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JUN 27 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLETON COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

Consolidated Case Nos. 2010-CP-10-5520; 2010-CP-10-7233;
2012-CP-10-5559; 2013-CP-10-3733; 2013-CP-10-4175; 2013-CP-10-4176

John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11,
John Doe 193, Father Doe 194, and John Doe 194.....Respondents,

v.

The Bishop of Charleston, A Corporation Sole, and
Robert Guglielmone, The Bishop of Charleston,
in his official Capacity, Rev. Monsignor Martin Laughlin,
former Administrator of the Diocese of Charleston, in his
Official capacity; Robert J. Baker, former Bishop of Charleston,
in his official capacity; Lawrence E. Richter, Jr., David K. Haller,
and Richter and Haller, LLC.....Defendants,

Of whom,

The Bishop of Charleston, A Corporation Sole, and
Robert Guglielmone, The Bishop of Charleston,
in his official Capacity, Rev. Monsignor Martin Laughlin,
former Administrator of the Diocese of Charleston, in his
Official capacity; and Robert J. Baker, former Bishop of,
Charleston in his official capacity, are.....Petitioners,

And Lawrence E. Richter, Jr.; David K. Haller; and
Richter and Haller, LLC, are.....Respondents.

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, the Petitioners respectfully request that the Court grant a writ of certiorari and review the Orders of the South Carolina Court of Appeals in this matter (dated May 24, 2017 and June 15, 2017), in which the Court dismissed the Petitioners' appeal. The Petitioners respectfully assert that the Court of Appeals erred in dismissing their appeal because at least one, if not both, of the challenged orders from the trial court were immediately appealable pursuant to S.C. Code Ann. §14-3-330.

STATEMENT OF THE CASE

This case arises out of allegations by the Respondents that they were abused by priests in the Diocese of Charleston many years ago. These claims have been extensively litigated as a result of a class action lawsuit filed in 2007 in Dorchester County. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (2014). The class action was resolved by way of a class settlement, which established a "fund from which awards would be made to claimants who established their sexual abuse claims by arbitration." *Id.*

These actions include consolidated civil Complaints filed by various plaintiffs, all represented by attorney Gregg Myers. The plaintiffs allege they are the victims of sexual abuse perpetrated against minors by agents of the Diocese parties. The plaintiffs in all of these various Complaints have also named as defendants Lawrence E. Richter, Jr. and David K. Haller, and their former law firm, Richer & Haller, LLC (collectively "the Richter Defendants").¹

Each plaintiff has alleged that he or she (or his or her child or spouse) was sexually abused, and that he or she is entitled to recovery under several legal theories including, but not limited to, negligent supervision, fraudulent concealment, and legal malpractice, breach of

¹ To avoid confusion, and because their respective interests are different, this Petition will refer to the plaintiffs as "Respondents" and to Richter, Haller and their former law firm as "the Richter Defendants."

fiduciary duty, and violation of the Unfair Trade Practices Act (as to the Richter Defendants). In addition the Petitioners and the Richter Defendants are all named in a cause of action for civil conspiracy.

In 2007 the circuit court approved a class action settlement in which the Richter Defendants served as class counsel. The court-approved class action settlement provided a mechanism in which primary sexual abuse claimants and loss of consortium claimants could participate in a process to resolve their claims through an arbitrator. The plaintiffs in these consolidated cases neither participated in this class action settlement opportunity, nor opted out of the class.

On October 26, 2016, the trial court in the current consolidated actions issued an Order Bifurcating Trial and an Order on Limited Collateral Review. In bifurcating the trial of this case, the trial court ordered that the Petitioners would first be required to proceed to trial on claims that the Respondents were sexually abused by priests. Then, following the conclusion of all sex abuse trials, the Petitioners and the Respondents would be required to participate in a second round of litigation involving the legal malpractice, breach of fiduciary duty, and civil conspiracy claims. The trials in that second round would also involve the Richter Defendants, who would not be required to participate in the first round of trials.

The Petitioners opposed both of the trial court's Orders and timely moved for reconsideration of those orders in November, 2016. The Petitioners asserted that this mode of trial would require them to try their case against each Respondent twice, and a verdict in the first case would not bring to a close the claims against them in the second case. Additionally, the Respondents would be required to try their cases against the Petitioners twice. Moreover, neither the Petitioners nor the Respondents would be able to appeal from the verdict or judgment in the

first trial until after the second trial had concluded. Put simply, the Petitioners contended that the mode of trial ordered by the trial court was manifestly unjust to both the Petitioners and the Respondents.²

On May 4, 2017, the trial court denied the Petitioners' motion to reconsider its Order Bifurcating Trial and, by separate order, its Order on Limited Collateral Review. At the same time as it issued those orders, the trial court issued a new Scheduling Order, which stated that the trials of these cases would begin on May 15, 2017, regardless of whether the Petitioners appealed its Order Bifurcating Trial and/or Order on Limited Collateral Review. Thus, the trial court clearly indicated that it would not recognize the automatic stay that would be triggered³ if and when the Petitioners filed a Notice of Appeal.

