this agreement, as set forth below.

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d. If, on January 1, 2037, 9.5 metric tons of the subject defense plutonium or defense plutonium materials have not been removed from the State of South Carolina, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during the time period from the signing of this Agreement to January 1, 2037, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be multiplied $1.5 Billion (One Billion Five Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy to the State of South Carolina by April 1, 2037. This payment shall be in full satisfaction of any claim for economic and impact assistance payments pursuant to 50 U.S.C. § 2566(d)(2) owed to the State of South Carolina from 2022 through 2036.

e. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, then the Department of Energy shall make a payment to the State of South Carolina, based upon the following calculation:

(1) The amount of subject defense plutonium or defense plutonium materials not removed from the State of South Carolina during that calendar year, shall be divided by 9.5;

(2) The resulting percentage of the said 9.5 metric tons remaining in the State of South Carolina as calculated pursuant to subparagraph (1) is to be

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multiplied by a sum of money representing $1 Million (One Million Dollars) per day for each day during that said year in which there remains a portion of the said 9.5 metric tons, with said sum of money to be capped for any given year at $100 Million (One Hundred Million Dollars);

(3) The resulting sum of money calculated pursuant to subparagraphs (1) and (2) shall be paid by the Department of Energy by December 31 of that particular calendar year, for which any of the 9.5 metric tons remains in the State of South Carolina, beginning with the year 2037.

f. If any of the 9.5 metric tons remains in the State of South Carolina after December 31, 2036, the Department of Energy shall continue to remove from the State of South Carolina such remaining subject defense plutonium or defense plutonium materials. If, after December 31, 2036, the Department of Energy has removed less than 4.75 metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may immediately institute legal action to enforce this paragraph 5(f) removal requirement. If, after December 31, 2036, the Department of Energy has removed 4.75 or more metric tons such defense plutonium or defense plutonium materials, then the State of South Carolina may only institute legal action to enforce this paragraph 5(f) removal requirement after January 1, 2042.

6. The parties agree that the United States retains sole discretion in the method of removal of the subject defense plutonium or defense plutonium materials. The parties further agree that the determination of the amount of total material removed from the State shall be by certification of the Department of Energy, through a declaration by an appropriate Department official, pursuant to the provisions of 28 U.S.C. § 1746.

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7. The terms of this agreement will remain in effect until the United States removes 9.5 metric tons of the subject defense plutonium or defense plutonium material from the State of South Carolina, or until Congress amends 50 U.S.C. § 2566(c) or (d) with respect to the obligations of the Department of Energy for the removal of defense plutonium or defense plutonium material or payments to the State of South Carolina in a manner that is inconsistent with the terms and conditions of this agreement, whichever is earlier.

8. The State of South Carolina's offer has been accepted on behalf of the United States Attorney General.

9. Upon satisfaction of the terms set forth in paragraph 5(a), the State of South Carolina agrees to join with the United States in stipulating to dismissal, with prejudice, of the appeal pending in the Court of Appeals for the Federal Circuit.

10. Upon removal of the 9.5 metric tons of subject defense plutonium or defense plutonium materials, the State of South Carolina releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of or related or otherwise involved in: (a) this case, regardless of whether they were included in the complaint, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort; and (b) any and all outstanding obligations of the Department of Energy arising under 50 U.S.C. § 2566(c) or (d).

11. This agreement is in no way related to or concerned with any taxes for which the State of South Carolina is now liable or may become liable in the future as a result of this agreement.

12. The State of South Carolina warrants and represents that no other action or suit with respect to the claims advanced in this suit or otherwise referenced in paragraph 10 is

pending or will be filed in or submitted to any other court, administrative agency, or legislative body by the State of South Carolina. The State of South Carolina further warrants and represents that it has made no assignment or transfer of all or any part of its rights arising out of or relating to the claims advanced in this suit. Should there be now or in the future any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement shall be refunded promptly by the State of South Carolina, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

13. This agreement is for the purpose of settling this case and all claims that the State of South Carolina may or could bring arising from obligations imposed on the Department of Energy pursuant to 50 U.S.C. § 2566(c) or 2566(d). The parties intend that this agreement will resolve all claims relating to economic and assistance payments or removal of plutonium that have arisen, or will arise, between 2016 and the date on which the Department of Energy completes removal of the subject 9.5 metric tons of defense plutonium or defense plutonium materials. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of this agreement.

14. The Attorney General for the State of South Carolina represents that he is authorized to enter into this agreement on behalf of the State of South Carolina.

15. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

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AGREED TO:

UNITED STATES OF AMERICA

WILLIAM P. BARR
Attorney General
United States of America

CLAIRE MCCUSKER MURRAY
Principal Deputy Associate Attorney General

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director, National Courts Section

TARA K. HOGAN
Assistant Director
Department of Justice
Civil Division
Commercial Litigation Branch
Washington, DC

DATED: August 28, 2020

STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General
State of South Carolina
Columbia, SC

DATED: August 21, 2020

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EXHIBIT 2

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HENRY MCMASTER
GOVERNOR

August 30, 2020

The Honorable Alan M. Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Attorney General Wilson:

I recently received a copy of the Settlement Agreement you executed with the federal government regarding the cancellation of the Mixed Oxide Fuel Fabrication Facility ("MOX") project and the Department of Energy's ("DOE") storage of defense plutonium and defense plutonium materials at the Savannah River Site ("SRS"). As you know, I did not receive the Settlement Agreement until late last week, at which point you had already signed it on behalf the State. Having carefully reviewed the document and your outside counsel's responses to my immediate questions regarding the same, I am compelled to express my concerns regarding the Settlement Agreement.

First, I am not convinced that this long-term arrangement provides sufficient assurances that DOE will remove the plutonium from our State in a timely manner. Currently, federal law provides that all defense plutonium transported into the State between 2002 and the present must be removed from SRS by January 1, 2022. However, under the Settlement Agreement, it appears that DOE will not be required to remove this plutonium until January 1, 2037. And if DOE only removes half of the total amount currently at SRS by this new deadline, the State of South Carolina will be forced to forgo legal action until January 1, 2042. I understand that settlement negotiations are inherently fluid in nature and that the transfer of defense plutonium is not an expeditious process, but the Settlement Agreement does not appear to align with previous discussions. At bottom, I cannot support a compromise that extends the existing removal deadline by up to twenty years.

Second, after reviewing your counsel's responses to my questions regarding the anticipated use of the settlement proceeds, I must note my concerns regarding the payment of attorneys' fees. After years of DOE repeatedly ignoring its obligations and abandoning the MOX project, President Trump and his Administration have demonstrated their commitment to removing surplus plutonium from our State. Secretary Brouillette's willingness to address these inherited issues is

noted and most appreciated. However, the federal government's relatively recent attention to this important issue is due in no small part to our zealous advocacy and coordination with members of the congressional delegation. Accordingly, while I recognize that this has been complicated and time-consuming litigation and that you needed the assistance of outside counsel to pursue these complex claims, I simply cannot endorse the payment of $75 million in attorneys' fees under the circumstances.

To be clear, I appreciate your efforts to recover the economic and impact assistance payments owed to the State and your pursuit of this litigation more generally. However, as I have repeatedly conveyed, it is of paramount importance that South Carolina not become a permanent plutonium waste repository. Therefore, I cannot support a Settlement Agreement that extends DOE's existing removal deadlines by up to twenty years and potentially sidelines South Carolina's future leadership by restricting the State's ability to enforce its legal rights.

Yours very truly,

Henry McMaster

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EXHIBIT 3

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The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit

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DAVID M. PASCOE
Solicitor

September 10, 2020

The Honorable Alan M. Wilson
S. C. Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear Attorney General Wilson:

I write to raise serious concerns about your intent to pay two law firms $75 Million from the proceeds of a $600 Million settlement with the United States Department of Energy (DOE). I believe such payment is prohibited by South Carolina law and appears to violate the canons of ethics which govern licensed attorneys. I request that you, Governor McMaster, and our legislative leaders get together to resolve these issues to avoid potential litigation.

South Carolina law prohibits the appropriation of State funds by any officer in the Executive Branch of government. The $600 Million allocated in the Settlement Agreement with DOE are public funds allocated to South Carolina. You, of all people, know that an Attorney General has no authority to direct how those public funds are spent. Recently, you filed a Brief in the South Carolina Supreme Court emphasizing the very point that executive officers do not have authority to direct funds from a settlement agreement.

The following is a specific quote from your Brief:

> Executive officers...possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund...See, *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623 (2002)["...there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation powers. Art. I, § 8.

State v. Quinn, Attorney General's Memorandum In Response to Court's Order of March 12 pg. 25.

This above quote is one of the few points I agree with in your Brief. When money is directed to go to the State's General Fund as in the case with the DOE Settlement Agreement, you nor the Governor have the authority to transfer those funds. Only the Legislature controls what happens with the $600 million.

The Legislature has spoken through S.C. Code Section 1-7-150. This statute requires you to deposit all funds received by judgment or settlement into the State's General Fund, and the exception for investigative costs and litigation costs awarded by court order or settlement in this statute clearly does not apply. There was not any order awarding attorneys' fees. The Settlement Agreement does not allocate any portion of the $600 Million to attorneys' fees. In fact, DOE specifically carved out attorneys' fees in the Settlement Agreement. Section 5(a) provides for:

> Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses*.

Section 5(a) clearly requires that payment of the entire $600 Million be made directly to the State of South Carolina, and S.C. Code Section 1-7-150 directs you to deposit $600 Million into the State's General Fund. These are public funds, not a slush fund to dole out money to private law firms.

Your agreement to pay private law firms also raises ethical concerns. Based upon the information I have been able to review, the agreement that you entered with these firms on behalf of the State appears to violate the South Carolina Rules of Professional Conduct. Rule 1.5 of the Rules of Professional Conduct, S.C. App Ct. Rule 407 states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Contingency fees are not exempt from this reasonable standard. *Id.* at Note 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. See, *Getzen v. L. Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006). At the very least, I believe it would be prudent to seek an opinion from the South Carolina Bar Ethics Advisory Committee regarding the fee amount.

The payment of a $75 Million fee for the services performed by the law firms in this matter seems arbitrary and unreasonable. This is public money. It belongs to the Citizens of South Carolina, and awarding private law firms $75 Million is unconscionable when one considers it is almost 13 times the total amount every Solicitor's Office in the State receives in annual state judicial circuit support. This is more than the State funding received by all 32 of the Solicitors' Offices and Public Defenders' Offices combined. It is more than our State provides our entire Judiciary in annual funding. In fact, it is even 5 times more than the annual base budget for the Attorney General's Office. Perhaps most egregious is your attempt to award more money to

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private law firms than will probably be received by the counties directly impacted by the storage of plutonium.

These law firms unsuccessfully filed suit to enforce a settlement reached by Governor Hodges which is codified in the United States Code at 50 USC § 2566. The federal statute requires DOE to pay South Carolina $100 Million per year for each year it fails to meet certain deadlines relating to the processing and disposition of surplus defense plutonium stored at the Savannah River Site (SRS). DOE never contested that it failed to comply with federal law. Rather, DOE took the position in federal court that Congress had not appropriated money from which DOE could pay the penalty.

Your lawyers first sued in federal court in South Carolina to collect the $100 Million penalty for failing to comply with the statute in 2017. The federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Claims. Subsequently, your lawyers refiled the same suit before the Court of Claims, this time seeking $200 Million because DOE had not complied with the statute for 2018. Once again, your lawyers lost the case. The Court of Claims ruled with DOE. Your lawyers then appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit. While the appeal was pending, you reached this settlement with DOE.

From court records, it does not appear your lawyers engaged in any discovery whatsoever. I can't find any record of them serving interrogatories; taking depositions; hiring experts; or obtaining documents from DOE. Instead, your lawyers only drafted pleadings and wrote briefs to address the legal question of whether DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. Quite frankly, I do not understand why our State felt the need to bring in private counsel in the first place to deal with a relatively straightforward issue that government leaders were ultimately able to negotiate among themselves.

Under the terms of the settlement, you have agreed on behalf of the people of South Carolina to forgo enforcing their federal rights to have the plutonium removed or processed for another 15 years. In exchange, DOE has agreed to pay South Carolina a substantially reduced penalty of $600 Million. As you acknowledged in your press release, this was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. Yet, you now plan to pay private lawyers a contingency fee on the entire $600 Million when they only sued for $200 Million. This makes absolutely no sense, and I agree with Governor McMaster's objection to your intention to pay $75 Million to these law firms.

The contingency fee agreement that you entered with these law firms is more favorable to the lawyers than your standard contingency fee agreements entered in other cases. Under the payment terms of your standard agreements, these law firms would have been entitled to receive approximately $25 Million, not $75 Million. Curiously, you have never posted the fee agreement for this matter on your office's official website, yet you have other contingency fee agreements posted: http://www.scag.gov/litigation-retention-agreements.

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Finally, this deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.[1]

$75 Million is an enormous amount of money that can be used to make a real difference in the lives of South Carolinians. You cannot lawfully give funds directed to go into the State General Fund to your political friends and even if you could, you should not. I request that you do the right thing as a constitutional officer of our State and seek approval from our General Assembly before you make any attempt to pay public funds to private law firms.

Respectfully yours,

David M. Pascoe, Jr.
First Circuit Solicitor

cc: The Honorable Henry D. McMaster, Governor
The Honorable Curtis M. Loftis, Jr., Treasurer
The Honorable Richard A. Eckstrom, Comptroller General
President Pro Tem Hugh K. Leatherman, Sr., South Carolina Senate
Minority Leader Nikki G. Setzler, South Carolina Senate
The Honorable James H. "Jay" Lucas, Speaker of the S. C. House of Representatives
The Honorable James T. Rutherford, Minority Leader of S. C. House of Representatives
The Honorable G. Murrell Smith, Jr., Chairman of S. C. House Ways and Means

[1] https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html

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EXHIBIT 4

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

State of South Carolina, Plaintiff, v. United States; United States Department Of Energy; Dr. Ernest Moniz, *in his official Capacity as Secretary of Energy*; National Nuclear Security Administration; *and* Lt. General Frank G. Klotz, *in his official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security*, Defendants.	Civil Action No. 1:16-cv-00391-JMC **ORDER**

On April 25, 2016, Defendants United States, the United States Department of Energy ("DOE"), Dr. Ernest Moniz, the National Nuclear Security Administration ("NNSA"), and Lieutenant General Frank G. Klotz (collectively "Defendants") filed a motion to dismiss the complaint filed by Plaintiff, the State of South Carolina (the "State"), arguing, among other things, that the third cause of action in the complaint, seeking review of Defendants' alleged failure to act in compliance with 50 U.S.C. § 2566(d), should be dismissed because the court lacked subject-matter jurisdiction over it. (ECF No. 17.) Specifically, Defendants contended that sovereign immunity had not been waived with respect to the third cause of action because the only potential waiver applicable to that cause of action—that found in the Administrative Procedures Act, 5

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U.S.C. § 701, *et seq.*—is not available where, as here, another court, such as the Court of Federal Claims ("CFC") provides an adequate remedy for the challenged agency action at issue. (*See id.* at 30-34.)

By order entered October 31, 2016, the court agreed with Defendants that the court lacked subject matter jurisdiction over the State's third cause of action because, pursuant to its jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346, 1491, the CFC provides an adequate remedy for the agency action challenged in that cause of action and, therefore, Defendants had not waived sovereign immunity from suit in this court with respect to the complaint's third cause of action. (*See* ECF No. 56.) The court subsequently denied the State's motion for reconsideration of its rulings in the October 31, 2016 order. (*See* ECF No. 75.) Because the court was uncertain whether it should dismiss the third cause of action without prejudice to the State's ability to prosecute it in an original action filed with the CFC or instead should transfer the cause of action to the CFC, pursuant to 28 U.S.C. § 1631, the court directed the parties to file supplemental briefing on the issue and declined to decide Defendants' motion to dismiss the third cause of action until the briefs had been submitted. (*See* ECF No. 56 at 24-31.)

The parties have since filed their supplemental briefs. (ECF Nos. 63, 64.) The parties agree that the court should dismiss the cause of action without prejudice to the State's ability to prosecute it in an original action filed in the CFC rather than transfer it. (*See* ECF Nos. 63, 64.) Accordingly, for the reasons stated in the court's October 31, 2016 order (ECF No. 56), as well as in its order denying the State's motion for reconsideration (ECF No. 75) and in the parties' supplemental briefs, Defendants' motion to dismiss the complaint (ECF No. 17) is hereby **GRANTED IN**

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PART.[1] The third cause of action in the State's complaint (ECF No. 1 ¶¶ 97-112) is hereby **DISMISSED** without prejudice to the State's ability to prosecute it an original action filed in the Court of Federal Claims.

IT IS SO ORDERED.

J. Michelle Childs

United States District Court Judge

February 7, 2017
Columbia, South Carolina

[1] The court notes that Defendants' motion to dismiss is not fully disposed by this order. Defendants have moved to dismiss the first and second causes of action in the State's complaint on grounds that the court has yet to address. (*See* ECF No. 17.)

EXHIBIT 5

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In the United States Court of Federal Claims

No. 18-38C
(Filed: August 20, 2019)

STATE OF SOUTH CAROLINA,	*	
	*	
Plaintiff,	*	50 U.S.C. § 2566; Appropriations;
	*	Cross-Motions for Summary Judgment;
v.	*	Economic and Impact Assistance Payments;
	*	Judgment Fund; RCFC 56
THE UNITED STATES,	*	
	*	
Defendant.	*	

Randolph R. Lowell, Columbia, SC, for plaintiff.

Tara K. Hogan, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff, the State of South Carolina, seeks an award of economic and impact assistance payments for 2016 and 2017 pursuant to 50 U.S.C. § 2566, which directs such payments if the United States Department of Energy ("DOE") fails to meet certain deadlines related to the processing and disposition of surplus defense plutonium stored at the DOE's Savannah River Site ("SRS").[1] Specifically, plaintiff contends that 50 U.S.C. § 2566(d) requires the DOE to pay it $1 million per day, up to a statutory cap of $100 million per year, for a total of $200 million. Both plaintiff and defendant move for summary judgment. For the reasons set forth below, the court grants defendant's motion and denies plaintiff's motion.

I. BACKGROUND

A. Facts

Following the end of the Cold War, the United States was challenged with finding a safe, secure method to dispose of large amounts of weapons-grade nuclear material, including weapons-grade plutonium, from both foreign and domestic nuclear weapons production

[1] The SRS is a federally owned and operated facility that processes and stores nuclear material in support of national defense, nonproliferation, research, and environmental missions. Pl.'s Mot. App. 145.

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facilities. Am. Compl. Ex. 3 at 2. The need to securely store these materials in a safe environment was paramount; however, there was also great promise in reprocessing this material into fuel for nuclear reactors. Id. at 3. If possible, enriched nuclear material would be repurposed into lower-grade fuel, and if the material was not suitable for conversion into fuel, it would be "immobilized" to render it difficult to use as a weapon.[2] Pl.'s Mot. App. 10. To comply with the terms of an agreement with the Russian Federation, which required irradiation to dispose of the material, the DOE determined that the best option would be irradiating the material in a nuclear reactor to degrade it. Id. at 9-10, 13, 19. See generally Am. Compl. Ex. 7.

In early 2000, the DOE selected the SRS to reprocess the material. Pl.'s Mot. App. 68, 77. Simultaneously, the DOE, interested in cost savings through facility closures, wanted to move the plutonium from the Rocky Flats DOE facility near Denver, Colorado, to the SRS. Id. at 82-86. While legislation for these activities was being considered, the governor of South Carolina expressed concern to the DOE regarding the storage of large amounts of weapons-grade nuclear material within the state's borders. Id. at 93-94 (letter from South Carolina Governor Jim Hodges to DOE Secretary Spencer Abraham, dated April 10, 2002). The governor's primary concern was that an agreement brokered between the state and the DOE to remove or reprocess the material would not be legally enforceable:

> I must insist on an ironclad agreement that is fully enforceable in a court of law. The stakes are too high to accept mere political assurances. I will not risk the health and welfare of South Carolina by allowing the enforceability of any agreement to be bound only by federal departmental policy that changes according to political considerations beyond our control.

Id. at 93; see also id. at 103-09 (agreement enclosed in April 11, 2002 letter from DOE Secretary Spencer Abraham to South Carolina Governor Jim Hodges).

Ultimately, on December 2, 2002, Congress enacted a statute, later codified at 50 U.S.C. § 2566, addressing the disposition of weapons-grade plutonium stored at the SRS. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3182, 116 Stat. 2458, 2747-50 (2002) (codified at 50 U.S.C. § 2566 (Supp. III 2004)). The statute provided for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility ("MOX facility") at the SRS to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors, id.; the MOX facility was designed to be capable of refining 3.5 metric tons of weapons-grade plutonium annually, Pl.'s Mot. App. 146. The statute further required the DOE to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019. § 3182(a)(1)-(2), (g)(1), 116 Stat. at 2747-50. If the DOE did not meet the MOX production objective by

[2] Immobilization is a process of encasing fissile material in glass or ceramics, making it stable for storage and difficult to recover for use in a nuclear weapon. Pl.'s Mot. App. 16. Defense plutonium that was converted into fuel would be "irradiated" in a nuclear reactor. Id. Both methods render nuclear material difficult to transport, conceal, and process into a nuclear weapon. Id.

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January 1, 2011, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2011, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to the site between April 15, 2002 and January 1, 2017, by January 2017. Id. § 3182(c)(1)-(2), 116 Stat. at 2749. The DOE would also be required to remit economic and impact assistance payments to plaintiff in the amount of $1 million per day for each day that certain milestones went unmet, up to a maximum of $100 million per year. Id. § 3182(d)(1), 116 Stat. at 2749. These payments would come "from funds available to the Secretary [of the DOE] . . . ." Id.

In subsequent enactments of the statute, Congress changed deadlines for both MOX processing and material removal, and also changed the funding source for payment of economic and impact assistance. In 2005, Congress amended 50 U.S.C. § 2566 to make payment of economic and impact assistance "subject to the availability of appropriations." See Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 313(4)(A)(ii), 119 Stat. 2247, 2280-81 (2005). This language was retained in the versions of the statute reenacted in 2013 and 2014. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3116, 126 Stat. 1632, 2172-73; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3142(f), 128 Stat. 3292, 3900 (2014). The current version of 50 U.S.C. § 2566 provides that if the MOX production objective was not met, the DOE would be required to remove from South Carolina at least one metric ton of plutonium by January 1, 2016, and an amount of plutonium equal to all unprocessed plutonium shipped to the site from April 15, 2002, to January 1, 2022, no later than January 1, 2022. See 50 U.S.C. § 2566(c) (2012 & Supp. II 2015). It further provides that if the DOE missed the January 1, 2016 deadline, the DOE would be required to make economic and impact assistance payments to plaintiff beginning in 2016. Id. § 2566(d)(1).

In 2002, the DOE began shipping plutonium to the SRS. Am. Compl. ¶ 41; Answer ¶ 41. In 2016 and 2017, the DOE failed to achieve the MOX production objective, did not remove one ton of plutonium from South Carolina, and did not provide economic and impact assistance payments to plaintiff as specified in 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45.

B. Procedural History

On January 8, 2018, plaintiff filed a complaint in the United States Court of Federal Claims, seeking $100 million in economic and impact assistance payments it alleges it is owed for 2016, prejudgment and postjudgment interest, costs and attorneys' fees, and any further relief deemed proper. On March 6, 2018, plaintiff amended its complaint to add a claim for the $100 million of economic and impact assistance payments it alleges is owed for 2017.

Ten days after defendant filed its answer, plaintiff moved for summary judgment. Defendant then cross-moved for summary judgment. Briefing is now complete and, deeming oral argument unnecessary, the court is prepared to rule.

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II. STANDARD OF REVIEW

Both plaintiff and defendant move for summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." Id. at 250.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. Id. at 324. Both parties may carry their burden by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1).

The court must view the inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the court must not weigh the evidence or make findings of fact. See Anderson, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Contessa Food Prods., Inc. v. Conagra, Inc., 282 F.3d 1370, 1376 (Fed. Cir. 2002) ("On summary judgment, the question is not the 'weight' of the evidence, but instead the presence of a genuine issue of material fact . . . .") (abrogated on other grounds by Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008) (en banc)); Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) ("Due to the nature of the proceeding, courts do not make findings of fact on summary judgment."); Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) ("[T]he Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues."). Entry of summary judgment is mandated against a party who fails to establish "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. However, if neither party satisfies this burden on the filing of cross-motions for summary judgment, then the court must deny both motions. See First Commerce Corp. v. United States, 335 F.3d 1373, 1379 (Fed. Cir. 2003) ("When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration."); Bubble Room, Inc. v. United States, 159 F.3d 553, 561 (Fed. Cir. 1998) ("The fact that both the parties have moved for summary judgment does not mean that the court must grant summary judgment to one party or the other.").

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III. DISCUSSION

The parties have differing views concerning the issue now pending before the court. Plaintiff states that the issue is whether the United States is liable to make economic and impact assistance payments for 2016 and 2017 under 50 U.S.C. § 2566(d)(1), and suggests that the funds to satisfy the liability may come from appropriations already authorized or the Judgment Fund. Pl.'s Mot. Summ. J. 12, 15-16. Defendant argues that the issue is whether the United States is liable to make economic and impact assistance payments if Congress did not appropriate funds for the payments. Def.'s Cross-Mot. Summ. J. 7-8.

The parties agree that the DOE has not met critical milestones to process or dispose of plutonium as required by 50 U.S.C. § 2566(d)(1). Am. Compl. ¶ 45; Answer ¶ 45. Defendant also agrees that had Congress appropriated funds for economic and impact assistance payments, the DOE would be required to remit those funds to plaintiff in accordance with the statute. See Def.'s Cross-Mot. Summ. J. 8. However, the parties disagree as to whether economic and impact assistance payments may be made from: (1) certain appropriated funds for activities already authorized or funds reprogrammed from those activities; or (2) the Judgment Fund. See id. at 11-22; Pl.'s Mot. Summ. J. 12, 15-16. Because these questions turn on the interpretation of law rather than findings of fact, this case is properly before the court on summary judgment.

A. Relevant Legal Standards

Central to the parties' competing contentions is the meaning of 50 U.S.C. § 2566(d)(1). Thus, the court turns to the text of that statute to ascertain how it should be construed. As originally enacted, this section provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2011, the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina each year beginning on or after that date through 2016 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of--
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. III 2004) (emphasis added).

In 2005, the background of 50 U.S.C. § 2566 and the purpose of the economic and impact assistance payments in 50 U.S.C. § 2566(d)(1) was discussed in the United States Senate:

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> In a sign of good faith to the State of South Carolina, language was negotiated . . . that required the [DOE] to convert one metric ton of defense plutonium into fuel for commercial nuclear reactors by 2011 or face penalties of $1 million per day up to $100 million per year until the plutonium is either converted into the fuel or removed from the State. It has never been the intention of South Carolina to receive penalty payments; the residents . . . simply sought reassurances that weapons-grade plutonium would not remain at [the] SRS indefinitely. South Carolina would not have accepted [the defense] plutonium without this statute.

151 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). Later in that session, a "technical correction" to 50 U.S.C. § 2566(d)(1) was proposed:

> It is also my intention to make a technical correction, in the future, to language contained in the conference report to the Fiscal Year 2006 Energy and Water Appropriations Act. This conference report contains a change to important authorizing language that would make these penalty payments "subject to the availability of appropriations."

Id. (statement of Sen. Graham).

The technical correction was made to the version of 50 U.S.C. § 2566 enacted in 2005; subsection (d) of that statute provided:

> (d) Economic and impact assistance
>
> > (1) If the MOX production objective is not achieved as of January 1, 2014, the Secretary shall, subject to the availability of appropriations, pay to the State of South Carolina each year beginning on or after that date through 2019 for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the later of–
> >
> > > (A) the date on which the MOX production objective is achieved in such year; or
> > >
> > > (B) the date on which the Secretary has removed from the State of South Carolina in such year at least 1 metric ton of defense plutonium or defense plutonium materials.

50 U.S.C. § 2566(d) (Supp. V 2006) (emphasis added).

Subsequent versions of 50 U.S.C. § 2566 enacted on January 2, 2013, and December 19, 2014, retained the phrase "subject to the availability of appropriations" in subsection (d)(1). See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). Notably, other

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parts of the statute remained essentially unchanged from the version originally enacted, with the exception of the deadlines. For example, 50 U.S.C. § 2566(d)(2)(A) has consistently provided:

> (A) If, as of January 1, 2022, the MOX facility has not processed mixed-oxide fuel from defense plutonium and defense plutonium materials in the amount of not less than—
>
> (i) one metric ton, in each of any two consecutive calendar years; and
>
> (ii) three metric tons total,
>
> the Secretary shall, from funds available to the Secretary, pay to the State of South Carolina for economic and impact assistance an amount equal to $1,000,000 per day, not to exceed $100,000,000 per year, until the removal by the Secretary from the State of South Carolina of an amount of defense plutonium or defense plutonium materials equal to the amount of defense plutonium or defense plutonium materials transferred to the Savannah River Site between April 15, 2002, and January 1, 2022, but not processed by the MOX facility.

