THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417 (Court of Appeals)
Appellate Case No. 2018-001990 (Supreme Court)

In Re: The Estate of James Brown a/k/a James Joseph Brown,

Tommie Rae Brown.....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown ..... Respondents below,

Of whom Deanna Brown-Thomas, Yamma Brown, and Venisha Brown are the ..... Petitioners.

PETITIONERS' RETURN TO RESPONDENT'S PETITION FOR REHEARING PURSUANT TO RULE 221(A), SCACR

Petitioners oppose Respondent's Petition for Rehearing Pursuant to Rule 221(a), SCACR (the "Petition") of this Court's Opinion published June 17, 2020 (the "Opinion"), because it offers not a single new or compelling reason to overturn this Court's carefully considered unanimous decision.[1] Instead, Respondent's Petition (1) purports to rely upon dubious materials

[1] In re: The Estate of James Brown, Op. No. 27982 (S.C. Sup. Ct. filed June 17, 2020) (Shearouse Adv. Sh. No. 24).

correctly denied admission into the record by this Court; (2) improperly suggests, yet again, that this Court should base its ruling upon something other than the law; (3) misleadingly touts Respondent's purported settlement agreement, while continuing to conceal the true terms of her complete agreement with the Estate; (4) baselessly critiques the Court's straightforward application of well-settled bigamy law, mischaracterizing it as a "new record-clearing rule"; (5) twists this Court's obvious jurisdiction and conflates its holding regarding Respondent's facially bigamous second marriage with her first marriage; (6) continues to base her entire house of cards on the false construct that her first marriage was bigamous after stipulating below that she has no admissible evidence supporting this contrived assumption, and the only admissible evidence shows it was not bigamous; and (7) defies black-letter law regarding *in rem* orders and the preclusion doctrines. It therefore comes as no surprise that Respondent turns South Carolina's strong public policy against bigamy and well-settled due process standards upside down by rehashing arguments specifically addressed and cogently rejected by this Court.

For all of these reasons, and as more fully explained below, Respondent's Petition must be denied.

I. RESPONDENT'S PETITION DOES NOT SATISFY THE STANDARD FOR REHEARING.

It is well established that rehearing is only appropriate where the losing party can demonstrate that the Court misapprehended or overlooked their argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532; 564 S.E.2d 322, 322 (2001). Respondent does not even mention this standard, much less meet it. Importantly, to the limited extent Respondent makes

new arguments in her Petition, such arguments are waived.[2] For these reasons alone, her Petition must be denied.

II. RESPONDENT'S PETITION BLATANTLY DISREGARDS THIS COURT'S PRIOR RULING AND RELIES UPON INCOMPLETE EXTRA-RECORD MATERIALS ALREADY REJECTED BY THIS COURT.

This Court has already considered and specifically *rejected* a request by Respondent to supplement the record to include her purported "settlement agreement" with the Estate and a largely inadmissible Afterman affidavit.[3] Yet, much of Respondent's Petition is devoted to a self-serving and misleadingly incomplete description of her purported settlement in total disregard of this Court's ruling. This Court's decision is correct and requires no reconsideration. Rule 210(c), SCACR pellucidly provides that the record "shall not . . . include matter which was not presented to the lower court or tribunal." *See Williamsburg Rural Water and Sewer Co., Inc. v. Williamsburg Cnty. Water and Sewer Auth.*, 367 S.C. 566, 627 S.E.2d 690 (2006) (reversing the Court of Appeals for granting rehearing after considering documents attached to the Petition for Rehearing but not included in the Record on Appeal); *Jones v. Builders Inv. Group, LLC*, 415 S.C. 321, 330 at n. 7, 781 S.E.2d 737 (Ct. App. 2015) (noting motion to supplement record under Rule 212, SCACR, was denied when proposed supplement was not part of the record below). Neither Respondent's incomplete settlement agreement nor the Afterman affidavit was presented to or considered by the trial court, and neither document was included in the Record on Appeal before the Court of Appeals.

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[2] *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating the familiar rule that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge").

[3] *In re: Estate of James Brown*, Order entered December 12, 2009.

