THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2020-001048
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Plaintiffs.

Of whom Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins are
Petitioners,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Respondent,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed

Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

LENNAR CAROLINAS, LLC'S
REPLY TO PETITIONERS'
RETURN TO THE PETITION FOR REHEARING

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Respondent Lennar Carolinas, LLC ("Lennar"), respectfully submits the following Reply to the Owners' Return to the Petition for Rehearing.

Of substantial significance from review of the Owners' Return is the clear observation that Owners do not dispute the point that matters most: this Court's ruling that Section 16.4 of the Purchase and Sale Agreement is unconscionable rests on the incorrect premise that Section 16.4 allows Lennar to force Owners to arbitrate their direct claims against subcontractors and other third parties, even though Owners have no arbitration agreement with them. According to the Court's Opinion, it is unconscionable to force a party to arbitrate claims against parties with which it never agreed to arbitrate. As Lennar's Petition for Rehearing demonstrated, that premise is wrong. Section 16.4 does not even purport to require Owners to assert and arbitrate direct claims against subcontractors. Notably, Owners argue only the false premise that Lennar itself previously contended that it could compel arbitration of Owners' direct claims against subcontractors. Lennar argued no such thing. As shown below, Owners rely entirely on a mischaracterization of statements Lennar made in opposing the lifting of the stay during the pendency of the appeal. In fact, Lennar has never argued that Section 16.4 allows it compel arbitration of Owners' direct claims against the other defendants, and it plainly does not. And Owners themselves do not argue that Section 16.4 confers such authority either. Correctly construed, Section 16.4 is merely a joinder provision. And *nobody* contends that, construed as such, the provision is unconscionable. The Court should grant the Petition, correct the premise underlying its Opinion, and affirm the judgment of the Court of Appeals.

I. The Owners' Return fails to establish that they preserved for appellate review the issue of the purported unconscionability of Section 16.4 or Section 16.5 of the Purchase and Sale Agreement.

This Court relied upon an analysis of Sections 16.4 and 16.5 of the Purchase and Sale Agreement as the basis for its conclusion that the arbitration agreement in the Purchase and Sale

Agreement was unconscionable and not enforceable. But Owners never raised Sections 16.4 and 16.5 in their challenge to the arbitration provision. Owners' Return proves the point—it relies merely on generic and out of context statements from prior filings in which Owners argued broadly that the arbitration provisions contained in the Limited Warranty, the Deeds, the Covenants, and the Purchase and Sale Agreement (collectively, the "Purchase Documents") are unconscionable when collectively read as a single arbitration provision. In arguing that the arbitration provisions in the Purchase Documents are unconscionable, Owners only identified provisions of the Limited Warranty and failed to identify a single term of the Purchase and Sale Agreement's arbitration provision that is unconscionable.

For example, in their Memorandum in Opposition to the Motion to Compel Arbitration filed with the Circuit Court, Owners identified no provision of the Purchase and Sale Agreement as unconscionable. Instead, Owners' entire argument to the Circuit Court rested on the *Prima Paint* doctrine, which they invoked to argue that the terms of the Limited Warranty rendered *all* of the arbitration provisions in the Purchase Documents *collectively* unconscionable. Owners even summarized their argument as, "The arbitration and other anti-remedy provisions contained in Lennar's Warranty (*see attached Exhibit 8*) are wholly unconscionable, contrary to South Carolina law, and thus, unenforceable." **(R. 2435)**. Argument II of the Owners' Memorandum in Opposition to the Motion to Compel Arbitration is titled, "THE MOTION TO COMPEL ARBITRATION SHOULD BE DENIED BECAUSE LENNAR'S WARRANTY PROVISIONS ARE UNCONSCIONABLE AND UNENFORCEABLE." **(R. 2443)**. Additionally, subsection (B) of that argument is titled, "Lennar's Warranty Provisions are Unconscionable and Unenforceable", **(R. 2445)**—an argument that was rejected both by the Court of Appeals and by this Court.

