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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-000572

Fast Formliners Company . . . . Appellant / Respondent,

vs.

Construction Resource Group, Inc. . . . . Respondent / Appellant,

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RESPONDENT / APPELLANT'S PETITION FOR REHEARING, MEMORANDUM IN SUPPORT THEREOF, AND SUGGESTION FOR REHEARING EN BANC

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Pursuant to Rule 221, SCACR, Respondent / Appellant Construction Resource Group, Inc., by and through its undersigned counsel, respectfully petitions the Court of Appeals for rehearing of various matters decided by Opinion No. 2025-UP-122, filed April 2, 2025 (referred to hereinafter as "**the Opinion**"). The primary appeal was taken by Fast Formliners Company ("**Formliners**"), and was focused on issues regarding attorneys' fees, taxable costs, and prejudgment interest. The cross-appeal was taken by Construction Resource Group, Inc. ("**CRG**"), and was focused on the issues of juror concealment and errantly admitted evidence. In general, the Opinion affirmed the trial court on all issues raised by CRG and reversed the trial court on all issues raised by Formliners. Therefore, CRG respectfully requests a rehearing of the following:

1. Whether the question of Formliners' entitlement to an award of contractual attorneys' fees is properly before this Court, which implicates rights under the State constitution, as well as the scope of this Court's jurisdiction;

2. Whether Formliners took a timely appeal from the adverse decisions of the trial court denying Formliners' request for an award of contractual attorneys' fees and pre-judgment interest, which implicates seemingly unsettled questions under the South Carolina Rules of Civil Procedure, as well as the scope of this Court's jurisdiction;

3. Whether CRG is entitled to a new trial as a result of juror concealment during voir dire, which also implicates rights under the State constitution; and,

4. Whether CRG is entitled to a new trial as a result of the admission of audio/visual evidence that was recorded and obtained in derogation of the South Carolina Homeland Security Act, S.C. Code § 17-30-10 et seq.

For the reasons set out below, CRG respectfully requests this Court to reconsider the Opinion and to grant a rehearing of the matters decided therein. Also, pursuant to Rule 219(b), SCACR, this Petition is joined by a suggestion for rehearing en banc.

MATTERS FOR WHICH REHEARING IS SOUGHT

I. THE OPINION REPRESENTS A MISAPPREHENSION, OR OVERLOOKING, OF THE LIMITATIONS ON THE COURT'S JURISDICTION TO ENTERTAIN MATTERS ON APPEAL THAT SHOULD HAVE BEEN, BUT WERE NOT, PRESENTED TO THE JURY FOR DECISION.

Formliners' appeal was based in substantial part on the decision of the trial court to refrain from making an award of contractual attorneys' fees to Formliners following a jury verdict in Formliners' favor on its breach of contract action. The Court did not find that it was error for the trial judge to have made no award of fees in Formliners' favor; but it did find that it was error for the trial judge to have failed to justify the award of no fees without making specific findings of fact. This conclusion assumes a circumstance that was very much disputed on appeal—whether the issue of attorneys' fees was preserved for appellate review, at all, or whether it was abandoned by Formliners not presenting the issue of contractual attorneys' fees to the jury at trial.

Under South Carolina law, an award of attorneys' fees pursuant to a "prevailing party" provision of a contract is a part of the plaintiff's compensatory damages in an action for breach of contract. See, e.g., Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978). And, because an action for breach of contract sounds in law, the constitutional right to a trial by jury is preserved inviolate. S.C. Const., Art. I, § 14; see, e.g., Peeples v. Hornik, 153 S.C. 321, 337, 150 S.E. 802, 808 (1929) (citation omitted); McCall v. IKON, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008). Consequently, if a plaintiff wishes to recover contractual attorneys' fees as part of a breach of contract action, the plaintiff must plead and prove those damages to a jury, if the case is tried to a jury.