As Petitioners have noted before, *Williamsburg* is particularly instructive here, and not only because of its clear holding that after-created documents cannot be added to the appellate record.[4] Importantly, the *Williamsburg* Court faced the same situation as this Court does now, where a party was attempting to persuade the court to rule a particular way based upon supposed factors other than applicable law.[5] The after-created affidavit at issue in *Williamsburg* described plans and programs already underway in the context of a lawsuit determining whether development rights were exclusive, and indicated that a finding of exclusivity would compromise the expectations of others. The *Williamsburg* Court sharply rejected the Court of Appeals's inappropriate consideration of such expectations: "We know of no authority for the proposition that a court should construe a statute not by its terms, but rather by weighing competing interests."[6]

Likewise, as Petitioners argued in response to Respondent's first attempt to get these documents not in the record considered by the Court, the notion that federal copyright law is somehow applicable to the question of whether Respondent is a surviving spouse under South Carolina marital law is meritless. Instead, it highlights that Respondent attempts to pander and sway this Court's ruling with false and misleading statements regarding her supposed newfound charitable intentions and the Trust's purported "competing interests" based thereon.. As Petitioners have explained before and will summarize below, Respondent's recitation of the application and effect of copyright law on the Trust is wholly inaccurate. Even if it were not, it is not relevant to the simple question before this Court: whether Respondent is the surviving spouse of James Brown, after she obtained a marriage license, engaged in a marriage ceremony

[4] 367 S.C. 566, 627 S.E.2d 690.

[5] *Id.* at 367 S.C. at 570-71, 627 S.E.2d at 692-93.

[6] *Id*. at 367 S.C. at 571, 627 S.E.2d at 693.

and failed to annul (and instead, concealed) her first marriage before improperly obtaining a second marriage license and engaging in a marriage ceremony with Mr. Brown. This Court has thoroughly considered the applicable law and answered with a resounding "no". The Court must reject Respondent's utter disregard of its prior ruling regarding her irrelevant extra-record documents and deny Respondent's Petition.

III. RESPONDENT INTENTIONALLY MISLEADS THE COURT REGARDING HER PURPORTED SETTLEMENT AGREEMENT.

a. Respondent Misrepresents Her Real Settlement Agreement With the Estate and Trust.

Touting her sudden charitable intentions, Respondent misrepresents to this Court the actual terms of her settlement with the Estate and Trust, just as she did to the trial court and the Court of Appeals. One cannot forget, however, that immediately after James Brown died, Respondent filed suit to set aside his will and charitable Trust, suing for an elective share or omitted spouse's share of Brown's entire Estate and tying up his Estate and Trust for over a decade. Represented by four law firms and eight lawyers, Respondent sought millions of dollars notwithstanding her binding pre-nuptial agreement with Brown and her express promise in the 2004 Consent Order to never even claim to be Brown's common-law wife.[7]

In March 2017, Respondent suddenly announced and filed with the Court of Appeals what she represented to be "the Settlement Agreement" with the Estate and Trust—the same

[7] R. pp. 349-350, Joint Stipulation Exhibit 19. Respondent also suggests that the Estate's funds have been drained by the Children's opposition to her surviving spouse claim, but the facts belie her attempt to deflect her own responsibility. For years, the Estate vigorously contested Respondent's surviving spouse claim and stood adverse to her during the entirety of the lower court litigation. It was only when the surprise settlement agreement was announced, after initial briefing was complete in the Court of Appeals, that the Estate abandoned its long-fought position that Respondent was not the surviving spouse of James Brown.

purported "Settlement Agreement" she now, once again, seeks to present to this Court.[8] That agreement was as suspect then as it is now: The cosmetically charitable provision in the agreement, so heavily leaned on by Respondent, would appear to be engineered to reverse the negative optics surrounding her case. After years of financially motivated litigation, Respondent purports to suddenly assign financial proceeds to the Estate for no discernable consideration, inasmuch as this appeal of her spousal order would continue unabated.[9]

When Respondent and the Estate were asked by James Brown's children to either (a) simply represent that this "Settlement Agreement" contained all terms of her settlement or (b) disclose any side agreements relating to their settlement, they refused to do either. Thereafter, at an October 2017 trial court hearing regarding the settlement, Respondent and the Estate even refused to answer the court's direct question as to whether any such side agreement existed, all but admitting its existence and their concealment of key settlement terms.[10]

James Brown's children subsequently filed suit, now pending in the District Court of South Carolina, because Respondent's evasion and tacit admissions indicated a concealed side-

[8] Respondent's Petition for Rehearing, p. 2 n.1 and Exh. A; Respondent's Motion for Leave to Supplement Pursuant to Rules 212 and 240, SCACR, p. 3 and Exh. A; Appx. pp. 57, 190-191, Petitioners' Petition for Rehearing (to Court of Appeals) at 5, Petitioners' Reply in Support of Petition for Rehearing (to Court of Appeals) at 10-11. Respondent's continued intimations or suggestions that Petitioners have refused to engage in settlement discussions with the Estate are false and misleading. Petitioners were wholly unaware that any settlement negotiations were taking place, much less that any agreement had been reached, until the day they were served via U.S. Mail with Respondent and the Estate's Joint Motion to Stay Appeal Pending Consummation of Settlement. The fact that Petitioners were kept in the dark is yet another reason why Petitioners suspect that Respondent's full and complete agreement between with the Estate is detrimental to their interests, despite the fiduciary obligations owed to them.