The Circuit Court erroneously agreed with the Owners' application of the *Prima Paint* doctrine and invalidated the arbitration agreement only by reading the terms of all of the Purchase Documents collectively as a single arbitration agreement. **(R. 11)**. Mirroring the arguments raised in the Owners' Memorandum in Opposition to the Motion to Compel Arbitration, the Circuit Court even titled the section stating its unconscionability findings as "The Court finds that Lennar's Warranty Provisions are Unconscionable, and thus Unenforceable." **(R. 12)**.

In their Return, Owners quote a limited portion of a paragraph of the Circuit Court's order and contend that the Circuit Court found the Purchase and Sale Agreement's arbitration provision is unconscionable. But the language quoted by Owners is from the section of the Circuit Court's Order titled, "The *Warranty* Provisions are Not Severable." **(R. 16-17 (emphasis added))**. The Circuit Court's entire analysis was tainted by the improper application of the *Prima Paint* doctrine and the limited excerpts from that Order cited by Owners do not show that the Circuit Court made findings concerning only the *Purchase and Sale Agreement's* arbitration provision. Rather, the Circuit Court's findings were based upon (1) reading all of the Purchase Documents collectively (an error that was recognized by both appellate courts) and (2) finding the terms of the Limited Warranty rendered all of the arbitration provisions in the Purchase Documents unconscionable. The Circuit Court's Order simply includes no finding that any provision of the Purchase and Sale Agreement's arbitration provision is unconscionable.

After Lennar appealed the Circuit Court's Order denying the Motion to Compel Arbitration, Owners continued to urge an improper application of the *Prima Paint* doctrine, taking the position that the provisions of the Limited Warranty rendered all of the arbitration provisions in the Purchase Documents unconscionable. Like the Circuit Court's Order, the unconscionability section of the Owners' Respondents' Brief is titled, "Lennar's *Warranty* Provisions are Unconscionable, and thus Unenforceable." (Owners' Respondents' Brief. p. 8 (emphasis added)).

Again, Owners did not identify a single provision of the Purchase and Sale Agreement's arbitration provision that they believed was unconscionable.

During oral argument before the Court of Appeals, Owners' counsel was questioned on the issue of whether the individual arbitration provisions were unconscionable when read in isolation. This was the first time any argument was raised about the supposed unconscionability of any provision of the Purchase and Sale Agreement's arbitration provision. Owners' counsel responded by admitting that the Circuit Court did not analyze the individual provisions in isolation:

> MR. SANCHEZ: You can look at these -- if you were to just segregate these provisions in each document and isolate them on their own, if you read those provisions, within them there are still unconscionable terms.
>
> The Court: Which are?
>
> MR. SANCHEZ: Which are ---
>
> The Court: Just give me an example.
>
> MR. SANCHEZ: Sure. So let's take the Purchase and Sale Agreement, you're looking to bind third parties to the ---
>
> The Court: i.e. children?
>
> MR. SANCHEZ: i.e., children and occupants. So we have this situation
>
> The Court: Was that in something Judge Nicholson found? Is that in his order?
>
> MR. SANCHEZ: I don't believe that he looked at the individual provisions because he took the *D.R. Horton* analysis and said look there are cross-references so I'm going to read these provisions together as a whole.

(Court of Appeals Oral Argument 32:06 – 32:48(emphasis added)). In addition to admitting that Circuit Court did not actually look at the individual provisions of the Purchase Document's arbitration provisions, Owners' counsel himself did not argue that either Section 16.4 or Section

16.5 were unconscionable on their own terms, nor did he contend during oral argument that they individually provided a basis for invalidating the arbitration provision.

Owners' Return argues that they raised arguments related to the specific terms of the Purchase and Sale Agreement's arbitration provision in their Petition for Rehearing to the Court of Appeals. In *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422-23, 526 S.E.2d 716, 723 (2000), however, this Court expressly stated that a respondent—like Owners in this case—abandons an additional sustaining ground by failing to raise it in the respondent's brief. This Court has long recognized that a question, "having not been presented to or passed upon by the Court below and having not been made as a sustaining ground by respondents, cannot be raised for the first time on a petition for a rehearing." *Rogers v. Rogers*, 221 S.C. 360, 374, 70 S.E.2d 637, 644 (1952). Because Owners did not argued before the Circuit Court or in their Respondents' Brief that Section 16.4 or 16.5 themselves were unconscionable, they abandoned that argument.

