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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY  
Court of General Sessions  
Grace Gilchrist Knie, Circuit Court Judge

Indictment No. 3885/2018

The People of the State of New York, ..... Respondent,

v.

Timothy Braico and Terrence Edwards, ..... Defendants.

In Re:

The Matter John Thomas Burger, Material Witness

John Thomas Burger..... Appellant.

**REPLY SUPPORTING THE EMERGENCY MOTION  
TO DISMISS APPEAL DUE TO MOOTNESS**

The Respondent, the People of the State of New York [hereinafter, “the People”], submits this reply in support of dismissing Burger’s appeal due to mootness. The parties agree that the underlying order is in fact moot since the October 10, 2023 date for the material witness to appear in the New York courtroom has passed. Thus, the issue is whether one of the narrow exceptions to the legal mootness doctrine applies. As we will show, the narrow exceptions do not apply. For the legal reasons that will be outlined, and for practical reasons, the People ask you to dismiss Burger’s appeal due to mootness.

Alternatively, in the event this Court prefers full briefing on the mootness and material witness issues, the People will notify this Court of the underlying litigation regarding the lifting the automatic

stay and point out that this Court has authority to lift the automatic stay pursuant to Rule 241(c-d), SCACR, which would permit the People to be heard on their new petition for Burger to appear in New York on November 13, 2023.

## ARGUMENT

### **I. Since Burger cannot now testify in New York on October 10, 2023, the issue is factually moot.**

In her October 3, 2023 order, Judge Knie commanded Burger<sup>1</sup> to appear in New York on October 10, 2023 to testify against his former coworkers in a criminal trial. *See* Order, p. 4, Response Exhibit B. The General Sessions Court Order found that Burger is a material and necessary witness without an undue hardship pursuant to the “Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings” [hereinafter, “the Act”]. *See* S.C. Code Ann. § 19-9-10.

Burger did not attend the New York trial on October 10, 2023 as ordered. Rather, he filed a civil notice of appeal on October 6, 2023. In emails with the New York prosecution team, Burger claimed that the appeal from the General Session’s order is a civil appeal and that the civil automatic stay applies. *See* Exhibit C, p. 70, Response Exhibit C (email from Mr. Griffin); and Rule 241(a), SCACR (automatic stay).

A moot issue is one in which the “judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep’t*, 260 S.C. 344, 346 (1973). In *Mathis*, the State appealed the circuit court’s lifting of the one-year

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<sup>1</sup> Burger has immunity from prosecution.

suspension of driving privileges after a DUI conviction. By the time the matter was scheduled for oral argument, the one-year suspension period had expired and Mathis was eligible to drive. The South Carolina Supreme Court dismissed the appeal as being moot since there was no longer a “controversy between the parties” for the court to resolve. *Id.*

The mootness doctrine in South Carolina is in accord with the doctrine as defined by the Supreme Court of the United States. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016). A moot issue deprives a court of jurisdiction. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam) (“Mootness is a jurisdictional question because the Court ‘is not empowered to decide moot questions or abstract propositions.’”) (quoting *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)).

As made clear by the South Carolina Supreme Court in *Mathis*, since it is now factually impossible for Burger to appear in New York for trial testimony on October 10, 2023, there is no controversy between the parties for this Court to resolve. Therefore, the appeal is moot.

## **II. The narrow exceptions to the mootness doctrine do not apply.**

Caselaw carves out three narrow exceptions to the mootness doctrine. Burger argues that two of the narrow exceptions apply to his appeal: first, the issue is repetitive yet evades review; and, second, there are important collateral issues at stake that require the Court to rule at this time. As will be shown below, these narrow exceptions do not support the Court exercising jurisdiction over this moot issue.

**A. This issue isn't repetitive or one that will evade judicial review for all litigants.**

This “capable of repetition yet evading review” exception, *see Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016)), to the mootness doctrine applies “only in exceptional situations.” *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). The classic example is when a pregnant woman challenges an abortion restriction yet has the baby prior to the appellate argument. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)(exception to mootness doctrine is appropriate)). Some flexibility to the mootness doctrine is needed because a rigid application of the mootness doctrine would prevent abortion restrictions from ever being subjected to appellate court scrutiny. However, even in the abortion restriction context, the Supreme Court frequently exercises its discretion by declining to find an exception to the mootness doctrine. *See Azar v. Garza*, 138 S. Ct. 1790, 1791–93 (2018) (dismissing abortion case as moot without applying, analyzing, or mentioning the “capable of repetition yet evading review” doctrine).

