STATE OF SOUTH CAROLINA)		
)	IN THE COURT OF GENERAL SESSIONS	
COUNTY OF RICHLAND)		
EX PARTE:		
SOUTH CAROLINA PRESS ASSOCIATION,)		
THE STATE MEDIA CO., INC., D/B/A)		
THE STATE NEWSPAPER, EVENING)		
POST INDUSTRIES, INC., D/B/A)	MOTION FOR INTERVENTION	
THE POST & COURIER, PACIFIC &)	TO CHALLENGE CLOSED	
SOUTHERN CO., INC., D/B/A WLTX-TV,)	COURT HEARING	
AND RAYCOM MEDIA, INC. D/B/A WIS-TV,)		
MOVANTS)		
IN RE:		
STATE GRAND JURY OF SOUTH CAROLINA)		
PROCEEDING CONCERNING)		
ROBERT W. HARRELL, JR.)		
)		

Movant South Carolina Press Association is a not for profit corporation organized and existing under the laws of South Carolina having as its members 109 newspapers published in South Carolina, movant The State Media Co., Inc. is publisher of *The State* newspaper in Columbia, movant Evening Post Industries, Inc. is the publisher of *The Post & Courier* newspaper in Charleston, movant Pacific & Southern Co., Inc. owns and operates television station WLTX in Columbia and movant Raycom Media, Inc. owns and operates television station WIS in Columbia.

Movants are informed and believe that attorneys for Robert W. Harrell, Jr. (Harrell) have moved or will move to have this court remove the Attorney General of the State of South Carolina from his role in the proceeding pending before the State Grand Jury of South Carolina. Movants are also informed and believe that attorneys for Harrell have moved to have this motion considered outside the presence of the public and press.

Movants seek to intervene in the proceeding for the purpose of contesting any motion to close any hearing conducted by this court considering disqualification of the Attorney General and any other matter, excluding the deliberations of the State Grand Jury of South Carolina itself, on grounds that open courts are guaranteed by the constitutions of South Carolina and the United States.

As a threshold matter, intervention is the appropriate mechanism to allow for a challenge to the closure of a courtroom. *Ex parte Hearst-Argyle Television, Inc.*, 369 S.C. 69, 631 S.E.2d 86 (2006); *Ex parte The Island Packet,* 308 S.C. 198, 417 S.E.2d 575 (1992).

Turning next to the substantive issue, as the Supreme Court of South Carolina explained in its unanimous decision reversing a trial court's closure of a hearing, South Carolina has a long history of open court proceedings guaranteed by a distinctive state constitutional provision:

> In South Carolina...our Constitution contains a particular provision that has no parallel at the federal level. Specifically, our Constitution provides "[a]"ll courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." S.C. Const. art. I § 9. While federal case law was still in considerable flux, our jurisprudence recognized article I, § 9's independent constitutional guarantee of open courts and held "[e]xclusion of the press and public from judicial proceedings is a drastic measure calling for a careful weighing of interests affected." *Steinle v. Lollis,* 279 S.C. 375, 376-77, 307 S.E.2d 230, 231 (1983).

Hearst-Argyle, supra, 631 S.E.2d 86, 89.

The South Carolina Supreme Court noted in *Hearst-Argyle* that the analysis of the closure of a courtroom starts with a determination "whether the particular type of proceeding has historically been open and whether public scrutiny plays a significant role in the functioning of the proceeding." *Hearst-Argyle, supra,* 631 S.E.2d 86, 90 n.5, citing *Ex parte Island Packet, supra.* In making this determination, the presumption of openness "is strengthened by the South

Carolina Constitution's unqualified language guaranteeing open courtrooms." *Id.* In making the determination here, the court must distinguish between presentations to and deliberations of the grand jurors on one hand and court proceedings ancillary to the operation of the grand jury on the other. Historically the secrecy attached to grand jury proceedings has application only to those "things which transpire in the Grand Jury room." *Margolis v. Telech,* 239 S.C. 232 , 122 S.E.2d 417, 421 (1961). Tellingly, the South Carolina Supreme Court in *Margolis, supra,* noted that the oath grand jurors take relative to secrecy is taken in open court. *Id.*

Even if the motion made on behalf of Harrell seeks evidence of the investigation or deliberation undertaken by grand jurors in the grand jury room, there is no historical tradition of secrecy that would override the constitutional presumption of openness with respect to a presentation made not to the grand jurors, but to the presiding judge because inquiry into the events inside the grand jury room is prohibited. *State v. Rector,* 158 S.C. 212, 155 S.E. 385 (1930).