[9] Respondent repeatedly hypes the assigned amount as "tens of millions of dollars" without any citations or basis.

[10] *See Deanna Brown-Thomas, et al v. Tommie Rae Hynie, et al* (Case no. 1: 18-cv-02191-JMC), DE 59, Declaration of Robert C. Byrd, Ex. 5 at 10:22-11:24 (more fully describing factual events and attaching relevant transcript) and *In re: Estate of James Brown,* Appellate Case No. 2018-000104 (same).

agreement (the "Concealed Agreement") aimed at trafficking in or diluting their federal copyright interests in exchange for significant undisclosed compensation to Respondent.[11] In that federal action, the defendants proceeded to stonewall disclosure of their Concealed Agreement, while never denying its existence, and argued it was a "confidential settlement agreement" that should not be produced, even under a stipulated protective order.[12] This willful concealment is all the more troubling given that in *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013), this Court voided Respondent's 2009 Settlement Agreement (in which the Estate gifted Respondent a net 23.75% of its assets) for lack of consideration. In fact, the cosmetically charitable language in Respondent's current Settlement Agreement, combined with her Concealed Agreement, may well be an attempted end-run around this Court's 2013 decision.

b. Respondent Misrepresents the Nature and Effect of Federal Copyright Termination Rights.

Respondent's representations as to the nature and effect of termination rights under the U.S. Copyright Act, 17 U.S.C. §§ 304(c), 203(a), continue to be false and misleading.[13] First and

[11] *Deanna Brown-Thomas, et al v. Tommie Rae Hynie, et al* (Case no. 1: 18-cv-02191-JMC).

[12] *See Deanna Brown-Thomas, et al v. Tommie Rae Hynie, et al* (Case no. 1: 18-cv-02191-JMC), DE 185, Order and Opinion ("Here, the court observes that during the multiple hearings on the pending Motions to Dismiss, Defendants have never denied the existence of these alleged, secret agreements, which directly undermines any argument that Plaintiffs' claims are 'conjectural or hypothetical.' (ECF Nos. 144, 180.)") *See also, e.g.*, DE 103 at 11-12, Defendants Tommie Rae Brown and James Brown II's Memorandum of Law in Opposition to Plaintiff's Motion for Jurisdictional Discovery; DE 104 at 11-12, Defendant Russell L. Bauknight's Memorandum for the Estate and Trust in Opposition to Expedited Jurisdictional Discovery; DE 105, Defendant David C. Sojourner Jr.'s Memorandum in Opposition to Plaintiff's Motion to Oppositional Discovery.

[13] From the start, Respondent exhibits a willful misunderstanding of statutory termination rights. For instance, she repeatedly references the assignment of termination rights to the Estate when (a) the termination right is inalienable and persists "notwithstanding any agreement to the contrary" 17 U.S.C. §§ 304(c)(5), 203(b)(5) and (b) an advance grant to a third party of any

foremost, as Respondent must admit, James Brown long ago "assigned to music publishers" the copyrights to his musical compositions ("Composition(s)") "as is typical in the industry."[14] Thus, these Composition copyrights were never part of James Brown's Estate or charitable Trust to begin with and could never be. The potential future recovery of such Composition copyrights by his children under the Act cannot deprive the Estate/Trust of copyrights previously signed away by Mr. Brown to third parties.

Second, to set up her parade of horribles, Respondent has repeatedly misrepresented (again, without citation) that "all of James Brown's … songs will be terminable within the next 6 years," that "[t]he rights to income from most of James Brown's valuable songs can be terminated within six years" and that this would purportedly "redirect most of the annual royalty income" to the intestate heirs.[15] This is demonstrably false.

As to such pre-1978 works and grants, the earliest U.S. copyrights can be recovered is 56 years after the copyright is secured by registration or publication, whichever is earlier. 17 U.S.C. § 304(c). The exercise of termination rights by statutory Notice of Termination can be no less than 2 years nor greater than 10 years in advance. In deceptive wordplay, Respondent conflates the 10-years-advance notice of termination with the actual date of copyright recovery in stating that most "songs will be terminable within the next six years" (emphasis added).[16] In other words, in 2026, the statutory heirs could give 10-years-advance notice that copyrights will revert

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interest in a terminated copyright prior to the actual date of copyright reversion is also void. *Id*., §§ 304(c)(6)(D), 203(b)(4).