The Supreme Court of the United States has applied this narrow “repetitive yet evades review” exception in limited areas involving “exceptional situations” outside of the pregnancy context. *See, for instance, Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457–60 (2007) (exception to the mootness doctrine appropriate where an advocacy group who runs election ads contested a regulation, the advocacy group made clear that they would run the ads in future election cycles, the regulations would likely remain constant, and the period between election cycles was too short to challenge restrictions in the future).

Evading judicial review is constrained to cases like the ones referenced above in which the appellate cycle makes it virtually impossible for any litigant to have her time-sensitive case heard on appeal. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 400 (1975) (“[T]he case before us is one in

which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.” ).

Whenever a case may be pursued by another litigant, then the general rule of declining to hear moot cases remains strongly favored. *See DeFunis v. Odegaard*, 416 U.S. 312 (1974) (law school admission racial discrimination suit not heard since DeFunis began taking law school classes, his claim was not capable of repetition by DeFunis since he was in law school and other applicants could bring their own lawsuits if aggrieved).

Burger makes an argument for applying this exception that confuses legal repetitiveness with a new material witness request. Legal repetitiveness is where due to a recurring event no material witness would ever be able to have her appeal heard. A new request for a material witness order is not “legal repetitive.” Furthermore, the new material witness request is the result of the legal maneuvering by Burger, who failed to comply with the order to appear in New York on October 10, 2023. After the October 10, 2023 date passed and Burger had not appeared as ordered, the People deemed that this appeal was moot and not likely to be resolved in time to get the witness to trial. Thus, the People sought a continuance of trial and filed a new material witness application. In granting the trial continuance until November 13, 2023, the New York trial judge made clear that on Nov. 13, 2023, the People will either call Burger as their final witness or be forced to rest their case-in-chief without a key witness. The New York trial court also issued a new certificate requesting that the South Carolina courts order Material Witness Burger to appear in the New York courtroom for trial testimony on November 13, 2023. This is a new application, not a repetitive factual scenario as defined by the mootness doctrine.

Additionally, the Act does not evade judicial review in all or most cases. In many contexts, the application of this Act may be fully litigated prior to the date a material witness is needed to testify out of state. *See above DeFunis v. Odegaard*, 416 U.S. 312 (1974) and *Sosna v. Iowa*, 419 U.S. 393, 400 (1975). Other litigants have asked and will be able to ask the Court to evaluate this Act. Consequently, this Act does not evade review in all cases.

Burger argues that this Court should keep this moot appeal to prevent the evasion of judicial review; however, immediately dismissing this moot appeal will aid judicial review of a non-moot question. Currently, Judge Knie believes that she has been divested of jurisdiction over this new material witness application for November 13, 2023 due to Burger’s notice of appeal relating to the October 10, 2023 appearance order. Judge Knie will not hear the new material witness application unless this Court dismisses this appeal prior to November 13, 2023 as moot (or, potentially if the automatic stay is lifted, as will be discussed below in III). **See Exhibit A, November 2, 2023 Order by Judge Knie.** Assuming Judge Knie hears the new material witness motion and grants it, then Burger may appeal prior to November 13, 2023. This new appeal would not be moot at its inception, and the People, upon receiving any notice of appeal, can immediately ask the General Sessions Court or this Court for an order pursuant to Rule 241(c-d) to lift the automatic stay. This would be an appeal of a non-moot issue.

In the case at hand, the factual situation is not legally repetitive yet likely to evade review as required to be considered as an exception to the mootness doctrine. Thus, it is not an “exceptional situation.”

**B. No South Carolina case supports Burger’s request to stretch the collateral consequences exception to fit his facts.**

In South Carolina there is a narrow exception to the mootness doctrine where the trial court’s ruling may have collateral consequences for the parties. *See generally Curtis v. State*, 345 S.C. 557 (2001). This exception does not exist in civil disputes in federal court.<sup>2</sup> While the South Carolina caselaw references the existence of this exception in several published cases, a review of the caselaw shows that South Carolina rarely uses this exception to work around the well-established mootness doctrine. In fact, South Carolina courts have exercised judicial restraint by refusing to take on moot questions even when this exception arguably might apply. *See Sloan v. Greenville County*, 380 S.C. 528, 535 (2009) (“The utilization of an exception under the mootness doctrine is flexible and discretionary....not a mechanical rule that is automatically invoked.”).

There is no South Carolina caselaw that supports Burger’s attempt to shoehorn his facts into the narrow collateral consequences exception. Burger cites to two cases for the application of this exception, but neither case supports this Court circumventing the mootness doctrine for Burger.