Following the issuance of these orders, the Petitioners filed and served their Notice of Appeal on May 4, 2017. Due to the trial court's refusal to acknowledge the automatic stay, the Petitioners also filed and served an Emergency Petition for *Supersedeas* Order to Stay Trial just hours after filing the Notice of Appeal.

On May 5, 2017, the Court of Appeals issued an Order in response to the emergency petition, which stated the following:

Appellants have served and filed a petition for supersedeas, requesting this court stay the trial scheduled for May 15, 2017. This court will act on the petition for supersedeas upon receipt and review of a return and reply. Pursuant to Rule 263(b), SCACR, and in light of the upcoming trial, Respondents' return shall be served and filed by noon on Tuesday, May 9, 2017, and Appellants' reply shall be served and filed by noon on Thursday, May 11, 2017.

² The Richter Defendants would not be subject to multiple trials against the same plaintiffs, and thus, the Order did not have any negative impact on their legal rights.

³ See Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . .").

[Order, p. 1.] Pursuant to that Order, the Respondents filed a Return on May 8, 2017. The Petitioners filed their Reply the following day.

The Richter Defendants also submitted filings to the Court on May 8, 2017. The Richter Defendants filed and served a Reply in opposition to the emergency petition, as well as a Motion to Dismiss the Appeal. Although the Petitioners contended that the Richter Defendants' filings were improper, the Petitioners complied with the Order out of an abundance of caution by filing and serving a Reply to the Richter Defendants' Return before the close of business on May 9, 2017. The Petitioners did not file a Return to the Richter Defendants' Motion to Dismiss because the time for doing so under Rule 240(e), SCACR, had not responded, and the Court of Appeals had not established any other deadline for filing a return to the Motion to Dismiss.

On May 11, 2017, the Court of Appeals issued a second Order. This Order granted the Richter Defendants' Motion to Dismiss and denied the emergency petition for *supersedeas*. The Petitioners responded to the Order by filing a timely Petition for Rehearing on May 12, 2017. In that petition, the Petitioners argued, *inter alia*, that the Court of Appeals had ruled on the Richter Defendants' Motion to Dismiss without allotting the full amount of time for the Petitioners to make a formal response.

Despite the fact the proceedings in the Court of Appeals were still ongoing, the trial court called the first of these cases to trial on May 15, 2017. Shortly after the trial court began its pre-trial tasks, however, the Petitioners and the plaintiff in that case reached a settlement. That settlement rendered the original *supersedeas* petition moot, but it did not resolve the status of the Petitioners' appeal.

In response to the rehearing petition, the Court of Appeals issued a second Order on May 24, 2017. That Order gave all parties fifteen days from the date of the Order (i.e. until June 8,

2017) to submit briefs on the appealability of the challenged lower court orders. The Petitioners and the Richter Defendants filed briefs arguing, respectively, for and against the appealability of the trial court's orders. The Court of Appeals issued on Order on June 15, 2017, in which it denied the Petitioners' rehearing petition and, in effect, reaffirmed its prior decision to dismiss the appeal.

ARGUMENT

Although the dismissal order did not set forth any substantive analysis, the Court of Appeals clearly concluded that the two challenged orders from the lower court were not immediately appealable. This decision constitutes an error which this Court should correct. As discussed below, the challenged orders were immediately appealable, and the Court of Appeals should have allowed the appeal to proceed. For this reason, this Court should grant a writ of certiorari to review the Court of Appeals' decision.

I. The order forcing the Petitioners to participate in multiple duplicative trials is immediately appealable because an appeal after final judgment could not provide any meaningful remedy.

South Carolina's appellate courts have jurisdiction to review:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. §14-3-330. In the present case, the challenged orders are immediately appealable under subsection (3) of this statute.

The “bifurcation order” affects the Petitioners’ substantial rights by imposing an immediate hardship on the Petitioners that a post-judgment appeal could not rectify or alleviate. The order requires the Petitioners to conduct two separate trials for the same case, without any ability to seek appellate review of trial errors in between. This requirement is prejudicial to the Petitioners (and also to the Respondents, for that matter) because it forces them to spend unnecessary amounts of time and money trying the same cases twice. It also creates a real and substantial risk of duplicative and/or inconsistent results in the successive trials.