In the instant case, Formliners sought an award of contractual attorneys' fees from CRG as part of its breach of contract action against CRG. The case was tried to a jury. The jury found in Formliners' favor on the breach of contract action. But, at trial, Formliners did not offer any evidence of attorneys' fees, did not request a jury instruction on the issue of attorneys' fees (or object to such a charge's omission), and did not object to the verdict form's silence on attorneys' fees. Instead, Formliners sought its fee award through a post-trial motion, (R. 71), which is appropriate for an award of <u>statutory</u> attorneys' fees—not for an award of <u>contractual</u> attorneys' fees in a matter tried to a jury.

At oral argument, it was suggested that the parties had come to an agreement that the issue of attorneys' fees would be reserved for post-trial motions. That is not exactly correct. On the first day of trial (during pre-trial motions), CRG's counsel mentioned that the contract in dispute "allows for attorney's fees, which we would reserve for a later time." (R. 135.) There was no further discussion at that time about attorneys' fees. The next time that attorneys' fees were mentioned was after the jury verdict, when Formliners' counsel advised the court that "we'll submit a written motion on the prevailing party attorney's fees issue." (R. 246.) Again, at that time, nothing further was said. The Opinion concluded that these circumstances form an agreement among counsel to reserve the question of contractual attorneys' fees for post-trial motions, which implicates Rule 43(k), SCRCP:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. . . .

According to the Opinion, "the parties agreed the circuit court would consider the issue of fees, costs, and interest after the jury adjudicated the competing breach of contract claims. The lawyers referenced this at trial." (Op. at 5.) Ostensibly, the type of Rule 43(k) agreement created was the type "made in open court and noted upon the record." (Op. at 5.) The Court is respectfully requested to take a closer look at whether, on the record presented, it is appropriate to consider these circumstances as capable of creating a waiver of a party's constitutional right to trial by jury on a material component of an opponent's claim.

If the issue of contractual attorneys' fees must be tried to the jury, then the Opinion must be vacated to the extent it holds that Formliners is entitled to a remand for the trial judge to make specific findings of fact to support its conclusion on the amount of fees to be awarded. After all, if the attorneys' fees issue was effectively waived by Formliners' failure to present the issue to the jury, then it was jurisdictionally improper for this Court to find error in the trial court's decision to refrain from awarding attorneys' fees and to send the matter back for further analysis. See, e.g., South Carolina Human Affairs Comm'n v. Zeyi Chen, 430 S.C. 509, 521, 846 S.E.2d 861, 867 (2020) ("Where Rule 43(k) applies, this Court has held its terms are mandatory . . . . Substantial compliance is not sufficient.").

II. THE OPINION REPRESENTS A MISAPPREHENSION, OR OVERLOOKING, OF THE LIMITATIONS ON THE COURT'S JURISDICTION TO ENTERTAIN MATTERS ON APPEAL THAT ARE THE SUBJECT OF SECOND, SUCCESSIVE MOTIONS FOR RECONSIDERATION AND FOR WHICH A TIMELY APPEAL WAS NOT TAKEN.

The Opinion summarily concludes that Formliners' appeal of the denial of an award of attorneys' fees and pre-judgment interest was timely. (Op. at 5.) This constitutes error.

On August 17, 2022, the jury returned a verdict in Formliners' favor. (R. 1.) On August 26, 2022, Formliners filed its motion for attorneys' fees and prejudgment interest. (R. 71.) Formliners' motion was denied by Form 4 dated September 22, 2022. (R. 3.) Then, on October 3, 2022, Formliners filed a motion for reconsideration of the order of September 22 denying an award of attorneys' fees and prejudgment interest. (R. 116.) This motion was also denied by Form 4 dated February 23, 2023. (R. 6.)

A material aspect of CRG's position on appeal was based on the following legal propositions, which are well-established: (1) that a party is entitled to file only one motion pursuant to Rule 59(e); (2) that a second motion pursuant to Rule 59(e) is not proper unless the decision resolving the first Rule 59(e) motion results "in a substantial alteration of the original judgment;" and (3) that the filing of a second, successive Rule 59(e) motion does not suspend the deadlines for filing a timely notice of appeal. See, e.g., Elam v. SCDOT, 361 S.C. 9, 20, 602 S.E.2d 772, 777 (2004) (citations omitted).