First, Burger cites to *Curtis v. State*, 345 S.C. 557 (2001). Curtis appealed the denial of a temporary injunction order that would permit him to sell clean urine to people facing drug tests. The judge later issued an order finding the new South Carolina law that prohibited selling urine to deceive a drug test to be constitutional. When Curtis appealed the temporary injunction order, the Attorney General asserted that the appeal regarding a temporary injunction was moot since a final

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<sup>2</sup> The federal collateral consequences exception is limited to criminal defendants who have completed the service of their sentences being permitted to challenge the underlying conviction where there are lingering collateral consequences flowing from the conviction. *See Fiswick v. United States*, 329 U.S. 211, 222 (1946); *see also United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam).

order on constitutionality had been entered. The Supreme Court agreed that the temporary injunction was moot. *See Curtis*, at 569. However, the SC Supreme Court, which has jurisdiction over constitutional questions, agreed to a limited review to sort through the constitutional challenges raised by Curtis. The South Carolina Supreme Court invoked judicial economy as the basis for reviewing the constitutional challenge. Thus, the collateral consequences exception was not relied upon in Curtis.

Second, Burger cites to *Sloan v. Greenville County*, 380 S.C. 528 (2009). Sloan challenged several of the county's prior procurement policies as being in violation of state law. After the hearing but prior to issuing a written order, the county changed its policies to comply with state law. In the written order, the circuit court found that the issues were now moot as the prior contracts were either completed or cancelled. Nevertheless, the circuit court addressed the merits by invoking the public interest exception -- not the collateral consequences exception -- to find that the prior policies violated state law. Upon an appeal by the county, this Court ruled that the public interest exception to the mootness doctrine did not apply. *Id.* at 538 (“[P]assing judgment upon this matter would only result in an advisory opinion on the application of an obsolete procurement ordinance to completed or cancelled contracts.”).

The gist of Burger's argument is for this Court to evade the mootness doctrine because Burger may otherwise be compelled to testify in New York before his appeal is fully litigated. This is possible, and it is proper under the circumstances.<sup>3</sup> However, appearing pursuant to a

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<sup>3</sup> The purpose of the Uniform Act is to benefit all the criminal courts in the United States by securing the service of process on material witnesses by either the prosecution or the defense. To achieve this end, the Uniform Act “shall be interpreted and construed to effectuate the general purpose” of the Act. S.C. Code Ann. 19-9-10 to 19-9-130. If one party is going to be shortchanged any process, it must not be the party who complies with the Act to secure a material witness, who has a certificate of materiality from an out-of-state judge, and who has an order from an in-state judge for the material witness to appear. The reluctant material witness

material witness order it is not a collateral consequence that this Court has recognized as an exception to the mootness doctrine. The Court should decline to recognize it now.

### **III. Pending Litigation to Lift the Automatic Stay so that Burger may be Compelled to Testify on November 13, 2023.**

A request to lift the automatic stay related to the October 3, 2023 Order has been filed and is currently pending in the General Sessions Court of Cherokee County. When it became clear that Judge Knie had reservations about hearing the new material witness motion due to the status of the appeal of the October 3, 2023 order, the People emailed a Motion to Lift the Automatic Stay to chambers on October 27, 2023. On October 30, 2023 Judge Knie's chambers indicated that Judge Knie would rule in favor of Burger on being divested of jurisdiction over the new motion, and instructed The People to file the Motion to Lift the Automatic Stay on the October 3, 2023 Order that had previously been emailed to chambers. That same day the People sent the Motion to Lift the Automatic Stay by Fed Ex to the Cherokee Clerk of Court, who stamped the motion as filed on November 1, 2023. **See Exhibit B, The People's Motion to Lift the Automatic Stay.** During the afternoon of November 2, 2023, Judge Knie's chambers emailed that Judge Kelly has assigned the Motion to Lift the Automatic Stay to Judge Knie. On November 3, 2023, upon a request by Burger, Judge Knie gave Burger until November 8, 2023 to submit a written response. Thus, the Circuit Court will not rule on the Motion to Lift the Automatic Stay before November 8, 2023.

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must not be permitted to override the judicial rulings. Burger argues that the trial judge in New York can continue the trial until this appeal is resolved, yet Burger knows that the November 13, 2023 continuance is final and Burger has not made a request of the trial judge in New York to continue it.

While the lifting of an automatic stay is usually initiated in the circuit court, it may be initiated by the appellate court in extraordinary circumstances. *See* Rule 241(d)(1)(where extraordinary circumstances make it impractical to wait.).

