THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000622

The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ the King, Waccamaw; Church of The Cross, Inc. and Church of the Cross Declaration of Trust; Church of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; The Church of St. Luke and St. Paul, Radcliffeboro; The Church of Our Saviour of the Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church of the Good Shepherd, Charleston, SC; The Church of The Holy Cross; The Church of The Resurrection, Surfside; The Protestant Episcopal Church of The Parish of Saint Philip, in Charleston, in the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens of The Parish of St. Matthew; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens of the Episcopal Church of

The Parish of Christ Church; Vestry and Church Wardens of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews,, ...

Respondents,

v.

The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina,..... Appellants.

REPLY IN SUPPORT OF MOTION TO RECUSE THE HONORABLE JUSTICE KAYE G. HEARN FROM PARTICIPATION IN THE REHEARING PETITION; MOTION FOR VACATUR OF OPINION OF JUSTICE HEARN AND FAILING THAT, MOTION BY NON-PREVAILING PARISHES AND THE DIOCESE TO VACATE ALL OPINIONS IN THIS MATTER; AND MOTION FOR CONSIDERATION OF THIS MOTION BY THE FULL COURT AND FOR OTHER RELIEF

I. Appellants offer no argument about why timeliness bars Justice Hearn from continuing to sit on this case and adjudicating the petition for rehearing.

Movants' recusal motion seeks two forms of relief. First, the motion argues that this Court's judgment should be vacated because Justice Hearn should have recused herself given the intimate involvement that both she and her husband had in this case. Second, the motion argues that Justice Hearn should be recused *on a going-forward basis* and thus cannot adjudicate the petition for rehearing.

Relying largely upon federal court precedent, Appellants argue that the recusal motion is barred because it is untimely. Although some federal cases have held that timeliness can bar motions for *vacatur* of prior opinions, that timeliness cannot bar relief *prospectively*. As explained in the Motion to Recuse, when a motion for recusal is "presented to the [judge] prior to a proceeding over which the judge would preside," the motion simply cannot be denied for lack of timeliness, lest a judge who has an actual or apparent bias be allowed to continue to preside over

the case. *United States v. Furst*, 886 F.2d 558, 581 (3d Cir. 1989); *see also In re Kensington Int'l*, 368 F.3d 289, 316–17 (3d Cir. 2004); *Bradley v. Milliken*, 426 F. Supp. 929, 931 (E.D. Mich. 1977). Simply put, this Court should not dismiss as untimely Respondents' motion to recuse Justice Hearn from participation in the petition for rehearing.

Appellants offer no response because there is none. The judicial system cannot tolerate a judge with an actual or apparent bias to continue to sit on proceedings after a recusal motion is brought. The federal courts have not tolerated such a result, and this Court should not create a split with those authorities and hold that a judge can continue to sit on a case going forward notwithstanding the fact that a litigant has filed a motion for recusal in advance of the judge's continued participation in this case.

The fact that federal courts have recognized that timeliness cannot bar Respondents' motion for recusal on a going-forward basis, and the fact that Appellants do not even attempt to respond to this point, severely undermines their unfortunate suggestion that the recusal motion is somehow brought in bad faith. Appellants have brought the motion in advance of Justice Hearn's participation in a dispositive motion in this case (the petition for rehearing), and they respectfully request that only a complement of judges without actual or apparent bias adjudicate that motion.

II. South Carolina law does not impose a timeliness requirement for an appellate motion to recuse.

Appellants argue that the Motion to Recuse should not be considered because it was not filed at the first opportunity after Movants learned of the facts giving rise to recusal. (Return pp. 18-20.) Appellants do not cite any South Carolina law establishing a timeliness requirement for motions to recuse, instead relying on federal cases interpreting the federal recusal statutes. South

Carolina has no such statutes, and this Court should decline to create a timeliness requirement in this appellate court setting.