Throughout this case Owners have relied upon a misapplication of the *Prima Paint* doctrine to argue that the terms of the Limited Warranty rendered *all* of the arbitration provisions in the Purchase Documents unconscionable. No other unconscionability argument was timely raised or preserved by Owners. Therefore, it was an error for this Court to address the unconscionability of two specific terms of the arbitration agreement in the Purchase and Sale Agreement and to invalidate those terms based on arguments that were not preserved by Owners below. Accordingly, the Court should grant Lennar's Petition for Rehearing and reinstate the Court of Appeals' opinion.

II. The Supreme Court's Order granting Owners' Petition for Writ of Certiorari did not provide Lennar notice that the Court would consider unpreserved and abandoned arguments.

The Supreme Court's Order granting the Owners' Petition for Certiorari states, "the petition for a writ of certiorari is granted to review the court of appeals' decision in *Damico v.*

Lennar Carolinas, L.L.C., 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020)." Owners' Return suggests that this general grant authorized them to raise any objection to the Court of Appeals' decision. Not so. The Court's Order granted the Owners' Petition for Certiorari to "review the court of appeals' decision." The Order provided no notice that the Court would considered unpreserved—and abandoned—arguments that were *not* addressed in the Court of Appeals' decision. The Court of Appeals' opinion did not address Section 16.4 or Section 16.5 of the arbitration agreement within the Purchase and Sale Agreement—because Owners did not make arguments about those sections before the Court of Appeals. Lennar thus had no notice that this Court would consider these unpreserved issues.

III. Lennar has not taken inconsistent positions regarding compelling the Owners to arbitrate their claims against the other Defendants.

In their Return, Owners present the incongruous argument that Lennar's arguments related to the stay of the entire case during the pendency of the appeal supports their argument that section 16.4 is unconscionable. The issue of whether a stay of the entire case is appropriate pending appeal has no bearing on whether the potential joinder provisions of Section 16.4 are unconscionable or unenforceable.

In response to Owners' repeated attempts to lift the stay of the case, Lennar argued that the entire case should be stayed during the pendency of the appeal only because all issues and causes of action in this case are *affected* by the appeal of the Circuit Court's order denying Lennar's Motion to Compel Arbitration. *See* Rule 205, SCACR; Rule 241(a), SCACR (providing that "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal" and "[t]his automatic stay continues in effect for the duration of the appeal"). Lennar did *not* argue—as Owners now assert—that it could unilaterally force Owners to arbitrate *their* direct claims against subcontractors even absent an arbitration

agreement with them. Lennar's argument instead was simply that the appeal *affects* all claims at issue in the underlying case, which is indisputably true.

When Owners sought to lift the automatic stay of the pending appeal to pursue discovery from subcontractors, Owners at the time had alleged thirteen (13) causes of action against Lennar and only six (6) subcontractors in a purely collective fashion. In turn, Lennar had asserted cross-claims or third-party claims against all subcontractors whose work or materials were implicated in Owners' broad and generalized, collective claims and allegations of defects in the properties.

Lennar also had moved to compel arbitration of Owners' claims against it and also moved to compel arbitration of its claims against the various subcontractors. In response to Owners' attempts to lift the stay to pursue discovery or have a settlement class certified, Lennar argued that all of the claims in the case were affected by the appeal and the arbitration decision. As Lennar emphasized, Owners had *not* separately and directly sued all of the subcontractors, and they made all of their allegations and claims against all parties in a purely generalized and collective fashion. Especially given those pleading choices, it was absolutely true that disposition of one set of claims could affect the other claims, and vice versa.