If the Court does not want to dismiss for mootness at this point but would like for the Circuit Court to rule on the new material witness motion for Burger to testify in New York on November 13, 2023, this Court could simply lift the automatic stay of the prior order pursuant to Rule 241(c-d), SCACR. Judge Knie has indicated that she will hear the new motion as soon as she believes that she has jurisdiction. Lifting the automatic stay will make clear that she has the jurisdiction.

In conclusion, the People of New York request an expedited dismissal of the appeal based on mootness so that the Circuit Court will be aware of its authority to entertain the new material witness request in time for the appearance of Burger at trial in New York on November 13, 2023. Alternatively, the People of New York request the Court of Appeals to lift the automatic stay of the October 3, 2023 order due to the extraordinary circumstance of a party complying with the Act being deprived of a critical material witness in a criminal trial.

RESPECTFULLY SUBMITTED.

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*Attorney for Respondent, The People of the  
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Charleston, South Carolina  
November 3, 2023

# EXHIBIT A

STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEA;  
SEVENTH JUDICIAL CIRCUIT

The People of the State of New York,

Indictment No. 3885/2018

v.

Timothy Braico and Terrence Edwards,  
(NY Indictment No. 3885/2018)

**ORDER**

In Re:

The Matter of John Thomas Burger,  
Material Witness

This matter is before the Court following the State of New York's ("Petitioner") submission of a second petition for an order compelling Mr. Burger to testify in a pending criminal prosecution in New York pursuant to the Uniform Act to Secure Witnesses from Without a State in Criminal Proceedings, S.C. Code Ann. § 19-9-10, *et seq.* (1976) (hereinafter "the Act"). Based on the findings of fact and conclusions of law set forth below, the Court finds it does not have jurisdiction to consider the second petition and therefore, **DENIES** the State of New York's request to conduct a hearing as to the same.

FINDINGS OF FACT

1. In connection with its prosecution of a criminal matter presently pending in New York, *The People of the State of New York v. Briaco, et al.*, the State of New York submitted a petition (the "1<sup>st</sup> Petition") to the Court for an order compelling Mr. Burger to testify in the nonjury criminal trial that began in May 2023.

2. The Court conducted hearings on the 1<sup>st</sup> Petition during which Petitioner presented argument in support of the 1<sup>st</sup> Petition and represented to the Court that October 10, 2023 was the last day on which Petitioner could present Mr. Burger's testimony in its case in chief. In response, counsel for Mr. Burger presented evidence and argued that Mr. Burger was not a material or

necessary witness in the New York action, and that compelling him to travel to New York would cause him undue hardship given his health issues which Petitioner was made aware of in May 2023.

3. On October 3, 2023, this Court granted the 1<sup>st</sup> Petition finding that Mr. Burger was a necessary and material witness under the Act, that traveling to New York to testify with his health issues would not constitute an undue hardship, and ordering him to testify in New York on October 10, 2023 (“the Order”).

4. On October 6, 2023, Mr. Burger filed his notice of appeal of the Order, and thereafter informed opposing counsel that Appellant would not be traveling to New York given his health issues and the pendency of this appeal.

5. Mr. Burger did not appear in New York to testify on October 10, 2023.

6. On October 20, 2023, while the appeal of the Order was pending, Petitioner submitted a 2<sup>nd</sup> Petition to this Court, seeking an order compelling Mr. Burger to testify in New York on November 13, 2023.

7. On October 23, 2023, Petitioner filed an Emergency Motion to Dismiss the Appeal on the grounds that the date for Mr. Burger’s testimony in the Order had already passed, and thus, the appeal was moot.

8. Upon request by this Court, the parties submitted memoranda outlining their respective positions as to whether the Court has jurisdiction to hear the 2<sup>nd</sup> Petition. Petitioner argued that the Court has jurisdiction to hear the 2<sup>nd</sup> Petition because the appeal of the Order was moot. In opposition, counsel for Mr. Burger argued that the Court was divested of jurisdiction over the dispute between Mr. Burger and Petitioner given the automatic stay in place during a pending appeal, and that the appeal was not moot because it necessarily involved the same issues

that would be before the Court when ruling on the 2<sup>nd</sup> Petition: (1) materiality, (2) necessity, and (3) undue burden.

### CONCLUSIONS OF LAW

9. “Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.” Rule 205, SCACR; *Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997). While the lower court retains jurisdiction over matters not affected by the appeal, it may not act or issue orders that affect an issue on appeal. *See generally, Arnal v. Fraser*, 371 S.C. 512, 518, 641 S.E.2d 419, 422 (2007); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 112, 576 S.E.2d 191, 197 (Ct. App. 2003) (discussing Rule 205, SCRAP). As to those issues on appeal, the same are subject to an automatic stay. *See, e.g.*, Rule 241(civil matters); Rule 246 (criminal matters).