[14] Resp. Pet. for Rehearing, Ex. B. Affidavit of Peter Afterman at 3 ¶ 3, also attached to Resp. Mot. to Supplement Record, Ex. B.

[15] Resp. Mot. to Supplement Record at 2 and n.3; *see also* Resp. Pet. for Rehearing, Ex. B, Affidavit of Peter Afterman at 4 ¶ 6.

[16] Resp. Mem. in Support of Mot. to Supplement, p. 2.

in 2036. James Brown wrote or co-wrote over 1,100 Compositions.[17] To date, based on the Compositions' dates of registration/publication, only about 70 Composition copyrights (out of 1,100) are subject to recovery (the last being "How Long Darling" registered on May 20, 1964 and recovered by statutory heirs 56 years later on May 21, 2020). *Id*.

The truth about "the next 6 years" is that a total of 189 (of approximately 1,100) Composition copyrights are recoverable (the last is "I'm Not Demanding" registered on June 1, 1970 and recoverable on June 2, 2026). *Id*. Of these, only a handful could be considered James Brown's valuable songs. For instance, the Composition copyrights to hits like "Sex Machine", "Make It Funky" "Get Up", and "Soul Power" first published in the mid-to-late 1970s, are not recoverable under the Copyright Act until mid-to-late 2036, and so on until mid-2043. *Id.* Respondent's desperate mischaracterizations of immediacy are belied by the facts and law.

Respondent makes many other misstatements, but a correct understanding of the law undermines her conclusory arguments. Given that none of Respondent's incorrect arguments are at all relevant to the legal determination of whether Respondent is or is not the surviving spouse of James Brown, a thorough discussion of her mistakes is unnecessary. Nevertheless, a few examples may be helpful to demonstrate to the Court that Respondent's arguments are wholly unfounded.

First, as the Copyright Act has no extra-territorial application, statutory termination has *no effect* on the Compositions' foreign copyrights and the Estate's substantial foreign revenues in the form of royalties from these copyrights. *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 72 (2d Cir. 1988; 3 Melville Nimmer and David Nimmer, *Nimmer on Copyright* § 11.02[B][2] at 11-19.). As a second example, Respondent vaguely refers to "songs", however, the statutory

[17] https://www.discogs.com/artist/12596-JamesBrown?limit=500&filter_anv=0&subtype=WritingArrangement& type = Credits&page=1.

terminations she refers to cover the copyrights to James Brown's Compositions, not his master recordings, or the revenues therefrom which notwithstanding such terminations remain the property of his Estate/Trust or his/their grantees. Because the copyrights to James Brown's Compositions were long ago signed away by him (*see* above), he received and his Estate continues to receive U.S. publishing royalties, which the Estate maintains are wholly unaffected by statutory termination, and notwithstanding the notices of termination, the Estate continues to be paid all its royalties by the leading collection agencies, BMI and ASCAP. Statutory termination also does not prevent the exploitation by the Estate/Trust of prior derivative works (e.g., James Brown's recorded songs) under what is known as the "derivative works exception", because such music recordings were created long before any statutory termination. *See* 17 U.S.C. §§ 304 (c)(6)(a), 203(b)(1).

Due to the way terminations legally function under the Copyright Act, Respondent's unsupported, transparently manipulative argument that the federal termination rights of James Brown's children will prevent Trust scholarships if she is not crowned his surviving spouse is completely spurious.

IV. THIS COURT CORRECTLY APPLIED PRECEDENT TO AFFIRM SOUTH CAROLINA'S LONG-STANDING PUBLIC POLICY AGAINST BIGAMY.

Setting aside Respondent's utter disregard of this Court's prior order that her purported settlement agreement and Afterman affidavit may not be introduced into the appellate record, all that remains is Respondent's rehashing of unavailing arguments premised upon her convenient assumption that her first marriage was bigamous—an assertion for which she has zero admissible evidence. Because Respondent stipulated to this in the trial court, her arguments construct

nothing more than a house of cards.[18] As more fully explained below, this Court's detailed, well-reasoned Opinion must stand because it is firmly grounded in South Carolina law and fundamental due process.

A. This Court's Opinion is Not a "New Record-Clearing Rule" But a Faithful Application of S.C. Code Ann. § 20-1-80 and *Lukich*.