Owners badly misconstrue Lennar's argument in opposing the stay that "the circuit court erred in not compelling each and every party to this action to arbitration." (Lennar Carolinas, LLC's Petition to Review the Circuit Court's Order Lifting the Automatic Stay, p. 5). Lennar was not arguing that to the extent Owners had independent direct claims against subcontractors, Owners were required to arbitrate those claims, too. Lennar instead was arguing that all parties should be required to arbitrate *with Lennar*. In other words, Owners' claims against Lennar would be arbitrated, as would Lennar's claims against all of the subcontractors derived from Owners' generalized and collective allegations and causes of action. The issue was that every party (Owners, Lennar, and subcontractors) would be required to proceed in arbitration. Additionally,

all of the allegations and all of the claims in the case were entwined and clearly affected the other allegations and claims in the case. This fact was the driving factor requiring the stay of the case during the pendency of the appeal.

Furthermore, Owners moved for the stay of the case to be lifted so that they may pursue discovery while the appeal is pending. It is a well-recognized principle that the appeal of an order denying a Motion to Compel Arbitration is a challenge to the continuation of any proceeding before the lower court on the underlying claims and discovery in an action should not proceed while the issue of arbitration is being decided by an appellate court. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264-65 (4th Cir. 2011); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). Lennar argued that the stay of discovery while the appeal is pending was necessary because "allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration," *id*., and allowing discovery to proceed while the appeal is pending "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter." *Id*. Such arguments in support of the stay of the case while the appeal is pending have no bearing on the interpretation or application of Section 16.4 and only relate to the effect of the appeal on the underlying case.

During the February 1, 2022, oral argument before this Court, there was no question about whether a stay of the litigation was appropriate for all the reasons Lennar articulated in June 2018. The question was merely whether Lennar could force Owners to assert separate direct claims against subcontractors, and pursue them in arbitration, even absent any agreement to arbitrate with them. Lennar's counsel correctly answered that hypothetical question in the negative. In the actual case before the Court, however, Owners did *not* allege separate primary claims against the subcontractors. Owners made only generalized and collective allegations against Lennar and six

subcontractors, where the latter claims could easily be understood as derivative of the claims against Lennar itself. It was only *Lennar* that clearly asserted distinct third-party claims against the remaining subcontractors. All of Owners' own allegations and causes of action are utterly intertwined—there is no separation or delineation of the claims against Lennar or those others Owners had chosen to sue. Under these circumstances, Lennar's third-party claims against other subcontractors are, by definition, interrelated with the main claims—they are founded on the proposition of Rule 14, SCRCP, that Lennar may assert such claims against third persons not already parties who are or may be liable to Lennar for all or a part of the Owners' claims against it. It follows all those claims are affected by the appeal and matters affected by the appeal are stayed during the pendency of the appeal. *See* Rule 205, SCACR; Rule 241(a), SCACR.

For these reasons, Lennar's prior arguments related to stay of the litigation while the appeal is pending are not evidence of inconsistent positions. They in no way support Owners' position that those arguments demonstrate the unconscionability of section 16.4. The venue in which Owners' claims against the subcontractors are ultimately resolved is a separate and distinct issue from whether all of the claims in this case are affected by the appeal and stayed. That is, there is no inconsistency between Lennar's contention that after the appeal is concluded Owners will *not* be required to arbitrate their claims against the individual subcontractor defendants, and its separate contention that the entire case should be stayed while the appeal is pending.

IV. Section 16.5 is not unconscionable.

Section 16.5 does not unconscionably alter the application of the law of *res judicata* or collateral estoppel as they would apply to the Owners in this situation. The doctrines of *res judicata* and collateral estoppel each require the parties to the action to be the same. *See Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999); *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). Thus, the Owners'

claims against other parties, in arbitration or civil litigation, will not be determined by the outcome of the arbitration of the Owners' claims against Lennar.

Moreover, Section 16.5 does not render the arbitration provision unconscionable because the preclusive effect—or lack thereof—of the arbitrations between Lennar and Owners may result in inconsistent decisions by the fact finders in separate proceedings involving separate parties. In fact, South Carolina courts have expressly recognized that "litigation and arbitration of intertwined issues may . . . lead to inconsistent results," but that "[a]ny inefficiency or risk of inconsistent results is a consequence of the parties' bargaining." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 70, 620 S.E.2d 86, 91 (Ct. App. 2005) (citation omitted).