10. In the present case, Mr. Burger appealed a final order of this Court that deemed him a necessary and material witness in the underlying criminal case of the *The People of the State of New York v. Briaco, et al.* and held that traveling to New York to testify would not impose an undue hardship upon him. Following his filing of an appeal of the Order, the South Carolina Court of Appeals has exclusive jurisdiction over the issues presented in that appeal.

11. That the 2<sup>nd</sup> Petition seeks Mr. Burger’s testimony on a different date, does not alter this Court’s conclusion that it lacks jurisdiction to rule upon the 2<sup>nd</sup> Petition. The 2<sup>nd</sup> Petition seeks to have Mr. Burger testify in the same underlying matter and for the same reasons as those set forth in the 1<sup>st</sup> Petition. Regardless of whether the Court is examining the 1<sup>st</sup> Petition or the 2<sup>nd</sup> Petition, the requisite findings to compel his attendance are identical. Specifically, in reaching a determination on the 1<sup>st</sup> Petition, this Court was required to, and did, rule on the issue of whether Mr. Burger is a necessary and material witness to the matter in New York and whether compelling

his attendance would cause Mr. Burger undue hardship given his health issues. *See* S.C. Code Ann. § 19-9-40; Order dated Oct. 3, 2023. These very same issues are central and necessary to the determination of the 2<sup>nd</sup> Petition; thus, the Court does not have jurisdiction to rule on the 2<sup>nd</sup> Petition as it involves identical issues to those on appeal. *See* Rule 205, SCACR.

12. Moreover, whether the present appeal is moot is a determination that will be appropriately made by the Court of Appeals when it addresses the Motion to Dismiss the appeal filed by the State of New York. The Court of Appeals granted the State of New York's request that the motion be addressed on an expedited basis and it set a shortened timeline for briefing on the matter. It follows a determination by the Court of Appeals on the Motion to Dismiss will be promptly issued, and if the appeal is dismissed, the Court may then rule on the New Application.

13. Finally, the Court is not persuaded by Petitioner's argument that it should hear the 2<sup>nd</sup> Petition because of the time constraint it now faces given the new deadline of November 13, 2023.

Accordingly, Petitioners request that the Court rule on its 2<sup>nd</sup> Petition is hereby **DENIED**.

IT IS SO ORDERED.



\_\_\_\_\_  
The Honorable Grace Gilchrist Knie  
Resident Judge, Seventh Judicial Circuit

Date: November 2, 2023

# EXHIBIT B



(1) Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal....

The Court has clear authority to lift the automatic stay pursuant to Rule 241(c), SCACR.

While the prior Order compelling Burger to testify on October 10, 2023 in New York is now moot, in the event the Court has any concern that it is divested of jurisdiction to hear the new Material Witness application, lifting the automatic stay is the correct step to take.

The purpose of the Uniform Act is to benefit all the criminal courts in the United States by securing the service of process on material witnesses by either the prosecution or the defense. To achieve this end, the Uniform Act “shall be interpreted and construed to effectuate the general purpose” of the Act. S.C. Code Ann. 19-9-10 to 19-9-130. A civil court rule must give way when it serves to thwart the clear legislative intent of the Act that judges, not witnesses, shall decide when a witness will appear pursuant to lawful subpoena.

Thus, the People ask the Court to lift the automatic stay on the appeal of the prior order and to enter an order on the new, pending material witness application.

RESPECTFULLY SUBMITTED,



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Charleston, South Carolina  
DATE: October 27, 2023

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CLERK OF COURT  
CHARLESTON COUNTY, SC

**CERTIFICATE OF SERVICE**

I, undersigned counsel for Respondent, hereby certify that on this date I have served all counsel in this action by using their primary email address.

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Charleston, South Carolina  
October 27, 2023

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THE STATE OF SOUTH CAROLINA  
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APPEAL FROM CHEROKEE COUNTY  
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Indictment No. 3885/2018

The People of the State of New York, ..... Respondent,

v.

Timothy Braico and Terrence Edwards, ..... Defendants.

In Re:

The Matter John Thomas Burger, Material Witness

John Thomas Burger..... Appellant.

**PROOF OF SERVICE**

I, undersigned counsel for Respondent, hereby certify that on November 3, 2023 I have served all counsel in this action a copy of the **REPLY SUPPORTING THE EMERGENCY MOTION TO DISMISS APPEAL DUE TO MOOTNESS** by emailing a copy to each attorney listed below using their primary email address.

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