As the Opinion correctly held, under *Lukich's* pragmatic, bright-line rule Respondent is not James Brown's surviving spouse. The rule in South Carolina, as set forth in S.C. Code Ann. § 20-1-80 and as interpreted by this Court both in the instant case and in *Lukich*, is that a spouse's annulment of her first marriage after her attempted second marriage does *not* relate back so as to validate her bigamous second marriage. *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907. This Court rightly concluded in *Lukich* that "[a]ny other construction of S.C. Code Ann. § 20-1-80 would lead to uncertainty and chaos" no better exemplified than by Respondent's

[18] Indeed, all of the admissible evidence before the Court points to the contrary. Ahmed's own sworn statement in his marriage application is that he was not married at the time he married Respondent. R. at 643, Application for Marriage License, attached as Exh. 3 to LSA Memorandum in Support. The Court acknowledged that sworn statement in its Opinion, along with a 2014 affidavit from a Georgia lawyer and a 2008 affidavit from a lawyer in Pakistan attested that Ahmed was located and said both that he was not married to anyone else at the time he married Respondent and that he and Respondent lived together after the marriage.

While Respondent suggests that marriage records do not exist for Pakistan, Pakistan is a modern country with a well-developed regulatory infrastructure and data collection systems. In Pakistan, as here, to be legally married one must obtain a marriage license, which is called a "Nikah Nama." *Pakistan: Information on Marriage Registrations, Including Mixed Marriages*, Immigration and Refugee Board of Canada—Responses to Information Requests, PAK104253E, 2, §3 (Jan. 14, 2013), available at

https://www.justice.gov/sites/default/files/eoir/legacy/2014/03/04/ PAK104253.E.pdf

(last visited May 7, 2016). Pursuant to the Muslim Family Law Ordinance of 1961, the Nikah Nama must be registered with the Nikah Registrar at the local Union Council. *Id.* Such records can be obtained from NADRA and/or the Karachi Union Councils via multiple internet services or attorneys in Pakistan. *See* http://inp.org.pk/nikkah-nama-registration; http://mamooinpakistan.com/services/marriage-certificate/. If the required records for Ahmed's alleged prior marriages existed, Respondent's qualified legal team would certainly have searched for, obtained, and presented such records.

tortured arguments, prolonging this case for over a decade. Indeed, this Court's Opinion notes that "[t]he uncertainty that arose as to Respondent's marital status in the current case and the lengthy legal process that ensued, to the detriment of all those concerned, is precisely the type of problem section 20-1-80 addresses by requiring the orderly recording of marriages and any terminations to facilitate the accuracy of the public record."[19]

It is undisputed that when Respondent attempted to marry Brown in 2001, she knew full well that she had previously obtained a marriage license and participated in a marriage ceremony with another man in Texas. It is also undisputed that before Respondent attempted to marry Brown, the critical moment in time under *Lukich*, she had neither sought a divorce nor any annulment of her first marriage, but chose instead to willfully conceal that marriage from Brown and the State of South Carolina. Those undisputed facts alone compel but one result under section 20-1-80: Her attempted marriage to James Brown was void under the bigamy statute, because Respondent did not have her first marriage "declared void by the sentence of a competent court" prior to attempting to remarry. S.C. Code Ann. § 20-1-80.

This Court's application of § 20-1-80 to the case at bar is neither new nor surprising. By circularly arguing that her 1997 marriage need not be annulled before her 2001 marriage due solely to the 2004 Annulment Order, Respondent openly contradicts *Lukich*'s central holding. Under *Lukich*, her *post-hoc* annulment of her first marriage after her facially bigamous second marriage cannot be used to retroactively validate the second marriage, as the bigamy statute "speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective." *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907 (emphasis added). The impact of the *Lukich* precedent to these facts is not "new"—it is

[19] Op. at 19; Shearouse Adv. Sh. No. 24 at 33.

predictable and straightforward, as this Court's Opinion made clear.

Likewise, it is willful distortion for Respondent to repeat the straw man that the Opinion renders bigamous marriages "effective" until voided by a court.[20] Instead, the Opinion affirms *Lukich's* practical statutory interpretation: a party to a marriage cannot ***remarry*** until that marriage is first "'declared void by the sentence of a competent court.'" *Id.*, 379 S.C. at 592, 666 S.E.2d at 907, *quoting* S.C. Code Ann. § 20-1-80. There is no "new record-clearing rule"; the plain language of the statute, public policy and, frankly, common sense compels this result.

As this Court rightly noted, "it is the rule set forth in section 20-1-80, not its exceptions, which is paramount" and that in the ten years since *Lukich* was decided, "the General Assembly has not carved out any exceptions to the threshold requirement that a party obtain a declaration of voidness from a competent court". Op. at 16; Shearouse Adv. Sh. No. 24 at 30.

B. The Court's Opinion Strongly Affirms South Carolina's Public Policy Against Bigamy.

The bigamy statute provides: "All marriages contracted while either of the parties has a former wife or husband living shall be void," except as to "any person . . . whose marriage shall be declared void by the sentence of a competent court," among other exceptions not relevant here. S.C. Code Ann. § 20-1-80 (emphasis added). The statute clearly says "shall be declared void," not "is void," reflecting that one who obtains a marriage license and engages in a marriage ceremony cannot unilaterally deem their marriage "void" without a judgment to that effect, when it is convenient to do so.