There is no statute or judicial rule under South Carolina law mandating the time in which a motion to recuse must be filed. Since the adoption of the current judicial canons, this Court has only "question[ed]" the timeliness of a motion to recuse on one occasion, and in that case, the Court, in *dicta*, cited a federal court case for the premise that a "recusal motion must be made at the first opportunity after discovery of the qualifying facts." *Davis v. Parkview Apartments*, 409 S.C. 266, 289, 762 S.E.2d 535, 547 (2014) (citing *Duplan Corp. v. Milliken, Inc.*, 400 F.Supp. 497, 510 (D.S.C. 1975)). The federal court timeliness requirement is created by statute. *See Duplan* at 510 ("Application of the foregoing discussion of applicable law to the facts of this case forces the court to conclude that the request was not timely as required by 28 U.S.C. § 144.").[1] The General Assembly has not elected to enact a parallel statute requiring timeliness for motions to recuse in South Carolina.

Moreover, South Carolina's judicial canons are inconsistent with a timeliness requirement in this setting. Disqualification on the basis of personal bias is not waivable under Canon 3F. The purpose of non-waivable disqualification is to "promote public confidence in the integrity of the judicial process," not to prevent prejudice to a party in a particular case. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (discussing non-waivable disqualification for personal bias under 28 U.S.C. § 455(a)); *see also Shell Oil Co. v. U.S.*, 672 F.3d 1283, 1294 (Fed. Cir. 2012) (finding that trial court's failure to recuse, as required by 28 U.S.C. § 455(b), was not

[1] To the extent that a timeliness requirement has arisen in the common law, it is merely a consideration for the Court in exercising its discretion. *See Ex parte Am. Steel Barrel Co.*, 230 U.S. 35, 45 (1913).

harmless error given risk of injustice and risk of undermining the public's confidence in the judicial process); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993) (stating that disqualification "concerns not only fairness to individual litigants, but, equally important, it concerns the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted." (citation omitted)). The duty to disqualify must be self-enforcing because whether a party timely files a motion to recuse—or files no motion to recuse at all—has no bearing on the public's confidence in the integrity of the judicial system. As a result, Canon 3 is directed to the judiciary but "***may*** be asserted ***also*** by a party to the action." *U.S. v. Conforte*, 624 F.2d 869, 880 (9th Cir. 1980) (emphasis added); *Davis v. Bd. of Sch. Comm'rs of Mobile Cty.*, 517 F.2d 1044, 1051 (5th Cir. 1975). Thus, requiring timely motions by a party subverts the purpose of Canon 3; a party should not be able to waive the enforceability of a judicial duty designed to protect public confidence in the judiciary after the judge fails to follow that duty by disclosing the basis for the appearance of impropriety.

Furthermore, under Canon 3F, even if a party who is prejudiced by the judge's personal bias expressly seeks to waive the conflict, it may *never* do so. Again, non-waivable disqualification exists because public confidence in the judiciary may not be controlled by a party. It is illogical to create a timeliness requirement through which that party may effect a waiver of recusal by inaction when it is barred from doing so through action.[2]

[2] To avoid this issue, some courts have held that the "timeliness" of a motion to recuse and "waiver" of grounds for recusal are different considerations. Even presuming that such a distinction exists, timeliness must be subservient to the need to ensure public confidence in the integrity of this Court's decisions. *See Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 169 (4th Cir. 2014) (Shedd, J., dissenting).

For grounds for disqualification other than personal bias or prejudice (such as personal knowledge of disputed evidentiary facts), waiver of the disqualification is only possible through the procedure outlined in Canon 3F:

> A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. ***If following disclosure*** of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding.

Canon 3F, CJC, Rule 501, SCACR (emphasis added). Unless and until the judge discloses on the record the basis of the disqualification, the parties may not waive the disqualification. Again, it is illogical to impose a timeliness requirement whereby the waiver procedure mandated by Canon 3F is rendered meaningless merely by inaction.