50 U.S.C. § 2566(d)(2)(A) (2012 & Supp. II 2015) (emphasis added).

If defendant is liable to plaintiff under 50 U.S.C. § 2566(d)(1), funds to satisfy the obligation in the statute must come from a congressionally sanctioned source because, pursuant to the Appropriations Clause of the United States Constitution, the federal government may only spend money that Congress has appropriated. See U.S. Const. art. I, § 9 cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Congress may also require that funds only be used for specific programs or purposes. See Nutt v. United States, 837 F.3d 1292, 1295 (Fed. Cir. 2016) ("According to the Constitution's Appropriations Clause, 'funds may be paid out [by the Treasury] only on . . . the express terms of a specific statute.'" (quoting Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990) (alteration in original))). If Congress specifies a purpose for appropriated funds, "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (2012).

If Congress elects to provide unrestricted, or "lump-sum," appropriations to an agency, those appropriations are normally allocated at the agency's discretion. See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); see also U.S. Government Accountability Office, Principles of Appropriations Law—Vol. II ("GAO Redbook") 6-5 (3d ed. 2006) ("A lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object

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described.").[3] The normally broad agency discretion to direct lump-sum appropriations may be limited when an agency is bound by a contract; in such circumstances, an agency may not avoid contractually obligated payments if unrestricted, i.e., lump-sum, funds are available. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 636-38 (2005). Agency discretion is also limited by line-item appropriations, in which Congress places conditions on how an appropriation may be spent. To determine whether an expenditure is permitted for a particular line item, agencies perform a "necessary expense" analysis. See GAO Redbook, supra, at 3-14 to 3-15. "Under the necessary expense doctrine, '[a]n appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.'" U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quoting GAO Redbook, supra, at 4-20). For an expense to be found necessary, (1) there must be a logical relationship between the expenditure and the appropriation; (2) the expenditure must not be prohibited; and (3) the expenditure must not be provided for in another appropriation. GAO Redbook, supra at 3-14 to 3-17.

B. Plaintiff May Not Receive Economic and Impact Assistance Absent a Congressional Appropriation for That Purpose

Although plaintiff and defendant agree that the DOE did not comply with the statute, they disagree as to whether any funds are available to satisfy the DOE's statutory obligation. See Pl.'s Mot. Summ. J. 12, 15-16; Def.'s Cross-Mot. Summ. J. 11-22. Defendant argues that, absent an appropriation, the DOE is not liable to plaintiff for any payments and, alternatively, that any liability that flows from the statute is limited to the amount Congress appropriated for economic and impact assistance. Def.'s Reply 1-2, 12. Plaintiff appears to concede that no funds were specifically appropriated for economic and impact assistance. See Pl.'s Reply 3. However, the lack of a specific appropriation does not per se remove the DOE's liability for economic and impact assistance payments. Rather, defendant's obligation to make economic and impact assistance payments manifested when it failed to comply with the terms of 50 U.S.C. § 2566. See Greenlee Cty. v. United States, 487 F.3d 871, 880 (Fed. Cir. 2007) ("We conclude that defendant's liability for . . . payments was limited to the amounts appropriated by Congress." (emphasis added)). The question remaining is the extent of defendant's liability, a question that is purely legal in nature.

Plaintiff advances two theories under which the DOE could remit economic and impact assistance payments without an additional congressional appropriation to the DOE: (1) the DOE could use existing lump-sum appropriations or (2) the DOE could reprogram funds Congress appropriated for other purposes. Pl.'s Mot. Summ. J. 15-25. The court examines them in turn.

[3] The first three chapters of the GAO Redbook are in the GAO Redbook's fourth edition, while the remaining chapters are in the third edition. Citations to the GAO Redbook are to the most recent version.

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1. Congress Did Not Provide Lump-Sum Appropriations in the Consolidated Appropriations Acts of 2016 and 2017

Under its first theory, plaintiff initially contends that there are lump-sum appropriations available to made the economic and impact assistance payments for 2016 and 2017. Pl.'s Mot. Summ. J. 15, 22. It primarily relies on the observation in Greenlee County that the United States Supreme Court ("Supreme Court") addressed the question of "what appropriation amounts are available?" in Cherokee Nation–in the context of a contract case–"that the presence of sufficient unrestricted lump-sum appropriations (not specifically appropriated for the program at issue) to meet the government's contractual obligation qualified as available appropriations." 487 F.3d at 880 & n.3, quoted in Pl.'s Mot. Summ. J. 15. In essence, plaintiff is suggesting that the principle espoused in Cherokee Nation–that a court can order an agency to use its lump-sum appropriations to satisfy a contractual obligation–should be extended to situations in which the government's obligation is only statutory in nature. See Pl.'s Reply 6.

Both Greenlee County and a related case, Prairie County, concern a government benefits program enacted to reimburse local governments for lost property tax revenues caused by the federal government's ownership of large amounts of land in their communities. See Prairie Cty. v. United States, 782 F.3d 685 (Fed. Cir. 2015); Greenlee Cty., 487 F.3d at 871. Because the federal government does not pay property taxes to local communities, Congress created a "Payment in Lieu of Taxes" ("PILT") program to compensate local governments for lost tax revenue. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 873-74. Although Congress designated a formula for reimbursing local governments, appropriations for the PILT program were insufficient to reimburse all qualifying communities to the amount yielded by the formula. Prairie Cty., 782 F.3d at 686; Greenlee Cty., 487 F.3d at 874. Greenlee County and Prairie County, whose compensation fell short when appropriations for PILT were exhausted, separately filed suits in the United States Court of Federal Claims, followed by appeals to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Prairie Cty., 782 F.3d at 687-88; Greenlee Cty., 487 F.3d at 874-75.

In Greenlee County, the Federal Circuit observed that obligations in contractual relationships were distinguishable from obligations flowing from benefits programs. 487 F.3d at 878-79. While contractual obligations could not be avoided if unrestricted appropriations were available for payment, noncontractual statutory obligations, i.e., benefits, could be avoided if Congress circumscribed its liability in the statute itself. See id. at 879 ("The conclusion that [the statute] limits defendant's liability to the amount appropriated is particularly appropriate because [the statute] . . . involves a benefits program not a contract, and 'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated." (emphasis added)). Eight years later, the Federal Circuit in Prairie County again focused on the plain language of the statute: "Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability . . . or whether [the statute] imposes a statutory obligation to pay the full amount . . . regardless of appropriations by Congress." 782 F.3d at 690 (quoting Star-Glo Assocs., LP v. United States, 414 F.3d 1349, 1355 (Fed. Cir. 2005)). Even in a contractual relationship, however, payment requires an appropriation. See Greenlee Cty., 487 F.3d at 878 ("The Supreme Court has noted that, even in the contract context, the 'subject to the availability of appropriations' language means that the government is not contractually bound except to the extent that appropriations are available."

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(citing Cherokee Nation, 543 U.S. at 643)); see also id. ("[A] statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress. . . . [I]t is undisputed that if [a statute] use[s] the phrase 'subject to the availability of appropriations,' [plaintiff's] right to recover would be limited to the amount appropriated.").

The Federal Circuit has also distinguished between the analysis of language limiting liability in contractual relationships from the analysis of similar language in benefit payment statutes, concluding in the latter that congressional intent plays a larger role:

> [When] the government is not seeking to limit contractual liability, but to limit benefit payments, . . . considerations of predictability are far less significant, and . . . there is greater room to rely on other indicia of Congressional intent, such as legislative history, to ascertain the congressional purpose.

Star-Glo Assocs., LP, 414 F.3d at 1355.

The relationship between the plaintiff and the government in Cherokee Nation was contractual, unlike the relationship between the plaintiff and the government here. Compare Cherokee Nation, 543 U.S. at 639, with 28 U.S.C § 2566 (2012 & Supp. II 2015). Plaintiff concedes that defendant's liability in this case is based upon a statute and not a contract. See Pl.'s Reply 6-7 ("The State has not (yet) asserted a contract claim against the United States. . . . [T]his case is only about DOE's failure to meet its statutory obligation to provide the economic and impact assistance payments. . . ."). In the absence of any binding precedent or other legal support for extending the holding of Cherokee Nation to a purely statutory obligation, the court declines to do so. Nevertheless, it is necessary to examine whether 50 U.S.C. § 2566 allows for the use of lump-sum appropriations for economic and impact assistance and, if so, whether Congress made such appropriations in the pertinent Consolidated Appropriations Acts.

When a statute creates a right to compensation, but also limits the government's liability to the amount appropriated, the court must determine "whether there are appropriations available to satisfy the government's liability by considering whether the statute in fact limits the government's liability to the amount appropriated," and "what appropriations are available . . . to satisfy that liability." Greenlee Cty., 487 F.3d at 878. In this case, the statute conditions defendant's payments to plaintiff as "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). This language was first enacted in 2005, well before the DOE's violation of the statute in 2016. See § 313, 119 Stat. at 2280-81. Moreover, this specific language is directly addressed in Greenlee County: "'[S]ubject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." 487 F.3d at 878. Also important is the fact that the less restrictive "from funds available to the Secretary" in the originally enacted version of 50 U.S.C. § 2566(d)(1) was later changed to the more restrictive "subject to the availability of appropriations." Compare 50 U.S.C. § 2566(d)(1) (Supp. V 2006), with 50 U.S.C. § 2566(d)(1) (Supp. III 2004).

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"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978) (collecting cases). Here, Congress twice reenacted 50 U.S.C. § 2566 following the 2005 addition of the "subject to the availability of appropriations" language and the Federal Circuit's 2007 explanation of that language in Greenlee County, retaining that verbiage each time. See 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). The court therefore may presume that Congress was aware that courts interpreted the phrase "subject to the availability of appropriations" as limiting the government's liability to the amount appropriated, and purposely retained this more restrictive language in subsequent reenactments.

Given the above, a plain reading of 50 U.S.C. § 2566(d)(1) evidences Congress's intent that payments for economic and impact assistance can only be made if (1) there is a specific appropriation for that purpose, or (2) there is a lump-sum appropriation that the DOE could use for that purpose. The parties do not dispute that Congress did not appropriate funds for the specific purpose of economic and impact assistance payments. Pl.'s Reply 9; Def.'s Reply 2. Plaintiff argues, however, that funds were available through lump-sum appropriations "legally available" to satisfy statutory obligations. Pl.'s Reply 3.

As plaintiff notes, "Congress appropriated approximately $18.59 billion and $19.69 billion to DOE for its 'Atomic Energy Defense Activities' for fiscal years 2016 and 2017, respectively." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 248-50 (fiscal year 2017). Of those amounts, "Congress directed that approximately $1.9 billion would be for 'Defense Nuclear Nonproliferation' each year." Pl.'s Mot. Summ. J. 19; accord Pl.'s Mot. App. 196 (fiscal year 2016), 250-51 (fiscal year 2017). Congress further directed that the $1.9 billion be allocated to certain, specified programs, including:

- Global Material Security
- Material Management and Minimization
  - Nuclear Material Removal
  - Material Disposition
- Nonproliferation and Arms Control
- Defense Nuclear Nonproliferation R&D
- Nonproliferation Construction

Pl.'s Mot. Summ. J. 19-20; Pl.'s Mot. App. 195. Plaintiff asserts that the funds Congress allocated to these programs were lump-sum appropriations that the DOE could use to make economic and impact assistance payments. Pl.'s Mot. Summ. J. 19-20.

Defendant contends that the funds Congress provided for these programs were not lump sums. See Def.'s Cross-Mot. Summ. J. 13-14. In support of its argument, defendant relies on the 2016 and 2017 Consolidated Appropriations Acts, id., which incorporate, by reference, tables allocating funds for specific programs (as plaintiff recognizes). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 301(d), 129 Stat. 2242, 2417 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 301(d), 131 Stat. 135, 320; Pl.'s Mot. App. 166; see also Pl.'s Mot. App. 166, 186-201 (containing the tables). Defendant contends that the

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"DOE's appropriated funds are limited to the specific purposes and amounts provided in the tables contained within the explanatory statements accompanying the relevant [Consolidated Appropriations Acts]." Def.'s Cross-Mot. Summ. J. 14; see also id. at 15 ("'When an appropriation specifies the purpose for which funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds for the specified purpose.'" (quoting GAO Redbook, supra, at 4-11)).

Defendant is correct. The tables incorporated by reference into the Consolidated Appropriations Acts specify funding for specific programs, evidencing that the appropriations for Defense Nuclear Nonproliferation and its constituent programs were not lump-sum appropriations, which, by definition, fund multiple programs. GAO Redbook, supra, at 6-5. Plaintiff fails to acknowledge the import of the tables. See Pl.'s Reply 12 ("[T]hese subprogram appropriations are 'lump-sum' appropriations because they 'cover a number of specific programs, projects, or items.'"). Because of Congress's level of precision, the court is not persuaded that these appropriations were in fact "lump-sum appropriations." Consequently, the appropriations could not be used for economic and impact assistance payments.

2. Reprogramming Is Not Available for Economic and Impact Assistance Payments

Plaintiff alternatively argues that the economic and impact assistance payments could be provided from other funds that Congress appropriated to the DOE via a discretionary reallocation known as "reprogramming." Id. at 16-17. "Reprogramming" refers to "the shifting of funds within an appropriation to purposes other than those contemplated at the time of appropriation." GAO Redbook, supra, at 2-44. Reprogramming, however, is subject to guidelines to prevent abuse or the allocation of funds to activities that are too far removed from Congress's intended purpose in providing the funds. See id. at 2-44 ("[A]gencies generally are free to reprogram, even if doing so is inconsistent with the budget estimates presented to the Congress, as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation."); see also id. at 2-45 ("Though agencies generally have authority to reprogram funds, Congress may limit this authority."). These limitations accord with the principle that funds appropriated for a particular purpose may not be used for any other purpose. See 31 U.S.C. § 1301(a)-(b).

Defendant argues that reprogramming funds for economic and impact assistance would effectively create a new program or activity because the purpose of economic and impact assistance is substantially different from the purposes of programs identified in the 2016 and 2017 Consolidated Appropriations Acts. Def.'s Reply 11. Defendant notes that those Acts "prohibit DOE from reprogramming funds to create, initiate, or eliminate a 'program, project, or activity.'" Id. (quoting § 301(f)(1), 129 Stat. at 2417; § 301(f)(1), 131 Stat. at 320). Defendant also observes that § 301(d) of each of these Acts incorporates, by reference, a table that specifically allocates appropriations to individual programs, projects, and activities. Def.'s Cross-Mot. Summ. J. 15. Defendant argues that because the purpose of economic and impact assistance payments are not reasonably related to the purposes for which Congress made appropriations in the 2016 and 2017 Consolidated Appropriations Acts, the funds appropriated in those Acts are not available to pay plaintiff or to be reprogrammed to pay plaintiff. Id. at 15-17.

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As an initial matter, plaintiff provides no legal support for the proposition that this court has the authority to direct an agency to reprogram funds appropriate for one purpose to another purpose. Nor is the court aware of any.[4] Moreover, even if the court could review an agency's decision to reprogram, or not to reprogram, appropriated funds, the record lacks any evidence indicating whether the DOE considered reprogramming funds or conducted an analysis to determine the feasibility of reprogramming funds. In other words, the court lacks the necessary administrative record to review the propriety of the DOE's decision.

Plaintiff also argues that a "necessary expense" analysis supports its contention that economic and impact assistance payments may be made from appropriations in the 2016 and 2017 Consolidated Appropriations Acts. See Pl.'s Reply at 13-14 ("The determinative issue in this case is whether the statutorily-mandated economic and impact assistance payments have a 'logical,' 'reasonable,' or 'sufficient' relationship to, and therefore constitute a necessary expense of, any of DOE's appropriations."). Id. But plaintiff gets ahead of itself. As noted above, an agency performs a "necessary expense" analysis to determine whether a prospective expenditure comports with appropriations Congress has provided. GAO Redbook, supra, at 3-17. As with its request that the court direct the DOE to reprogram funds to make economic and impact assistance payments, plaintiff provides no legal support for the proposition that the court has the authority to conduct a "necessary expense" analysis, and the court is unable to locate any. Moreover, even if the court could conduct such an analysis, the record lacks evidence that would be necessary for the court to proceed. Thus, the court declines to conduct the analysis.

Ultimately, to the extent that the DOE could exercise its discretion to make economic and impact assistance payments, the payments would need to be consistent with the purpose restrictions in the appropriation to be charged because the DOE is required to obey the restrictions Congress places on appropriations. See Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation . . . .'" (quoting UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984))). In the 2016 and 2017 Consolidated Appropriations Acts, the DOE was restricted from using appropriations to create or initiate a program, project, or activity. Thus, the DOE's reprogramming authority was limited to shifting funds within programs, projects, or activities that already existed. And both parties admit that no appropriations for economic and impact assistance were made in the 2016 and 2017 Appropriations Acts. Consequently, Congress provided the DOE with no mechanism through which it could reprogram funds to make economic and impact assistance payments.

Congress could have appropriated money for economic and impact assistance, or it could have broadened the DOE's discretion to reprogram funds. But it did neither. The court cannot ignore the limiting language in the statute–"subject to the availability of appropriations"–which courts have consistently held to limit government liability. The unique mention of economic and impact assistance payments in 50 U.S.C. § 2566, as well as the detail in the appropriations

[4] To the extent that reprogramming decisions are subject to judicial review, they would be reviewable under the Administrative Procedure Act ("APA"), see 5 U.S.C. § 702 (2012), but this court lacks jurisdiction to adjudicate APA claims, see Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

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Congress provided in 2016 and 2017, persuade the court that had Congress intended to appropriate funds for these payments, it would have made a specific appropriation. There is also evidence in the record that the purpose of the economic and impact assistance payments was to assure plaintiff that weapons-grade plutonium would not be stored at the SRS indefinitely. See Pl.'s Mot. App. 93, 100; see also 51 Cong. Rec. S12,745 (daily ed. Nov. 14, 2005) (statement of Sen. Graham). These facts support the DOE's failure to use existing appropriations to satisfy the obligation resulting from its failure to meet the MOX production objective.

Agencies must comply with the law and, where Congress has given direction on how to do so, agencies are not free to improvise. Although Congress originally provided that the DOE was required to make economic and impact assistance payments "from funds available to the Secretary [of the DOE]," 50 U.S.C. § 2566(d)(1) (Supp. III 2004), it subsequently narrowed the DOE's discretion, providing that economic and impact assistance payments were "subject to the availability of appropriations." 50 U.S.C. § 2566(d)(1) (Supp. IV 2006); 50 U.S.C. § 2566(d)(1) (2012); 50 U.S.C. § 2566(d)(1) (2012 & Supp. II 2015). When Congress originally enacted 50 U.S.C. § 2566, the DOE arguably could have had discretion to reprogram funds to make economic and impact assistance payments, but the court cannot ignore that Congress has since intentionally and consistently restricted the DOE's discretion.

C. The Judgment Fund Is Not Available for Economic and Impact Assistance Payments

Finally, plaintiff argues that the economic and impact assistance payments could be paid from the Judgment Fund if there are no legally available appropriations. Pl.'s Mot. Summ. J. 12. Plaintiff is incorrect. Pursuant to the Appropriations Clause, "no money can be paid out of the Treasury unless it has been appropriated by Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). "The Judgment Fund is a permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States." 31 C.F.R. § 256.1(a) (2015); accord 31 U.S.C. § 1304 (providing that the Judgment Fund can be used "to pay final judgments, award compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law"). Significantly, the Judgment Fund may only be used when "payment is not otherwise provided for . . . ." 31 U.S.C. § 1304(a)(1). "Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment." GAO Redbook, supra, at 14-39.

The Judgment Fund was designed to expedite the administration of justice by enabling courts to issue awards without the need to obtain separate appropriations. Slattery v. United States, 635 F.3d 1298, 1316-17 (Fed. Cir. 2011) (en banc); see also United States v. Maryland ex rel. Meyer, 349 F.2d 693, 695 (D.C. Cir. 1965) ("The obvious purposes of the [Judgment Fund] are (1) to enable . . . prompt payment without awaiting a special appropriation, and (2) to relieve the United States of the obligation of paying interest, or of a bad conscience as it were for not doing so, while the principal remains unpaid.").

Plaintiff effectively seeks to exploit the flexibility of the Judgment Fund to circumvent Congress's failure to appropriate funds for economic and impact assistance. But, "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990).

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Two facts are fatal to plaintiff's argument: First, there is clear statutory language limiting the DOE's liability to the amount appropriated, and no funds were subsequently appropriated. Second, there is no contractual relationship available to complement the statutory language and thereby overcome the lack of an appropriation and that limiting language. Given these facts, to resort to the Judgment Fund would ignore the apparent Congressional intent not to appropriate for economic and impact assistance payments.

Congress created a benefit of economic and impact assistance in 50 U.S.C. § 2566 and outlined the circumstances under which plaintiff could receive payment. Congress then did not appropriate funds to make payments, choosing instead to fund other priorities. The record indicates that Congress did make restricted appropriations to the DOE that not only reserved funds for particular purposes, but also prohibited those funds from being used for other, unrelated purposes.

The Judgment Fund is a separate appropriation which is available to furnish awards when other appropriations are not legally available. But plaintiff is not merely asking for a damages award. Plaintiff is effectively asking for the Judgment Fund to be used to create an appropriation where none was made by Congress. Resorting to the Judgment Fund, however, bypasses the case's central question, answered above: Did Congress make any appropriations available to pay economic and impact assistance? The answer is clearly "no." The Judgment Fund cannot be manipulated to change the answer to this question from "no" to "yes." To hold otherwise would enable courts to circumvent congressional decisions not to act. Most importantly, allowing resort to the Judgment Fund in a case where Congress has also clearly limited the government's liability entangles the court in decisions reserved to Congress by the United States Constitution. The court declines to become so entangled.

Under the circumstances of this case, plaintiff's proper course to obtain economic and impact assistance is to request an appropriation from Congress.

IV. CONCLUSION

As set forth in more detail above, the court **DENIES** plaintiff's motion for summary judgment and **GRANTS** defendant's cross-motion for summary judgment. Plaintiff's complaint is **DISMISSED**. Each party shall bear its own costs. The clerk of court shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

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EXHIBIT 6

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U.S. District Court
District of South Carolina (Aiken)
CIVIL DOCKET FOR CASE #: 1:16-cv-00391-JMC

State of South Carolina v. United States et al
Assigned to: Honorable J Michelle Childs
Cause: 05:702 Administrative Procedure Act

Date Filed: 02/09/2016
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

State of South Carolina

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Defendant

Dr Ernest Moniz
in his official capacity as Secretary of Energy

represented by

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(See above for address)
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Defendant

National Nuclear Security Administration

represented by **Barbara Murcier Bowens**
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Defendant

Dr General Frank G Klotz
in his official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security

represented by **Barbara Murcier Bowens**
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Defendant

United States Department of Energy

represented by **Barbara Murcier Bowens**
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Martin Mason Tomlinson

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Date Filed	#	Docket Text
02/09/2016	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0420−6390222.), filed by State of South Carolina. Service due by 5/12/2016 (Attachments: # 1 Table of Exhibits to Complaint, # 2 Exhibit 1 (Am. Interim Action Determination), # 3 Exhibit 2 (SPD Supplemental EIS Factsheet), # 4 Exhibit 2 (SPD Supplemental EIS Factsheet), # 5 Exhibit 4 (Final Surplus Plutonium Disposition Supplemental Environmental Impact, # 6 Exhibit 5 (Excerpt from History of the U.S. Weapons−Usable Plutonium Disposition, # 7 Exhibit 6 (Report to Congress: Disposition of Surplus Defense Plutonium at Savan, # 8 Exhibit 7 (Record of Decision for PEIS), # 9 Exhibit 7 (Record of Decision for PEIS), # 10 Exhibit 9 (Excerpt from Surplus Plutonium Disposition Final EIS, Summary), # 11 Exhibit 10 (Record of Decision for SPD EIS), # 12 Exhibit 11 (PMDA), # 13 Exhibit 12 (Congressional Research Serv., Mem., U.S.−Russia Plutonium Management, # 14 Exhibit 13 Exhibit NRC EIS, # 15 Exhibit 14 (Press Release, No. PR−02−007), # 16 Exhibit 15 (Am. ROD for PEIS & SPD EIS), # 17 Exhibit 16 (Am. SPD EIS ROD), # 18 Exhibit 17 (Storage of Surplus Plutonium Materials at the Savannah River Site Su, # 19 Exhibit 18 (NRC Construction Authorization No. CAMOX−001), # 20 Exhibit 19 (DOE/NNSA Report to Congress), # 21 Exhibit 20 (Excerpt from Draft SPD Supp. EIS), # 22 Exhibit 21 (PMDA as amended by 2010 Protocol), # 23 Exhibit 22 (Letter to Secretary Moniz), # 24 Exhibit 22 (Letter to Secretary Moniz), # 25 Exhibit 24 (Letter of Atty General Wilson to Secretary Moniz), # 26 Exhibit 25 (FY2015 Budget Justification))(asni,) (Entered: 02/09/2016)
02/09/2016	2	Summons Issued as to United States Department of Energy, Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, U.S. Attorney and U.S. Attorney General. (asni,) Modified to edit text on 2/10/2016 (asni,). (Entered: 02/09/2016)
02/09/2016	3	Local Rule 26.01 Answers to Interrogatories by State of South Carolina.(asni,) (Entered: 02/09/2016)
02/18/2016	5	NOTICE of Appearance by William Henry Davidson, II on behalf of State of South Carolina (Davidson, William) (Entered: 02/18/2016)
03/31/2016	6	MOTION to Intervene by Southern Carolina Regional Development Alliance. Response to Motion due by 4/18/2016. (Attachments: # 1 Exhibit A − Complaint, # 2 Exhibit 1 to Complaint (Affidavit of Danny Black), # 3 Exhibit 2 to Complaint (South Carolina Promise Zone Fact Sheet))No proposed order.(Shealy, Samuel) (Entered: 03/31/2016)
04/06/2016	7	MOTION for Extension of Time to File Answer re 1 Complaint by Frank G Klotz, Ernest Moniz, United States, United States Department of Energy and National Nuclear Security Administration. Response to Motion due by 4/25/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) Modified to add filers on 4/7/2016 (asni,). (Entered: 04/06/2016)

04/06/2016	8	**ORDER granting 7 Motion for Extension of Time to Answer Frank G Klotz answer due 4/25/2016; Ernest Moniz answer due 4/25/2016; United States answer due 4/25/2016; United States Department of Energy answer due 4/25/2016, National Nuclear Security Administration answer due 4/25/2016. Signed by Honorable J Michelle Childs on 4/6/2016.(asni,)** (Main Document 8 replaced on 4/6/2016) (asni,). Modified to edit text on 4/7/2016 (asni,). (Entered: 04/06/2016)
04/06/2016	9	SUMMONS Returned Executed by State of South Carolina. All Defendants. (Attachments: # 1 Summons Service on DOE, # 2 Summons Service on NNSA, # 3 Summons Service on Moniz, # 4 Summons Service on Klotz, # 5 Summons Service on Lynch, # 6 Summons Service on Nettles)(Lowell, Randy) (Entered: 04/06/2016)
04/06/2016	10	MOTION for Summary Judgment by State of South Carolina. Response to Motion due by 4/25/2016. (Attachments: # 1 Memo in Support, # 2 Exhibit Table of Exhibits, # 3 Exhibit 1 (Excerpt from D.J. Spellman et al., History of the U.S. Weapons–Usable Plutonium Disposition Program Leading to DOEs Record of Decision), # 4 Exhibit 2 (Report to Congress: Disposition of Surplus Defense Plutonium at Savannah River Site), # 5 Exhibit 3 (Record of Decision (ROD) for Storage and Disposition of Weapons–Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS)), # 6 Exhibit 4 (Excerpt from Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS), Vol. I Part A), # 7 Exhibit 5 (ROD for SPD EIS), # 8 Exhibit 6 (Plutonium Management and Disposition Agreement (PMDA)), # 9 Exhibit 7 (Release No. PR–02–007), # 10 Exhibit 8 (Aff. of Jessie Hill Roberson (ECF No. 10), 1:02–cv–01426–CMC), # 11 Exhibit 9 (Ltr. of Hodges to Abraham (Apr. 6, 2001)), # 12 Exhibit 10 (Ltr. of Hodges to Abraham (Apr. 24, 2001)), # 13 Exhibit 11 (Ltr. of Hodges to Abraham (Jun. 13, 2001)), # 14 Exhibit 12 (Ltr. of Abraham to Hodges (Jun. 26, 2001)), # 15 Exhibit 13 (Ltr. of Card to Hodges, Peeler, and Wilkins (Aug. 27, 2001)), # 16 Exhibit 14 (Ltr. of Hodges and Condon to Abraham (Aug. 30, 2001)), # 17 Exhibit 15 (Ltr. of Abraham to Hodges (Sept. 21, 2001)), # 18 Exhibit 16 (Ltr. of Hodges to Abraham (Oct. 26, 2001)), # 19 Exhibit 17 (Ltr. of Hodges to Abraham (Apr. 10, 2002)), # 20 Exhibit 18 (Ltr. of Abraham to Hodges (Apr. 11, 2002)), # 21 Exhibit 19 (Ltr. of Hodges to Abraham (Apr. 11, 2002)), # 22 Exhibit 20 (Ltr. of Bates to Otis (Apr. 11, 2002)), # 23 Exhibit 21 (Am. ROD for SPD EIS), # 24 Exhibit 22 (Storage of Surplus Plutonium Materials at the Savannah River Site Supplemental Analysis), # 25 Exhibit 23 (Ltr. of Trice to Congressman Wilson (Oct. 9, 2015)), # 26 Exhibit 24 (Amended PMDA), # 27 Exhibit 25 (CRS PMDA Report), # 28 Exhibit 26 (Excerpt from Draft SPD Supplemental EIS), # 29 Exhibit 27 (Excerpt from FY 2014 DOE Budget Justification), # 30 Exhibit 28 (Excerpt from FY 2015 DOE Budget Justification), # 31 Exhibit 29 (Ltr. to Moniz (Mar. 6, 2014)), # 32 Exhibit 30 (Excerpt from Consolidated Appropriations Act 2016), # 33 Exhibit 31 (Consolidated Appropriations Act FY 2016 Explanatory Statement), # 34 Exhibit 32 (Excerpt from FY 2017 DOE Budget Justification), # 35 Exhibit 33 (High Bridge Associates, Inc., Independent Assessment of the Impact of Disposing of Surplus Plutonium at WIPP), # 36 Exhibit 34 (Excerpt from Senate Armed Services Strategic Forces Subcommittee Hearing Transcript (Feb. 24, 2016)), # 37 Exhibit 35 (Excerpt from Senate Appropriations Subcommittee Hearing Transcript (March 16, 2016)), # 38 Exhibit 36 (Ltr. of Wilson to Moniz (Sept. 4, 2015)), # 39 Exhibit 37 (Ltr. of Haley to Moniz (Dec. 14, 2015)), # 40 Exhibit 38 (Ltr. of Moniz to Haley (Jan. 19, 2016)), # 41 Exhibit 39 (DOE/NNSA Report to Congress (Oct. 3, 2011)), # 42 Exhibit 40 (Environmental Assessment for Gap Material Plutonium Transport, Receipt, and Processing))No proposed order.(Lowell, Randy) (Entered: 04/06/2016)
04/18/2016	11	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by State of South Carolina.Reply to Response to Motion due by 4/28/2016 (Attachments: # 1 Exhibit)(Lowell, Randy) (Entered: 04/18/2016)
04/18/2016	12	MOTION for Extension of Time to File Response/Reply as to 6 MOTION to Intervene by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/18/2016)
04/19/2016	13	**TEXT ORDER granting 12 Motion for Extension of Time to File Response/Reply re 6 MOTION to Intervene Response to Motion due by 5/2/2016. Signed by Honorable J Michelle Childs on 4/19/2016.(asni,)** (Entered: 04/19/2016)