Although the two trials would technically involve different causes of action against the Petitioners, the Petitioners would still be required to present the same testimony, exhibits and arguments in both. Some of the legal issues might be slightly different in the second trial, but for all practical purposes, the Petitioners would have to repeat the presentation of their case from the first trial. This unnecessary and prejudicial repetition would take place in every one of the cases that goes to trial. The end result would be several weeks’ worth of additional trial time and expenses that the Petitioners would have to incur for no compelling or legitimate reason.

The Respondents, specifically the Richter Defendants, may argue that there is a legitimate or compelling reason for this arrangement, but the Petitioners obviously disagree, and that is the whole point of this appeal. The trial court made a decision that has a tremendously

negative impact on the Petitioners' interests, both financial and strategic. That harmful impact will be immediate and effectively irreversible. For that reason, the Petitioners have exercised their right to have this Court review the trial court's decision. If the appeal proceeds, as it should, both sides will have a fair opportunity to present their arguments for and against that decision. If this Court conducts a full review and allows the decision below to stand, at least the necessary appellate oversight would have occurred before the harmful impact, not afterwards. Thus, this immediate appeal is proper and serves to protect the Petitioners' substantial rights.

Furthermore, immediate appellate review is necessary because even a successful appeal after a final judgment would not (and could not) provide the Petitioners any meaningful relief. If the Petitioners are forced to try each case twice before having an ability to seek appellate review, that review would be pointless. By that time, the Petitioners already would have spent the unnecessary time and money conducting multiple trials of the same cases. The costs and the limited attorney's fee available to a prevailing party on appeal would not come anywhere close to making the Petitioners whole for the expenses of numerous "double trials." Thus, any victory on a post-judgment appeal of the bifurcation order would be entirely Pyrrhic in nature.

This is especially true when one considers that the only remedy an appellate court could grant in that circumstance would be a new trial. This would merely add insult to the injury the Petitioners had already sustained. Granted, the Petitioners would have won their appeal, but the "victory" would simply mean the Petitioners would have to try each case a third time in a consolidated proceeding. The only way to avoid this absurd and unfair result is to recognize that the "bifurcation" order significantly affects the Petitioners' rights and to allow this appeal to proceed.

Although they have not addressed this specific factual scenario, South Carolina's appellate courts have found immediate appeals to be warranted in analogous cases where an appeal after a final judgment would not afford any meaningful relief. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (an order disqualifying a party's attorney in a civil case is immediately appealable because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the afflicted party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification."); *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004) (denial of a motion to proceed anonymously was immediately appealable because a post-judgment appeal would not adequately protect the party's claimed need for privacy); *Lakes v. State*, 333 S.C. 382, 510 S.E.2d 228 (Ct. App. 1998) (denial of a motion to proceed in forma pauperis was immediately appeal because otherwise the plaintiff could not pursue the case at all); *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993) (denial of a motion to dismiss for lack of subject matter jurisdiction was immediately appealable because this threshold issue had to be determined in order for the lower court to hear the case); *Knight Pub. Co. v. University of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) (order allowing discovery of materials claimed to be confidential was immediately appealable because it in effect determined the action and prevented any meaningful appellate review); *rev'd on other grounds, Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994); *Rutledge v. Tunno*, 63 S.C. 205, 41 S.E. 308 (1902) (denial of a motion to intervene is immediately appealable because the purported intervenor would have no other way to obtain appellate review).

Again, the present case falls into the same category. The Petitioners' substantial rights will already have been negatively impacted by the time of final judgments because the

duplicative trials (and the expenses stemming from them) will have taken place. At that point, even a successful appeal would only make things worse in terms of the time and expenses, as the Petitioners would have to try each case a third time.

Of course, it is possible that if immediate appellate review occurs, the appellate court could wind up affirming the “bifurcation” order. In that event, the Petitioners would be forced to incur the expenses of duplicative trials. But at least in that scenario the necessary appellate review would already have occurred, and all parties could go to trial in the knowledge that the trial court’s procedure had been deemed proper by higher courts. Thus, an immediate appeal is not only proper under the governing statute, but it also removes one potential basis for re-trials of these cases.