Lukich strictly construed the statute, holding that a first marriage must be "declared void" before entering into a second marriage. 379 S.C. at 592, 666 S.E.2d at 907. This is a bright-line timing requirement: "The statute speaks to the status quo at the time the [second] marriage was

[20] Resp. Pet. For Rehearing, p. 27.

contracted and does not contemplate either a prospective or retroactive perspective. Any other construction of § 20-1-80 would lead to uncertainty and chaos." *Id.* at 593, 666 S.E.2d at 907 (emphasis added). *Lukich's* holding and this Court's Opinion not only adhere faithfully to § 20-1-80, but also reflect the rule in 52 Am. Jur. 2d *Marriage* § 57, cited by the Court of Appeals in *Lukich*,[21] that a *post-hoc* annulment of a first marriage for any reason "does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid . . . there must be a new ceremony following the termination of the earlier marriage."

As the Opinion makes clear, the policy behind the statute and *Lukich*'s timing requirement is obvious: once a person like Respondent actively obtains a marriage license and participates in a marriage ceremony, her marital status in the eyes of the law is too important to be left to her convenient "subjective[]" beliefs that such marriage was void. *Johns*, 309 S.C. at 203, 420 S.E.2d at 858; *see also Perlstein v. Perlstein*, 204 A.2d 909, 911-12 (Conn. 1964) (alleged invalidity of a marriage must be judicially determined); *State v. Crosby*, 420 P.2d 431, 433 (Mont. 1966) (voidness must be determined by a court). As this Court rightly noted, "it is possible that a party could falsely claim (or mistakenly believe) that a marriage is bigamous, so requiring this point to be established in a formal setting with admissible evidence provides a verifiable method for ascertaining the parties' marital status."[22] Indeed, the bigamy statute mandates that such first marriage must be declared void by a competent court, and *Lukich* rationally construed the statute as requiring this prior to attempting a second marriage.

Respondent continues to argue that this unequivocal rule, set forth in *Lukich* without any exceptions, somehow applies only to "voidable" marriages, when *Lukich* and the bigamy statute

[21] *Lukich v. Lukich*, 368 S.C. 47, 55, 627 S.E.2d 754,758 (Ct. App. 2006).

[22] Op. at 17; Shearouse Adv. Sh. No. 24 at 31.

say no such thing.[23] Respondent's circular mantra that bigamous marriages are void *ab initio* is unpersuasive and legally irrelevant, as all annulled marriages are declared "*void ab initio*." *Splawn v. Splawn*, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993) (holding that there is "no legal distinction between a marriage which is annulled and one terminated by reason of bigamy. Legally, they are both void *ab initio*.").

It is thus no surprise that this Court, in *Lukich* and the present Opinion, affirmatively "rejected" attempts to distinguish between void and voidable marriages, particularly given the practical policy considerations driving the timing requirement central to its construction of the bigamy statute.[24] Instead, this Court has reaffirmed that a void/voidable distinction would foster a "legal fiction" and lead to "inconsistent" results[25] and reaffirmed that the statutory language makes no such distinctions.[26]

Respondent's disingenuous plea describes a mess of her own making and does not override settled South Carolina law. Respondent is not specially exempted from the bigamy

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[23] *State v. Sellars*, 140 S.C. 66, 134 S.E. 87, does not aid Respondent. There, Marriage 1 was not void, and if voidable, was never annulled, so Wife 1's attempted marriage to Husband 2 was invalid, leaving Husband 2 not criminally liable for bigamy. Thus, any discussion in *Sellars* as to a void/voidable distinction cited by Respondent is pure *dicta*. Nor is *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950), helpful, as it merely denied a putative spouse death-benefits due to bigamy. *Day* has nothing to say about when and how someone in an allegedly bigamous marriage can lawfully marry again.

[24] Op. at 16. Shearouse Adv. Sh. No. 24 at 30; *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907 ("[a]ny other construction of [] § 20-1-80 would lead to uncertainty and chaos").

[25] *Lukich*, 379 S.C. at 592–93, 666 S.E.2d at 907 (citing *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004).