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04/21/2016	14	MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/9/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 04/21/2016)
04/21/2016	15	RESPONSE in Opposition re 14 MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment Response filed by State of South Carolina.Reply to Response to Motion due by 5/2/2016 (Lowell, Randy) (Entered: 04/21/2016)
04/22/2016	16	**ORDER granting 14 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment Response to Motion due by 5/25/2016. Signed by Honorable J Michelle Childs on 4/22/2016.(asni,)** (Entered: 04/22/2016)
04/25/2016	17	MOTION to Dismiss by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/12/2016. (Attachments: # 1 Exhibit A, MOX February 2013−14 Report, # 2 Exhibit B, HQ Signed Report 2015)No proposed order.(Bowens, Barbara) (Entered: 04/25/2016)
04/28/2016	19	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 04/28/2016)
05/02/2016	20	MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/19/2016. No proposed order.(Bowens, Barbara) (Entered: 05/02/2016)
05/02/2016	21	RESPONSE in Opposition re 6 MOTION to Intervene Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 5/12/2016 (Bowens, Barbara) (Entered: 05/02/2016)
05/10/2016	25	REPLY to Response to Motion re 6 MOTION to Intervene Response filed by Southern Carolina Regional Development Alliance. refiled by the clerk to correct event type. (asni,) (Entered: 05/11/2016)
05/11/2016	24	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 5/31/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/11/2016)
05/11/2016	26	**ORDER granting 24 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/11/2016.(asni,)** (Entered: 05/11/2016)
05/12/2016	27	RESPONSE in Opposition re 17 MOTION to Dismiss Response filed by State of South Carolina.Reply to Response to Motion due by 5/23/2016 (Attachments: # 1 Table of Exhibits, # 2 Exhibit 1 (Deadlines Table), # 3 Exhibit 2 (Hodges Ltr), # 4 Exhibit 3 (COA Table), # 5 Exhibit 4 (Transcript Excerpt))(Lowell, Randy) (Entered: 05/12/2016)
05/17/2016	28	Joint MOTION for Extension of Time to File Response/Reply as to 10 MOTION for Summary Judgment , 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* by State of South Carolina. Response to Motion due by 6/3/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 05/17/2016)
05/18/2016	29	**ORDER granting 28 Motion for Extension of Time to File Response/Reply re 10 MOTION for Summary Judgment, 20 MOTION to Stay Proceedings on Plaintiff's Motion for Summary Judgment Response to Motion to Stay due by 5/24/2016, Response to Motion for Summary Judgment due by 6/10/2016. Signed by Honorable J Michelle Childs on 5/18/2016.(asni,)** (Entered: 05/18/2016)
05/23/2016	31	Consent MOTION for Leave to File Excess Pages by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 6/9/2016. No proposed order.(Bowens, Barbara) (Entered: 05/23/2016)

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05/23/2016	32	**TEXT ORDER granting 31 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 5/23/2016.(asni,)** (Entered: 05/23/2016)
05/23/2016	33	REPLY to Response to Motion re 17 MOTION to Dismiss Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/23/2016)
05/24/2016	34	NOTICE of Hearing on Motion 10 MOTION for Summary Judgment, 6 MOTION to Intervene, 20 MOTION to Stay, 17 MOTION to Dismiss : Motion Hearing set for 6/30/2016 10:00 AM in Columbia # 3, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable J Michelle Childs. ***Please note this hearing will include all pending motions not ruled upon prior to the date of the hearing***(asni,) (Entered: 05/24/2016)
05/24/2016	35	RESPONSE in Opposition re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by State of South Carolina.Reply to Response to Motion due by 6/3/2016 (Lowell, Randy) (Entered: 05/24/2016)
05/25/2016	36	**ORDER AND OPINION denying 6 Motion to Intervene. Signed by Honorable J Michelle Childs on 5/25/2016.(asni,)** (Entered: 05/25/2016)
05/25/2016	37	REPLY to Response to Motion re 20 MOTION to Stay *Proceedings on Plaintiff's Motion for Summary Judgment* Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. (Bowens, Barbara) (Entered: 05/25/2016)
06/10/2016	38	RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Exhibit 1, Record of Decision, Surplus Plutonium Disposition, 81 Fed. Reg. 19588 (Apr. 5, 2016), # 2 Exhibit 2, Declaration of Henry A. Gunter, # 3 Exhibit 3, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No., # 4 Exhibit 4, Department of Energy, Preferred Alternative for Certain Quantities of Plutonium, 80 Fed. Reg. 80348 (Dec. 24, 2015), # 5 Exhibit 5, Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, div. D, tit. III, Dec. 18, 2015, # 6 Exhibit 6, Explanatory Table, 114 Cong. Rec. 161, H10108–H10123 (daily ed. Dec. 17, 2015), # 7 Exhibit 7, Explanatory Statement, 114 Cong. Rec. 161, H10056, H10102–H10107 (daily ed. Dec. 17, 2015), # 8 Exhibit 8, Declaration of Peter H. Hanlon, # 9 Addendum Table of Exhibits)(Bowens, Barbara) (Entered: 06/10/2016)
06/15/2016	39	Consent MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 7/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Lowell, Randy) (Entered: 06/15/2016)
06/16/2016	40	**ORDER granting 39 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 6/16/2016.(asni,)** (Entered: 06/16/2016)
06/20/2016	42	REPLY to Response to Motion re 10 MOTION for Summary Judgment Response filed by State of South Carolina. (Attachments: # 1 Exhibit, # 2 Exhibit 1 (Ltr. of Del Vecchio), # 3 Exhibit 2 (Moniz Senate Test.), # 4 Exhibit 3 (Fact Sheet), # 5 Exhibit 4 (Rpt. to Congress), # 6 Exhibit 5 (DOE FY16 Budget Excerpt))(Lowell, Randy) (Entered: 06/20/2016)
06/20/2016	41	CORRECTED RESPONSE in Opposition re 10 MOTION for Summary Judgment Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 6/20/2016 (Attachments: # 1 Corrected Memorandum in Opposition) Re–filed by Clerk to correct event type.(mdea) Modified on 6/21/2016 to correct entry number (mdea,). (Entered: 06/21/2016)
06/21/2016	43	**TEXT ORDER denying 20 Motion to Stay: This matter is before the court on Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20) seeking to stay all proceedings on Plaintiffs pending Motion for Summary Judgment (ECF No. 10) until the court adjudicates Defendants pending Motion to Dismiss (ECF No. 17). In support of their Motion to Stay, Defendants assert that all Plaintiffs claims are subject to dismissal on jurisdictional or other legal grounds and, therefore, concerns for judicial**

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		economy and litigation efficiency make it appropriate for the [c]ourt to resolve [D]efendants Motion to Dismiss before proceeding to summary judgment. (ECF No. 20 at 4.) Plaintiff opposes the Motion to Stay arguing that Defendants have not met their burden to demonstrate a need for a stay, and both judicial economy and the prejudice to South Carolina if such stay is granted weigh heavily in favor of denying the stay request. (ECF No. 35 at 1.) When considering a motion to stay, the district court should consider three factors: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non–moving party. Johnson v. DePuy Orthopaedics, Inc., No. 3:12–cv–2274, 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012) (granting stay pending a transfer of the case to MDL) (citation omitted). In view of these factors, the court finds that a stay would not serve the interests of judicial economy and could cause prejudice to Plaintiff. In this regard, the court understands that it will first have to address the merits of Defendants Motion to Dismiss asserting a lack of subject matter jurisdiction. In re Bulldog Trucking, Inc., 147 F.3d 347, 352 (4th Cir. 1998) (A federal court is required, sua sponte, to determine if a valid basis for its jurisdiction exists, and to dismiss the action if no such ground appears.) (citation omitted). However, the court is also persuaded that judicial economy will be best served by allowing the parties to proceed with their arguments relevant to Plaintiffs Motion for Summary Judgment at the June 30, 2016 hearing (ECF No. 34), even if the court has to allow for discovery and additional briefing subsequent to the hearing. Accordingly, the court DENIES Defendants Motion to Stay Proceedings on Plaintiffs Motion for Summary Judgment (ECF No. 20). Signed by Honorable J Michelle Childs on 6/21/16.(alew,) (Entered: 06/21/2016)
06/22/2016	44	MOTION to Appear Pro Hac Vice by Raphael Ortega Gomez by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/22/2016)
06/24/2016	45	MOTION to Appear Pro Hac Vice by Spencer Elijah Wittmann Amdur by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 7/11/2016. (Attachments: # 1 Application/Affidavit for Pro Hac Vice Admission, # 2 Certificate of Good Standing)No proposed order.(Bowens, Barbara) (Entered: 06/24/2016)
06/27/2016	46	**TEXT ORDER granting 44 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/27/2016	47	**TEXT ORDER granting 45 Motion to Appear Pro Hac Vice. Signed by Honorable J Michelle Childs on 6/27/2016.(asni,)** (Entered: 06/27/2016)
06/30/2016	50	**Minute Entry. Proceedings held before Honorable J Michelle Childs: taking under advisement 10 Motion for Summary Judgment; 17 Motion to Dismiss. Motion Hearing held on 6/30/2016. Written order forthcoming. Court Reporter Kathleen Richardson. (mbro,)** (Entered: 06/30/2016)
08/18/2016	51	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Motion hearing held on June 30, 2016, before Judge J. Michelle Childs. Court Reporter/Transcriber Kathleen Richardson, RMR, CRR, Telephone number/E–mail Kathleen_Richardson@scd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction.. Redaction Request due 9/8/2016. Redacted Transcript Deadline set for 9/19/2016. Release of Transcript Restriction set for 11/16/2016. (kari,) (Entered: 08/18/2016)
09/15/2016	53	Letter from Counsel for the State. (Lowell, Randy) (Entered: 09/15/2016)
10/03/2016	55	Letter from Spencer E. Amdur. (Attachments: # 1 Letter, # 2 Press Release)(Bowens, Barbara) (Entered: 10/03/2016)
10/31/2016	56	**ORDER AND OPINION: The court declines to rule on Defendants' Motion to Dismiss 17 for failure to state a claim for which relief could be granted as to the**

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		removal claim under Fed. R. Civ. P. 12(b)(6) until supplemental briefs, herein described are submitted. The parties are DIRECTED to file briefs that address the following issues: 1. Whether the court should transfer the monetary claim to the CFC, pursuant to 28 U.S.C. § 1631. 2. Whether the court should dismiss the monetary claim without prejudice to the State's ability to refile the claim in an action in the CFC. The briefs shall comply with rules governing memoranda in Local Civ. Rule 7 (D.S.C.) and must be filed by November 30, 2016. Signed by Honorable J Michelle Childs on 10/31/2016.(asni,) (Entered: 10/31/2016)
11/18/2016	59	Consent MOTION for Extension of Time by State of South Carolina. Response to Motion due by 12/5/2016. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 11/18/2016)
11/21/2016	60	**ORDER granting in part and denying in part 59 Motion for Extension of Time. The parties are directed to file their supplemental briefs in response to the court's October 31, 2016 order on or before December 5, 2016. The State is given no additional time by this order in which to file a memorandum in support of a motion to reconsider under Rules 59(e) or 60(b). Signed by Honorable J Michelle Childs on 11/21/2016.(asni,)** (Entered: 11/21/2016)
11/28/2016	62	MOTION for Reconsideration re 56 Order on Motion to Dismiss by State of South Carolina. Response to Motion due by 12/15/2016. (Attachments: # 1 Memo in Support)No proposed order.(Lowell, Randy) (Entered: 11/28/2016)
12/05/2016	63	REPLY by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 56 Order on Motion to Dismiss,,, *Defendants' Supplemental Brief.* (Bowens, Barbara) (Entered: 12/05/2016)
12/05/2016	64	REPLY by State of South Carolina to 56 Order on Motion to Dismiss,,, *State of South Carolina's Supplemental Brief.* (Roberts, John) (Entered: 12/05/2016)
12/16/2016	66	Joint MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 1/3/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Bowens, Barbara) (Entered: 12/16/2016)
12/16/2016	67	RESPONSE in Opposition re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.Reply to Response to Motion due by 12/28/2016 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Bowens, Barbara) (Entered: 12/16/2016)
12/19/2016	68	**ORDER granting 66 Motion for Extension of Time. Signed by Honorable J Michelle Childs on 12/19/2016.(mbro,)** (Entered: 12/19/2016)
01/11/2017	70	MOTION for Leave to File Excess Pages by State of South Carolina. Response to Motion due by 1/25/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Proposed order is being emailed to chambers with copy to opposing counsel.(Roberts, John) (Entered: 01/11/2017)
01/11/2017	71	**TEXT ORDER granting 70 Motion for Leave to File Excess Pages. Signed by Honorable J Michelle Childs on 1/11/2017.(asni,)** (Entered: 01/11/2017)
01/13/2017	72	REPLY to Response to Motion re 62 MOTION for Reconsideration re 56 Order on Motion to Dismiss,,, Response filed by State of South Carolina. (Roberts, John) (Entered: 01/13/2017)
02/07/2017	75	**ORDER AND OPINION denying 62 Motion for Reconsideration re 56 Order on Motion to Dismiss. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,)** (Entered: 02/07/2017)
02/07/2017	76	**ORDER AND OPINION granting in part 17 Motion to Dismiss. The third cause of action in the State's complaint (ECF No. 1 97–112) is hereby DISMISSED without prejudice to the State's ability to prosecute it an original action filed in**

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		the Court of Federal Claims. Signed by Honorable J Michelle Childs on 2/7/2017.(asni,) (Entered: 02/07/2017)
02/08/2017	77	**CONFERENCE AND SCHEDULING ORDER Rule 26(f) Conference Deadline 2/28/2017, 26(a) Initial Disclosures due by 3/14/2017, Rule 26 Report due by 3/14/2017, Motions to Amend Pleadings due by 4/24/2017, Plaintiffs ID of Expert Witness due by 5/24/2017, Defendants ID of Expert Witnesses Due by 6/23/2017, Records Custodian Affidavit due by 6/23/2017, Discovery due by 7/24/2017, Motion in Limine due by 11/3/2017, Motions due by 8/7/2017, Rule 26(a)(3) Disclosures due by 11/3/2017, Pretrial Briefs due by 11/28/2017, Bench Trial Deadline 12/5/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/08/2017	78	**MEDIATION ORDER Mediation Due by 7/31/2017, Signed by Honorable J Michelle Childs on 2/8/2017. (asni,)** (Entered: 02/08/2017)
02/13/2017	79	NOTICE of Appearance by Barbara Murcier Bowens on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Bowens, Barbara) (Entered: 02/13/2017)
03/10/2017	81	ADR STATEMENT/CERTIFICATION by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	82	Rule 26(f) Report by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy.(Bowens, Barbara) (Entered: 03/10/2017)
03/10/2017	83	**AMENDED SCHEDULING ORDER Mediation concluded by 7/31/2017, Signed by Honorable J Michelle Childs on 3/10/2017. (asni,)** (Entered: 03/10/2017)
03/14/2017	84	**ORDER AND OPINION Defendants' motion to dismiss the State's complaint 17 is hereby GRANTED IN PART, with respect to the complaint's first cause of action, and DENIED IN PART, with respect to the complaint's second cause of action. The first cause of action in the State's complaint (ECF No. 1 at 84–88) is hereby DISMISSED. Signed by Honorable J Michelle Childs on 3/14/2017. (asni,)** (Entered: 03/14/2017)
03/20/2017	86	**ORDER AND OPINION granting in part and denying in part 10 Motion for Summary Judgment. Parties shall submit a joint written statement to the court on or before April 21, 2017, and, after reviewing the statement, the court will determine the need for further submissions or hearings. Signed by Honorable J Michelle Childs on 3/20/2017.(asni,)** Modified to edit text on 3/24/2017 (asni,). (Entered: 03/20/2017)
04/20/2017	88	NOTICE of Appearance by Jennifer J Aldrich on behalf of Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy (Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	89	Consent MOTION for Extension of Time by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy. Response to Motion due by 5/4/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. No proposed order.(Aldrich, Jennifer) (Entered: 04/20/2017)
04/20/2017	90	**TEXT ORDER granting 89 Motion for Extension of Time for the parties to submit the joint written statement. Signed by Honorable J Michelle Childs on 4/20/2017.(asni,)** (Entered: 04/20/2017)
07/31/2017	96	STATUS REPORT *(Joint Statement)* by State of South Carolina. (Lowell, Randy) supplement 97 added on 8/1/2017 (asni,). supplement added 100 added on 8/14/2017 (asni,). supplements added 103 104 8/22/2017 (asni,). (Entered: 07/31/2017)
07/31/2017	97	SUPPLEMENT by State of South Carolina *Proposing Injunctive Relief.* (Lowell, Randy) (Entered: 07/31/2017)
08/01/2017	98	**TEXT ORDER: By a March 20, 2017 order, the court granted in part the State of South Carolina's (the "State") motion for summary judgment in this matter,**

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specifically granting the State's requested relief for an injunctive order compelling the Secretary of Energy (the "Secretary") to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the State's summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties "to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]." (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that "[i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy." (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant "is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017," and that (2) one of the four attorneys representing them in this matter is "out of the office" on a scheduled one–week vacation in August and is "out of the office" for another week in August and five days in September while "handling depositions in another matter." (Id.) The State objects to Defendants' proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the State's consideration until July 20, and arguing that Defendant's proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the court's March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the court's March 20, 2017 order. (Id. at 2.) In the court's view, Defendants' April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants' proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the court's previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants' April 20, 2017 motion also contemplated that the parties would "propose" deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants' proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be "out of the office" for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants' proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the State's unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a lackadaisical approach on Defendants' part to complying with the court's order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly,

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Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017.: By a March 20, 2017 order, the court granted in part the State of South Carolinas (the State) motion for summary judgment in this matter, specifically granting the States requested relief for an injunctive order compelling the Secretary of Energy (the Secretary) to remove from South Carolina one metric ton of defense plutonium. (See ECF No. 86 at 37.) However, the court denied the States summary judgment motion in part to the extent the State requested that the injunctive order compel the Secretary to remove the defense plutonium immediately. (See id.) Instead, the court ordered the parties to meet and confer and prepare a joint written statement setting forth, if necessary, proposed deadlines, schedules, or other items in detail sufficient to form the basis of the injunctive order contemplated by [the March 20, 2017 order]. (Id.) The court ordered that the joint statement be submitted on or before April 21, 2017. (See id.) On April 20, 2017, the named Defendants in this matter filed a motion to extend the time in which to file the joint statement until July 31, 2017. (See ECF No. 89.) In their motion for extension of time, Defendants requested that [i]f the parties are unable to agree [on a proposed injunction], they will propose a date for the filing of separate statements regarding the appropriate remedy. (Id.) The State consented to the motion (see id.), and the court granted it by text order (see ECF No. 90.) On July 31, 2017, the parties filed a joint statement, explaining that they were unable to reach agreement as to a proposed injunctive order. (See ECF No. 96 at 1.) The State proposed to file on July 31, 2017, a separate statement setting forth the details of a proposed injunctive order and thereafter filed its separate statement. (See id. at 1; ECF No. 97.) Defendants proposed to file their separate statement setting forth details of a proposed injunctive order by September 15, 2017. (See ECF No. 96 at 1–2.) As grounds for a deadline to file the separate statement more than six weeks hence, Defendants assert that (1) their declarant is currently out of the office and unable to participate in the drafting of his declaration until his return to the office on August 14, 2017, and that (2) one of the four attorneys representing them in this matter is out of the office on a scheduled one–week vacation in August and is out of the office for another week in August and five days in September while handling depositions in another matter. (Id.) The State objects to Defendants proposed September 15, 2017 deadline for filing a separate statement, noting that Defendants already obtained a more than three–month extension of time, asserting that Defendants did not submit a substantive proposal for the States consideration until July 20, and arguing that Defendants proposing to file a separate statement on September 15, 2017, amounts to, at worst, non–compliance with the courts March 20, 2017 order and, at best, a second request for an extension of time in which to file the joint statement required by the courts March 20, 2017 order. (Id. at 2.) In the courts view, Defendants April 20, 2017 motion contemplated that if, as happened here, the parties did not reach agreement on a proposed injunctive order, the parties would, by July 31, 2017, propose dates for filing separate statements regarding their proposed injunctive orders. The court granted that motion; therefore, Defendants proposal to submit a separate statement sometime after July 31, 2017, does not amount to non–compliance with the courts previous orders and does not amount to a second request for an extension of time. Nevertheless, Defendants April 20, 2017 motion also contemplated that the parties would propose deadlines for filing their separate statements, leaving the court to determine whether the proposed deadlines were acceptable. The court finds that Defendants proposed September 15, 2017 deadline is not acceptable. As the State points out, Defendants have already been accorded more than four months to develop a proposed injunctive order. Although Defendants assert that a six–week delay is needed because a declarant and an attorney will be out of the office for portions of August and September, Defendants fail to explain why the preceding four months and change was insufficient time for them, with or without one of an undisclosed number of declarants and one of at least four attorneys, to develop a proposed injunctive order. Defendants proffered grounds for proposing September 15, 2017, as a deadline for filing their separate statement simply fails to account for the time between March 20 and July 31, 2017. The court notes that the State had no trouble developing its own separate statement during this time and further notes the States unrebutted assertion that Defendants failed to provide any substantive proposal as to the injunctive order until as late as July 20, 2017, suggesting a

		lackadaisical approach on Defendants part to complying with the courts order during the same time. The court finds that ten days is a sufficient amount of time in which to file a separate statement. Accordingly, Defendants are hereby ORDERED to file the statement contemplated by the courts March 20, 2017 order on or before August 11, 2017. (Specific Document due by 8/11/2017.) Signed by Honorable J Michelle Childs on 8/1/2017. (asni,) (Entered: 08/01/2017)
08/11/2017	100	SUPPLEMENT by Frank G Klotz, Ernest Moniz, National Nuclear Security Administration, United States, United States Department of Energy to 98 Order, Set Deadlines,,,

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CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:17-cv-01068-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Cause: 28:1491 Tucker Act

Date Filed: 08/07/2017
Date Terminated: 03/05/2018
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
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Date Filed	#	Docket Text
08/07/2017	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4115693) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 10/6/2017.** (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9

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		Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Civil Cover Sheet, # 16 Exh. List)(ac7) (Entered: 08/07/2017)
08/07/2017	2	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 08/07/2017)
08/07/2017	3	NOTICE of Designation of Electronic Case. (ac7) (Entered: 08/07/2017)
08/18/2017	4	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 08/18/2017)
10/06/2017	5	MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Hogan, Tara) (Entered: 10/06/2017)
10/06/2017	6	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 11/3/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/06/2017)
10/18/2017	7	MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA.**Response due by 11/1/2017.**(Hogan, Tara) (Entered: 10/18/2017)
10/24/2017	8	RESPONSE to 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/7/2017.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 10/24/2017)
10/30/2017	9	RESPONSE to 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by STATE OF SOUTH CAROLINA.**Reply due by 11/6/2017.** (Lowell, Randolph) (Entered: 10/30/2017)
10/31/2017	10	REPLY to Response to Motion re 7 MOTION to Stay summary judgment briefing pending disposition of 12(b)(1) motion , filed by USA. (Hogan, Tara) (Entered: 10/31/2017)
11/07/2017	11	REPLY to Response to Motion re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA. (Hogan, Tara) (Entered: 11/07/2017)
11/20/2017	12	MOTION for Leave to File Surreply , filed by STATE OF SOUTH CAROLINA.**Response due by 12/4/2017.** (Attachments: # 1 Exhibit A)(Lowell, Randolph) (Entered: 11/20/2017)
11/28/2017	13	ORDER granting 7 Motion to Stay; granting 12 Motion for Leave to File Surreply. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/28/2017)
11/28/2017	14	SUR-REPLY re 5 MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 11/28/2017)
02/15/2018	15	SCHEDULING ORDER: **Defendant's Supplemental Brief due by 3/8/2018. Plaintiff's Supplemental Response Brief due by 3/29/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/15/2018)
03/05/2018	16	NOTICE of Voluntary Dismissal without prejudice, filed by STATE OF SOUTH CAROLINA (Lowell, Randolph) (Entered: 03/05/2018)
03/05/2018		Complaint dismissed pursuant to Rule 41(a)(1)(A)(i) this day. (ac7) (Entered: 03/06/2018)

PACER Service Center

Transaction Receipt			
09/01/2020 12:08:29			
PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:17-cv-01068-MMS
Billable Pages:	2	**Cost:**	0.20

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APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18-cv-00038-MMS

STATE OF SOUTH CAROLINA v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $100,000,000
Case in other court: 19-02324
Cause: 28:1491 Tucker Act

Date Filed: 01/08/2018
Date Terminated: 08/20/2019
Jury Demand: None
Nature of Suit: 516 Miscellaneous - Damages
Jurisdiction: U.S. Government Defendant

Plaintiff

STATE OF SOUTH CAROLINA represented by **Randolph Russell Lowell**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by **Tara K. Hogan**
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Date Filed	#	Docket Text

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01/08/2018	1	COMPLAINT against USA (DOE) (Filing fee $400, Receipt number 9998-4403717) (Copy Served Electronically on Department of Justice), filed by STATE OF SOUTH CAROLINA.**Answer due by 3/9/2018.** (Attachments: # 1 Exh. List, # 2 Exhibit 1-13, # 3 Civil Cover Sheet)(ac7) (Entered: 01/08/2018)
01/08/2018	2	NOTICE of Directly Related Case(s) [17-1068C], filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 01/08/2018)
01/08/2018	3	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 01/08/2018)
01/08/2018	4	NOTICE of Designation of Electronic Case. (ac7) (Entered: 01/08/2018)
01/25/2018	5	NOTICE of Appearance by Tara K. Hogan for USA . (Hogan, Tara) (Entered: 01/25/2018)
03/05/2018	6	MOTION to Amend Pleadings - Rule 15 , filed by STATE OF SOUTH CAROLINA.**Response due by 3/19/2018.** (Attachments: # 1 Exhibit A - Proposed Amended Complaint)(Lowell, Randolph) (Entered: 03/05/2018)
03/06/2018	7	ORDER granting 6 Motion to Amend Pleadings - Rule 15(b). **Amended Complaint due by 3/9/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 03/06/2018)
03/06/2018	8	AMENDED COMPLAINT against USA, filed by STATE OF SOUTH CAROLINA. , filed by STATE OF SOUTH CAROLINA.Answer due by 3/20/2018. (Attachments: # 1 Exhibit Exhibit List, # 2 Exhibit Exhibits 1-14)(Lowell, Randolph) (Entered: 03/06/2018)
03/20/2018	9	ANSWER to 8 Amended Complaint , filed by USA.**JPSR due by 5/8/2018.**(Hogan, Tara) (Entered: 03/20/2018)
03/30/2018	10	MOTION for Summary Judgment , filed by STATE OF SOUTH CAROLINA.**Response due by 4/27/2018.** (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 03/30/2018)
04/23/2018	11	Unopposed MOTION for Extension of Time until 5/18/18 to File Response as to 10 MOTION for Summary Judgment , filed by USA.**Response due by 5/7/2018.**(Hogan, Tara) (Entered: 04/23/2018)
04/24/2018	12	ORDER granting 11 Motion for Extension of Time to File Response re 10 MOTION for Summary Judgment. **Response due by 5/18/2018. Reply due by 6/8/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 04/24/2018)
05/08/2018	13	JOINT PRELIMINARY STATUS REPORT . (Hogan, Tara) (Entered: 05/08/2018)
05/16/2018	14	Unopposed MOTION for Extension of Time until 5/23/18 to File Response , filed by USA.**Response due by 5/30/2018.**(Hogan, Tara) (Entered: 05/16/2018)
05/17/2018	15	ORDER granting 14 Motion for Extension of Time to File Response re: 10 Motion for Summary Judgment. **Response due 5/23/2018. Reply due 6/13/2018.** Signed by Judge Margaret M. Sweeney. (pp) Service on parties made. (Entered: 05/17/2018)
05/23/2018	16	CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA, filed by USA.**Response due by 6/20/2018.**(Hogan, Tara) (Entered: 05/23/2018)
06/12/2018	17	Unopposed MOTION for Extension of Time to File Reply , filed by STATE OF SOUTH CAROLINA.**Response due by 6/26/2018.**(Lowell, Randolph) (Entered:

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		06/12/2018)
06/13/2018	18	ORDER granting 17 Motion for Extension of Time to File Combined Reply in Support of 10 MOTION for Summary Judgment and Response to 16 CROSS MOTION for Summary Judgment. **Plaintiff's Reply and Response due by 6/20/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 06/13/2018)
06/20/2018	19	REPLY to Response to Motion re 10 MOTION for Summary Judgment , 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix)(Lowell, Randolph) (Entered: 06/20/2018)
07/05/2018	20	REPLY to Response to Motion re 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA , filed by USA. (Hogan, Tara) (Entered: 07/05/2018)
10/24/2018	21	ORDER Staying Further Consideration of 10 MOTION for Summary Judgment filed by STATE OF SOUTH CAROLINA and 16 CROSS MOTION and RESPONSE to 10 Motion for Summary Judgment filed by STATE OF SOUTH CAROLINA filed by USA., ORDER STAYING CASE **Status Report due by 11/26/2018** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 10/24/2018)
11/26/2018	22	JOINT STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 11/26/2018)
01/25/2019	23	JOINT STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Lowell, Randolph) (Entered: 01/25/2019)
03/26/2019	24	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 03/26/2019)
05/28/2019	25	JOINT STATUS REPORT , filed by All Defendants. (Hogan, Tara) (Entered: 05/28/2019)
05/29/2019	26	STATUS REPORT ORDER **Status Report due by 6/28/2019** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 05/29/2019)
06/24/2019		**IMPORTANT NOTICE:** On **Monday, August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e-filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e-filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two-step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e-file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800-676-6856 or the Clerk's Office CM/ECF Help Desk at (202)357-6402.. (dh) (ADI) (Entered: 06/24/2019)

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06/28/2019	27	STATUS REPORT , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Exhibit Ltr of McMaster to Trump, # 2 Exhibit Ltr of Wilson to Barr)(Lowell, Randolph) (Entered: 06/28/2019)
06/28/2019	28	STATUS REPORT , filed by USA. (Hogan, Tara) (Entered: 06/28/2019)
07/01/2019	29	ORDER LIFTING STAY and ORDER to file supplemental briefs. The stay on proceedings in this case is lifted. **The parties shall file supplemental briefs by Wednesday, July 31, 2019.** Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 07/01/2019)
07/20/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after **August 26, 2019**. To link your upgraded PACER account **on or after August 26, 2019**, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357-6402. (dh) (ADI) (Entered: 07/20/2019)
07/31/2019	30	SUPPLEMENTAL BRIEF , filed by STATE OF SOUTH CAROLINA. (Attachments: # 1 Appendix to Supplemental Brief)(Lowell, Randolph) (Entered: 07/31/2019)
07/31/2019	31	RESPONSE to *Court's order*, filed by USA. (Hogan, Tara) (Entered: 07/31/2019)
08/16/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. **Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account**on or after August 26, 2019**. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you **MUST** know your CM/ECF login and password---do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk **immediately** at (202) 357-6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/20/2019	32	REPORTED OPINION denying 10 Motion for Summary Judgment; granting 16 Cross Motion. The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (lfh) Service on parties made. (Entered: 08/20/2019)

08/20/2019	33	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of defendant. Plaintiff' complaint is dismissed. Each party shall bear its own costs. (Service on parties made.) (ac7) (Entered: 08/20/2019)
08/23/2019	34	NOTICE OF APPEAL as to 33 Judgment, filed by STATE OF SOUTH CAROLINA. Filing fee $ 505, receipt number 9998-5597681. Copy to CAFC. (Lowell, Randolph) (Entered: 08/23/2019)
08/26/2019		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 34 Notice of Appeal. (ac7) (Entered: 08/26/2019)
08/28/2019		CAFC Case Number 2019-2324 for 34 Notice of Appeal filed by STATE OF SOUTH CAROLINA. (ac7) (Entered: 08/28/2019)

PACER Service Center

Transaction Receipt

09/01/2020 12:04:02

PACER Login:	JimG1297	**Client Code:**	New Case
Description:	Docket Report	**Search Criteria:**	1:18-cv-00038-MMS
Billable Pages:	4	**Cost:**	0.40

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EXHIBIT 7

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LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A. and Davidson and Lindemann, P.A. ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of radioactive material at the Savannah River Site; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

ARTICLE I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016, and terminates on January 4, 2019, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the termination date, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

ARTICLE II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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1. Special Counsel assumes joint responsibility with the Attorney General's Office for the representation of the State in this litigation. However, the Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion shall appoint a designated assistant or assistants ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General's Office for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must identify the Attorney General or his designated assistant as counsel of record.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Attorney General's Office, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be provided to the Attorney General's Office in draft form in a reasonable and timely manner for review and approval. Special Counsel shall copy the Attorney General's Office on all case-related correspondence. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Attorney General's Office unless otherwise authorized by the Attorney General.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

7. The scope of Special Counsel's retention under this Agreement shall include appellate proceedings in this litigation.

8. The scope of Special Counsel's retention under this Agreement shall include any litigation initiated by the defendant(s) against the Attorney General or the State relating to this litigation.

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B. Non-Delegation of Work

Special Counsel may not, without the express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

C. Employment Status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

ARTICLE III. CASE MANAGEMENT

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within five business days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

At a minimum, status reports must include a description of the current status of the litigation, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

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Name:	Alan Wilson Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-253-6283
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Fax:	803-734-3677
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Fax:	803-734-3677
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Fax:	803-256-8062
Email:	rlowell@willoughbyhoefer.com

Name:	Kenneth P. Woodington Davidson and Lindemann, P.A.
Address:	1611 Devonshire Drive, Second Floor Columbia, SC 29204
Phone:	803-806-8222
Fax:	803-806-8855
Email:	kwoodington@dml-law.com

C. Communication

Special Counsel agrees to consult in advance, in person, by telephone, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings;
2. Dispositive motions;
3. Hearings;
4. Rulings;
5. Trials;
6. Settlement negotiations;
7. Appeals or Notice of Appeals;
8. Briefs filed by any party or entity;
9. Appellate arguments or decisions; and
10. Enforcement efforts.

Special Counsel agrees to meet with Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Should Special Counsel receive any public records request which seeks records related to this litigation, Special Counsel shall within one business day email that public records request to the Attorney General and obtain his approval before responding to that request. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from

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destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

G. Settlement or Judgment Proceeds

All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's Office, which shall distribute them or have them distributed.

ARTICLE IV. COMPENSATION

A. Contingent Status

Notwithstanding any other term of this Agreement, Special Counsel shall receive no compensation of any kind for any services rendered unless the State of South Carolina receives a settlement or judgment in connection with this litigation.

B. Fee Schedule and Division

If the State receives a settlement or award in connection with this litigation, Special Counsel will be compensated from the litigation's gross recovery (any final settlement or judgment received by the State, including any post-judgment interest) for their services as follows:

1. The Attorney General's Office shall be reimbursed for all costs and expenses incurred in the litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit. Compensation under this Section IV.B.1 shall be deducted from the litigation's gross recovery before any further distribution is made. However, any attorneys' fees retained by the Attorney General's Office are not subtracted from the gross recovery for purposes of calculating Special Counsel's fee.

2. Special Counsel shall be reimbursed for certain costs and expenses incurred in this litigation, any appeals, any separate suit against the Attorney General or the State regarding the litigation or this Agreement, and any appeals of such separate suit, pursuant to Article V below. Compensation under this Section IV.B.2 shall be deducted from the litigation's gross recovery before any further distribution is made.

3. After any deduction from the gross recovery pursuant to Section IV.B.1 and IV.B.2, if the defendant(s) filed a separate suit against the Attorney General or the State regarding this litigation or this Agreement, Special Counsel shall be compensated for time spent defending against such suit at the following rates: $190 per hour for attorneys with 10 or more years of experience, $130 per hour for attorneys with more than 6 but less than 10 years of experience, $110 per hour for attorneys with more than 3 but less than 6 years of experience, $100 per hour for attorneys with less than 3 years of experience, and $60 per hour for paralegals. This applies only to time spent defending a

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lawsuit against the Attorney General or the State, and not to time spent on the litigation brought by the Attorney General against the defendant(s). Compensation under this Section IV.B.3 shall be deducted from the net recovery that remains after any deduction pursuant to Section IV.B.1 and IV.B.2 and before any further distribution is made.

4. After any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	24%
$25,000,000.01 to $50,000,000.00	21%
$50,000,000.01 to $75,000,000.00	18%
$75,000,000.01 to $100,000,000.00	16%
$100,000,000.01 to $125,000,000.00	13%
$125,000,000.01 to $150,000,000.00	10%
$150,000,000.01 to $250,000,000.00	5%
Greater than $250,000,000.00	2%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

6. If Special Counsel's fee is to be divided among lawyers who are not in the same firm, all lawyers receiving a fee must jointly submit (a) a declaration that the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and (b) the share each lawyer will receive, for written approval by the Attorney General's Office prior to the disbursement of any fee.

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C. Early Settlement

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees shall be one half of that specified in Section IV.B.4 above.

D. Non-Monetary Relief

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General in his sole discretion shall determine the monetary value to the State and attorneys' fees awarded based on such monetary value. Should the litigation be favorably resolved by solely non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), in consultation with the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee, Special Counsel is entitled to attorneys' fees at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2016 and not to exceed $100,000 for every calendar year thereafter; in such event the obligation for such attorneys' fees shall be upon the opposing party in the litigation or as appropriated by the General Assembly.

E. Compensation upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys' fees as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

F. No Other Payment Source

Special Counsel shall be reimbursed solely from the litigation's recovery. Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for their work in this litigation other than as set forth in Articles IV and V herein. Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

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G. Court Approval of Fees and Costs

When possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.

ARTICLE V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production, other than those costs paid by the Attorney General's Office in its sole discretion. Special Counsel's agreement to advance these litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above. For all of the following expenses, Special Counsel shall be reimbursed solely from the litigation's recovery.

B. Expert Expenses

Special Counsel shall seek prior approval from the Attorney General for the retention of experts before incurring expenses related to such expert. Provided that the Attorney General has approved the retention of an expert, Special Counsel shall be reimbursed for the expert's retainer and fees incurred on an hourly basis. Other expert expenses will be reimbursed in accordance with the provisions of Section V.C.

C. Other Expenses

Special Counsel shall be reimbursed for other certain reasonable expenses and costs enumerated below.

1. Overnight lodging shall be reimbursed at actual cost up to a maximum of the rate published by the United States General Services Administration as of the date of the lodging exclusive of taxes and fees. There is no reimbursement for in-room internet, room service, business center services, gratuity, or any other hotel services or upgrades.

2. There is no reimbursement for meals.

3. Automobile travel shall be reimbursed at the rate per mile published by the Internal Revenue Service for business miles driven as of the date of the automobile travel. Special Counsel must document the date of the travel, the address of the departure location, the address of the arrival location, and the purpose of the travel in order to be eligible for reimbursement. Automobile travel reimbursement must not exceed the commercial coach fare available for the same travel. There is no reimbursement for gas.

4. All other travel or travel-related expenses, including airfare, train, bus, taxi, shuttle, parking, and baggage fees, will be reimbursed at actual cost. Airfare reimbursements must be for commercial coach fares. There is no reimbursement for seat upgrades, preferred seating, preferred boarding, internet access, or any other transportation related upgrade.

5. Actual expenses for court fees and both offensive and defensive discovery, including but not limited to filing fees, service of process, motions fees, document productions, transcripts, and witness fees, as well as mailing costs related thereto. Charges for priority or overnight mail services shall be reimbursed only if use of such services is necessary. Should the cost of printing and copying any particular item under this section exceed $100, such expense shall be reimbursed.

6. If Special Counsel determines that the hiring of an Outside Vendor for any discovery, electronic discovery, or printing related project is reasonably necessary to the litigation, Special Counsel shall assess and select an appropriate Outside Vendor based on objective criteria, including but not limited to expertise, experience, professional certifications, capacity, geographic location, and cost. The Attorney General retains the right to veto the selection of any Outside Vendor, and the Attorney General must give written approval prior to the use of or contracting with any Outside Vendor by Special Counsel.

7. There will be no reimbursement for printing, copying or mailing costs other than under Section C.5, secretarial, paralegal, or other staff costs or overtime, Westlaw, LexisNexis, PACER, or other research expenses, or any telephone calls, or any other expense, unless prior approval is obtained in writing from the Attorney General.

Any deviation from these rules, such as a hotel room higher than GSA rate, must be approved by the Attorney General's Office prior to Special Counsel incurring the expense. Should a significant, unusual, and unexpected expense arise that is necessary and germane to the litigation, Special Counsel may request approval from the Attorney General for such expense. The Attorney General shall, in his sole discretion, determine whether Special Counsel shall be reimbursed for such expenses.

D. Hourly Fee

Where Special Counsel seeks payment of an hourly fee for defending litigation brought against the Attorney General or the State under the terms of this Agreement, in accordance with Section IV.B.3, Special Counsel is required to submit detailed time records on a monthly basis for time worked over the previous month. The Attorney General's Office is not obligated to approve or reject any requests for hourly fees until after the conclusion of the litigation. Each monthly time record must clearly identify, by name or initials, the attorney or paralegal who performed the work, the date of the work, a detailed description of the work, and the number of hours or fraction thereof worked to the nearest tenth of an hour. When initials are used, the submission must identify all persons whose initials appear on the invoice and indicate whether each is an attorney or paralegal.

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No time records shall be submitted or paid for work occurring either prior to the effective date of this Agreement or after its termination.

To the extent time was spent working on both the case brought by the Attorney General and the case where the Attorney General or the State is a defendant, it is Special Counsel's duty to separate the time based on the proportion fairly allocated to each case and only seek payment of an hourly fee for time fairly spent defending the Attorney General or the State in a case brought by the defendant(s). The Attorney General, in his sole discretion, may decline to pay an hourly fee for time determined to be unnecessary, unreasonable, and/or not submitted in accordance with the requirements of this Agreement.

E. Form and Timing of Submission

Special Counsel shall submit invoices every 90 days for any expenses incurred over the previous 90 days for which Special Counsel seeks reimbursement; however, the Attorney General's Office is not obligated to approve or reject any expenses until after the conclusion of the litigation.

For an expense to be reimbursed, Special Counsel must provide an original receipt reflecting the charges. Credit card statements are not sufficient unless approved by the Attorney General's Office. The receipts will be scanned and submitted to the Attorney General's Office as a single PDF document.

In addition, Special Counsel will provide an Excel spreadsheet that contains, at a minimum, the following information:

1. Date of expense;
2. Amount of expense;
3. Amount of expense for which reimbursement is sought;
4. Description of expense; and
5. Page reference to the PDF document of receipts.

To the extent prior written approval of the Attorney General's Office was given for a particular expense, such approval shall be included with the invoice.

Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following the termination of this Agreement. All expenses must be itemized and no reimbursement will be granted for "miscellaneous" listings. The Attorney General may, in his sole discretion, decline to reimburse Special Counsel for any expenses determined to be unnecessary, unreasonable, improperly documented, or improperly submitted.

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ARTICLE VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

ARTICLE VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform their duties

required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that it has no conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time for this representation. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment that may impact this representation.

F. Equal Opportunity

Special Counsel hereby represents that neither they nor their law firms discriminate on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Right to Contact

To clarify, nothing in this Agreement shall be construed to prohibit defendant(s) from discussing this case with the Attorney General without the presence of Special Counsel if the Attorney General agrees to such discussion.

H. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

I. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

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J. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

K. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

L. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

SPECIAL COUNSEL

Davidson & Lindemann, P.A.
By:
Its: Shareholder

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EXHIBIT 8

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AMENDMENT TO THE LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO ECONOMIC AND IMPACT ASSISTANCE FOR THE VIOLATIONS OF 50 U.S.C.A. § 2566 RELATED TO THE MIXED OXIDE (MOX) FACILITY

Pursuant to Article VII.J of the Litigation Retention Agreement for Special Counsel Appointed by the Attorney General as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 related to the Mixed Oxide (MOX) Facility, the Litigation Retention Agreement is hereby amended as follows, effective as of January 1, 2019. Except as set forth in this Amendment, the Agreement is unaffected and shall continue in full force and effect in accordance with its terms. If there is conflict between this amendment and the Agreement or any earlier amendment, the terms of this Amendment will prevail.

1. **The title of the Agreement is deleted in its entirety and replaced with the following:**

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO VIOLATIONS OF 50 U.S.C.A. § 2566 AND OTHER CLAIMS RELATED TO NEPA, CERTIFICATION, AND WAIVER CLAIMS REGARDING THE MIXED OXIDE (MOX) FACILITY AND PLUTONIUM DISPOSITION

2. **The preamble of the Agreement after the title and prior to the recitals is deleted in its entirety and replaced with the following:**

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and Willoughby & Hoefer, P.A., for certain causes of action and claims as set forth herein, and Davidson, Wren & Plyler, P.A., for certain causes of action and claims as set forth herein, each respectively "Special Counsel" for the matters for which each law firm has been engaged.

3. **The recitals of the Agreement are deleted in their entirety and replaced with the following:**

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual

litigation arising from the U.S. Department of Energy's failure to meet statutory milestones for the disposition of defense plutonium at the Savannah River Site; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of, and/or actual litigation arising from the U.S. Department of Energy's attempts to terminate the MOX Project at the Savannah River Site without compliance with applicable law; and

WHEREAS, Special Counsel specifically represent that they have the skill, experience, expertise, resources, and competence necessary for the meaningful resolution of this litigation;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

4. Article I of the Agreement is deleted in its entirety and replaced with the following:

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on February 8, 2016 and terminates at the completion of these litigation matters, unless the Attorney General or Special Counsel terminates this appointment earlier pursuant to Article VI of this Agreement. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

5. Article II.D is added to the Agreement as follows:

D. Legal Services

Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are retained as Special Counsel for litigation matters to enforce claims for injunctive relief under 50 U.S.C.A. § 2566(c) and for monetary claims under 50 U.S.C.A. § 2566(d). Willoughby & Hoefer, P.A., is further retained as Special Counsel for litigation matters: arising from and related to all other matters under 50 U.S.C.A. § 2566; in venues outside of the State of South Carolina arising from or related to any claim under 50 U.S.C.A. § 2566 or defense plutonium disposition at the Savannah River Site; and arising from NEPA, waiver, or certification claims regarding the MOX Facility project termination.

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6. Article III.B is deleted in its entirety and replaced with the following:

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); or (5) by email.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party, by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Email:	awilson@scag.gov

Name:	Robert D. Cook Solicitor General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3792
Email:	bcook@scag.gov

Name:	T. Parkin Hunter Senior Assistant Attorney General
Address:	P.O. Box 11549 Columbia, SC 29211
Phone:	803-734-6151
Email:	phunter@scag.gov

Name:	Randolph R. Lowell Willoughby & Hoefer, P.A.
Address:	P.O. Box 8416 Columbia, SC 29202
Phone:	803-252-3300
Email:	rlowell@willoughbyhoefer.com

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Name: Kenneth P. Woodington
Davidson, Wren & Plyler, P.A.
Address: 1611 Devonshire Drive, Second Floor
Columbia, SC 29204
Phone: 803-806-8222
Email: kwoodington@dml-law.com

7. Article III.F is deleted in its entirety and replaced with the following:

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §§ 30-4-10 *et seq.*, for the purposes of maintaining all public records in accordance with State law. Public records requests are to be handled by the Attorney General's Office, and any public records requests received by Special Counsel shall be emailed to the Attorney General's Office within one business day of receipt. Special Counsel agrees to cooperate fully with the Attorney General's Office in responding to any public records request received by the Attorney General pertaining to this litigation, comply with the Attorney General's policy on document retention, and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

8. Article IV.B.4 is deleted in its entirety and replaced with the following:

4.i. For the matters for which Willoughby & Hoefer, P.A., and Davidson, Wren, and Plyler, P.A., are jointly engaged as Special Counsel in the District Court of South Carolina and Court of Federal Claims, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	21%
$25,000,000.01 to $50,000,000.00	18%
$50,000,000.01 to $75,000,000.00	15%
$75,000,000.01 to $100,000,000.00	13%
$100,000,000.01 to $125,000,000.00	11%
$125,000,000.01 to $150,000,000.00	9%
$150,000,000.01 to $250,000,000.00	4%
Greater than $250,000,000.00	1%

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4.ii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of South Carolina related to the MOX Facility and its termination, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

4.iii For litigation matters in which Willoughby & Hoefer, P.A., serves as Special Counsel in the District Court of Nevada related to the transport and storage of defense plutonium from South Carolina and its disposition, after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, Special Counsel shall receive the following in attorneys' fees, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery based on litigation under this Agreement	Contingent percentage
For litigating the claims and defenses before the District Court	2%
For litigating any appeal from a decision of the District Court in the Ninth Circuit	1%
For litigating a petition for certiorari at the U.S. Supreme Court	0. 5%
For litigating a case before the U.S. Supreme Court if a petition for certiorari is granted	1%

If an event does not occur, Special Counsel is not entitled to the additional attorneys' fees associated with that event.

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9. Article IV.B.5 is deleted in its entirety and replaced with the following:

5. If the defendant(s) appeal a successful trial court judgment in the litigation, in consideration for services in the appellate proceedings for any matter under the ambit of Section IV.B.4.i only, Special Counsel shall receive the following in additional attorneys' fees for each individual appellate matter, contingent upon and to be paid from a settlement or judgment from the matters pending before the Court of Federal Claims:

Amount of the remaining net recovery	Contingent percentage
First $0 to $25,000,000.00	3%
$25,000,000.00 to $50,000,000.00	3%
$50,000,000.00 to $75,000,000.00	3%
$75,000,000.00 to $100,000,000.00	2%
$100,000,000.00 to $125,000,000.00	2%
$125,000,000.00 to $150,000,000.00	1%
$150,000,000.00 to $250,000,000.00	1%
Greater than $250,000,000.00	1%

The Attorney General may, in his sole discretion, reduce these fees if he determines that the effort required to resolve the case on appeal does not justify increasing the fee. These fees are not awarded for any matter for which Special Counsel receives additional attorneys' fees under Section IV.B.4.ii or iii. The fees awarded under this section are based on the entire net recovery remaining after any deductions from the gross recovery pursuant to Sections IV.B.1, IV.B.2 and IV.B.3, not just the portion of the net recovery attributable to post-judgment interest.

10. Article IV.C is deleted in its entirety and replaced with the following:

If the defendant(s) agree to a settlement or resolution prior to commencement of the action, shortly thereafter, or upon only initial responses, as determined by the Attorney General in his sole discretion, then Special Counsel's fees may be reduced to one half of that specified in Section IV.B.4 above, in the sole discretion of the Attorney General.

11. Article IV.D is deleted in its entirety and replaced with the following:

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Except as otherwise set forth and contemplated in the compensation and fee recovery provisions in Article IV.B.4 and 5 for those actions and the requested relief, should the litigation be favorably resolved solely by other non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), Special Counsel shall engage in best efforts to recover attorneys' fees from the opposing party in the litigation. If attorneys' fees cannot be recovered from the opposing party, the

Attorney General shall seek an appropriation of attorneys' fees from the General Assembly at the rate of $250 per hour per attorney not to exceed $200,000 for time and effort accumulated through December 31, 2017 and not to exceed $100,000 for every calendar year thereafter. In no event shall Special Counsel be entitled to attorneys' fees directly from the Attorney General's office except out of a monetary recovery as specified in Article IV.B.

[Signatures on following page.]

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ATTORNEY GENERAL OF SOUTH CAROLINA

Alan Wilson

Alan Wilson

Date: June 5, 2019

SPECIAL COUNSEL

Willoughby & Hoefer, P.A.
By: Randolph R. Lowell
Its: Shareholder

Date: 6/13/19

SPECIAL COUNSEL

Davidson, Wren & Plyler, P.A.
By: William H. Davidson, II
Its: Shareholder

Date: 6/2/19

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EXHIBIT 9

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912 F.3d 720
United States Court of Appeals, Fourth Circuit.

State of SOUTH CAROLINA,
Plaintiff – Appellee,
v.
UNITED STATES of America; United States Department of Energy; Rick Perry, in His Official Capacity as Secretary of Energy; National Nuclear Security Administration; Lisa E. Gordon-Hagerty, in Her Official Capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants – Appellants.

No. 18-1684
|
Argued: September 27, 2018
|
Decided: January 8, 2019

Synopsis

Background: State brought action against United States Department of Energy (DOE) and National Nuclear Security Administration (NNSA) and their officials challenging termination of mixed oxide fuel fabrication facility project in state. The United States District Court for the District of South Carolina, No. 1:18-cv-01431-JMC, J. Michelle Childs, J., 329 F.Supp.3d 214, granted state's motion for preliminary injunction, and defendants appealed.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

[1] state did not suffer sufficiently concrete injury-in-fact to support standing to bring action, and

[2] state's claims were not ripe for adjudication.

Vacated and remanded.

West Headnotes (12)

[1] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears burden of establishing standing to assert each of its claims.

1 Cases that cite this headnote

[2] **Federal Courts** Standing

Court of Appeals reviews question of whether plaintiff possesses standing de novo.

1 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, plaintiff must show that: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to defendant's challenged action; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. U.S. Const. art. 3, § 2, cl. 1.

7 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

To satisfy injury-in-fact requirement for standing, plaintiff must establish realistic danger of sustaining direct injury.

2 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

While it is true that threatened rather than actual injury can satisfy Article III standing requirements, not all threatened injuries constitute injury-in-fact; rather, injury-in-fact

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must be concrete in both qualitative and temporal sense. U.S. Const. art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[6] **Environmental Law** Government entities, agencies, and officials

State did not suffer sufficiently concrete injury-in-fact to support standing to bring action alleging that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state, despite state's contention that DOE's decision meant that it would become permanent repository of weapons-grade plutonium and be subject to environmental, health, and safety risks that entailed, where current environmental impact statement provided that DOE had 28 years to identify alternative method for disposing of nuclear material or otherwise removing it from state, Secretary of Energy had already certified that one potential alternative to MOX program existed, and Congress had put in place contingency plans for removal of plutonium shipped to site to forestall indefinite storage of plutonium in state. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[7] **Constitutional Law** Nature and scope in general

Federal Civil Procedure In general; injury or interest

Standing doctrine is built on separation-of-powers principles, and serves to prevent judicial process from being used to usurp political branches' powers.

1 Cases that cite this headnote

[8] **Federal Courts** Ripeness; Prematurity

Ripeness is question of subject matter jurisdiction.

10 Cases that cite this headnote

[9] **Federal Courts** Fitness and hardship

Question of whether claim is ripe turns on fitness of issues for judicial decision and hardship to parties of withholding court consideration.

4 Cases that cite this headnote

[10] **Administrative Law and Procedure** Ripeness; prematurity

In context of claims challenging agency actions, ripeness doctrine's purpose is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties.

5 Cases that cite this headnote

[11] **Administrative Law and Procedure** What constitutes finality in general

To be fit for judicial review, controversy should be presented in clean-cut and concrete form, which occurs when action is final and not dependent on future uncertainties or intervening agency rulings.

5 Cases that cite this headnote

[12] **Environmental Law** Ripeness

State's claims that Department of Energy (DOE) failed to comply with NEPA or to follow statutory waiver provisions before terminating construction of mixed oxide (MOX) fuel fabrication project facility in state were not ripe for adjudication, where state based its claims on premise that it would be permanent repository of weapons-grade nuclear material currently stored in state, but numerous contingent future events would have to occur before that would occur, including DOE's failure to identify alternative method of disposal and breach its commitment

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to dispose of waste, and failure by Congress and courts to set aside or refuse to enforce statutory mechanisms currently in place to ensure timely removal of nuclear material. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

***722** Appeal from the United States District Court for the District of South Carolina, at Aiken. J. Michelle Childs, District Judge. (1:18-cv-01431-JMC)

Attorneys and Law Firms

ARGUED: Andrew Alperin Rohrbach, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Randolph R. Lowell, WILLOUGHBY & HOEFER, PA, Columbia, South Carolina, for Appellee. ON BRIEF: Chad A. Readler, Acting Assistant Attorney General, Mark B. Stern, Daniel Tenny, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellants.

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Opinion

Vacated and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Niemeyer and Judge King joined.

WYNN, Circuit Judge:

The State of South Carolina brought this action to enjoin the United States of America and other Defendants[1] (collectively, "the United States") from terminating the construction of a mixed-oxide fuel nuclear processing facility located at the Savannah River Site in South Carolina. South Carolina alleges that the United States Department of Energy unlawfully failed to (1) prepare a supplemental Environmental Impact Statement analyzing the long-term storage of plutonium in the state; and (2) follow statutory waiver provisions for terminating construction of the facility. We conclude that South Carolina ***723** has not established standing to pursue either of these claims. Accordingly, we vacate the preliminary injunction imposed by the district court.