The courts that have created a timeliness requirement at the trial court level have done so out of concerns for delay and judicial economy, to promote fairness and equity, and to prevent gamesmanship through ethical issues. *See, e.g.*, *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) ("The motivation behind a timeliness requirement is also to a large extent one of judicial economy . . . Lack of a timeliness requirement, though, would allow the losing party an increased chance of a new trial."). These concerns undeniably predominate in the context of motions to recuse a trial court, which typically manages pretrial proceedings through years of litigation. As part of the pretrial management process, the trial court has ample opportunity to hold conferences and issue orders as necessary, including to disclose the information on the record which may give rise to the question of disqualification pursuant to Canon 3E. If the judge does not disqualify himself or herself, that judge alone issues all orders and conducts the trial, and a motion to recuse

that comes after the judge has adjudicated the case casts the validity of that ruling into doubt and may require rewinding years of litigation. Accordingly, appellate courts have imposed a timeliness requirement for trial court motions to recuse in order to prevent waste, delay, and doubts on the finality or validity of pre-recusal decisions. *See, e.g.*, *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 168 (4th Cir. 2014) ("[T]he requirement of timeliness . . . is vital . . . to prevent waste and delay." (citations omitted)).

The appellate context is different. The first opportunity in which a justice appears before the parties to offer them the option to waive disqualification pursuant to Canon 3F is at oral argument. Thus, the parties cannot know with certainty whether the Justice intends to disclose the basis for her potential disqualification until oral argument, and the parties cannot know whether the Justice intends to recuse herself until she does not do so and signs an opinion.

Thus, in the appellate context, there is no concern about late attacks on the Justice's rulings. This Court's quorum is three members, and this Court could have held oral argument or issued its Opinion with three, four, or five (with a replacement) members. The judicial economy and fairness concerns present in late motions to recuse at the trial court level are minor at the appellate level, particularly when contrasted to the increased public concern for the integrity of this Court's decisions.

Furthermore, the timeliness requirement proposed by the Appellants in the appellate context is practically unworkable. Should this Court decide to impose such a timeliness requirement, the Court may require that a party move to recuse a Justice at the earliest opportunity upon learning of the grounds for recusal, like in the trial court context. That rule, however, would create many issues and would be bad policy.

Such a rule would create a parallel duty on parties to move for recusal independently of the Justices' own duty to disclose, and parties would be forced to file motions to recuse even before the Justice is given the opportunity to recuse himself or herself. Each motion to recuse could require that the Court consider not only on the grounds for recusal, but also whether the motion was brought by the party at the "earliest opportunity." Such a requirement drastically diminishes what would otherwise be a clear duty on the justice to disclose and recuse himself or herself, and significantly shifts the duty to counsel in the form of a duty to move early to recuse.

Alternatively, the Court could consider a rule that requires that the party move to recuse a Justice after the Justice has refused to recuse himself or herself at oral argument. That, however, is also an unworkable solution; the party would not know of the Justice's refusal to recuse, or refusal to disclose the grounds for disqualification, until the Justice appears in his or her seat at oral argument. Such a rule would then require that the party object, and refuse to proceed with the oral argument until it can offer evidence on the reasons the party believes the Justice should have recused himself or herself—potentially on video and in front of a full courtroom.

The Court might consider a rule that a party must file a motion to recuse after the oral argument, but prior to the Court's decision, in circumstances where the Justice does not recuse herself. This would still usurp the Justice's ability to recuse himself or herself after oral argument, during which the Justice may have recognized the basis for disqualification. A motion to recuse filed any time before the issuance of the opinion does not give the Justice all opportunities to recuse herself and presumes that she will derogate her duty to do so.

A rule that the motion is proper here in full promotes the best policy and practice. If Justice Hearn had recused herself at any time from issuing an opinion in this matter, the motion would not have been necessary. Furthermore, the opinion may provide actual evidence of bias. *See*

Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) (applying older rules but stating, "[i]t is not enough for a party to allege bias; a party seeking disqualification of a judge must show some evidence of bias or prejudice."). Justice Hearn's opinion in this case demonstrates actual evidence of bias through the multiple instances of citations to evidence outside the record. (Mot. Recuse pp. 9-11.) Movants could not have known that Justice Hearn would cite to evidence outside the record prior to the issuance of the opinion. *See Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) ("In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice.").