Formliners' first Rule 59(e) motion occurred upon Formliners' August 26, 2022 filing. (R. 71.) With respect to the part of the motion dealing with taxable costs, the motion is expressly predicated on Rule 54(d), SCRCP, which is the appropriate procedural mechanism. However, the motion is silent as to the procedural rule sustaining the request for attorneys' fees and interest. But this is important.

There is scant, but some, authority to suggest that a post-jury-trial request for an award of contractual attorneys' fees may be made under Rule 59(e).[1] See, e.g., Elam,

[1] To be clear, CRG does not concede this point. CRG maintains that an award of contractual attorneys' fees in a jury trial arising from a breach of contract action must be made by the jury. However, in the event that a trial court can award contractual attorneys' fees as part of a post-trial motion filed by the prevailing party, under Elam, it would seem to be the case that the motion must be made pursuant to Rule 59(e), SCRCP.

361 S.C. at 22-23, 602 S.E.2d at 777 (citation omitted). The same appears to be true for post-jury-trial requests for an award of prejudgment interest. See Hentges v. Hentges, Op. No. 2011-UP-513, at ¶ 6 (S.C. Ct. Nov. 28, 2011) (unpublished opinion) (citation omitted). To apply these propositions to the instant case:

1. The initial judgment of the trial court was an entry of the jury's verdict, which did not award—or contemplate—attorneys' fees or prejudgment interest;

2. By its August 26 motion, Formliners asked the trial court—by way of reconsideration pursuant to Rule 59(e)—to award attorneys' fees and interest, which was denied. As a result, there was no change whatsoever between the initial judgment of the trial court and the outcome of the invitation to reconsider that judgment; and,

3. Despite there being no change between the initial judgment and the order on reconsideration, Formliners filed a motion for reconsideration explicitly under Rule 59(e) to alter or amend the order denying the prior 59(e) motion.

If it is the case that the filing of a second Rule 59(e) motion requesting alteration of the disposition of the first Rule 59(e) motion, which itself "d[id] not result in a substantial alteration of the original judgment," is considered "successive" and does not suspend the time to file a notice of appeal, see, e.g., Elam, 361 S.C. at 20, 602 S.E.2d at 777 (2004), then Formliners' appeal of the denial of an award of attorneys' fees and interest is not timely. To be timely, Formliners' appeal of these issues should have been filed on or before October 22, 2022—30 days after the date on which the Form 4 denying the first Rule 59(e) motion was entered. The Opinion holds otherwise.

Formliners did not file a timely notice of appeal of the issues pertaining to attorneys' fees and interest. Accordingly, this Court did not have jurisdiction to consider—let alone reverse—the trial court's disposition of those issues.

III. The Opinion represents a misapprehension, or overlooking, of the Applicable Framework regarding Juror concealment and its consequences.

The Opinion affirmed the trial court's denial of CRG's motion for a new trial based on juror concealment. But, in reaching this decision, the panel of this Court appears to have applied the wrong analytical framework.

After principal briefing on this appeal closed, but before oral argument, the Supreme Court issued a decision that altered decades of precedent regarding juror concealment. State v. Rowell, 444 S.C. 109, 906 S.E.2d 554 (2024). Instead, at the time of CRG's trial, the pertinent standards regarding juror concealment were established by State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014). Rowell does not state—one way or the other—whether it has retroactive application. However, because a party's right to exercise peremptory juror strikes has historically been characterized as a "substantive right," see, e.g., State v. Harding, 70 S.C. 395, 50 S.E. 11 (1905), and because intervening appellate decisions that affect a litigant's substantive rights have been given only prospective effect, see, e.g., Lord v. D&J Enters., Inc., 407 S.C. 544, 757 S.E.2d 695 (2014), it seems the analysis pertinent to CRG's issue on appeal regarding juror concealment would be controlled by Coaxum, not Rowell.[2] Yet the Opinion appears to apply Rowell, not Coaxum. And because the analytical frameworks established by Coaxum and Rowell are so different, the error is not harmless.