I.

Following the collapse of the Soviet Union and the end of the Cold War, the United States of America and the Russian Federation began a worldwide nuclear nonproliferation effort that included developing plans for the safe disposition of nuclear weapons material. As part of this nonproliferation pact, the Department of Energy began studying the effects of various nuclear waste storage and disposal strategies. In its initial 1996 study, the Department of Energy prepared an Environmental Impact Statement in accordance with Section 4332 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., analyzing the potential environmental consequences associated with the long-term storage of weapons-grade plutonium and highly enriched uranium prior to disposition. The Environmental Impact Statement addressed storage of these materials for a period of up to fifty years.

Ultimately, the Department of Energy determined that the best approach to nuclear waste disposal was a dual strategy involving (1) immobilization of a portion of the surplus plutonium in glass or ceramic; and (2) irradiation of the remaining plutonium in mixed oxide fuel (the "MOX process"). Both strategies would convert the surplus nuclear material into forms that would meet the National Academy of Science's Spent Fuel Standard, meaning that the material would be "inaccessible and unattractive for weapons" use. J.A. 78.

In 1997, the Department of Energy announced its intention to build a new mixed oxide fuel fabrication facility (the "MOX facility") to dispose of some of the nuclear material using the MOX process. Following completion of a supplemental Environmental Impact Statement and a Record of Decision in January of 2000, the Department of Energy announced that the MOX facility would be located at the Savannah River Site along South Carolina's border with Georgia. The facility's original production goals included disposition of up to thirty-three metric tons of nuclear material using the MOX process and immobilization of up to seventeen metric tons of additional nuclear material. As part of its supplemental Environmental Impact Statement, the Department of Energy continued to look at the environmental impacts of long-term plutonium storage.

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In 2002, the Department of Energy decided to drop the immobilization portion of the disposition strategy, leaving the MOX process as the sole plutonium disposal method. That same year, Congress directed the Secretary of Energy to submit a plan for the construction and operation of the MOX facility at the Savannah River site. Pub. L. No. 107-314, § 3182 (2002), *subsequently codified* as 50 U.S.C. § 2566. Congress further authorized the Secretary to take corrective actions if the construction timetable and operation schedule for the MOX facility were not being met. Additionally, Congress also required that in the event the MOX facility failed to achieve its production goals, the Department of Energy remove plutonium shipped to South Carolina for processing. *See* 50 U.S.C. § 2566(c), § 2566(e). Finally, as part of its findings, Congress mentioned the economic benefit that the MOX facility would bring to the State of South Carolina, noting that the economic benefit would not be fully realized unless the facility was built. *See* Pub. L. No. 107-314 at § 3181.

Three years later, in 2005, the Department of Energy began transferring plutonium to the Savannah River Site for conversion, and in 2007, construction began on ***724** the MOX facility. The original cost estimate for construction of the facility was $4.8 billion, with completion anticipated in 2016. And the original production goal estimate for the facility was to have thirty-four metric tons of defense plutonium processed no later than January 1, 2019. 50 U.S.C. § 2566(a)(2)(B).

These original estimates proved grossly inaccurate due to delays and cost overruns in the construction of the MOX facility. The Department of Energy now estimates cost for construction of the facility to be $17.17 billion, with completion now anticipated to be in 2048, over thirty years beyond the original estimated schedule.

Since 2014, the Department of Energy has sought to terminate the MOX program and pursue an alternative method of plutonium disposal known as "Dilute and Dispose," which it contends is less costly, faster, and safer. Under the Dilute and Dispose method, nuclear material would be "downblended" with inhibitor materials to reduce the plutonium content to less than ten percent by weight. Upon completion of the downblending process, the material would then be shipped from the Savannah River Site to the Waste Isolation Pilot Plant near Carlsbad, New Mexico, for permanent disposal.

Thus far, Congress has continued to fund construction of the MOX facility and has, to date, restricted the Department of Energy from utilizing MOX-related appropriations to begin termination of the program. To that end, in 2017, Congress enacted a statute providing that the Secretary of Energy "shall carry out construction and project support activities relating to the MOX facility." Pub. L. 115-91, § 3121(a), 131 Stat. 1283, 1892.

However, Section 3121(b) of that statute allows the Secretary of Energy to discontinue construction of the MOX facility if certain conditions have been met. Specifically, the Secretary of Energy must submit to the Congressional defense committees:

> (A) the commitment of the Secretary [of Energy] to remove plutonium intended to be disposed of in the MOX facility from South Carolina and ensure a sustainable future for the Savannah River Site;
>
> (B) a certification that—
>
> (i) an alternative option for carrying out the plutonium disposition program for the same amount of plutonium as the amount of plutonium intended to be disposed of in the MOX facility exists, meeting the requirements of the Business Operating Procedure of the National Nuclear Security Administration entitled "Analysis of Alternatives" and dated March 14, 2016 (BOP-03.07); and
>
> (ii) the remaining lifecycle cost, determined in a manner comparable to the cost estimating and assessment best practices of the Government Accountability Office ["GAO"], as found in the document of the Government Accountability Office entitled "GAO Cost Estimating and Assessment Guide" (GAO-09-3SP), for the alternative option would be less than approximately half of the estimated remaining lifecycle costs of the mixed oxide fuel program; and
>
> (C) the details of any statutory or regulatory changes necessary to complete the alternative option.

§ 3121(b)(1).

Additionally, in exercising his authority to discontinue construction of the MOX facility, the Secretary of Energy

> (1) shall concurrently submit to the Committees on Appropriations of both Houses of Congress the lifecycle

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cost estimate used to make the certification under section 3121(b) of such Act; and

***725** (2) may not use funds provided for the Project to eliminate such Project until the date that is 30 days after the submission of the lifecycle cost estimate required under paragraph (1).

Pub. L. No. 115-141, § 309(c), 132 Stat. 348, 530 (2018).

Pursuant to these provisions, on May 10, 2018, the Secretary of Energy submitted a letter to the Chairman of the House Armed Services Committee that purported to execute the authority of the Secretary of Energy under Section 3121(b) to discontinue construction of the MOX facility. The Secretary of Energy certified, *inter alia*, that (1) the Department of Energy is committed to removing plutonium from South Carolina; (2) an alternative option for carrying out the plutonium disposition, the Dilute and Dispose method, exists and has a lifecycle cost of less than approximately half of the remaining lifecycle cost for the MOX program; (3) the Department of Energy estimated the cost of the Dilute and Dispose approach in a manner compatible with the best practices of the GAO; and (4) the Department of Energy is committed to ensuring a sustainable future for the Savannah River Site. The Secretary of Energy further reported that the Department of Energy expected the total cost of disposition via the Dilute and Dispose method to be $19.9 billion, compared to $49.4 billion for the total cost of construction of the MOX facility and conversion of all the plutonium into MOX fuel.

In accordance with the Secretary of Energy's letter, the Department of Energy and the National Nuclear Security Administration issued a Partial Stop Work Order on May 14, 2018, ending all new contracts and hiring related to the MOX program. The Department of Energy further indicated its intent to issue a Full Stop Work Order and begin winding down the MOX program, including terminating employees currently working on the project, on or about June 11, 2018.

On May 25, 2018, before the Department of Energy issued a full stop work order, South Carolina brought this action in the United States District Court for the District of South Carolina and moved for a preliminary injunction barring the federal government from terminating the MOX program. In its complaint, South Carolina asserted that the United States (1) violated NEPA by failing to prepare a supplemental Environmental Impact Statement covering a period of more than fifty years and (2) failed to satisfy Section 3121(b) because of the alleged insufficiency of the Secretary of Energy's certifications.[2]

On June 7, 2018, the district court granted South Carolina's motion for preliminary injunction. The district court first found that South Carolina had standing due to environmental risks associated with long-term storage at the Savannah River Site, which abuts property owned by South Carolina. As to the merits, the district court held, in pertinent part, that South Carolina was likely to succeed on the merits of its NEPA claim and its claim that the Secretary of Energy's certifications were insufficient. The district court further found that South Carolina would be irreparably harmed absent a preliminary injunction and that the balance of equities tilted in South Carolina's favor. Thus, the district court enjoined the federal government from ceasing construction of the MOX facility and issuing the full stop work order. The United States timely appealed.

***726** After careful review, we dispositively hold that South Carolina failed to establish standing and therefore we do not reach the district court's determination on the merits of this matter.

II.

A.

On appeal, the United States contends that the district court erred in concluding that South Carolina established standing to pursue the two claims that serve as the basis of the district court's preliminary injunction order—the NEPA claim and the claim premised on the alleged insufficiency of the Secretary's certifications. The standing doctrine derives from "the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.' " *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 750–51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). Standing implicates the court's subject matter jurisdiction. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 230 (4th Cir. 2008).

[1] **[2]** Here, South Carolina, as plaintiff, bears the burden of establishing standing to assert each of its claims. *See id.*;

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see also Lewis v. Casey, 518 U.S. 343, 359 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." (internal quotation marks omitted)). We review the question of whether South Carolina possesses standing de novo. *Frank Krasner Enters.*, 401 F.3d at 234.

[3] To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The United States contends South Carolina failed to show it has suffered an injury-in-fact sufficient to give rise to Article III standing.

[4] **[5]** To satisfy the injury-in-fact requirement, a plaintiff must establish a "realistic danger of sustaining a direct injury." *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "[W]hile it is true 'that threatened rather than actual injury can satisfy Article III standing requirements,' ... not all threatened injuries constitute an injury-in-fact." *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc)). "Rather, as the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.' " *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The requirement that an alleged injury be palpable and imminent ensures that the injury "is not too speculative for Article III purposes." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564–65 n.2, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[6] On appeal, South Carolina contends that it has suffered an injury-in-fact sufficient ***727** to support standing because "[South Carolina] is harmed by being rendered the permanent repository of weapons-grade plutonium as a result of [the Department of Energy's] decision to terminate the MOX Facility without first complying with NEPA or following the congressional mandates of § 3121." Appellee's Br. at 15–16. According to South Carolina, this "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." *Id.* at 14. But this alleged injury is too speculative and thus, does not give rise to a concrete injury-in-fact sufficient to support either of South Carolina's claims.

The Supreme Court has repeatedly held that an alleged harm is too "speculative" to support Article III standing when the harm lies at the end of a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *see also*, *e.g.*, *Beck*, 848 F.3d at 275 (holding that plaintiffs, who received treatment at a medical center that suffered a data breach and alleged that they were at risk of experiencing identity theft, failed to establish standing because their theory of injury rested on an "attenuated chain of possibilities").

Illustratively in *Clapper*, the Supreme Court considered a challenge to Section 702 of the Foreign Intelligence Surveillance Act, which "authoriz[es] the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." 568 U.S. at 401, 133 S.Ct. 1138. The plaintiffs—a group of "attorneys and human rights, labor, legal, and media organizations"—alleged that their work demanded that they "engage in sensitive international communication with individuals who they believe are likely targets of surveillance under" Section 702, rendering it reasonably likely that the government would target and intercept the plaintiffs' communications. *Id.* at 401, 406, 133 S.Ct. 1138.

The Supreme Court held that the plaintiffs failed to establish a concrete injury-in-fact based on the possibility that their communications would be intercepted, explaining that a series of hypothetical events would have to occur before the government would intercept any particular plaintiff's communications. *Id.* at 1148–50, 133 S.Ct. 1138. The Court held that among other steps, the government would have to decide to invoke its Section 702 authority to target a non-U.S. person with whom a plaintiff communicated, a panel of federal judges would have to "conclude that the Government's proposed surveillance procedures satisfy [the statute's] many safeguards and are consistent with the Fourth Amendment," and the government would have to succeed in intercepting one of the target's communications with the plaintiff. *Id.* Thus, the Court held that that the "highly attenuated chain of possibilities, d[id] not satisfy

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the requirement that threatened injury must be certainly impending." *Id.* at 1148, 133 S.Ct. 1138 (citation omitted).

Applying *Clapper*, this Court reached a similar conclusion in *Beck*, in which a putative class of veterans who received medical treatment at a veterans' medical center alleged that they had been injured when two sets of records were stolen from the center. 848 F.3d at 262, 267. Although none of the named plaintiffs alleged any actual or attempted misuse of the personal information contained in their stolen records, they alleged that they suffered cognizable injuries-in-fact because they faced "(1) [an] increased risk of future identity theft, and (2) the costs of protecting against the same." *Id.* at 273. We concluded ***728** that both alleged injuries were too speculative to confer standing. *Id.* at 275–77. As to the alleged increased risk of identity theft, in particular, we explained that plaintiffs' theory of injury required us to "assume that the thie[ves] targeted the stolen items for the personal information they contained" and that the thieves would "then select, from thousands of others, the personal information of the named plaintiffs, and attempt successfully to use that information to steal their identities." *Id.* at 275. "This 'attenuated chain' cannot confer standing," we held. *Id.* We likewise rejected the plaintiffs' costs of mitigation theory of standing as a "repackaged" version of their first theory of standing, amounting to an effort to recoup "costs they incurred in response to a *speculative threat*." *Id.* at 276 (emphasis added) (quoting *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138).

Here, South Carolina's theory of standing—that it will become "the permanent repository of weapons-grade plutonium" and all the environmental, health, and safety risks that entails, Appellee's Br. at 15–16—rests on a similarly "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138. Between now and 2046—when the analysis in the current Environmental Impact Statement governing the risks associated with long-term storage of weapons-grade nuclear material at the Savannah River Site expires—the Department of Energy has twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina. The Secretary of Energy already has certified that one potential alternative to the MOX program exists, the Dilute and Dispose method. And the Department of Energy may identify and develop other methods during that twenty-eight-year period. Or the Department of Energy may decide to transfer the plutonium out of South Carolina to another location.

Furthermore, Congress has put in place contingency plans for the removal of plutonium shipped to the Savannah River Site to forestall the indefinite storage of plutonium in South Carolina. A federal statute requires that, by 2022, all additional plutonium transferred into South Carolina to the MOX facility, but not processed, must be removed. 50 U.S.C. § 2566(c)(2). Notably, because the Department of Energy already has failed to meet certain statutory time limits for disposing of nuclear material at the site, South Carolina has successfully brought suit pursuant to the Administrative Procedure Act to enforce these congressionally mandated deadlines via a mandatory injunction. *See id.* § 2566(c)(1) (requiring removal of one metric ton of plutonium no later than January 1, 2016); *South Carolina v. United States*, 243 F.Supp.3d 673 (D.S.C. 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018) (ordering the Department of Energy to remove one metric ton of plutonium within two years).

In sum, for South Carolina's alleged injury—becoming "the permanent repository of weapons-grade plutonium," Appellee's Br. at 15–16—to occur: (1) the proposed Dilute and Dispose method must fail; (2) the Department of Energy must fail to identify an alternative method for disposing of the nuclear material; and (3) the Department of Energy must breach its statutory obligation to remove the nuclear material from South Carolina, Congress must repeal that obligation, or the courts must refuse to enforce that obligation. At this juncture, before the Department of Energy has even had an opportunity to finish analyzing the Dilute and Dispose method, this "chain of possibilities" is too speculative to give rise to a sufficiently concrete injury-in-fact.

[7] That several of the links in this "chain of possibilities" the State's standing ***729** theory contemplates require our coordinate branches to either breach or abandon their existing commitments to ensure timely removal of the nuclear material at the Savannah River Site further weighs against treating the South Carolina's alleged injury as conferring standing. As *Clapper* recognized, the standing doctrine is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408, 133 S.Ct. 1138 (citations omitted); *see also Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315 (1984) ("[Article] III standing is built on a single basic idea—the idea of separation of powers."). To confer standing on South Carolina at this juncture based on an alleged injury —becoming the permanent repository of nuclear material— that the political branches already have made written and legally binding commitments to forestall would improperly

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"usurp the powers of the political branches." *Clapper*, 568 U.S. at 408, 133 S.Ct. 1138.

The "highly attenuated chain of possibilities" that must occur for South Carolina to become the permanent repository of nuclear material also sets this case apart from this Court's decision in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), upon which South Carolina principally relies.

Like the instant case, *Hodges* dealt with the storage of plutonium at the Savannah River Site. *Id.* at 436. In 2002, the Department of Energy issued a Record of Decision authorizing the immediate shipment of six metric tons of plutonium from a nuclear facility in Colorado to the Savannah River Site. *Id.* The Governor of South Carolina sought to enjoin shipment of the plutonium into South Carolina, alleging that the Department of Energy's *existing* Environmental Impact Statement, and its supplemental analyses to the Environmental Impact Statement, related to storage of plutonium at the Savannah River Site violated NEPA in several ways. *Id.* at 445. This Court held that the Governor adequately alleged an injury-in-fact to support his NEPA claims because the South Carolina owned property adjacent to the Savannah River Site. *Id.* "[T]he Governor, in his official capacity, is essentially a neighboring landowner, whose property is at risk of environmental damage" as a result of the Department of Energy's shipment of plutonium to the Savannah River Site and storage of that plutonium there, we explained. *Id.*

Here, unlike in *Hodges*, South Carolina does not argue that its injury, as a neighboring landowner, is attributable to the *current* storage of nuclear material at the Savannah River Site or the inadequacy of the Environmental Impact Statement pursuant to which the nuclear material is *currently* stored—a question that *Hodges* already resolved in the federal government's favor. *Id.* at 446–49. Rather, South Carolina contends it is injured because the termination of the MOX program renders it the *permanent* repository of the nuclear material when the Department of Energy has not issued an Environmental Impact Statement analyzing the environmental impact of the storage of the material at the Savannah River Site *beyond the year 2046*, the year when the existing Environmental Impact Statement's analysis terminates, or, allegedly, satisfies its statutory obligations in terminating the MOX program. There is a meaningful distinction between the alleged *immediate* environmental injuries associated with storing plutonium at the Savannah River Site, which were at issue in *Hodges*, and the alleged *future* adverse environmental impacts on South Carolina as a neighboring landowner if the Department of Energy continues to store the plutonium at the Savannah River Site *decades in the future*. That distinction is particularly meaningful because, as explained ***730** above, numerous contingencies must occur in order for the plutonium to remain in South Carolina after 2046, the year when South Carolina's alleged injury will mature.

In sum, the single theory of injury[3] that South Carolina relies on to support both of its claims is too speculative at this juncture to support Article III standing. The district court, therefore, was without jurisdiction to enter its preliminary injunction premised on those two claims.

B.

[8] For reasons similar to those that lead us to find that South Carolina lacks standing, we also find that the two claims at issue fail on ripeness grounds. Like standing, the ripeness doctrine "originates in the 'case or controversy' constraint of Article III." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 269 (4th Cir. 2013) (citations omitted). "Analyzing ripeness is similar to determining whether a party has standing." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). "Although the phrasing makes the questions of who may sue and when they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness." *Id.* (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)). As with standing, ripeness is a question of subject matter jurisdiction. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (citation omitted).

[9] **[10]** The question of whether a claim is ripe "turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) (citation omitted). In the context of claims challenging agency actions, like the two at issue, the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136,

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148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

[11] To be fit for judicial review, a controversy should be presented in a "clean-cut and concrete form." *Miller*, 462 F.3d at 319 (citation omitted). This occurs when the action is "final and not dependent on future uncertainties or intervening agency rulings." *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (citation omitted). On the other hand, just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, a plaintiff's claim is not ripe for judicial review "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

[12] The two claims that South Carolina advances before this Court rest on the premise that South Carolina will be the permanent repository of the weapons-grade ***731** nuclear material currently stored at the Savannah River Site. But, numerous "contingent future events," *id.*, must occur before South Carolina becomes the *permanent* repository of the nuclear material, *see supra* Part II.A. In particular, the Dilute and Dispose method must prove unworkable. The Department of Energy must fail to identify an alternative method of disposal and breach its commitment to dispose of the waste. And Congress or the courts must set aside or refuse to enforce the statutory mechanisms currently in place to ensure timely removal of the nuclear material. All of these "future uncertainties," *Franks*, 313 F.3d at 195, lead us to conclude that the two claims at issue are not ripe for review at this time —at least as presented by South Carolina. Accordingly, the ripeness doctrine provides an additional basis for our holding that the district court was without jurisdiction to enter the preliminary injunction.

III.

In sum, the only theory of injury advanced by South Carolina —that South Carolina will be the permanent repository of the nuclear material currently stored at the Savannah River Site—rests upon a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, 133 S.Ct. 1138, and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins*, 718 F.3d at 270. In such circumstances, we must conclude that South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review.

That the two claims are not currently justiciable does not mean that they never will be so. If uncertainty as to several links in the chain of possibilities is resolved, then South Carolina's alleged injury may move from the speculative to the concrete, and therefore the two claims also may become ripe for review. But until that uncertainty is lifted, the Constitution demands that we withhold judicial review.

Accordingly, we vacate the preliminary injunction imposed by the district court and remand the case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED

All Citations

912 F.3d 720

Footnotes

1 The other Defendants are the United States Department of Energy; Rick Perry, in his official capacity as Secretary of Energy; the National Nuclear Security Administration; and Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration.

2 South Carolina further claimed that the United States violated 50 U.S.C. § 2567 by failing to consult with the governor before deciding to terminate the MOX facility. The district court held that South Carolina failed to establish that that claim was likely to succeed on the merits, and therefore that claim is not before this Court.

3 Because South Carolina has advanced only one theory of injury to support the two claims before this Court—that South Carolina is harmed by becoming the permanent repository of weapons-grade nuclear material—we cannot and do not take any position on whether other theories of injury would presently confer standing on South Carolina to support either of the two claims before us on appeal.

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EXHIBIT 10

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2019 WL 2464930 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
June 7, 2019.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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***i** QUESTION PRESENTED

The U.S. Department of Energy (DOE) shipped massive amounts of weapons-grade plutonium to South Carolina for a decade in anticipation of building a facility there - the "MOX Facility" - to process it. After running way behind schedule and far over budget, DOE sought to mothball the still-uncompleted MOX Facility. In response, Congress enacted a statute requiring DOE to keep building the MOX Facility unless DOE gets a "waiver" of that requirement. This lawsuit arose from DOE's decision to halt construction of the MOX Facility permanently after purportedly satisfying the statute's requirements for a waiver. South Carolina claims in this suit that DOE's decision violates the statute, which was specifically designed to protect South Carolina's interests, and the National Environmental Policy Act.

The question presented is whether the United States Court of Appeals for the Fourth Circuit erred in holding that South Carolina lacked standing to challenge the DOE's final action and that the challenge is not ripe.

***ii** PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. State of South Carolina, Plaintiff and Petitioner;

2. United States of America, Defendant and Respondent;

3. United States Department of Energy, Defendant and Respondent;

4. Rick Perry, in his official capacity as Secretary of Energy, Defendant and Respondent;

5. National Nuclear Security Administration, Defendant and Respondent;

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6. Lisa E. Gordon-Hagerty, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendant and Respondent.

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Business Operating Procedure of the National Nuclear Security Administration, "Analysis of Alternatives," dated March 14, 2016	3
Consolidated Appropriations Act, 2018, § 309(a), 132 Stat. 348 (2018)	7
Consolidated Appropriations Act, 2018, § 309(b), 132 Stat. 348 (2018)	8, 10
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13B Charles Alan Wright *et al., Federal Practice and Procedure* § 3531.11.1 (3d ed. 2008)	22
National Academies of Sciences, Engineering, and Medicine, *Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report* 2	6
National Defense Authorization Act for Fiscal Year 2019, § 3119, 132 Stat. 1636 (2018)	7
National Defense Authorization Act for Fiscal Year 2018, § 3121, 131 Stat. 1283 (2017)	3, 7, 8, 10
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R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009) ...	27, 32

*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner State of South Carolina (South Carolina or State) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.3d 720. App. 1a-22a. The opinion of the district court is reported at 329 F. Supp. 3d 214. App. 34a-82a. The decision of the United States Secretary of Energy is unreported but is reproduced in the appendix. App. 107a-109a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on January 8, 2019. On March 29, 2019, the Chief Justice extended the time to file a petition for a writ of certiorari up to and including June 7, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the U.S. Constitution provides in relevant part, "[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 83a-106a.

*2 INTRODUCTION

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This case involves the justiciability of a State's claims against the federal government for statutory violations, including violations of provisions expressly designed to protect the State's concrete interests. The decision below, which denied the justiciability of those claims, conflicts with this Court's decision in *Massachusetts v. EPA,* 549 U.S. 497 (2007), and provides an excellent vehicle for dispelling continuing confusion among the lower courts about the standing of States to sue the federal government.

South Carolina is home to the Savannah River Site (SRS), where Congress directed the U.S. Department of Energy (DOE) to build a facility to convert weapons-grade plutonium (also known as "defense plutonium") into mixedoxide (MOX) fuel for use in commercial nuclear reactors. App. 3a-4a, 83a.[1] In the statute directing DOE to build this facility - known as the MOX Facility or Project - Congress included multiple provisions designed to address South Carolina's concern about becoming a permanent dumping ground for multiple tons of this admittedly dangerous material. 50 U.S.C. § 2566. Starting in 2014, DOE sought to terminate construction of the MOX Facility after its construction had fallen way behind schedule and gone way over budget.

On May 10, 2018, the Secretary of DOE announced his decision to permanently abandon construction of the ***3** MOX Facility and to pursue a new concept for processing weapons-grade plutonium called "Dilute and Dispose" or "downblending." In the letter announcing this decision, the Secretary purported to comply with the statutory requirements for a "waiver" of the statutory mandate to continue construction of the MOX Facility. DOE made this decision without any analysis under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (NEPA), or complying with the analysis requirements of the governing statute.[2]

To remedy these statutory violations, South Carolina brought this action against DOE. The district court granted a preliminary injunction to prevent DOE from terminating construction of the MOX Facility, but the Fourth Circuit reversed. Without reaching the merits, the Fourth Circuit held that South Carolina lacked Article III standing and that its claims are not ripe. The Fourth Circuit characterized South Carolina's standing argument as resting on its fear of being "the permanent repository of weapons-grade plutonium." App. 12a. The Fourth Circuit believed that this fear was "too speculative" to constitute injury in fact or present ripe claims. App. 12a. The Fourth Circuit did not cite *Massachusetts v. EPA* despite its obvious relevance and South Carolina's citation of that decision in its brief.

The Fourth Circuit's decision conflicts with this Court's decision in *Massachusetts v. EPA* and misreads ***4** other decisions of this Court on Article Ill's standing and ripeness requirements. The decision warrants this Court's review because it could hamper South Carolina's ability to enforce statutory provisions that relate to the weapons-grade plutonium at SRS, and other States' ability to enforce statutory rights enacted to protect their interests.

STATEMENT OF THE CASE

South Carolina is home to 10 metric tons of weapons-grade plutonium, which are stored at SRS. If the decision below stands and DOE has its way, South Carolina will be forced to host at least an additional 20 metric tons indefinitely, while DOE tries to turn a new concept for processing it into a reality. DOE's track record in dealing (more accurately, in failing to deal) with the existing 10 metric tons does not inspire confidence that the proposed total of more than 30 metric tons, and their associated dangers, will be going anywhere any time soon. Remarkably, after the district court held that South Carolina was likely to succeed on the merits of its claims in this action, the Fourth Circuit foreclosed the State from even being able to question executive-branch compliance with statutory requirements that Congress specifically and expressly designed to protect South Carolina's interests.

I. Congress enacts statutory protections to prevent South Carolina from becoming the permanent repository of weapons-grade plutonium put there by the federal government.

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In September 2000, the United States and Russia entered an agreement under which each country ***5** would dispose of 34 metric tons of weapons-grade plutonium. App. 35a, 76a. To meet its obligations under this agreement, Congress in 2003 enacted legislation authorizing the construction of the MOX Facility at SRS. App. 39a, 76a-77a. The legislation included a finding that the "agreement with Russia is a significant step toward safeguarding nuclear materials and preventing their diversion to rogue states and terrorists." Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA FY03), § 3181(1), 116 Stat. 2458, 2747 (2002). Another finding stated that DOE planned - quite optimistically in hindsight - for the MOX Facility to begin operating in 2009 and to convert 34 metric tons of weapons-grade plutonium into mixed-oxide fuel "before the end of 2019." *Id.* § 3181(3) & (4).

South Carolina had protested selection of SRS as the site for the MOX Facility. In addition to the concern that weapons-grade plutonium could fall into the wrong hands, South Carolina worried about its citizens' prolonged exposure to multiple tons of this admittedly hazardous material. Indeed, the Nuclear Regulatory Commission (NRC) recognized, when it issued the construction license for the MOX Facility in 2005, that the primary benefit of the Facility's operation would be to reduce the supply of weapons-grade plutonium "available for unauthorized use." App. 62a. The NRC also recognized that "continued storage [of the plutonium] would result in higher annual impacts" of public radiation exposure than implementation of the Project. App. 62a. Besides concerns for its citizens, South Carolina had concerns as the owner of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

***6** Congress addressed some of South Carolina's concerns in the 2003 statute authorizing the MOX Facility. NDAA FY03, § 3182, *subsequently codified* as 50 U.S.C.A. § 2566 (Section 2566). Section 2566 prescribes deadlines for construction of the Facility and for its processing of the plutonium. *E.g., id.* § 2566. The key deadline provided that, as of January 1, 2012, the MOX Facility would be processing no less than one metric ton of weapons-grade plutonium per year. *Id.* 2566(a), (h). The statute also prescribes remedies against DOE for missing these deadlines. *Id.* § 2566(b)(6)(B), (b)(6)(C); *id.* § 2566(c); *id.* § 2461.