[26] Op. at 16; Shearouse Adv. Sh. No. 24 at 30. Similarly, and as previously noted, in *Scarboro v. Morgan*, 233 N.C. 449, 452 64 S.E.2d 422,424 (1951), where a "void" marriage to a minor was annulled after a bigamous second marriage, the North Carolina Supreme Court held, as this Court did here and in *Lukich*, that the subsequent annulment order "would be effective only from [its] date [] and would not ... give retroactive validity to a bigamous [second] marriage." 233 N.C. at 452, 64 S.E.2d at 424 (195l) Pet. Br. p. 41, *see also* pp. 40-44.

statute. She actively obtained a marriage license and engaged in a marriage ceremony with another man in 1997.[27] In the four years before her attempted marriage to James Brown, Respondent could have annulled her first marriage, but instead, she opted to conceal it from both Brown and the State of South Carolina.[28]

Moreover, under South Carolina law, "after the impediment [of the first marriage] is removed . . . there must be a new mutual agreement" to enter into the second marriage, such as "by way of civil ceremony." *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005); *accord Prevatte v. Prevatte*, 297 S.C. 345, 349, 377 S.E.2d 114, 117 (Ct. App. 1989) (same); *Yarbrough*, 280 S.C. at 551, 314 S.E.2d at 16 (same). It is undisputed that Brown and Respondent did not marry after the 2004 annulment order of her first marriage, but that instead, Respondent covenanted never to claim to be even Brown's "common law" wife.[29]

Respondent is by no means an unsuspecting victim. South Carolina law is clear, and common sense (if not decency) requires that a person desiring the benefits of legal marriage has both a legal and moral obligation to disclose and resolve their prior marriage before re-marrying. *See Johns*, 309 S.C. at 202-03, 420 S.E.2d at 858-59 (noting that even "good faith" will not change this basic requirement). In the eyes of the law, what matters is that Respondent's "first marriage shall have been declared void by the sentence of a competent court" before she attempted to remarry. S.C. Code Ann. § 20-1-80. A long line of cases forbids exactly what Respondent tried here, and both *Lukich* and the Opinion reaffirms that *post-hoc* annulment orders can never be used to retroactively validate a facially bigamous second marriage.

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[27] R. p. 256, Joint Stipulation, ¶ 6.

[28] R. pp. 329-335, Joint Stipulation, Exhibits 15-16.

[29] R. pp. 258, 349, Joint Stipulation, ¶¶ 19-20 & Exhibit 19 at 1.

C. The Court Is Not Discriminatory In Its Application of South Carolina's Bigamy Statute to Respondent.

Despite Respondent's protestations to the contrary, the Court's Opinion does not apply *Lukich* any differently to Respondent's attempted marriage to James Brown marriage than to her first marriage. This is true whether the accusation is considered from the perspective of South Carolina's marital law or the Equal Protection Clause. As an initial matter, Respondent has never before premised her arguments on the federal Constitution, and all such arguments are waived. Should this Court nonetheless entertain them, they are devoid of merit.[30] Simply put, the issue before this Court was not whether Respondent's first husband or James Brown could remarry. Indeed, bigamy by its definition cannot exist unless and until a previously married party attempts a second marriage, and there's no evidence that her first husband or James Brown attempted to remarry. Instead, the question is whether Respondent's putative second marriage is bigamous under S.C. Code Ann. § 20-1-80 due to her concerted failure to terminate her first marriage by the sentence of a court before attempting to remarry.

In this regard, it is also worth noting that all of Respondent's arguments, like in all her briefs, are falsely premised on the unproven assumption that her first marriage was bigamous when, in fact, she stipulated below that she has no evidence of this and the unlitigated findings in her post-hoc *in rem* annulment order are not binding on Petitioners. Even worse for Respondent, the only admissible evidence in the record indicates that her first marriage was not bigamous.[31]

D. The Court Correctly Applied Its Holding to Respondent.

Respondent inexplicably asserts, for the first time, that the simple application of a nearly 150-year-old statute and public policy against bigamy should only apply prospectively.

[30] Respondent makes no citations to any authority in these sections of her Petition.

[31] See n. 18 above.

Notwithstanding her argument's lack of merit, it has been waived because it was never presented below.[32]

In South Carolina, prospective application is only required if liability is created where none previously existed. *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508 S.E.2d 565 (1998). There is no new creation of liability by the Opinion here. As this Court has recognized time and time again, prospective effect generally makes sense with respect to a *new* statute enacted by the legislature, although even new enactments can sometimes be given retroactive effect. *See Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 720 S.E.2d 462 (2011) (analyzing statutory *amendments* to determine whether remedial or procedural in nature to warrant retroactive application). Here, no complicated analysis is necessary. As the Opinion recognizes, the current statutory language relating to bigamy that the Court construes, consistent with its decision in *Lukich*, dates back to at least 1873.[33] Moreover, the state's longstanding policy and laws against bigamy date back to at least 1827 in published opinions. *See State v. Britton*, 4 McCord 256 (S.C. 1827).