The threshold issue under Coaxum is whether a juror's response to a question propounded during voir dire was accurate and honest. If it was not, then it is concealment, at which point the court must proceed to examine whether the concealment

[2] Even the Opinion expresses doubt that Rowell is applicable to CRG's position on appeal: "It is not clear that Rowell applies to this case. Rowell was decided long after this case was tried . . . ." (Op. at 5.)

was “intentional” or “unintentional.” To the best of the undersigned’s knowledge, our appellate courts never defined what “intentional concealment” is; instead, the appellate courts defined what “unintentional concealment” is, and used that definition to contrast and describe the circumstances that comprise “intentional concealment.” Consistent with the Supreme Court’s decision in Coaxum, “unintentional concealment” arises when the question posed during voir dire:

1. Is ambiguous;
2. Is incomprehensible to the average juror; and/or,
3. Is, as to the subject of inquiry, so insignificant or removed in time that the juror’s failure to respond is reasonable under the circumstances.

A juror’s concealment that can be placed into these categories is “unintentional.” And, by implication, a juror’s concealment that cannot be placed into these categories is “intentional.” The material difference between these forms of concealment arises with their consequences.

With respect to unintentional concealment, “no inference of bias can be drawn. [Instead], the moving party has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party’s exercise of its peremptory challenges. In other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias.” Coaxum, 410 S.C. at 329, 764 S.E.2d at 246 (internal citation omitted).

Not so with respect to intentional concealment. The party seeking relief from a juror’s intentional concealment “need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party’s inability to strike the juror is

apparent." Id., 410 S.C. at 328-29, 764 S.E.2d at 246 (citation omitted). If the intentional concealment is discovered before the jury has rendered its verdict, the trial judge may either replace the juror or grant a mistrial. If the concealment is not discovered until after trial, then presumably, the only recourse available is a new trial.

By contrast, under Rowell, once a circumstance suggesting concealment has been discovered (either before trial or after), the trial court should hold a hearing to determine whether the concealment evidences a potential for bias. If such a potential is established, then, before excusing a juror or granting a new trial, the court must evaluate whether the concealment evidencing a potential for bias would have made an objectively material difference in a party's choice to request a strike for cause or to exercise a peremptory strike.

In short: under Coaxum, a party complaining of juror concealment has the burden of proving prejudice when the form of concealment is unintentional, but prejudice is presumed when the form of concealment is intentional; under Rowell, there is no distinction between intentional and unintentional concealment, and the party complaining of concealment has the burden of proving both a potential for bias and prejudice.

Were CRG's position on juror concealment analyzed under Coaxum, a new trial would have been granted. The voir dire question at issue was as follows:

> The Court: This is a breach of contract case involving work at Construction Resource Group's business located on Brown Creek Road. We did have one individual earlier who indicated he had worked for Construction Resource Group. Is there any member of the jury panel have [sic] any connection with anybody or the site, the location of Construction Resource Group at Brown Creek Road here in Union? If so, please stand.

(No response given.)

The Court: Thank you. No one stands.

(R. 125:4-13.)

Immediately following trial, CRG learned that a member of the jury failed to disclose that her "best friend" is the spouse of the quality control manager for CRG. As evidenced from the excerpt from voir dire quoted above, the juror did not disclose this circumstance in response to a direct question from the trial court. Under Coaxum, this is concealment, and the question then becomes whether the concealment is intentional or unintentional.

The trial court's question was very simple: *does anybody have any connection with Construction Resource Group or anybody there?* The question is not ambiguous; it is not incomprehensible; and the condition of someone being the best friend of a member of CRG's management cannot be said to be so remote in time as to constitute a justifiable excuse for non-disclosure. Accordingly, by the Supreme Court's definition, the type of concealment raised by CRG is not "unintentional;" it must necessarily be "intentional." And the consequence of intentional concealment not discovered until after trial is a new trial.