Beginning shortly after the enactment of § 2566 and continuing through 2012, DOE shipped significant amounts of defense plutonium to South Carolina for conversion into MOX fuel. Construction began on the MOX Facility on or about August 1, 2007. As the National Academy of Sciences observed, however, "Construction has encountered substantial schedule delays and cost overruns." National Academies of Sciences, Engineering, and Medicine, *Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report* 2 (Washington, DC: The National Academies Press, Oct. 2018) [hereafter cited as NAS Interim Report].[3] Although the MOX Facility originally was supposed to begin operating in 2009, today DOE estimates construction will not be completed until at least 2048. App. 5a. The delay caused DOE to violate, among other statutory requirements, a requirement that it remove not less than one metric ton of weapons-grade plutonium by January 1, 2016. In a prior action, South Carolina successfully sued DOE for this statutory ***7** violation. *South Carolina v. United States,* 907 F.3d 742 (4th Cir. 2018).

II. DOE terminates construction of the MOX Facility with no approved alternative for disposition of the defense plutonium at SRS.

Since 2014, DOE has continuously sought termination of the MOX Project and advocated for its proposed "Dilute and Dispose" concept, under which DOE would prepare "dilute" plutonium at SRS for ultimate "disposition" at the Waste Isolation Pilot Plant (WIPP) in New Mexico. Despite DOE's new idea, Congress has continued to mandate that DOE build the MOX Facility. The current mandate is found in two statutory provisions: Section 3121(a) of the NDAA FY18, and Section 309(a) of the Consolidated Appropriations Act, 2018 (CAA FY18). App. 95a-98a.[4]

Recognizing South Carolina's concerns that it be left as an indefinite repository for defense plutonium, Congress specified that DOE can avoid the statutory mandate to construct the MOX Facility only if the Secretary of Energy obtained a waiver of it. The waiver requirements are prescribed in Section 3121(b) of NDAA FY18, and are incorporated by reference in Section 309(b)

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of CAA ***8** FY18. App. 95a-98a. To get a waiver, the Secretary must "submit to the congressional defense committees" (1) a commitment to remove defense plutonium from South Carolina and (2) a certification regarding certain points, including the existence of a viable and feasible alternative option.[5] This waiver requirement was enacted by Congress to ensure a legally viable and feasible disposition pathway existed to remove defense plutonium from South Carolina.

The Secretary of Energy purported to meet the waiver requirement in a letter dated May 10, 2018 ("May 10 Letter"). The May 10 Letter notified Congress of DOE's decision to permanently abandon construction of the MOX Facility and pursue its "Dilute and Dispose" concept for plutonium disposition. App. 107a-109a. In the May 10 Letter, the Secretary stated, "I confirm that the Department is committed to removing plutonium from South Carolina intended to be disposed of in the MOX facility." App. 107a. The Secretary also certified that "an alternative option for carrying out the plutonium disposition program … exists" - namely, the "Dilute and Dispose Approach." App. 108a. But the Secretary did not address the "many barriers" that the National Academy of Sciences has identified and said "must be addressed … before the dilute and dispose conceptual plans can be implemented." NAS Interim Report, *supra,* at 19. In particular, the Secretary did not address any of the legal barriers that exist, despite the waiver provision's requirement that he identify "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose concept. NDAA FY18, § 3121(b)(1)(C).

***9** Based on the decision reported in the May 10 Letter, the Secretary issued a "partial stop work order" on May 14, 2018. App. 50a (quoting ECF No. 19-1 ¶ 10). The partial stop work order "halted any new contracts or new hires at SRS for the MOX Project." App. 44a, 72a. The order "was issued to minimize cos[t] to the government during the 30 day period leading up to an eventual full stop work order and the termination letter expected to be issued on June 11, 2018." App. 50a (quoting ECF No. 19-1 ¶ 10). South Carolina filed this action before the termination letter issued and obtained a preliminary injunction against its issuance.

Today, South Carolina continues to host about 10 metric tons of weapons-grade plutonium at SRS slated for MOX Facility processing. South Carolina has no reason to believe that this material is going anywhere anytime soon. To the contrary, as discussed above, DOE has repeatedly missed statutory deadlines for construction and operation of the MOX Facility. In the meantime, South Carolina and its people continue to live with the dangers that are associated with this material and that led to the international agreement with Russia and the Act of Congress directing construction of the MOX Facility in the first place.

III. The Proceedings Below.

A. Federal District Court

On May 25, 2018, the State filed a complaint in the United States District Court for the District of South Carolina challenging DOE's final agency action to terminate the Project. The complaint invoked subjectmatter ***10** jurisdiction under the federal-question statute, 28 U.S.C. § 1331. The State asserted two claims of statutory violations, both resting on the cause of action created by the Administrative Procedure Act (5 U.S.C. §§ 702, 704 & 706): DOE violated (1) NEPA by failing to prepare a supplemental Environmental Impact Statement analyzing its decision to terminate the MOX Facility in favor of the Dilute and Dispose approach; and (2) the statutory provisions requiring DOE to obtain a waiver before terminating construction of the MOX Facility (NDAA FY18, § 3121(b) and CAA FY18, § 309(b)). The State sought declaratory relief and a permanent injunction.

The State also moved for a preliminary injunction to maintain the status quo by enjoining DOE from terminating the Project during the pendency of this lawsuit. The district court granted the preliminary injunction on June 7, 2018. App. 34a-82a.

In its preliminary injunction order, the district court comprehensively addressed and rejected DOE's arguments that South Carolina lacks standing and that the May 10 Letter is not final agency action. App. 44a-54a. The court held that South Carolina has standing to assert its procedural rights under NEPA and the statutory waiver provisions "because the State owns extensive property adjoining, and one road traversing the impacted area." App. 47a. The court further held that the decision of the Secretary

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announced in the May 10 Letter is final agency action reviewable under the APA. The Secretary's "execution of the MOX termination waiver" in the May 10 Letter, if allowed to stand, waives the statutory requirements to continue building the MOX Facility. In addition to this legal effect, the May 10 Letter creates the ***11** "practical reality that the full stop order that is planned for June 11, 2018 will shut down the MOX Facility." App. 50a. Furthermore, the court concluded, "[b]ecause the MOX Project is the only legally authorized disposition method for MOXable plutonium at SRS," the "practical effect" of the decision announced in the May 10 Letter "is that the plutonium will remain at SRS indefinitely." App. 54a.[6]

The court also held that South Carolina is likely to succeed on the merits of both its claims.

In analyzing the State's NEPA claim, the court observed that the relevant statutes, and DOE itself, contemplate that NEPA applies "when rendering decisions and taking action related to the disposition of defense plutonium at SRS." App. 60a. DOE relied, however, on an Environmental Impact Statement (EIS) issued in December 1996 that analyzed the storage of weapons-grade plutonium for a period of up to 50 years - *i.e.,* until 2046. App. 63a, 65a. DOE argued that this EIS sufficed because its use of the new Dilute and Dispose approach would remove all the MOXable plutonium before that 50- ***12** year period ended. App. 63a. The district court rejected that argument on two grounds. First, DOE's past actions with regard to the MOX Facility "have called into question the viability" of DOE's timeline for removal using the Dilute and Dispose approach. App. 65a. Second, and in any event, "pursuing the Dilute and Dispose approach" for the MOXable plutonium "would have a significant impact on the environment." App. 65a. Therefore, the court held, DOE must "produce a supplemental EIS that addresses the conceivability, both practically and legally" of its proposed new approach. App. 65a-66a.

The court also held that the State is likely to succeed on its claim that the Secretary violated the statutory requirements for a waiver of the statutory mandate to continue building the MOX Facility. App. 66a-72a. The court identified three flaws in the May 10 Letter announcing the Secretary's decision to terminate the MOX Project. First, there is no basis for the Secretary's commitment to remove the MOXable plutonium from SRS, since it rests on the unauthorized and unanalyzed Dilute and Dispose approach. App. 68a. Second, the Secretary's cost comparison of the MOX Project and the Dilute and Dispose approach does not meet statutory requirements for accuracy. App. 69a-70a. Third, although the statutory waiver provision requires the Secretary to report to Congress "the details of any statutory or regulatory changes necessary to complete" the Dilute and Dispose alternative, the May 10 letter provides no such details. App. 70a-71a. The district court, however, held that adoption of the Dilute and Dispose approach would require, among other changes, the amendment of two federal statutes. App. 71a-72a.

***13** DOE appealed the district court order granting the preliminary injunction to the Fourth Circuit under 28 U.S.C. § 1291(a)(1).[7]

B. Court of Appeals

The Fourth Circuit vacated and remanded, holding that "South Carolina lacks Article III standing to advance the two claims that serve as the basis of the district court's injunction and that those two claims are not ripe for review." App. 22a.

The court held that South Carolina lacks Article III standing because it cannot establish injury in fact. App. 10a-19a. The State argued that DOE's failure to comply with NEPA and Section 3121's waiver provision "results in increased radiation exposure to the public, increased risk of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium." App. 12a (quoting State's brief on appeal). The court concluded that those alleged injuries were "too speculative" because they rest "on a … 'highly attenuated chain of possibilities.' " App. 13a (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013)).

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The court focused on the time frame "[b]etween now and 2046 - when the analysis in the current [EIS] governing the risks associated with long-term storage of ***14** weapons-grade nuclear material at the Savannah River Site expires." App. 15a. The court did not explain how the EIS's time frame bears on South Carolina's standing. Nonetheless, it assigned 2046 as "the year when South Carolina's alleged injur[ies] will mature." App. 19a. On this view, the court reasoned that the EIS gives DOE "twenty-eight years to identify an alternative method for disposing of the nuclear material or otherwise removing it from South Carolina." App. 15a. The court observed that DOE has already identified the Dilute and Dispose method as "one potential alternative," and it might come up with more. App. 15a. The court also observed that DOE is under a statutory deadline to remove, by January 1, 2022, any weapons-grade plutonium that have been slated for processing by the MOX Facility but not yet processed by then. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)). If DOE failed to meet that deadline, the court explained, South Carolina could sue it, just as it had for DOE's past failure to meet statutory deadlines. App. 16a.

"For reasons similar to" the ones that led the court of appeals to hold that South Carolina lacks standing, it also held that "the two claims at issue fail on ripeness grounds." App. 19a. The court recognized that " 'ripeness turns on the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " App. 20a (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983)). The court apparently found the problem here to be a lack of fitness. *See* App. 20a-21a (paragraph discussing requirements for a case "[t]o be fit for review"). The court said that a case is fit "when the action is final and not dependent on future uncertainties." App. 21a (internal quotation marks omitted). Despite this reference to ***15** "final[ity]," the court of appeals did not discuss, much less express disagreement with, the district court's conclusion that DOE's decision to terminate the MOX Project was final agency action. *Cf.* App. 21a. Instead, the court of appeals seemed to conclude that neither the NEPA claim nor the statutory-waiver-provision claim is ripe because of "uncertainties" about whether South Carolina will indeed become "the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a.

REASONS FOR GRANTING THE PETITION

There are four compelling reasons for this Court to grant review of the Fourth Circuit's opinion on a writ of certiorari.

First, the Fourth Circuit's decision conflicts with *Massachusetts v. EPA, Lujan v. Defenders of Wildlife,* and other decisions of this Court addressing the justiciability of suits by States and other plaintiffs seeking to compel a federal agency to comply with express statutory directives. Rule 10(c). Instead, the Fourth Circuit rejected the precedent of this Court in favor of a novel standing and ripeness analysis that narrowly interprets and, thus, unduly restricts the ability of a State to seek enforcement of a statute that involves and pertains to its legitimate interests.

Second, the Fourth Circuit's opinion creates a conflict among the circuits in applying this Court's holdings on standing. By circumscribing the State's ability to invoke the federal judicial power in seeking the enforcement of an existing statutory framework, the Fourth Circuit went far ***16** beyond any other circuit in heightening the level of injury sufficient to form the basis for a "case or controversy." This Court's intervention is necessary to address the conflict among the circuits. Rule 10(a).

Third, this case presents important Constitutional issues regarding the justiciability of claims brought by a State seeking to vindicate its sovereign interests. The State has a legitimate interest in protecting its environment and in enforcing its substantive and procedural rights in its relations with the federal government. The Fourth Circuit's opinion denies the State the ability to even adjudicate its claims, which strikes at the heart of the federalism principle accepted by the State and the United States upon the formation of the union.

Fourth, this case provides an excellent opportunity for this Court to provide the clarification of *Massachusetts v. EPA* that the Fourth Circuit's decision and the conflict among the circuits demonstrate is warranted. This case presents fundamental and well-defined questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA,* including how "special solicitude" relates to a State's possession of a "procedural right" and to the apparent limitations on suits against the federal government by States suing as *parens patriae.*

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I. The decision below squarely conflicts with decisions of this Court.

A. The decision below conflicts with *Massachusetts v. EPA*.

The decision below conflicts in approach and result with this Court's decision in *Massachusetts v. EPA* by ***17** failing to give "special solicitude" to South Carolina when analyzing the State's standing. South Carolina met all the requirements for Article III and statutory standing, and had the court below given South Carolina the "special solicitude" required by *Massachusetts v. EPA,* it would have been compelled to uphold South Carolina's standing in this case.

In *Massachusetts v. EPA,* this Court held that Massachusetts was "entitled to special solicitude in [its] standing analysis" because of (1) the State's possession of a "procedural right" and (2) its "stake in protecting its quasi-sovereign interests." 549 U.S. at 520. The State's "procedural right" was the statutory right to seek judicial review "for agency action unlawfully withheld." *Id.* at 517 (quoting 42 U.S.C. § 7607(b)(1)). The "quasi-sovereign interests" at stake were Massachusetts' "desire to preserve its sovereign territory" from harmful effects assertedly imposed on that State by greenhouse gases (GHGs). *Id.* at 519. The latter interests were reinforced by Massachusetts ownership of "a great deal of the territory alleged to be affected" by GHGs. *Id.* (internal quotation marks omitted).

Both conditions for "special solicitude" exist here. First, South Carolina asserts violations of its procedural rights under NEPA and the statutory provisions requiring DOE to get a waiver before terminating the MOX Facility. NEPA's creation of a procedural right was recognized by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992). And the statutory waiver provisions plainly create procedural rights designed to protect South Carolina's interests. *Cf. Maryland People's Counsel v. FERC,* 760 F.2d 318, 320 (D.C. Cir. 1985) (per Scalia, J.) ***18** (stating that statute authorizing state agencies to seek judicial review of FERC orders showed "special solicitude" for States, removing prudential barriers on States' relying on *parens patriae* standing in litigation against federal government). Second, South Carolina asserts its quasi-sovereign interests in protecting its territory against the environmental harms threatened by the DOE's decision to terminate the MOX Facility. *See* App. 12a (quoting South Carolina's allegations that DOE's May 10 decision "results in increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increase threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium"). Here, as in *Massachusetts v. EPA,* the State's quasi-sovereign interests are reinforced by its ownership of "extensive property adjoining, and one road traversing, the impacted area." App. 47a.

Given South Carolina's "procedural right[s] and [its] stake in protecting its quasi-sovereign interests," South Carolina was "entitled to special solicitude" in the Fourth Circuit's standing analysis. *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina plainly identified those rights and interests in its brief for the Fourth Circuit, and cited *Massachusetts v. EPA* in its brief. Br. of Pl.-Appellee at 16-17, *South Carolina v. United States,* 912 F.3d 720 (4th Cir. 2019) (No. 18-1684), ECF No. 31. Yet the Fourth Circuit disregarded those rights and interests, and based its standing analysis - not on *Massachusetts v. EPA* - but instead primarily on *Clapper,* a case involving the standing of private plaintiffs. *Id.* at 406; App. 13a-17a (citing *Clapper*).[8]

***19** The Fourth Circuit's disregard of *Massachusetts v. EPA* led to error. South Carolina's argument for standing closely resembles Massachusetts'. Both States attack agency decisions (to deny a rulemaking petition; to terminate the MOX Project) for failure to follow statutory requirements that, if followed, could have led to a different decision. As things stood, the challenged agency decisions exposed the States to increased risk of harms (additional loss of coastal land; additional radiation and risks of accidents and theft). The risks of harm associated with prolonged storage of weapons-grade plutonium are at least as well established and imminent as those associated with greenhouse gases. *See* App. 39a (district court decision quoting federal officials' acknowledgement of dangers posed by storage of weapons-grade plutonium). Thus, South Carolina's standing in this case follows *a fortiori* from this Court's decision upholding Massachusetts' standing in *Massachusetts v. EPA*.

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***20 B. The decision below conflicts with decisions of this Court on ripeness.**

The Fourth Circuit held that South Carolina's claims are not ripe because they are not "fit" for review. App. 19a-21a. They are not fit for review, the Fourth Circuit concluded, because South Carolina might not "become[] the *permanent* repository" of "weapons-grade nuclear material currently stored at the Savannah River Site." App. 21a (emphasis in original). This conclusion, however, conflicts with decisions of this Court.

South Carolina's claims are fit for review under this Court's precedent. That precedent establishes that a claim is generally fit for review when it challenges agency action that is final, the challenge is purely legal, and the court's ability to resolve the challenge will not benefit from further factual development. *E.g., Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 811 (2003). The court of appeals below did not disturb the district court's holding that DOE's decision to terminate the MOX Facility is "final agency action" within the meaning of the federal APA. App. 48a-54a; 5 U.S.C. § 704. Furthermore, South Carolina's claims that DOE violated NEPA and the statutory waiver requirements are purely legal, as is clear from the district court's analysis of these claims. *See* App. 59a-72a. The court of appeals below did not identify any further factual developments that would facilitate the resolution of South Carolina's NEPA and statutory-waiver claims.

As this Court has held, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes ***21** place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 737 (1998). The decision below squarely conflicts with this holding in *Ohio Forestry Ass'n* by finding South Carolina's NEPA claim unripe. *See* App. 19a-21a. Moreover, this Court's holding in *Ohio Forestry Ass'n* also applies to South Carolina's claim that DOE violated the requirements for a waiver of the statutory mandate to continue construction of the MOX Facility: Nothing that happened after the date of the Secretary's May 10 Letter will affect analysis of South Carolina's claim that the DOE violated the requirements for a waiver of that mandate.[9]

Although the Fourth Circuit apparently, erroneously - and in conflict with this Court's precedent - relied on the "fitness" prong of ripeness analysis, its conclusion of unripeness seemed to rest on a supposed lack of hardship. That conclusion, in turn, rested on the Fourth Circuit's belief that only in the year 2046 will "South Carolina's alleged injury mature." App. 19a. The Fourth Circuit cited the year 2046 because it was the end date of the 50-year period analyzed in DOE's 1996 Programmatic EIS (PEIS) on storage of weapons-grade plutonium at SRS. App. 15a, 36a. The 1996 PEIS's 50-year period of analysis arguably *might* bear on the merits of South Carolina's claim that DOE must now prepare a supplemental EIS for its termination of the MOX Project. But it has no bearing on South Carolina's standing or the ripeness of its claims. In concluding otherwise, the Fourth Circuit's ***22** ruling reflects "the familiar confusion between standing and the merits." 13B Charles Alan Wright *et al., Federal Practice and Procedure* § 3531.11.1, at 98 (3d ed. 2008).

Properly understood, South Carolina's standing and hardship stem from the *existing* 10 metric tons of weapons-grade plutonium stored within its borders, plus the additional 20 metric tons that DOE currently plans to ship to South Carolina. The existing plutonium exposes South Carolina's property and its citizens to ongoing radiation and the risks of nuclear accidents and threats. South Carolina reasonably fears that DOE's decision to terminate the MOX Facility to pursue the unstudied, unauthorized "Dilute and Dispose" concept will indefinitely *prolong* the storage of massive amounts of plutonium in South Carolina, and in turn cause South Carolina to incur additional costs associated with protecting against the radiation and risks. South Carolina's fear is well-founded considering DOE's dismal track record in meeting statutory deadlines for construction of the MOX Facility. *See* App. 5a.

The Fourth Circuit dismissed this fear, reasoning that South Carolina can always sue DOE when DOE fails to meet the *next* statutory deadline. App. 16a. But the likelihood that DOE will violate *additional* statutory requirements in the future surely cannot disable South Carolina from suing DOE for current statutory violations arising from its termination of the Project. To the contrary, the possibility that South Carolina will have to sue DOE again in the future represents just another realistic risk of future harm that supports its standing to bring this suit. *Cf. Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 154-55 (2010) (upholding standing based ***23** partly on costs incurred by plaintiffs to mitigate realistic risks); *Texas v. United States,* 497

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F.3d 491, 497 (5th Cir. 2007) (upholding State's standing based partly on realistic risk that State would have to participate in compelled mediation over tribal gaming).

II. The Fourth Circuit's decision creates a conflict among the circuits concerning the justiciability of State suits against the federal government.

The Fourth Circuit's decision conflicts in approach with decisions in at least three other circuits: the Second, Fifth, and Tenth. Courts of appeals in these circuits rely on *Massachusetts v. EPA* to accord "special solicitude" to States in analyzing the States' standing to sue the federal government. The analysis in those decisions strongly suggest that those courts of appeals would have upheld South Carolina's standing to bring the present suit.

A. Second Circuit

The Second Circuit analyzed *Massachusetts v. EPA* in a decision that upheld the standing of eight States to sue electric power companies that allegedly contributed to global warming. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 109 (2d Cir. 2015), *rev'd on other grounds,* 564 U.S. 410 (2011).[10] As the Second Circuit understood ***24** *Massachusetts v. EPA,* in that case this Court "seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land." *Id.* at 338.

The Second Circuit upheld the States' standing using reasoning that, if applied in the present case, would have led it to uphold South Carolina's standing: The Second Circuit emphasized that the States were suffering present harms from the defendants' conduct - just as South Carolina's property and residents are currently exposed to radiation and other threats from the continued storage of plutonium - and the relief sought could incrementally reduce the harm - as could occur here, if DOE's compliance with its statutory obligations reduces the amount of time that massive amounts of weapons-grade plutonium are stored at SRS. *Id.* at 340-43.

Although *Connecticut* was a suit against private defendants, the Second Circuit relied on it, as well as on *Massachusetts v. EPA,* in a later decision upholding several States' standing to sue a federal agency for statutory violations. *Nat. Res. Def Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 103-04 (2d Cir. 2018) (internal citations omitted).

***25** B. Fifth Circuit

The Fifth Circuit accorded "special solicitude" to a State under circumstances close enough to those of this case to indicate that it would have upheld South Carolina's standing in this case.

Texas and other States sued the United States over the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). *Texas v. United States,* 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court,* 136 S. Ct. 2271 (2016). After the federal district court preliminarily enjoined implementation of DAPA, the United States appealed. *Id.* On appeal, the Fifth Circuit affirmed the preliminary injunction and upheld Texas's standing to bring the suit. *Id.* at 151-62.

The Fifth Circuit said, "[O]ur determination that Texas has standing is based in part on the 'special solicitude' we afford it under *Massachusetts v. EPA.* " *Id.* at 162. The court described "special solicitude" as a "presumption," presumably meaning a presumption that favors standing in close cases. *Id.; see also id.* at 159 (relying partly on "special solicitude" in finding traceability). The court afforded "special solicitude" based on the same two conditions that exist in the present case: The State was asserting procedural rights that required interpretation of federal statutes, and the challenged conduct implicated the State's "quasi-sovereign interests." *Id.* at 152-53.

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Moreover, the Fifth Circuit's reasons for concluding that "quasi-sovereign interests" were at stake equally apply here. Texas challenged DAPA, a federal immigration program. The Fifth Circuit observed that "[w]hen the ***26** states joined the union, they surrendered some of their sovereign prerogatives over immigration." *Id.* at 153. Consequently, the Fifth Circuit explained, States must rely on the federal government to protect their interests in immigration matters, just as they must with respect to their interests in the matters involved in *Massachusetts v. EPA:* namely, interstate and international pollution. *Id.* at 153-54. So too here: Because of the federal government's control over nuclear defense material, South Carolina cannot prevent it from storing that material at SRS as long as federal law allows. South Carolina must rely on the federal government to protect its interests and those of its citizens. This reliance warrants consideration when South Carolina sues to enforce the federal executive-branch's compliance with federal statutory requirements enacted, in part, to protect the State's interests. In short, South Carolina's present lawsuit provides at least as compelling a case for "special solicitude" as did the States' lawsuit in *Texas v. United States.*

C. Tenth Circuit

Like the Fifth Circuit, the Tenth Circuit has relied partly on "special solicitude" to uphold State standing.

Illustrative is *New Mexico v. Dep't of Interior,* 854 F.3d 1207 (10th Cir. 2017). In that case, New Mexico sued the Department of Interior (DOI) claiming that DOI lacked statutory authority for regulations on tribal gaming. *Id.* at 1211. Under the challenged regulations, DOI could allow tribal gaming without the State's input unless the State participated in a process that included mediation. *Id.* at 1213. The Tenth Circuit held that New Mexico had standing to challenge the regulations ***27** on two grounds. First, the regulations caused New Mexico procedural injury by depriving it of its asserted statutory right to have a court determine that the State had bargained in bad faith before tribal gaming could be allowed without the State's input. *Id.* at 1216-17. Second, the regulations "injure[d] New Mexico by forcing it to choose between participating in a process it considers unlawful and forgoing any benefit from that allegedly unlawful process - viz., the benefit of being able to offer input, presumably beneficial to its interests, relating to the content of those procedures." *Id.* at 1218. After identifying these two injuries, the Tenth Circuit said, "[T]he Supreme Court's direction that we give states special solicitude in analyzing standing provides further support for each basis establishing New Mexico's standing." *Id.*

In *New Mexico v. Dep't of Interior* and other cases, the Tenth Circuit has, like the Fifth Circuit, apparently treated "special solicitude" as a presumption favoring standing in close cases, or possibly as a "plus factor" applicable in all cases. At the same time, the Tenth Circuit has remarked on " 'the lack of guidance on how lower courts are to apply the special solicitude doctrine to state standing.' " *Id.* at 1219 (quoting *Wyoming v. United States Dep't of Interior,* 674 F.3d 1220, 1238 (10th Cir. 2012); *see also Ariz. State Legisl. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions … are hard to reconcile.") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263-266 (6th ed. 2009)); *New Mexico ex rel. Richardson v. BLM,* 565 F.3d 683, 696 n.13 (10th Cir. 2009) ("In determining ***28** that New Mexico has standing because of the threat of environmental damage to lands within its boundaries, we consider that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders."); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States,* 528 F.3d 712, 721 (10th Cir. 2008) (attaching "importan[ce]" to "special solicitude" in analyzing State's standing).

III. This case presents important issues of constitutional justiciability for a State seeking to vindicate its rights under federal law.

The proper handling of weapons-grade plutonium is a public policy matter of exceptional importance, implicating not only issues of national defense and national security but also the United States' obligations under an agreement with Russia. *Cf. New York v. United States.* 505 U.S. 144, 149 (1992). South Carolina does not challenge the federal government's broad authority to regulate this matter or to control operations at the SRS as a federal facility. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983); *Hancock v. Train,* 426 U.S. 167 (1976). But being forced by virtue

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of the Supremacy Clause to host SRS, South Carolina seeks only to ensure federal executive-branch compliance with federal law. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607-08 (1982) ("[T]he State has an interest in securing observance of the terms under which it participates in the federal system.… [A] State does have an interest … in assuring that the benefits of the federal system are not denied to its general population."). This petition thus poses a question of the justiciability of claims by a State against the federal government.

***29** The importance of this question is reflected in the long line of cases in which this Court has addressed it. In addition to *Massachusetts v. EPA, see, e.g., Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995) (addressing State's standing to assert claim against the United States under prior decree); *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (addressing scope of statutory waiver of federal government's sovereign immunity from State's suit); *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966) (addressing standing of State to challenge constitutionality of federal statute); *Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923) (addressing State's standing to challenge constitutionality of federal statute); *Kansas v. United States,* 204 U.S. 331 (1907) (addressing United States' sovereign immunity from suits by States); *Georgia v. Stanton,* 73 U.S. 50 (1867) (addressing justiciability of State's suit to enjoin federal Reconstruction Act).

Although the defense plutonium at issue implicates domestic and international concerns of broad significance, even in these areas, States play an important role. Implementing policies and actions involving defense plutonium necessarily require some degree of state involvement through state regulation of related, collateral matters (such as the issuance of certain environmental permits), the utilization of state infrastructure, and the emissions and impact on state proprietary interests.[11] For ***30** that reason, this case implicates the relationship between the federal government and the States. The Supremacy Clause gives the United States the upper-hand in this relationship. But the federal government's supremacy rests on the rule of law. The federal government's violation of the rule of law generally is objectionable, but for an executive agency to inflict violence upon statutory obligations enacted by the legislature to protect a State without any mechanism of accountability by the state through the judiciary is particularly harmful to our system of government. This Court's review is necessary to ensure a State can remedy that harm, especially when, as here, the harm concerns the State's concrete interests in the proper disposition of the massive amounts of weapons-grade plutonium within its borders.

IV. This case provides an excellent vehicle for clarifying *Massachusetts v. EPA.*

The decision below and the circuit split discussed above show the need for clarification of *Massachusetts v. EPA.* This Court has granted certiorari in two prior cases that offered opportunities to do so that were not subsequently realized. *See United States v. Texas,* 136 S. Ct. 2271; *Connecticut,* 546 U.S. at 420. This case provides an excellent opportunity to provide the needed clarification.