Furthermore, Section 16.5 by its terms is expressly limited—it applies only to the extent "permitted by applicable law." If the applicable law does not permit the application of the terms otherwise set forth in Section 16.5, then they are of no moment. They cannot be unconscionable.

V. Severing Sections 16.4 and 16.5 of the Purchase and Sale Agreement's arbitration provision does not render it a fragmented and unenforceable agreement to arbitrate.

Owners' Return fails to identify how severing Section 16.4 or Section 16.5 would amount to the Court re-writing the agreement to arbitrate. In fact, Owners present no argument as to how severing Section 16.5 of the arbitration provision would materially alter the arbitration or render the arbitration provision so fragmented that it is unenforceable. If Section 16.4 is severed, then the Purchase and Sale Agreement still contains a valid agreement for the Owners to arbitrate their claims against Lennar. All that is changed is that the joinder provision which Owners now wish to argue is oppressive and unconscionable is eliminated. Otherwise, the agreement to arbitrate remains the same. Owners will still arbitrate their claims against Lennar in an arbitration that is administered by the AAA in accordance with the AAA's Home Construction Arbitration Rules. Owners present no argument as to how an arbitration that is administered by the AAA in accordance with the AAA's applicable rules is in any way unconscionable. Indeed, courts have

repeatedly found that the AAA's rules are not unconscionable and are geared toward achieving an unbiased decision by a neutral decision maker. *See Brown v. Santander Consumer USA, Inc.*, No. CA 0:12-2825-CMC-PJG, 2013 WL 4017162, at *4 (D.S.C. Aug. 5, 2013) ("[B]ecause [the defendant's] Arbitration Policy follows the AAA's rules for arbitration, it is clear that [the defendant's] policy is 'geared towards achieving an unbiased decision by a neutral decision-maker.'"); *Roland-Davis v. Remington Coll.*, No. CA 3:12-2227-MBS, 2013 WL 4692733, at *6 (D.S.C. Aug. 29, 2013) ("The AAA's rules ensure that the plaintiff's rights are protected, so it cannot be said to be unfair to [the plaintiff]."); *Fellerman v. Am. Ret. Corp.*, No. 03:09–CV–803, 2010 WL 1780406, at *5 (E.D.Va. May 3, 2010) (collecting cases and noting that courts tend to enforce arbitration agreements whose terms specify that the parties be bound by the rules of the AAA).

VI. The Court's Opinion violated the equal-treatment principle by treating the arbitration provision different from other contracts based upon public policy considerations.

The Court's opinion violates the equal-treatment principle because it acknowledges that the Court treated its analysis of the Purchase and Sale Agreement, and the arbitration provision therein, differently than other contracts. Specifically, the Court stated that the South Carolina public policy related to protecting new home buyers impacted its decision:

> The second additional consideration of which we take note is that this contract involves a consumer transaction. More specifically, this contract involves the purchase of a new home. South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. As we stated over thirty years ago, it is 'intolerable to allow builders to place defective and inferior construction into the stream of commerce.' Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction.

Damico v. Lennar Carolinas, LLC, No. 2020-001048, 2022 WL 4231032, at *11 (S.C. Sept. 14, 2022) (internal citations omitted).

While in other contexts the Court may endorse the proposition that South Carolina intends to be in the vanguard of protecting home buyers, *Reynolds v. Ryland Grp., Inc.*, 340 S.C. 331, 338, 531 S.E.2d 917, 921 (2000), the Court erred in treating the Purchase and Sale Agreement's arbitration provision different from other contracts based upon the public policy of protecting new homebuyers. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534, 132 S. Ct. 1201, 1204, 182 L. Ed. 2d 42 (2012) (per curiam) (unanimously invalidating a state's public policy to not refer wrongful death claims against a nursing home to arbitration). Thus, South Carolina's policy of granting special protection to home buyers provides no basis for applying different standards to arbitration agreements in home buyer contracts.

CONCLUSION

Based on the foregoing, Lennar respectfully requests the Court grant this Petition for Rehearing and issue an opinion affirming the Court of Appeals.

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