The Opinion does not undertake this analysis. Immediately after expressing doubt that Rowell applies to CRG's appeal, the Opinion proceeds to analyze CRG's appeal under Rowell. The Opinion acknowledges that the trial court held a post-trial hearing on CRG's motion for a new trial based on juror concealment, but then holds that CRG "had the burden to present evidence in support of its juror concealment claim," which "consisted of two affidavits." (Op. at 5-6.) The veracity of the affidavits has not been questioned. And, based on the information in the affidavits, the juror failed to disclose

information during the course of voir dire under circumstances that were not "unintentional."

Regardless, the Opinion concluded that "nothing suggests the juror in question was potentially biased against [CRG]." (Op. at 6.) But that conclusion is not relevant to the Coaxum analysis. Under Coaxum, bias and prejudice are presumed in the event of intentional juror concealment.

The Opinion also holds that the voir dire question propounded was "not a model of clarity." (Op. at 6.) But that is not the standard. Under Rowell, a voir dire question that is less than "a model of clarity" may be relevant to the evaluation of whether a juror's concealment reveals a potential for bias. Under Coaxum, though, the standard is not whether the voir dire question could have been asked better; it is whether the question, as asked, is "ambiguous" or "incomprehensible." The Opinion reaches neither of those conclusions. The Opinion also observes that, contrary to CRG's suggestion of prejudice arising from concealment, "one might reasonably infer that if the juror's friendship with the wife of a [CRG] employee suggests any potential for bias, it would suggest bias in [CRG's] favor." (Op. at 6.) Perhaps. And perhaps not. The inference of favor or bias rests wholly on speculation.

The Opinion references the fact that "nobody challenged [] the procedure the circuit court used here" to evaluate CRG's request for a new trial for juror concealment. (Op. at 5.) Which is true. But it cannot be forgotten that, at the time CRG raised the issues regarding juror concealment to the trial court, it was following the procedure established by Coaxum; Rowell wouldn't be decided for two more years.

In conclusion, the Opinion should be reconsidered to the extent that it relies on Rowell, that it neglects Coaxum, that it fails to find an instance of intentional juror concealment, and that it declines to award CRG a new trial.

IV. THE OPINION REPRESENTS A MISAPPREHENSION, OR OVERLOOKING, OF THE STATUTORY FRAMEWORK GOVERNING UNAUTHORIZED SURVEILLANCE EVIDENCE AND ITS ADMISSIBILITY.

The Opinion affirmed the decision of the trial court in declining to grant a new trial based on the admission of evidence, over objection, consisting of videos taken by a Formliners employee on his mobile phone of CRG's facility, recorded without CRG's permission and against CRG's posted policies, on which voices of CRG employees were recorded without their knowledge. (Op. at 6.) Before and during trial, CRG objected to the admission of these videos into evidence based on the plain language of South Carolina Code § 17-30-65, which is a provision of the South Carolina Homeland Security Act, and which provides that, "[w]henever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communications and no evidence derived therefrom may be received in evidence at any trial, hearing, or other proceeding in or before any court." S.C. Code § 17-30-65(A) (emphasis added). The trial court allowed the video portion of the recordings into evidence but excluded the audio portion. On appeal, the panel of this Court held that "no 'interception' of wire, oral, or electronic communication" had occurred, and therefore, there was "no basis under this act to exclude this evidence." (Op. at 7.)

The Opinion's conclusion that an "interception" did not occur is contrary to the statute. "Intercept" is a defined term, which "means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." S.C. Code § 17-30-15(3).

It was undisputed that the mobile phone recording procured by Formliners' employee captured the voices of CRG employees on the videos that were submitted into evidence at trial. There is no evidence or suggestion that any CRG employees had actually or implicitly given their consent to be recorded. Cf. S.C. Code § 17-30-30(C). Consequently, as a purely definitional matter, the recording taken by the Formliners employee would appear to be an "interception."