For one thing, the decision below is for all practical and legal purposes final. *Cf., e.g., Trump v. Hawaii,* 138 S. Ct. 2392 (2018) (granting certiorari to review court of appeals decision affirming preliminary injunction on dispositive grounds). Although the Fourth Circuit below addressed an interlocutory appeal from an order granting ***31** a preliminary injunction, its holding that South Carolina lacks standing prevents the case from going forward on the merits. By the same token, this Court's reversal of the decision below will enable South Carolina to pursue legal claims that the district court held, in rulings not disturbed on appeal, are likely to succeed. App. 59a-72a.

For another thing, South Carolina preserved below the arguments that it would advance in this Court. The Fourth Circuit characterized South Carolina as advancing "one theory of injury" (App. 19a n.3) because the State's injuries all arise from the real risk of it becoming the indefinite - and, as a practical matter, the "permanent" - "repository of weapons-grade plutonium." App. 12a (quoting South Carolina's brief for the Fourth Circuit). As the Fourth Circuit's opinion reflects, however, South Carolina argued for standing based on its quasi-sovereign interests and its proprietary interests. App. 9a, 12a. Thus, South Carolina has asserted in the courts below precisely the same claims of injury-in-fact that Massachusetts advanced in *Massachusetts v. EPA,* 549 U.S. at 518-23.[12]

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Finally, this case presents legal claims that crystallize key questions about the nature of the "special solicitude" recognized in *Massachusetts v. EPA*. One key question is how "special solicitude" relates to the ***32** State's possession of a "procedural right." That question is cleanly posed here by South Carolina's claim under NEPA, a statute that this Court has recognized creates a procedural right. *See Defenders of Wildlife,* 504 U.S. at 572 n.7. Another key question is how "special solicitude" relates to case law apparently limiting suits against the federal government by States suing as *parens patriae. See Massachusetts v. EPA,* 549 U.S. at 539 (Roberts, C.J. dissenting). That question is posed starkly by South Carolina's claim under SRS-specific statutory provisions that are designed partly for the precise purpose of protecting South Carolina's interests and therefore evince "special solicitude" for the State and a corresponding intention to allow South Carolina to sue for enforcement of those provisions. *Cf. Maryland People's Counsel,* 760 F.2d at 320; Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 266 (6th ed. 2009). A decision by this Court addressing those questions would go far toward providing the needed clarification of *Massachusetts v. EPA*.

***33 CONCLUSION**

The petition for a writ of certiorari should be granted.

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June 7, 2019

Footnotes

1 We use "DOE" to refer collectively to the respondents. Among the respondents is the National Nuclear Security Administration (NNSA). NNSA is "established within the Department of Energy [as] a separately organized agency." 50 U.S.C. § 2401(a). The NNSA administers and manages activities related to the MOX Facility. *See id.* §§ 2471(2)(D) & 2481(a).

2 National Defense Authorization Act for Fiscal Year 2018 (NDAA FY18), § 3121(b)(1)(B)(i), 131 Stat. 1283, 1892-93 (2017) (App. 95a); Business Operating Procedure of the National Nuclear Security Administration, "Analysis of Alternatives," dated March 14, 2016 (BOP-03.07), available at https://directives.nnsa.doe.gov/bop/bop-0003-0007.

3 Available at https://www.nap.edu/read/25272/chapter/1.

4 *See* NDAA FY18, § 3121(a); CAA FY18, § 309(a), 132 Stat. 348, 530 (2018). After the district court issued its preliminary injunction and while this case was pending at the Fourth Circuit, Congress reaffirmed this mandate for fiscal year 2019. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, § 3119, 132 Stat. 1636, 2292 (2018) (requiring continued construction of the MOX Facility unless the waiver requirements prescribed in Section 3121(b) of NDAA FY18 are met).

5 NDAA FY18, § 3121(b)(1); CAA FY18, § 309(b), (c).

6 The district court's reference to "MOXable plutonium" (App. 54a) reflects that, as the court explained, "[t]he plutonium at SRS can be divided into two general categories - the plutonium intended for disposition through the MOX Facility and the plutonium not intended for MOX disposition." App. 63a-64a. For the latter, "non-MOXable" plutonium at SRS, DOE has "assign[ed] Dilute and Dispose as the preferred alternative" in a supplemental Environmental Impact Statement published on April 5, 2016. App. 64a. As the district court further explained, "The ongoing Dilute and Dispose approach is limited in resources and legal authority and is not applicable to the plutonium intended for disposition through the MOX Facility." App. 64a.

7 The district court denied DOE's motion for a stay of the preliminary injunction pending appeal. App. 27a-33a. After briefing and oral argument before the Fourth Circuit, however, that court granted DOE's motion for a stay on October 9, 2018. App. 24a. On October 10, 2018, DOE issued a Project termination notice and began terminating employees at the Project.

8 The Fourth Circuit below erred in relying on *Clapper* not only because *Clapper* involved private plaintiffs but also because the plaintiff in *Clapper* did not assert procedural rights. Lacking procedural rights, the plaintiffs in *Clapper* were subject to a determination in an "injury-in-fact" analysis inapplicable to this case. *Massachusetts v. EPA,* 549 U.S. at 517-18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." (citing *Lujan v. Defenders of Wildlife,* 504 U.S. at 572 n.7)). Moreover, the plaintiffs - as "US persons" - did not fall into a class to which the FISA provision in *Clapper* was directed, and that provision did not create any legal rights or protections for the plaintiffs. But, here, through NDAA FY18 and CAA FY18, Congress established statutory protections specifically for South Carolina, and South Carolina also falls within the class entitled to bring claims for NEPA violations. Accordingly - "special solicitude" or not - South Carolina met all the requirements for Article III and statutory standing

9 Nor does South Carolina's lawsuit present a programmatic challenge of the sort that, if addressed now, would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n,* 523 U.S. at 733. South Carolina challenges a highly discrete agency action - DOE's decision to terminate the MOX Facility.

10 The Second Circuit's ruling on standing was affirmed by an equally divided Court. "Four Members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*.... Four Members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing." *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 420 (2011). The Court reversed the Second Circuit's ruling on the merits, holding that the plaintiffs' federal common-law public nuisance claim was displaced by the Clean Air Act and EPA action authorized under the Act. *Id.* at 420-29.

11 All those elements are indisputably present here. South Carolina has and will continue to provide regulatory oversight on certain aspects of the operations at SRS, such as waste disposal. Much of the supporting infrastructure for SRS is provided by the State of South Carolina or its political subdivisions (such as roads and emergency services). *See generally* Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.*; Atomic Energy Act, 42 U.S.C. §§ 2201 *et seq.*

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12 In the decision below, the Fourth Circuit purports to reserve the question "whether other theories of injury would presently confer standing on South Carolina." App. 19a n.3. There are no "other theories" of standing remaining to the State. Accordingly, DOE has given notice of its intent to move for dismissal of the action for lack of jurisdiction if this Court denies further review. Notice, *South Carolina v. United States,* No. 1:18-cv-01431-JMC (D.S.C. May 1, 2019), ECF No. 45.

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EXHIBIT 11

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2019 WL 4730104 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES OF AMERICA, et al., Respondents.

No. 18-1531.
September 24, 2019.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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*1 REPLY BRIEF FOR PETITIONER

In this case, a State sues the federal executive branch for statutory violations that deprive it of procedural rights designed to protect its quasi-sovereign interests. This case thus presents the same situation - and presents the same issue of the State's Article III standing - as presented in *Massachusetts v. EPA,* 549 U.S. 497 (2007). This Court's decision in that case would have accordingly controlled analysis of the State's standing if this case had arisen in the Second, Fifth, or Tenth Circuits. *See* Pet. 23-28. In square conflict with those circuits, however, the Fourth Circuit ignored *Massachusetts v. EPA* and failed to accord South Carolina the "special solicitude" to which it was entitled under that case. *Id.* at 521. Had the Fourth Circuit properly applied *Massachusetts v. EPA,* it would have upheld South Carolina's standing to assert the statutory claims upon which, the district court below determined (in rulings not disturbed on appeal), the State is likely to prevail. Pet. App. 59a-72a.

The United States defends the Fourth Circuit's disregard of *Massachusetts v. EPA* on the ground that *Massachusetts v. EPA* applies only "in a close case." Br. in Opp. 14. Even if this were a close case, which it is not, the United States misreads *Massachusetts v. EPA,* and its defense of the decision below merely highlights the need for "guidance on how lower courts are to apply the special solicitude doctrine to state standing." *New Mexico v. Dep't of Interior,* 854 F.3d 1207, 1219 (10th Cir. 2017). The United States does not dispute the importance and complexity of the issue of the States' standing to sue the federal government. *See, e.g.,* ***2** *United States v. Texas,* 136 S. Ct. 2271 (2016). Nor does the United States impugn South Carolina's showing that this Court's decision in *Massachusetts v. EPA* has bred uncertainty among lower federal courts and that this case provides a good vehicle for clarifying it.

ARGUMENT

I. The Decision Below Conflicts with *Massachusetts v. EPA* and Decisions in at Least Three Circuits.

The United States argues that under *Massachusetts v. EPA,* "a State's status as a plaintiff" affects standing analysis only "in a close case." Br. in Opp. 14. This is not a close case, as discussed in the next section. More fundamentally, the United States misreads *Massachusetts v. EPA,* Under a straightforward reading of that case, the Fourth Circuit erred by failing to accord South Carolina "special solicitude" in analyzing the State's standing, and, in the process, the Fourth Circuit put itself in conflict with decisions in at least three other circuits.

Contrary to the United States' submission, this Court did not hold in *Massachusetts v. EPA* that a State's status as the plaintiff matters only in cases where standing is a close call. The Court broadly said that "States are not normal litigants for purposes of invoking federal jurisdiction," and that it was therefore "of considerable relevance that the party seeking review [there] [wa]s a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. Accordingly, the dissent read the ***3** majority's opinion as "adopt[ing] a new theory of Article III standing for States." *Id.* at 539-540 (Roberts, C.J., dissenting). Thus, the Fourth Circuit below ignored the plain import of *Massachusetts v. EPA* by attaching no significance to South Carolina's status as a sovereign State and failing even to cite this Court's decision. Those failures alone warrant further review. *Cf., e.g.,Horn v. Banks,* 536 U.S. 266, 271 (2002) (summarily reversing because of lower court's failure to apply *Teague v. Lane,* 489 U.S. 288 (1989)); *see also* Stephen M. Shapiro, *Supreme Court Practice* 251 (10th ed. 2013) ("Where the decision of the court of appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari.").

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Moreover, further review is warranted here to clarify that the special solicitude to which States are entitled under *Massachusetts v. EPA* is not limited - as the United States would have it - to "close case[s]." Br. in Opp. 14. Instead, as explained in our petition (at 17-18), special solicitude is required when, as here, the State asserts procedural rights connected with protecting its quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 520. The United States does not directly dispute that South Carolina is asserting procedural rights to protect its quasi-sovereign interests. And the United States' oblique arguments against South Carolina's entitlement to special solicitude are unavailing.

The United States seeks to obscure South Carolina's quasi-sovereign interests by repeatedly referring ***4** only to its general concern about becoming an indefinite repository for weapons-grade plutonium. *See* Br. in Opp. 7, 9, 10, 11, 13 & 15. But that concern stems from "increased radiation exposure to the public, increased risks of nuclear-related accidents, and an increased threat of action by rogue states or terrorists seeking to acquire weapons-grade plutonium," as the Fourth Circuit recognized. Pet. App. 12a (quoting Appellee's Br. at 14). The United States cannot contest that these dangers implicate South Carolina's quasi-sovereign interests. *See Massachusetts v. EPA,* 549 U.S. at 518-519 ("[I]n its capacity of *quasi*-sovereign … the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.") (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). And here, as in *Massachusetts v. EPA,* those quasi-sovereign interests are reinforced by the State's ownership of property adjacent to, and a road traversing, the Savannah River Site (SRS), all of which property is directly affected by these threats. *See id.* at 519; Pet. App. 47a.

The United States observes that there is no "special statutory right of judicial review" in this case. Br. in Opp. 15. But special solicitude under *Massachusetts v. EPA* does not depend on any such right. What matters is the existence of a "procedural right." *Massachusetts v. EPA,* 549 U.S. at 520. South Carolina has procedural rights under NEPA, which this Court recognized as a source of such rights in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (cited in *Massachusetts v. EPA,* 549 US. at 517-518); and under ***5** statutes enacted expressly and specifically to protect the State's concrete interests in connection with SRS. *See* Pet. 17-18; Br. of *Amicus Curiae* United States Senator Lindsey Graham in Support of Petitioner 4-10 [hereinafter Sen. Graham *Amicus* Br.]. Those procedural rights, together with the quasi-sovereign interests that those rights protect, entitle South Carolina to special solicitude under *Massachusetts v. EPA.*

As shown in our petition (at 23-28), the State would have been accorded this solicitude in, among other courts, the Second, Fifth, and Tenth Circuit. *See also Brackeen v. Bernhardt,* No. 18-11479, 2019 U.S. App. LEXIS 23839 (5th Cir. Aug. 9, 2019) (relying on *Massachusetts v. EPA* to analyze States' standing to challenge Indian Child Welfare Act and final rule implementing it). The United States argues, however, that precedent from those courts involves different facts from those of this case. Br. in Opp. 16. The argument misses the point. Those other circuits, unlike the Fourth Circuit, would have recognized that it is "of considerable significance that the party seeking review here is a sovereign State." *Massachusetts v. EPA,* 549 U.S. at 518. By failing to attach any significance to that circumstance, the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and with decisions of other federal courts of appeals. Sup. Ct. R. 10(a) & (c).[1]

6 II. South Carolina Has Article III Standing under *Massachusetts v. EPA.

In holding that South Carolina lacks standing and that its claims are not ripe, the Fourth Circuit reasoned that South Carolina's injuries will not "mature" until 2046, the end date of the period analyzed in a prior Environmental Impact Statement. Pet. App. 19a. Understandably, the United States does not defend this reasoning, which confuses the issue of standing with the issue of the merits of South Carolina's NEPA claim. Pet. 21-22. Instead, the United States argues that South Carolina's injuries will not mature until *2048,* because that is the earliest that the MOX Facility can be completed. Br. in Opp. 11. That argument suffers from the same two flaws that underlay the Fourth Circuit's reasoning.

First, the argument ignores that South Carolina is suffering *current* injuries. Those injuries include the legal wrongs caused by the United States' violations of South Carolina's statutory rights. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action … is entitled to judicial review thereof."). Those legal wrongs create ongoing actual harms and threats ***7** of harm caused by the approximately 10 metric tons of weapons-grade plutonium at SRS. Just as Massachusetts asserted current

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injury in the form of rising sea levels submerging its coast, South Carolina asserts current injuries in the form of excessive radiation contaminating its environment and other dangers associated with the plutonium's continuing (and mounting) presence. *Cf. Massachusetts v. EPA,* 549 U.S. at 522-523.

Second, South Carolina also faces imminent *future* injuries traceable to the federal government's May 10 decision to halt construction of the MOX Facility in favor of the unauthorized and untested Dilute and Dispose concept for processing the MOXable plutonium at SRS. There is at least a "reasonable probability" that the May 10 decision to switch horses in midstream will *prolong* the presence of massive amounts of weapons-grade plutonium at SRS, especially considering the federal government's current plan to ship an additional 26 metric tons of plutonium to SRS. Pet. App. 72a. *Clapper v. Amnesty Int'l,* 568 U.S. 398, 432 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 (2010)). This probability exists despite the United States' prediction that "the decision to halt construction of the MOX facility *reduces* the likelihood of injury by allowing the Department to focus its resources on other disposal methods that can begin more quickly and with greater certainty." Br. in Opp. 12 (emphasis in original).

The federal government's prediction partakes of magical thinking. For one thing, it contradicts the ***8** federal government's own prior forecast that the Dilute and Dispose method will not be completed before 2049, a year *after* completion of the MOX Facility is forecast. *See* National Academies of Sciences, Engineering, and Medicine, Disposal of Surplus Plutonium at the Waste Isolation Pilot Plant: Interim Report 17-18 (Washington, D.C.: The National Academies Press, Oct. 2018) [hereinafter NAS Interim Report]. Moreover, the district court below identified multiple legal and practical hurdles that are likely to delay or altogether block implementation of the Dilute and Dispose alternative. Pet. App. 67a (lack of NEPA analysis of alternative); *id.* at 70a-72a (statutory and regulatory changes required before implementation of alternative); *id.* at 75a-76a (lack of congressional approval for alternative); *id.* at 78a (federal government's prior view that alternative violates agreement with Russia); *see also* NAS Interim Report at 2-3, 19-35 (also discussing "barriers" to implementation of Dilute and Dispose alternative). Beyond all this, the federal government's dismal track record strongly suggests that the predicted 2049 completion date for processing all the SRS plutonium under the Dilute and Dispose method is a chimera.[2]

***9** This Court upheld Massachusetts' standing to challenge EPA's failure to address the long-term, global, hard-to-quantify threat of injury assertedly posed by greenhouse gases from new-car engines manufactured in the United States. *Massachusetts v. EPA,* 549 U.S. at 516-526. This case concerns South Carolina's standing to challenge the Department of Energy's failure to address the ongoing, localized, well-established injuries and threat of future injuries posed by the massive and growing amounts of weapons-grade plutonium within South Carolina's borders. Because the injuries asserted here surely are no more speculative or remote than those found sufficient in *Massachusetts v. EPA,* South Carolina's standing follows a fortiori from this Court's decision in that case.

III. South Carolina's Claims Are Ripe.

As discussed in our petition (at 20-23), the Fourth Circuit's ripeness analysis conflicts with this Court's decisions in *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803 (2003), and *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726 (1998). Indeed, the Fourth Circuit failed even to identify clearly why it found a lack of ripeness under this Court's precedent: Its analysis implies that the claims are not "fit" for review, even though the claims (1) challenge discrete agency action that is indisputably final, (2) pose pure questions of law, and (3) do not depend for their resolution on ***10** further factual development. Reflecting the weakness of the Fourth Circuit's ripeness analysis, the United States does not defend it or attempt to reconcile it with this Court's ripeness precedent. Instead, the United States mischaracterizes the Fourth Circuit's decision.

The United States says the Fourth Circuit "understood petitioner to challenge a decision to make South Carolina 'the permanent repository of the weapons-grade nuclear material currently stored at the Savannah River Site.' " Pet. 13 (quoting Pet. App. 21a). But that is wrong. The Fourth Circuit correctly recognized that South Carolina challenges a much more narrow, discrete decision: the decision to halt construction of the MOX Facility. Pet. App. 2a. And the Fourth Circuit also correctly understood that ripeness analysis applies to South Carolina's legal *claims,* not its assertions of injury. *See id.* at 19a. Where the Fourth

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Circuit erred was in apparently concluding that South Carolina could not satisfy the hardship prong of ripeness analysis. *See* Pet. 21-22. That conclusion rested on "reasons similar to those that" led it to conclude that South Carolina lacks standing (Pet. App. 19a), and is flawed for the same reasons that its conclusion on standing is flawed.

IV. This Case Is an Excellent Vehicle for Addressing an Issue of Exceptional Importance.

The United States does not impugn South Carolina's showing that the Fourth Circuit's decision is ***11** final and that the question presented was properly raised below. *See* note 1 *supra.*

Nor does the United States contest the importance of the question presented, which concerns the justiciability of suits by States against the federal executive branch. The importance of that question is established by the long line of decisions by this Court on that issue. *See* Pet. 29. Its importance is reinforced by the growing number of suits by States against the federal government - many of which have reached this Court[3] - and by uncertainties among lower federal courts and commentators about *Massachusetts v. EPA* and related precedent. *See Ariz. State Legis. v. Ariz. Indep. Redisricting Comm'n,* 135 S. Ct. 2664, 2664 n.10 (2015) ("The cases on the standing of states to sue the federal government … are hard to reconcile.") (internal quotation marks omitted).

This case arises in a setting that vividly illustrates the close connection between State standing and federalism. As set forth in the brief of *amicus curiae* U.S. Senator Lindsey Graham in support of South Carolina's Petition, the federal statutes violated by the federal government were intended to protect South Carolina from exactly what is occurring here - the federal government abandoning its statutory obligations and leaving South Carolina to deal with the ***12** consequences. Sen. Graham *Amicus* Br. 3-10. These statutes were enacted after high-level negotiations between the federal government and the State, and were specifically enacted to provide the State with recourse should the federal government fail to construct and begin operations of the MOX project. *Id.* at 5-10.

Allowing the federal government to shirk its statutory responsibilities to the State in an instance where Congress's clear intent was to protect it sets a dangerous precedent for other States and their relations with the federal government. For, if the federal government is free to violate statutes resulting from negotiations between the federal government and a sovereign State and that are specifically designed to protect the State's sovereign interests with no judicial recourse available to the State once protection is necessary, then the practicality of such negotiations becomes obsolete and the State's sovereign interests may never be protected against injuries caused by the federal government. This contravenes the principles of federalism upon which this nation was established.

*13 CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alan Wilson

Robert D. Cook

T. Parkin Hunter

Attorney General for he State of South Carolina

Post Office Box 11549

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Randolph R. Lowell

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Counsel for Petitioner

September 24, 2019

Footnotes

1 The United States admits that, in South Carolina's brief for the Fourth Circuit, South Carolina cited *Massachusetts v. EPA* in support of its standing, but the United States criticizes South Carolina's failure to give *Massachusetts v. EPA* more prominence. Br. in Opp. 14. The criticism is misplaced. South Carolina satisfied this Court's "traditional rule" limiting certiorari to issues "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992). The issue of South Carolina's standing under *Massachusetts v. EPA* was presented to the Fourth Circuit, and the Fourth Circuit's disregard of that decision warrants further review because it creates a split among the circuits over a "significant issue." *Verizon Commc'ns, Inc. v. FCC,* 535 U.S. 467, 530 (2002).

2 In holding that South Carolina's threat of future injury was speculative, the Fourth Circuit partly relied on the statutory provision requiring removal by January 1, 2022, of weapons-grade plutonium shipped to SRS between April 15, 2002, and January 1, 2022 for processing at the MOX Facility. Pet. App. 15a-16a (citing 50 U.S.C. § 2566(c)(2)); *id.* at 21a. Significantly, the United States does not rely on that provision in defending the Fourth Circuit's holding (Br. in Opp. 11), presumably because if the executive branch has

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its way that provision is not long for this world. After all, the federal government has not altered its plans to ship an additional 26 metric tons of plutonium to SRS, notwithstanding the looming January 1, 2022, deadline. Pet. App. 72a.

3 *E.g., Dep't of Homeland Sec. v. Regents of the Univ. of Calif.,* 139 S. Ct. 2779 (2019); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); *see also* Tara L. Grove, *When Can a State Sue the United States?,* 101 Cornell L. Rev. 851, 852 (2016) ("State suits against the federal government are on the rise.").

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EXHIBIT 12

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140 S.Ct. 392
Supreme Court of the United States.

SOUTH CAROLINA, Petitioner
v.
UNITED STATES, et al.

No. 18-1531
|
October 15, 2019

Case below, 912 F.3d 720.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

All Citations

140 S.Ct. 392 (Mem), 205 L.Ed.2d 214

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EXHIBIT 13

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1:25

INJUNCTION HEARING SEPT. 30 AT 10:00 A.M. BARNWELL COUNTY ET AL. V. ALAN WILSON

VW

Vicky Ware
vmware@williamsattys.com

To: rlowell@willoughbyhoefer.com
tyoung@tomyounglaw.com
Cc: You cbhutto@williamsattys.com
Friday, September 25, 11:10 AM

Please see the email below from Judge Newman with hearing date in the above matter.
Thank you
Vicky

WILLIAMS & WILLIAMS
ATTORNEYS AT LAW

VICKY WARE LEE

Reply to All

30

EXHIBIT 14

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: Hearing on Temporary and Preliminary Injunctions
Date: Friday, September 25, 2020 at 4:57:38 PM Eastern Daylight Time
From: James Carpenter <james.carpenter@carpenterlawfirm.net>
To: aleelc@sccourts.org <aleelc@sccourts.org>
CC: Alan Wilson <AWilson@scag.gov>, Jim Griffin <jgriffin@griffindavislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>
Attachments: image001.jpg, 2020-09-25_Motion for TRO Preliminary Injunction.pdf

Dear Judge Lee:

Today the South Carolina Public Interest Foundation and John Crangle filed a Summons and Complaint (Case Number 2020-CP-40-04603) and a Motion for Temporary and Preliminary Injunctions objecting to the Attorney General's anticipated payout of $75 million in attorneys' fees from funds which we believe belong to the State of South Carolina. I attach a copy of the Motion.

The money is expected to arrive in South Carolina by October 1, or shortly thereafter. We are seeking Temporary and Preliminary Injunctions to maintain the status quo during the litigation and prevent the payout of $75 million, which, once paid out, would probably be very difficult to reclaim.

We are flexible on scheduling. We have notified the Attorney General of our filing the case and the motion.

Please telephone me to discuss scheduling a time for a hearing on our Motion for Temporary Injunction.

Respectfully submitted,

Jim Carpenter
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Mobile: (864) 380-4880
www.carpenterlawfirm.net

W_`a Ir'c Wdeb_ Ffg_bfa g Fde!

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EXHIBIT 15

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Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 4:02:53 PM Eastern Daylight Time
From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>, Emory Smith <ESmith@scag.gov>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, jgriffin@davislaw.com <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, McCaslin, Debra Secretary (Danita O. Martin) <dmccaslinsc@sccourts.org>, Fitzgerald, Roderick <rfitzgerald@sccourts.org>

All,

Below is the link to join the Virtual Courtroom via WebEx for tomorrow's hearing at 3:00 PM. Please join several minutes prior to ensure you are able to properly connect, and contact me If you have any questions

https://scjudicial.webex.com/scjudicial/onstage/g.php?MTID=ec472dac763c1e4f902b0e7479f1f27cd

Best,
Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:56 PM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

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We prefer to go forward tomorrow at 3pm via WebEx.

Thank you.

Jim Griffin

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From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44:11 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>; jgriffin@davislaw.com <jgriffin@davislaw.com>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com
Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 16

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ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 12:06:55 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Badge Humphries <bhumphries@griffinhumphries.com>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Jim Griffin <jgriffin@griffinhumphries.com>, James Griffin <jgriffin@griffindavislaw.com>
Attachments: image002.jpg

I will accept service as of today.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Badge Humphries <bhumphries@griffinhumphries.com>
Sent: Monday, September 28, 2020 12:01 PM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; Jim Griffin <jgriffin@griffinhumphries.com>; James Griffin <jgriffin@griffindavislaw.com>
Subject: Re: SCPIF v. Wilson 2020CP4004603

Emory,

Please see attached, and please advise if you are willing and able to accept service on behalf of the Attorney General.

Thanks.

Badge

BADGE HUMPHRIES
ATTORNEY

Griffin Humphries LLC
2113 Middle Street, Ste. 305
Sullivan's Island, SC 29482
o. 843.883.7424 f. 843.883.7462 c. 843.991.7080
BHumphries@griffinhumphries.com
www.griffinhumphries.com

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this e-mail message in error, please notify us immediately at the telephone number listed above to arrange for the return and/or deletion of the original message. Thank you for your cooperation.

From: Emory Smith <ESmith@scag.gov>
Date: Monday, September 28, 2020 at 10:13 AM
To: "aleelc@sccourts.org" <aleelc@sccourts.org>
Cc: "james.carpenter@carpenterlawfirm.net" <james.carpenter@carpenterlawfirm.net>, "jgriffin@davislaw.com" <jgriffin@davislaw.com>, Badge Humphries <bhumphries@griffinhumphries.com>, Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

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EXHIBIT 17

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Monday, September 28, 2020 at 3:46:03 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>
CC: James Carpenter <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 3:44 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

OK.

Who should we speak with then?

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 3:03 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

As I said below, I cannot agree to a temporary hold on the monies.

Emory

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 2:23 PM
To: Emory Smith <ESmith@scag.gov>; Brad Hutto <cbhutto@aol.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I have spoken with Brad Hutto and we both would like to reach an agreement with your office to prevent disbursement of the money until the cases are determined on the merits.

Thanks

Jim

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 12:04 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I may have misunderstood about the request to hear both matters at the same time, but having both matters heard at the same time before Judge Newman makes sense and would serve judicial economy. I don't know the process for referral of the Richland case to Judge Newman. I don't know if it could come from Judge Lee or a party.

An email just came in that you may have seen that a hearing can be held tomorrow at 3pm before Judge McCaslin. I have not responded, but believe that having Judge Newman would be better b/c he could consider both matters and avoid the possibility of differing orders in the two cases.

I have not been involved in this matter until your suit and the Barnwell suit were brought. I am just the lawyer on these cases, and I am not involved in the handling of funds. I cannot agree to a temporary hold on the monies.

Emory

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 11:30 AM
To: Emory Smith <ESmith@scag.gov>
Cc: James Carpenter <james.carpenter@carpenterlawfirm.net>; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Emory

I don't know where you heard that we intended to request that our motion for TRO be heard before Judge Newman at the same time. Frankly, we had not give it any thought.

I did speak with Brad today about the possibility of reaching an agreement with you that covers both his case and ours. We are certainly amenable to an agreement that the funds not be dispersed until the cases are heard on the merits.

If we cannot reach an agreement, we are certainly fine with Judge Newman hearing our motion as well, if this is a possibility. But our case is a Richland County case and Brad's case is in Barnwell County.