Ultimately, timeliness concerns are secondary to the overarching purpose of recusal. Recusal cannot rewrite the past, but vacatur can undo any effect on the opinion and promote public confidence in the integrity of the judicial process. Because rehearing has not yet occurred, no retrospective effects must happen here; Justice Hearn's opinion may be reheard by a different acting Justice.[3]

Regardless, even if this Court imposes a timeliness requirement and finds that this Motion was untimely to warrant Justice Hearn's recusal as to the opinion, timeliness has no effect on whether Justice Hearn should sit on this case prospectively as to the petition for rehearing, as set

[3] Appellants also argue that this motion is made in bad faith because Movants sought an extension to avoid filing it. Movants acknowledge that they took all efforts to avoid the filing of this motion because of its nature, including seeking an extension to mediate the case and make efforts thereby to render the issue moot. It was the Appellants who indicated they were not inclined to consent to any extension. Ultimately, the motion for the extension was denied. Seeking to avoid a potentially needless filing of a motion to recuse is not "threatening to present ***criminal or professional disciplinary charges*** solely to obtain an advantage in a civil matter," in violation of Rule 4.5 of the Rules of Professional Conduct, as Appellants declare. Appellants' allegations of bad faith are unwarranted and devoid of merit.

forth above. Appellants do not argue otherwise. At a minimum, Justice Hearn should recuse herself as to rehearing and the Court permit another Justice to consider this motion for vacatur and the petition for rehearing.

III. Justice Hearn should be recused and her opinion vacated.

Appellants offer several arguments why none of the grounds for disqualification in Canon 3E apply to Justice Hearn. Appellants' arguments are unavailing. As an initial matter, Movants have not moved to recuse based on Justice Hearn being an Episcopalian, as stated by Appellants. Justice Hearn's connection to the underlying dispute triggers several grounds for disqualification, and her opinion shows actual evidence of bias, as set forth in the motion to recuse. Accordingly, Justice Hearn should recuse herself from this proceeding and vacate her opinion.

Appellants argue that Justice Hearn was not required to disqualify herself because George Hearn was not called as a "witness at trial." (*See* Return p. 15 (Hearn "was not called as a witness and his deposition was not introduced at trial.").) Under the South Carolina judicial canons, a judge must disqualify herself if she knows that her spouse has more than a de minimis interest that could be substantially affected by the proceeding or was likely to be a material witness. Canon 3E(1)(c), (d)(iii)-(iv), CJC, Rule 501, SCACR.[4] South Carolina appellate courts enforce this rule of imputing a spouse's interests to the judge. *See, e.g.*, *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014); *Ness v. Eckerd Corp.*, 350 S.C. 399, 403, 566 S.E.2d 193, 196 (Ct. App. 2002). Appellants cite no authority to the contrary.

[4] George Hearn was also a "witness" in this action. He was deposed as a witness but was not called to testify at trial. *See* Rule 32, SCRCP (describing the trial use of the deposition testimony of an unavailable "witness"); Rule 33, SCRCP (describing witnesses as persons with knowledge concerning the facts of the case). Appellants cite no authority defining a "material witness" under Canon 3E as applying only to a witness called to testify at trial.

Appellants do not dispute the facts underlying George Hearn's substantial involvement in and personal connection to the underlying dispute. As set forth in the motion to recuse, George Hearn was a key leader in the minority group of parishioners at St. Paul's Conway who opposed Bishop Lawrence and the actions taken by St. Paul's Conway. Mr. Hearn was one of the individuals who started St. Anne's and served on its steering committee and mission committee. He represented a TECSC convention as a delegate from St. Paul's Conway despite no longer attending St. Paul's and signed a declaration of conformity to TECSC on its behalf. While Appellants may claim that Movants' showing that George Hearn had a key role in this dispute is "utterly and totally baseless," but they do not dispute the facts set forth in the affidavits and exhibits in support of the motion to remand. George Hearn's key role and affiliation with TEC demonstrates that he has greater than a de minimis interest in the outcome of this action and was a critical fact witness, so Justice Hearn was required to disqualify herself.