The next point of inquiry is whether public scrutiny plays a significant role in the functioning of the proceedings. *Ex parte Island Packet, supra,* citing *Press-Enterprise Co. v. Superior Court of California,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). Addressing openness in the context of criminal trials, the United States Supreme Court explained that open court proceedings enhance public understanding of their governmental institutions and promote confidence in the fair administration of justice:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:
>
> > "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with

> the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." 6 Wigmore, *supra*, [J. Wigmore, Evidence § 1834 (J. Chadbourn rev. 1976)] at 438. See also 1 J. Bentham, Rationale of Judicial Evidence, at 525.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S.Ct. 2814, 2825, 65 L.Ed.2d 973 (1980).

Harrell's prominence in the affairs of the State of South Carolina demands that any judicial proceeding concerning him be open for scrutiny by public and press so that the public may have confidence that "justice was in fact done." *Id.* Public scrutiny would be appropriate were Harrell simply a member of the General Assembly, but given Harrell's position as Speaker of the House of Representatives, and the allegations that he has violated state law with respect to the use of campaign funds, any outcome reached by a secret judicial hearing would be met with understandable skepticism regardless of whether the decision were favorable or unfavorable to Harrell.

Should this court undertake consideration of a motion to close a court proceeding, those seeking to exclude the public and press may overcome the presumption of openness only by demonstration of "an overriding interest based on specific findings that closure is necessary to preserve 'higher values,' and the closure must be narrowly tailored to serve that interest." *Hearst-Argyle, supra,* 631 S.E.2d 86, 89. Even in cases where the "higher value" advanced to justify closure has been a defendant's right to a trial by an impartial jury, the assertion of that interest alone is insufficient to overcome the constitutionally rooted presumption of open courts. The party seeking to close the courtroom must show that there is a compelling governmental interest at risk of irreparable harm without the closure, that the closure will be effective in preserving the compelling governmental interest, and that there are no reasonable alternatives to

closure that would preserve the governmental interest. And in those instances where the compelling governmental interest is asserted is the competing constitutionally guaranteed right of a trial by an unbiased jury, extensive *voir dire*, rather than closure of a courtroom "is the preferred and generally accepted tool that protects a defendant from the prejudicial effects of pre-trial publicity." *Hearst-Argyle, supra,* 631 S.E.2d 86, 90.

With respect to procedure, a hearing in an open court must be held in advance of any decision being made to close a courtroom to the public and press, and for that hearing to satisfy the requirements of procedural due process, those opposing the closure must be given a meaningful opportunity to be heard on the closure motion. *Id.*

While movants are informed and believe a motion seeking to have a hearing closed to the public and press has been filed, there is no public docket reflecting such a filing, and efforts to obtain confirmation of a date, time and place of any hearing scheduled concerning Harrell's request to disqualify the Attorney General have been unavailing. The undersigned requests that he be provided with adequate notice of any hearing in order to appear and make argument in opposition to closure. Given that the undersigned has teaching duties at the University of South Carolina, it is requested that notice be communicated to him via his cellphone at 803.730.6396 as well as to the firm.

Columbia, South Carolina

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Jay Bender
BAKER, RAVENEL & BENDER, L.L.P.
Post Office Box 8057
3710 Landmark Dr., Suite 400
Columbia, South Carolina 29202
803.799.9091 (firm telephone)
803.779.3423 (firm facsimile)
ATTORNEYS FOR MOVANTS