I think we would need a special assignment from Court administration or the Chief before Judge Newman could hear our Richland County motion.

Jim

From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: aleelc@sccourts.org
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: SCPIF v. Wilson 2020CP4004603

Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 18

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ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Tuesday, September 29, 2020 at 6:59:35 PM Eastern Daylight Time
From: Emory Smith <ESmith@scag.gov>
To: Jim Griffin <jgriffin@griffinhumphries.com>, McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>

For the information of all, I note that following the WebEx hearing earlier today, the law firm reported that it had received the money. I don't understand the information reported in Mr. Griffin's email about the money still being at the Treasurer's Office.

As noted in our call today, our Office sent the it to the CG through the system for doing so at 11:21 am on Friday, before this suit was filed. The Executive Budget Office had approved the funds earlier that morning following this Office's request on Sept. 17.

Emory Smith

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 6:43 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please see a revised order. I apologize for the earlier draft. Please use this one.

From: Jim Griffin
Sent: Tuesday, September 29, 2020 6:39 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please find a proposed order from the Plaintiffs' granting a TRO.

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 6:13 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is asking to hold a conference via WebEx to discuss this matter tonight, tentatively at 7:00

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PM. I will be sending invitations to each of you immediately. I will also be reaching out via telephone to all parties to alert them of this conference in case they do not have access to email. Please contact me as soon as possible to confirm receipt of this message.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 5:48 PM
To: Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Crangle was informed that the funds may have been "wired" out of the AG's litigation account but that they have not yet been received by the Treasurer. The Treasure expects to receives the fund tomorrow in the Treasurer's bank account and then will wire to the law firms as requested by the AG.

Also, he was informed that normally payment is made via check and takes approximately 22 days. Here, there has been a request for an expedited wire.

From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 5:06 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I do not understand. My understanding is that the transfer of funds has occurred.

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General

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P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 4:58 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Judge McCaslin

Our client Mr Crangle has just been informed by an official in Treasurers office that the money has not been wired. They received an expedited request for a wire and it is scheduled to be sent either tomorrow or Thursday.

We would therefore request that the Court enter an injunction ASAP to enjoin the Treasurer's office from making the transfer.

We are available if the Court wishes to reconvene the hearing.

Thank you

Jim

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 4:37 PM
To: Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

In addition to the grounds for and against imposing a constructive trust, Judge McCaslin is requesting both parties submit brief proposed Orders as quickly as possible. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072

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dmccaslinlc@sccourts.org

From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 2:12 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Your Honor:

I have just submitted for efiling the attached documents. I am sorry that I have not submitted them earlier but had a computer glitch that delayed me a little while. Will look forward to seeing the Court and counsel at the hearing via WebEx at 3 pm.

Respectfully,

Emory Smith
Counsel for Attorney General Wilson

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to

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have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com

Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 19

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

Subject: RE: SCPIF v. Wilson 2020CP4004603
Date: Wednesday, September 30, 2020 at 9:27:04 AM Eastern Daylight Time
From: Jim Griffin <jgriffin@griffinhumphries.com>
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>, Emory Smith <ESmith@scag.gov>, McCaslin, Debra <dmccaslinj@sccourts.org>
CC: james.carpenter@carpenterlawfirm.net <james.carpenter@carpenterlawfirm.net>, Badge Humphries <bhumphries@griffinhumphries.com>, Brad Hutto <cbhutto@aol.com>

Judge McCaslin

I received confirmation this morning from the State Treasurer that the funds were wired to the Willoughby & Hoefer yesterday just hours prior to the hearing.

Mr. Loftis informed two members of the State Senate of the following in writing: "The Treasurers office received a warrant for payment from the Comptrollers Office Monday night. We processed and wired the funds on Tuesday morning to the law firm's account. This was a standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires."

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 9:29 PM
To: Emory Smith <ESmith@scag.gov>; Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Evening,

Please find attached Judge McCaslin's Order in the above referenced matter which is to remain in effect until a final Order is issued in this matter, no later than 5:00 PM on Friday, October 2, 2020. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

ELECTRONICALLY FILED - 2020 Sep 30 12:58 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4004603

From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 7:00 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

For the information of all, I note that following the WebEx hearing earlier today, the law firm reported that it had received the money. I don't understand the information reported in Mr. Griffin's email about the money still being at the Treasurer's Office.

As noted in our call today, our Office sent the it to the CG through the system for doing so at 11:21 am on Friday, before this suit was filed. The Executive Budget Office had approved the funds earlier that morning following this Office's request on Sept. 17.

Emory Smith

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 6:43 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please see a revised order. I apologize for the earlier draft. Please use this one.

From: Jim Griffin
Sent: Tuesday, September 29, 2020 6:39 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Please find a proposed order from the Plaintiffs' granting a TRO.

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 6:13 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is asking to hold a conference via WebEx to discuss this matter tonight, tentatively at 7:00

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PM. I will be sending invitations to each of you immediately. I will also be reaching out via telephone to all parties to alert them of this conference in case they do not have access to email. Please contact me as soon as possible to confirm receipt of this message.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 5:48 PM
To: Emory Smith <ESmith@scag.gov>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Crangle was informed that the funds may have been "wired" out of the AG's litigation account but that they have not yet been received by the Treasurer. The Treasure expects to receives the fund tomorrow in the Treasurer's bank account and then will wire to the law firms as requested by the AG.

Also, he was informed that normally payment is made via check and takes approximately 22 days. Here, there has been a request for an expedited wire.

From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 5:06 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

I do not understand. My understanding is that the transfer of funds has occurred.

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549

Columbia, SC 29211
803-734-3642 Direct

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Tuesday, September 29, 2020 4:58 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Judge McCaslin

Our client Mr Crangle has just been informed by an official in Treasurers office that the money has not been wired. They received an expedited request for a wire and it is scheduled to be sent either tomorrow or Thursday.

We would therefore request that the Court enter an injunction ASAP to enjoin the Treasurer's office from making the transfer.

We are available if the Court wishes to reconvene the hearing.

Thank you

Jim

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, September 29, 2020 4:37 PM
To: Emory Smith <ESmith@scag.gov>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

In addition to the grounds for and against imposing a constructive trust, Judge McCaslin is requesting both parties submit brief proposed Orders as quickly as possible. Please contact me if you have any questions.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Tuesday, September 29, 2020 2:12 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; McCaslin, Debra <dmccaslinj@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Your Honor:

I have just submitted for efiling the attached documents. I am sorry that I have not submitted them earlier but had a computer glitch that delayed me a little while. Will look forward to seeing the Court and counsel at the hearing via WebEx at 3 pm.

Respectfully,

Emory Smith
Counsel for Attorney General Wilson

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 1:44 PM
To: Jim Griffin <jgriffin@griffinhumphries.com>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

All,

Judge McCaslin is happy to hear this matter either in person or via WebEx tomorrow. Based on the procedural hurdles which may prevent Judge Newman from hearing the motion on Wednesday, it may be easier for Judge McCaslin to hear the matter tomorrow at 3:00 PM. Please let me know how the parties wish to proceed.

Best,

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Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Jim Griffin <jgriffin@griffinhumphries.com>
Sent: Monday, September 28, 2020 1:17 PM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

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Mr. Norton

We are available tomorrow afternoon at 3 p.m. to be heard on the pending motion for a TRO.

We do not object to Judge Newman hearing the motion on Wednesday. However, we are concerned that Judge Newman does not have jurisdiction over the matter since he is assigned to Barnwell County.

Will the hearing take place in person?

Thank you

Jim Griffin

From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, September 28, 2020 11:53 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>; Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; Badge Humphries <bhumphries@griffinhumphries.com>; Jim Griffin <jgriffin@griffinhumphries.com>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Good Morning,

Judge McCaslin is available to hear this matter tomorrow afternoon at 3:00 PM. If the parties would prefer to have the motion heard at the hearing before Judge Newman on Wednesday morning instead, please let me know.

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Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
Lexington County Courthouse
205 East Main Street, Suite 463
Lexington, S.C. 29072
dmccaslinlc@sccourts.org

From: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Sent: Monday, September 28, 2020 11:43 AM
To: Emory Smith <ESmith@scag.gov>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com; McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Subject: RE: SCPIF v. Wilson 2020CP4004603

Thank you for the update. Judge Lee assigned this matter to Judge McCaslin this week. I have copied her Law Clerk, Mr. Norton, to communicate any scheduling matters.

Thank you,

Austin D. Nichols, JD
Law Clerk to the Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29202
(803) 576-1767 (Phone)
(803) 576-1768 (Fax)
aleelc@sccourts.org

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From: Emory Smith <ESmith@scag.gov>
Sent: Monday, September 28, 2020 10:13 AM
To: Lee, Alison Renee Law Clerk (Austin Nichols) <ALeeLC@sccourts.org>
Cc: james.carpenter@carpenterlawfirm.net; jgriffin@davislaw.com; bhumphries@griffinhumphries.com; jgriffin@griffinhumphries.com
Subject: SCPIF v. Wilson 2020CP4004603

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Good morning. I will be appearing for the Attorney General in this case.

I see that Plaintiffs' counsel has requested a hearing re their Motion for a TRO and Preliminary Injunction. My understanding is that a request has or will be made to have this motion heard at the same time as another proceeding in Barnwell regarding the same settlement at issue in the instant case. That hearing will be held before Judge Clifton Newman at 10:30 am on Wednesday. If the SCPIF motion is not heard in Barnwell then, I respectfully request that a hearing not be held before Thursday afternoon as I have a conflict Thursday morning.

Thank you for your consideration of this matter.

Respectfully,

Emory Smith

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3642 Direct

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EXHIBIT 6

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	Case No. 2020-CP-40-04603 **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs hereby move the Court for a temporary restraining order and a preliminary injunction pursuant to Rule 65, SCRCP. A temporary restraining order and preliminary injunction are necessary to preserve the status quo during the pendency of this action and to avoid irreparable injury. This motion is supported by the Amended Complaint and Exhibits being filed herewith. Plaintiffs further allege the following:

FACTUAL SUMMARY

On August 31, 2020 Defendant Wilson announced the settlement of a lawsuit against the United States Department of Energy (the "DOE") resolving the DOE's liability for violating of the terms of an agreement brokered by former Governor James H. Hodges regarding the disposition of weapons grade plutonium stored at the Savannah River Site ("SRS"). Compl., Ex. A., Affidavit of James M. Griffin, Sept. 25, 2020 (hereinafter, "Griffin Aff."), Ex. 1, Settlement Agreement. Governor Hodges's brokered settlement is codified at Title 50, United States Code, Section 2566 ("Section 2566"). Under Section 2566, the DOE must pay the State of South Carolina "economic impact and assistance payments" of $100 million per year from appropriated funds starting in 2016

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for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least $400 million in economic impact and assistance payments. Under the terms of the settlement agreement announced by Defendant Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of $600 million. Under the terms of the Settlement Agreement, the DOE is required to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." Griffin Aff., Ex. 1, ¶ 5(a). According to Wilson, this payment is expected on or after October 1, 2020.

Defendant Wilson has announced that he intends to pay two private law firms $75 million from the proceeds of the DOE settlement. Upon learning of the Defendant Wilson's intent, Governor Henry McMaster wrote Defendant Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he "could not endorse the payment of $75 million in attorneys' fees under the circumstances." *Id.* First Circuit Solicitor David Pascoe likewise wrote to Defendant Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

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Plaintiffs have filed this action seeking injunctive relief and a declaratory judgment ruling that Defendant Wilson does not possess authority to use the proceeds from the DOE settlement to pay private law firms because the funds are intended solely for the State of South Carolina. Alternatively, if the Court were to conclude that Defendant Wilson is authorized to use these settlement proceeds to pay the private law firms, Plaintiffs seek an order requiring the Defendant to obtain court approval of the reasonableness of the fee as provided by the terms of the fee agreement with the law firms and South Carolina law.

On Friday, September 25, 2020, Plaintiffs filed suit against Defendant Wilson and filed Plaintiff's motion for a temporary restraining order and preliminary injunction against Defendant Wilson seeking to enjoin Defendant Wilson's payment of $75,000,000 to the law firms ("Plaintiffs' Initial Motion"). On the morning of Friday, September 25, 2020 at 11:10 a.m., Defendant Willoughby & Hoefer, P.A. ("Willoughby & Hoefer") and a representative of the Office of the Attorney General received notice of a hearing set for Wednesday, September 30, 2020 in a related case that likewise sought to enjoin the expenditure of the $600 million in settlement funds. *See id.*, Ex. 13. On the afternoon of September 25, 2020, Plaintiffs' counsel provided Defendant Wilson with copies of Plaintiffs' filings while requesting that the Court schedule a hearing on Plaintiffs' Initial Motion. *See id.*, Ex. 14.

On the morning of Monday, September 28, 2020, counsel for Defendant Wilson emailed the Court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. *See id.*, Ex. 15. The Court responded by stating that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Plaintiffs' Motion over Defendant Wilson's objections. *See id.* Counsel for Defendant agreed to accept service as of the Complaint and Plaintiffs' Initial Motion as of September 28, 2020. *See id.*, Ex. 16.

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On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Defendant Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. In response, counsel for the Attorney General ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17. Immediately prior to that hearing on September 29, 2020, Defendant Wilson filed a memorandum in opposition to Plaintiffs' Initial Motion in which Defendant Wilson claimed that the funds at issue in this dispute had been transferred to the law firms earlier in the day. Based on this purported transfer of the funds, Defendant Wilson claimed that this matter is now moot. *See* Mem. Atty. General in Opp'n. to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3.

Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds have not been transferred to the law firms, and Plaintiffs' counsel informed the Court of this purported fact. *See* Griffin Aff., Ex. 18. Thereafter, the Court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the law firm of Willoughby & Hoefer had received the disputed funds. *See id.* During the hearing, the Court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the Court entered such order following the hearing. That order expires at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020 Plaintiffs received confirmation from the State Treasurer that the proceeds were in fact wired to the law firm hours before the 3 p.m. hearing on September 29, 2020. According to Treasurer Loftis: "The Treasurers office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]. We processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account. This was a

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standard transaction. I checked if we had received a notice or direction to void a warrant for payment and we had not. Therefore, we completed our ministerial duty as the statute requires." *See id.*, Ex. 19.

Plaintiffs bring the instant motion to preserve the status quo now that the funds in dispute have been transferred from the State of South Carolina to the Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters. To preserve the status quo while this case is litigated on the merits, Plaintiffs seeks a temporary restraining order requiring Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters to return the disputed funds to the State of South Carolina or, in the alternative, enjoining them from further dispersing or encumbering the funds and, instead, holding them in trust for the benefit of the State of South Carolina while this dispute is litigated to its conclusion.

ARGUMENT

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church,* 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). Without the equitable relief requested herein, Plaintiffs will be irreparably harmed.

In *Sloan v. School Dist. of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000), the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that "'[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.'" *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). In *South Carolina Department of Rev. v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court's

refusal to grant an injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Department of Rev. v. Richland County*, 422 S.C. at 311, 811 S.E.2d at 768.

Plaintiffs have shown it will succeed on the merits of this case by making a prima facie showing that Plaintiffs are entitled to the injunctive relief sought. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

Plaintiffs have no adequate remedy at law because the equitable relief sought herein is necessary to preserve the subject of controversy in the condition which it is until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. *See Peek*, 367 S.C. at 457, 626 S.E.2d at 37-38. Injunctive relief is necessary to preserve the status quo and prevent Plaintiffs' important constitutional challenge from becoming moot. Moreover, as established below, Plaintiffs have made a sufficient showing that they are entitled to relief.

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I. Defendant Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement

Plaintiffs contend that the payment of $75 million to private law firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code § 1-7-150. In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*" Accordingly, Section 5(a) clearly requires that payment of the entire $600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson plans to pay private lawyers $75 million, out of the $600 million.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See Condon v. Hodges,* 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002)

("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."). Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.* Wilson's intent to pay $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive department, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution, Art. I, § 8.

The General Assembly has also enacted the South Carolina Federal and Other Funds Oversight Act ("Federal Funds Oversight Act") specifically addressing the use of federal funds received by a state agency. *See* S.C. Code § 2-65-10 *et seq.* Section 2-65-30 of the Federal Funds Oversight Act regulates the receipt of unanticipated federal funds by a state agency. This statute requires the state agency submit expenditure proposals to the Executive Budget Office ("EBO") and receive authorization from the EBO before spending any of the funds. S.C. Code § 2-65-30. Upon information and belief, Defendant Wilson has not sought or obtained approval from the EBO to pay $75 million to the law firms from the $600 million his agency will receive through this settlement. Thus, even if Defendant Wilson could retain a portion of these federal settlement funds for use by his agency, Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the EBO.

II. The Amount of the Fee Is Patently Unreasonable and Should Not Have Been Paid Until Approved by Court Order

Even if the settlement was structured in a way that the United States agreed to pay the State's litigation costs, attorneys fees totaling $75 million for the amount of work performed in

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this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g.*, *Getzen v. Law Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006).

The lawyers first sued in 2016 in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the $100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this monetary claim,[1] ruling that any such claim must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the lawyers refiled the same claim before the Court of Federal Claims, this time seeking $200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the lawyers lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The lawyers then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs to prove the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Defendant Wilson had no need to hire private counsel to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

[1] The District Court did not dismiss the State's claim for injunctive relief.

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In addition, the express terms of the fee agreement with the law firms states that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Id.*, Ex. 7. There is nothing prohibiting the Defendant Wilson from seeking judicial approval of the payment of $75 million to the law firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.[2] However, the Defendant Wilson seeks to avoid judicial review and intends to pay the law firms $75 million without making any showing of reasonableness.

Furthermore, a payment of $75 million to the law firms exceeds the fee amount that the law firms would be entitled to receive under the contingency fee agreements entered with these firms. The fee agreement provides for a base contingency fee payment of $29,250,000, calculated as follows:

$0 to $25,000,000	21%	$5,250,000
$25,000,000 to $50,000,000	18%	$4,500,000
$50,000,000 to $75,000,000	15%	$3,750,000
$75,000,000 to $100,000,000	13%	$3,250,000
$100,000,000 to $125,000,000	11%	$2,750,000
$125,000,000 to $150,000,000	9%	$2,250,000
$150,000,000 to $250,000,000	4%	$4,000,000
$250,000,000 to $600,000,000	1%	$3,500,000
	Total Fee	$29,250,000

Id., Ex. 8.

Defendant Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefer additional money from any proceeds recovered in the case pending before the Court of Federal Claims as compensation for the firm's representation of the State on

[2] Under South Carolina, the following factors are considered to determine whether an award of attorneys' fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019 Willoughby & Hoefer along with Defendant Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.,* Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Defendant Wilson agreed to pay Willoughby & Hoefer 2% for representing the State in the U.S. District Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Willoughby & Hoefer, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Thus, Willoughby & Hoefer is purported to be paid 3.5% of the $600 million, or $21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Willoughby & Hoefer had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefer is receiving .5% of $600 Million, or $3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages,

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for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefer over $65,000 per page for these filings.

The maximum amount of fees for which the law firms have a claim under the amended fee agreement appears to be $50,250,000, yet Defendant Wilson intends to pay the firms $75,000,000. There has been no explanation for Defendant Wilson's decision to pay these firms an additional $24,750,000 for a total payment of $75 million.

Plaintiffs, individually and on behalf of the Citizens of this State, are third party beneficiaries under the fee agreement entered into with the law firms. Plaintiffs seek an order requiring Defendant Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Defendant is permitted to use any portion of the settlement proceeds to pay litigation costs.

III. Defendants Willoughby & Hoefer and Davidson, Wren & DeMasters Have Received an Unauthorized Payment of Funds, and a Constructive Trust Should Be Deemed to Exist Over the Disputed Funds.

As noted above, Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters have received a disbursement of funds in dispute in this litigation. For the reasons explained above and in more detail in Plaintiffs' Amended Complaint, these law firms are not entitled to the disputed funds that they have received. Accordingly, the disputed funds should be returned to the State of South Carolina or Defendants Willoughby & Hoefer and/or Davidson, Wren & DeMasters should be enjoined from distributing or encumbering the disputed funds pending a determination of this lawsuit on the merits. *See SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990); *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 334–35, 577 S.E.2d 468, 472–73 (Ct. App. 2003).

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IV. Plaintiffs Have Public Interest Standing

Plaintiffs have "public interest" standing to pursue the declaratory action and injunctive relief as recognized in the following cases: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); Sloan v Friends of the Hunley, 393 S.C. 152, 711 S.E.2d 895 (2011); *American Petroleum Institute v. S.C. Dep't. of Revenue,* 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006*); Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).

CONCLUSION

THEREFORE, Plaintiffs request a temporary restraining order and preliminary injunction prohibiting the Defendant Wilson from using any of the funds from the DOE settlement to pay attorneys' fees during the pendency of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Badge Humphries

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Attorneys for Plaintiffs

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EXHIBIT 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STATE OF SOUTH CAROLINA,	)	
	)	
Appellant,	)	
	)	
v.	)	19-2324
	)	
THE UNITED STATES,	)	
	)	
Appellee.	)	

AGREEMENT TO VOLUNTARY DISMISSAL OF APPEAL

Pursuant to Rule 42 of the Federal Rules of Appellate Procedure, appellant, the State of South Carolina, and appellee, the United States, stipulate and agree that this appeal should be dismissed with prejudice, with each side to bear its own costs.

This dismissal is made as part of an agreement to resolve and settle a number of disputes, including the issue presented on appeal. The settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount, and the State shall have no further claim against the United States for such fees and costs. Such payment has been made, and with this requirement now being satisfied, the parties request dismissal of this appeal with prejudice.

Respectfully submitted,

Of Counsel:

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Robert D. Cook
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September 29, 2020

Attorneys for Appellant

Respectfully submitted,

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Attorneys for Appellee

September 29, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/Randolph R. Lowell
Randolph R. Lowell
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5) and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 155 words, according to the count of Microsoft Word.

/s/Randolph R. Lowell
Randolph R. Lowell

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT L

Letter from V. Claire Allen to John S. Simmons and J. Todd Rutherford, Oct. 2, 2020

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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FAX: (803) 734-1839
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October 02, 2020

Mr. John S. Simmons, Esquire
1711 Pickens St.
Columbia SC 29201

Mr. James Todd Rutherford, Esquire
The Rutherford Law Firm
2113 Park Street
Columbia SC 29201-1452

Re: SC Public Interest Foundation v. Alan Wilson
Appellate Case No. 2020-001314

Dear Counsel:

This will acknowledge receipt of your Motion to Stay / Supersedeas.

By copy of this letter, opposing counsel is requested to serve and file a return to the motion to stay / supersedeas no later than Monday, October 5, 2020 at 3:00 p.m. A reply to the return to the motion to stay / supersedeas is due to be served and filed no later than Tuesday, October 6, 2020 at 12:00 p.m.

Very truly yours,

V Claire Allen

CLERK

cc: James Mixon Griffin, Esquire
Badge Humphries, Esquire
James G. Carpenter, Esquire

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals
Appeal from Richland County
Honorable Alison R. Lee

South Carolina Public Interest Foundation and John Crangle, individually, and on behalf of all others similarly situated,

Plaintiffs - Respondents,

v.

Willoughby & Hoefer, P.A.,

Defendant - Appellant,

and

Alan Wilson, Attorney General for the State of South Carolina, and Davidson, Wren & DeMasters, P.A., Defendants.

Appellant Case No. _____

Case No. 2020-CP-40-4603

EXHIBIT M

Memorandum of Attorney General in Opposition to Motion for a TRO or Temporary Injunction
Ex Parte Barnwell County et al. v. Wilson, C/A No. 2020CP0600294
(Barnwell Cnty. Comm. Pleas Sept. 29, 2020)

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL	)	
	)	
EX PARTE: Barnwell County, Allendale County, And the Southern Carolina Regional Development Alliance,	)	C/A No. 2020CP0600294
Petitioners,	)	
IN RE: Barnwell County, Allendale County, and Southern Carolina Regional Development Alliance,	)	**MEMORANDUM OF ATTORNEY GENERAL IN OPPOSITION TO MOTION FOR A TRO OR TEMPORARY INJUNCTION**
v.	)	
Alan Wilson, in his official capacity As Attorney General for State of South Carolina and Aiken County,	)	
Defendants.	)	

Without waiving any other defenses that may exist to this suit, the Attorney General, as named herein, opposes this Motion for injunctive relief for the reasons set forth below.

BACKGROUND

The motion asks that this Court "restrain[] the Defendants from depositing settlement funds into the General Fund of the State until it can be determined who is the beneficial owner of the settlement funds, or alternatively issue its declaratory ruling that the settlement funds are federal funds and must be used for their intended purpose." The settlement monies are from an agreement in a suit brought by the State of South Carolina against the United States (U.S. Court of Claims, Fed. Cir. No. 19-2324) for payments due to the storage of plutonium or plutonium materials at the Savannah River Site for the purpose of MOX facility that has not been built and will not be constructed. Ex. 1 to Complaint. The State of South Carolina is the only Plaintiff in

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that case and the agreement provides for the payment of the $600 million in settlement money to the State of South Carolina. Ex. 1, p. 2, ¶5a. The statute under which settlement was reached provides for payment of funds to the State of South Carolina and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, but the General Assembly is the proper body to determine how the funds at issue in this action should be allocated, rather than him or this Court.

A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION SHOULD BE DENIED

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. . . . For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. . . ." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (2004). Plaintiffs fail to meet these standards.

A

Plaintiffs Have No Likelihood of Success

1

They have no standing and present no justiciable controversy

> Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

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Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). No statute confers standing on these Plaintiffs. Constitutional standing and public interest standing also fail.

> The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., supra, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008). "Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006).

Plaintiffs cannot succeed because have not sustained a direct injury or the immediate danger that a direct injury will be sustained so as to establish standing. As noted, they are not parties to the Federal suit nor are they parties to the settlement agreement. The General Assembly will control the disbursement of funds as discussed, *infra.*

> For these same reasons, public interest standing is lacking. The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

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ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341. Public interest standing is lacking here because no need exists for "future guidance" in that the General Assembly will determine the allocation of funds.

Standing fails for the above reasons. Accordingly, Plaintiffs have also not alleged a case or controversy. *ACT S, supra*.

2

Plaintiffs have no likelihood of success because these funds are controlled by the General Assembly

The Attorney General has no authority to appropriate money. The money in the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).[1]

> The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition

[1] As stated in *Condon*:

> The General Assembly cannot delegate this legislative power [to transfer appropriated funds] even if it so desired. *See Gilstrap v. South Carolina Budget and Control Bd., supra* (General Assembly may not delegate its power to make laws); State ex rel. McLeod v. McInnis, supra (General Assembly's attempt to delegate to Joint Appropriations Review Committee power to control expenditure of state and federal funds was found to violate separation of powers because committee was permitted to control expenditures by administration rather than by legislation); *Bauer v. South Carolina State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978) (non-delegation doctrine is based on the constitutional requirement that branches of government be forever separate and distinct from each other).

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> against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11–11–160 (Supp.2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2–65–20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90–91, 678 S.E.2d 412, 416–17 (2009). The courts "may not, by mandamus or otherwise, direct the appropriation of public funds, for to do so would be to trespass upon the legislative domain." *Gregory v. Rollins*, 230 S.C. 269, 275, 95 S.E.2d 487, 491 (1956). "The General Assembly has . . . the right to specify the conditions under which the appropriated monies shall be spent." *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633, 637, 278 S.C. 307, 313–14 (1982). The appropriation of public funds, as a legislative function, presents a political question, a function of the separation of powers doctrine which the courts do not address. *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 376–77, 718 S.E.2d 432, 438 (2011). ("Petitioners' argument that the funds appropriated for conducting a 2012 Presidential Preference Primary are insufficient presents a nonjusticiable political question; " *Segars–Andrews v. Judicial Merit Selection Comm'n,* 387 S.C. 109, 121, 691 S.E.2d 453, 460 (2010)("The nonjusticiability of a political question is primarily a function of the separation of powers.").

For the above reasons this Court lacks the authority to stop the monies from being deposited into the General Funds and thereby prevent the General Assembly from appropriating them as determined by that body. This matter presents a political question and invokes the separation of powers doctrine to prevent this Court from issuing an injunction. Plaintiffs, therefore, have no likelihood of success.

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Irreparable Harm

Plaintiffs have alleged that they will suffer irreparable harm if the Attorney General pays the funds into the general fund before this court declares who the intended beneficiaries of settlement are, but Plaintiffs have no justiciable interest in the settlement because the suit was brought in the name of the State, and the monies are payable to the State. Whether Plaintiffs receive any monies from the settlement is entirely up to the legislature. Therefore, they suffer no harm from the transfer of funds to the General Fund, where it is supposed to go. They can direct their concerns to the legislature for that body's consideration in the appropriations process.

CONCLUSION

Plaintiffs must show both a likelihood of success and irreparable harm. They have shown neither. Because they fail to meet those requirements, they are not entitled to a TRO or a temporary injunction, and adequacy of a remedy need not be addressed. Their remedy is to go the legislature to seek the funds that they want.

Respectfully submitted,

s/ J. Emory Smith, Jr.
S.C. Bar No. 5262
Deputy Solicitor General

ALAN WILSON
Attorney General

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[Signature block continues next page]

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September 29, 2020

Attorneys for the Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I am herewith serving the foregoing Response to Petition for Writ of Supersedeas by Appellant Willoughby & Hoefer, P.A. upon the following as permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, on this the 5th day of October 2020:

Alan Wilson
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RECEIVED
Oct 05 2020
SC Court of Appeals

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s/Badge Humphries
Badge Humphries (S.C. Bar No. 72904)