In addition, this Court has recently recognized that the simple fact an order is styled a “bifurcation order” does not determine its appealability. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In *Morrow*, the Court concluded the challenged order was immediately appealable, regardless of what it was called, because it implicated the appellant’s substantial rights. As the Court stated, “Our review of the trial court order is not constrained by how the order is styled.” *Id.* at 539, 773 S.E.2d at 147. The Court further cited *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 479 (Ct. App. 2011), for the proposition that “an appellate court should look to the effect of an interlocutory order to determine its appealability.” *Id.* at 540, 773 S.E.2d at 147 (emphasis added). As discussed above, the effect of the trial court’s order in the present case makes it immediately appealable under the statute, no matter what the order is called.

Morrow is important to the current issue because it undercuts the Respondents' primary argument for dismissal of the appeal. Citing two decisions by this Court,⁴ the Respondents claim there is a hard-and-fast rule that bifurcation orders are not immediately appealable. However, *Morrow* makes it clear that no such *per se* rule exists anymore (to the extent one ever did), and appellate courts must consider the effects of each individual order to make the determination. This is significant because the present case is very different than the situations that *Senter* and *Flagstar* presented.

Senter was a personal injury case involving disputed liability and significant damages claims. The defendant moved to bifurcate the trial into a liability phase and then, if necessary, a damages phase. The defendant based its motion on a belief that a jury would be unduly swayed by the damages evidence and would not pay sufficient attention to the question of liability. The trial court denied the motion, and the Court of Appeals dismissed the resulting appeal. This Court granted a writ of certiorari and affirmed the dismissal, concluding that participating in a standard trial procedure (i.e. liability and damages determined in a single trial) would not impact the defendant's rights. The present case, of course, does not involve the denial of a motion to bifurcate, and, therefore, *Senter* has no impact on the appealability of this order. Furthermore, even if *Senter* had involved the granting of a motion to bifurcate, such an order under those circumstances would not have required any party to re-litigate the same issues in a second trial.

Flagstar was a contract dispute between an insured and its excess insurer over the existence of coverage for payments of a class action settlement. The trial court granted the insured's motion to bifurcate the trial into two phases. The first would only address and determine the threshold issue of whether a specific exclusion in the excess policy applied. If the

⁴ *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000)

jury determined it did, the proceedings would end. If the jury decided the exclusion did not apply, the second phase would cover the remaining substantive issues, which were unrelated to the exclusion. The insurer appealed, and the Court of Appeals addressed the merits of the bifurcation order. However, this Court granted a writ of certiorari and reversed, concluding that “an order granting separate trials of issues in a contract case is not immediately appealable.” 341 S.C. at 73, 533 S.E.2d at 334. Significantly, though, the Court also took the opportunity to caution trial courts that bifurcation under Rule 42(b), SCRCF, is only appropriate for truly “separate issues.” *Id.* at 73, 533 S.E.2d at 333, n. 8.

Although *Flagstar*, unlike *Senter*, did involve an order granting bifurcation, the situation was much different than the one in the present case. The bifurcation order in *Flagstar* did not force either side to participate in duplicative trials covering the same issues. To the contrary, the first trial in *Flagstar* involved a completely separate threshold issue that had the potential to end the case. A second trial was only necessary if the party seeking coverage cleared that first hurdle, and even then the second trial did not involve re-litigating the same issue. Thus, assuming the threshold exclusion did not apply, the litigation of the remaining issues was necessary, regardless of whether that litigation occurred in one trial or two separate proceedings. In other words, *Flagstar* represented the bifurcation of truly separate issues, as contemplated by Rule 42(b), SCRCF.

No such tidy division exists in the present case. The challenged order is not really one of “bifurcation” as it applies to the Petitioners. It may be called a bifurcation order, but *Morrow* instructs the Court to disregard that label and examine the order’s effect on the Petitioners. As discussed above, the order forces the Petitioners to try the same case twice, several times over. Granted, the specific causes of action may be different, but both trials will necessarily involve

the same evidence, witnesses and arguments from the Petitioners. The second trial will be an unnecessary duplication of efforts for the Petitioners; there is simply no other way to state it. This was not the situation in *Flagstar*, and, therefore, that case is not controlling here.

Senter and *Flagstar* involved appellants who were merely dissatisfied with the planned methods of trying the cases because they preferred different procedures for strategic reasons. The appealing parties' challenges in those cases did not involve any immediate harm in terms of incurring unnecessary time and expenses. Accordingly, there was nothing to prevent meaningful relief from being afforded in appeals after final judgment. This is why those appeals were dismissed. The dismissals had nothing to do with what the orders were called. Rather, the dismissals were proper because immediate appeals were not necessary in order to correct the alleged errors and provide sufficient relief.