Appellants next claim that it "would come as a surprise to many and is as laughable as it is untenable" that members of a church may be personally liable for an unincorporated church's liabilities. (Return p. 16.) Although Appellants dismiss this principle without further argument, South Carolina has long recognized this precise principle as a rule of law even if the unincorporated association is a church. *See Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E. 651, 652 (1936) ("While each member became a party to the action when the complaint was served upon an officer of the association, and while plaintiffs have the right to enter judgment against all or any one of the members, no liability arises against any member unless judgment is entered against such member by plaintiffs."); *see also* S.C. Code Ann. § 15-35-170 ("On judgment being obtained against an unincorporated association under process served as provided in § 15-9-330 final process may issue to recover satisfaction of such judgment, and any property of the association and the

individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment."); *Patterson v. Witter*, 418 S.C. 66, 78, 791 S.E.2d 294, 301 (Ct. App. 2016), *reh'g denied* (Oct. 27, 2016) ("Moreover, the liability of its members is joint and several." (citing *Elliott*)); 77 C.J.S. Religious Societies § 154 (2017). Under South Carolina law, Justice Hearn may be personally liable for a judgment against TEC as a member, so she is a party and has greater than a de minimis interest under Canon 3E.

Appellants argue that Justice Hearn did not rely on evidence outside of the record by noting that other courts have recognized that schisms in The Episcopal Church were caused by doctrinal issues like the role of women, citing *Bishop & Diocese of Colorado v. Mote*, 716 P.2d 85, 89 (Colo. 1986). *See* Return p. 23. Even if true, a recitation of stipulated facts by the Colorado Supreme Court in a case thirty years ago could not have provided the basis for Justice Hearn's statement that "it is clear from the record that doctrinal issues concerning marriage and the role of women were the trigger." Op. at 37. (*See* Mot. Recuse p. 9.) Appellants do not address the other evidence in Justice Hearn's opinion taken from outside of the record.

CONCLUSION

This Motion recognizes the reality that "[j]udges are human; like all humans, their outlooks are shaped by their lives' experiences. It would be unrealistic to suppose that judges do not bring to the bench those experiences and the attendant biases they may create." *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994). The depth of Justice Hearn's connection to this case warrants her disqualification pursuant to Canon 3E to ensure the promotion of public confidence in the integrity of the Court and in this decision. Justice Hearn should recuse herself and the Court should vacate her opinion. Failing that, the Court should vacate all of the opinions and order rehearing.

Signed w/ express permission by William Marra

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000622

The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ the King, Waccamaw; Church of The Cross, Inc. and Church of the Cross Declaration of Trust; Church of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; The Church of St. Luke and St. Paul, Radcliffeboro; The Church of Our Saviour of the Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church of the Good Shepherd, Charleston, SC; The Church of The Holy Cross; The Church of The Resurrection, Surfside; The Protestant Episcopal Church of The Parish of Saint Philip, in Charleston, in the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens of The Parish of St. Matthew; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity

Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens of the Episcopal Church of The Parish of Christ Church; Vestry and Church Wardens of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews,,..... Respondents,

v.

The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina, ... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by e-mailing a copy of the same to the following address(es):

Pleadings: **Reply in Support of Motion to Recuse the Honorable Justice Kaye G. Hearn from Participation in the Rehearing Petition; Motion for Vacatur of Opinion of Justice Hearn and Failing That, Motion by Non-Prevailing Parishes and the Diocese to Vacate all Opinions in this Matter; and Motion for Consideration of this Motion by the Full Court and for Other Relief**

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