The Opinion finds that Formliners' mobile phone recording was not an "interception," though, by focusing on the portion of the definition of "interception" referring to the phrase "electronic, mechanical, or other device." (Or. at 6.) This phrase is defined, and in relevant part "means any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than . . . (a) any telephone or telegraph instrument, equipment, or facility, or any component thereof: (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business." S.C. Code § 17-30-15(4)(a)(i). The Opinion then proceeds to find (perhaps implicitly) that the Formliners employee who was performing the recording was acting in the ordinary course of Formliners' business. Consequently, by virtue of the fact that Formliners' employee was using his mobile phone to obtain audio/visual recordings in furtherance of Formliners' business, he was not engaged in an unlawful interception of oral communications.

The implications of this construction are sweeping. It cannot be the law of this State that any use of an electronic device to intercept the communications of others

without their authorization is permissible so long as: (i) the device is a mobile phone; and (ii) the interception is in furtherance of the recording-party's business.

The Homeland Security Act was passed in 2002. At that time, mobile phones were just that: a mobile phone. That is not the case anymore. Mobile phones are cameras; they are calculators; they are calendars. They can take dictation, send text messages and emails, give directions, facilitate Web-browsing, pay bills, and play music. They allow us to work remotely, and at the same time, shackle us to constant work. Through them, we have access to the sum of human knowledge. And Wordle. In short, perhaps the least useful feature of a mobile phone has become its ability to be used as a phone.

In the instant case, the Formliners employee who was recording CRG's operations and personnel was using his mobile phone—not for communications—but as an audio/visual recording device. One has to wonder whether the decision of the Court with respect to the applicability of the Homeland Security Act would have been the same if the Formliners employee had been walking around CRG's facility with a camcorder. Or a television camera.

Suppose that, instead of using his mobile phone to record CRG's operations and personnel, the Formliners employee had used his mobile phone—not for communications—but to emulate a malicious Wi-Fi network in order gain access to the emails and text messages exchanged among CRG's personnel.[3] *Would this fail to be an*

[3] This hypothetical is not so far-fetched. Australian Fed. Police Press Release, June 28, 2024, Man charged over creation of 'evil twin' free WiFi networks to access personal data (available online at https://www.afp.gov.au/news-centre/media-release/man-charged-over-creation-evil-twin-free-wifi-networks-access-personal) (last accessed April 9, 2025).

“interception” under the Homeland Security Act? Under the reasoning of the Opinion, that may very well be the case.

Formliners should not have been excused from the consequences of the Homeland Security Act simply because its employee was using a mobile phone. And the evidence obtained from Formliners’ unlawful recording should have been excluded.

It seems significant to the reasoning of the Opinion that the trial judge excluded the audio portion of the recording and admitted only the visual components. (Op. at 7.) But this, too, is error. The statute plainly states that “[w]henever any wire, oral, or electronic communication has been intercepted, <u>no part</u> of the contents of the communications and no evidence derived therefrom may be received in evidence at any trial, hearing, or other proceeding in or before any court.” S.C. Code § 17-30-65(A) (emphasis added). CRG understands the Legislature’s use of the phrase “no part” to mean exactly that: no part. Not the audio component of an unlawfully recorded communication, and not the visual part. No part.

For these reasons, the trial court should have excluded Formliners’ recordings from evidence. The portion of the Opinion that affirms the trial court’s decision should be vacated, and the matter remanded for a new trial.

<u>CONCLUDING STATEMENT</u>

Consistent with the foregoing discussion, and for any other reason that may appear from the record, Respondent / Appellant would respectfully request this Court to grant this petition for rehearing, to vacate the judgment below, to order a new trial, and to provide such other and further relief as the Court deems just and proper.

Suggestion for Rehearing En Banc

Pursuant to Rule 219(b), SCACR, Respondent / Appellant respectfully suggests that the rehearing be entertained en banc.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned counsel for Respondent / Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): Respondent / Appellant's Petition for Rehearing & Suggestion for Rehearing En Banc

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Respectfully submitted,

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