Here, on the other hand, the harm to the Petitioners will be immediate, and it involves much more than strategic disadvantages. The order will force the Petitioners to devote vast amounts of time and money to duplicative trials in several different cases. This is a much different kind of order than the ones seen in this Court's previous decisions.

Furthermore, under the Respondents' position, the Petitioners would have no right to appeal until the duplicative trials were finished. This means the harm to the Petitioners would have already occurred before they could seek any appellate review. For that reason, an appeal challenging the "bifurcation" order at that late stage would not provide any real remedy to the Petitioners. By that point, the harm could not be undone. As previously discussed, our appellate courts have not hesitated to allow immediate appeals of orders in analogous "no win scenarios" where an appeal after final judgment would not do the party any good.

While the Appellants may not be entitled to a trial in the exact format of their preference, they do have a substantial right not to be forced to try the same cases twice for no justifiable reason. The Petitioners also have a substantial right to obtain meaningful appellate review of alleged errors by the trial court. In the present situation, that fundamental right to appellate review is eviscerated if the courts force the Petitioners to wait until after a final judgment to present their arguments. The appellate court could technically still review the challenged order, but for all practical purposes, such review would be all form and no substance. Even a reversal would leave the harm to the Petitioners intact.

This is the real issue for purposes of determining appealability. The title the trial court gave to the order does not impact that decision, and for purposes of this petition, the Court should ignore that title. The challenged order immediately and irreparably harms the Petitioners in a way that no amount of proceedings after a final judgment could put right. For this reason, the order is immediately appealable under the statute, and the Court of Appeals erred in dismissing the appeal. This Court should now grant a writ of certiorari and review that erroneous decision.

II. The Court should also grant the petition to review the dismissal of the limited collateral review order.

The limited collateral review order also affects the Petitioners' substantial rights because it allows claims to proceed against the Petitioners when those claims should be barred by the previous court-approved class settlement. Thus, this order has the practical effect of denying and/or striking one of the Appellants' defenses. This makes the order immediately appealable under S.C. Code §14-3-330(2)(c). *See Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) ("An order affects a substantial right and is immediately appealable when ... [it] strikes out an answer or any part thereof or any pleading in any action.").

The previous court-approved class settlement was intended to bring closure to these types of claims against the Petitioners. This is why that settlement bars claims by anyone who should have presented those claims in the class. The Petitioners have asserted that bar as a legal defense in these claims, and that defense constitutes a threshold issue that the trial court should have fully addressed. Therefore, the challenged order is the functional equivalent of a ruling on the merits that the defense of the settlement bar does not apply. This constitutes the kind of decision that is immediately appealable.

Furthermore, even if the limited collateral review order were not itself immediately appealable, that would not warrant dismissal of the appeal. As previously argued, the bifurcation order is immediately appealable under S.C. Code Ann. §14-3-330(3). For this reason, the Court of Appeals could have – and should have – also reviewed the limited collateral review order. *See Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998) (an order not immediately appealable will nevertheless be reviewed if another appealable issue is before the court and review will avoid unnecessary litigation). The interests of judicial economy would best be served by addressing the merits of both issues on appeal simultaneously.

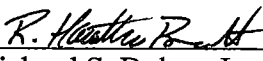
CONCLUSION

The Court of Appeals' decision to dismiss the appeal was erroneous. The so-styled "bifurcation" order will immediately and permanently harm the Petitioners, and an appeal after a final judgment would not serve any useful purpose. Either the Petitioners must be able to obtain appellate review now, or the harm stemming from the order becomes a *fait accompli* that is essentially unreviewable. The statute governing appealability is no so inflexible as to allow this kind of fundamentally unfair result to stand. Therefore, the Court of Appeals should have

allowed the appeal to proceed in the normal course, and the Court should have addressed both orders in the interest of judicial economy.

For all of these reasons, this Court should grant a writ of certiorari to review and reverse the Court of Appeals' decision to dismiss the appeal.

Respectfully submitted,


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ATTORNEYS FOR PETITIONERS

June 27, 2017

CERTIFICATION

Pursuant to Rule 242(d)(1), SCACR, the undersigned counsel for the Petitioners certifies that the Petitioners filed a timely Petition for Rehearing in the South Carolina Court of Appeals, which was finally denied in an Order filed on June 15, 2017.

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PROOF OF SERVICE

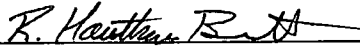
The undersigned, an attorney in this matter for the Petitioners, certifies that I have this
27th day of June, 2017, served copies of the Petitioners' **Petition for Writ of Certiorari** and the

Appendix upon counsel for the Respondents by causing them to be deposited in the United States mail with sufficient postage attached, addressed to:

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