Indeed, the *Lukich* decision is more than a decade old, and the Court's Opinion today does not vary from it. Importantly, *Lukich* itself applied retroactively, as has every single case Petitioners cite regarding the application of South Carolina's long-standing policy against bigamy.[34]

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[32] *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating the familiar rule that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge").

[33] Op. at 16; Shearouse Adv. Sh. No. 24 at 30) (quoting *Davis v. Whitlock*, 90 S.C. 233, 237, 73 S.E. 171, 172 (1911)).

[34] Moreover, it is well established law that civil litigants at bar get the benefit of their efforts. Indeed, even in civil cases where (unlike here) a new rule is announced, it applies both in that case and future cases. *See e.g.*, *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508 S.E.2d

Stated simply, there is no legal support for Respondent's contention that the Opinion is "new" or surprising. As explained above, there is no "new record-clearing rule" as Respondent attempts to argue. This case instead entails the simple application of a long-standing statute to stipulated facts in arriving at an appropriate legal conclusion. Retroactive application is the only appropriate result.

V. THIS COURT CORRECTLY APPLIED JURISDICTIONAL LAW REGARDING SURVIVING SPOUSAL STATUS

The Court rightly holds that Respondent's strawman regarding "religitating" the annulment of her first marriage is unavailing. As the Opinion correctly acknowledges, Petitioners do not "seek to overturn the annulment or the family court's order."[35] Again, Respondent's pages upon pages of repetitive recycled arguments are meritless, cannot satisfy the standard for rehearing and thus her Petition must be denied.

a. This Court Correctly Determined That It Has Subject Matter Jurisdiction and That Petitioners Have Standing.

Respondent persists in arguing both that the circuit court lacks jurisdiction to determine spousal status in a probate matter and that Petitioners lack standing, without any legal basis for either assertion. Her arguments regarding subject matter jurisdiction are particularly strange, inasmuch as (1) Respondent was the moving party asking the trial court to make this determination and (2) Respondent's denial of subject matter jurisdiction is based on her willful misapprehension of the well-settled doctrines regarding *in rem* orders.

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565 (1998) (holding revised view of assumption of risk doctrine applied to present case as well as prospectively); *Ludwick v. This Minute of Carolina*, 287 S.C. 219, 337 S.E.2d 213 (1985) (same with respect to recognition of tort of wrongful discharge of employee in violation of public policy).

[35] Op. at 7, n.7; Shearouse Adv. Sh. No. 24 at 21 n.7.

The circuit court properly has subject matter jurisdiction over this matter and Petitioners have standing because this matter arises in the circuit court under the South Carolina Probate Code, not in family court. The Probate Court has exclusive jurisdiction to determine the heirs of an estate, including purported spouses. *See* S.C. Code Ann. § 62-1-302 (a)(1); *Thomas v. McGriff*, 368 S.C. 485, 488, 629 S.E.2d 359, 360 (2006) (stating the determination that a party is an heir of a decedent is within the probate court's exclusive jurisdiction); *see also* S.C. Code Ann. § 62-3-105; *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950) (determining spousal status in the circuit court in connection with determining eligibility for post-death benefits); *Ex parte Blizzard*, 185 S.C. 131, 193 S.E. 133 (1937) (determining competing surviving spouse claims in context of probate proceedings); *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906) (same). Respondent's resistance to this legal reality is impossible to reconcile with, *e.g.*, *Palm v. Gen. Painting Co.*, 302 S.C. 372, 374, 396 S.E.2d 361 (1990), where this Court ordered the circuit court to allow the plaintiff in a death-benefits case to litigate issues already covered by the findings of fact and conclusion of law in not just one, but <u>two</u> *in rem* <u>family-court</u> orders.

The trial court conclusively determined that Petitioners are "interested persons" under Section 62-1-201(2) of the South Carolina Probate Code in multiple ways: heirs, devisees, children, and beneficiaries.[36] Respondent chose not to appeal that ruling, making it law of the case. Ironically, it is Respondent who argues that the outcome of this proceeding will have important ramifications in areas as far-reaching and undeniably personal to Petitioners as their

[36] Order Determining Parties to Severed Omitted Spouse Claim, etc., Case No. 2008-CP-02-1647 (Feb. 7, 2014). As an additional ground for its decision, the trial court also explained that Sections 62-1-303 and 403 provide that the personal representative would <u>only</u> be able to bind the Decedent's children if there was no conflict of interest between them. Given that the Personal Representative and Limited Special Administrator have both steadfastly refused to disclose to Petitioners (to whom they owe a fiduciary duty), the concealed side-deal they struck with Respondent this case continues to present an obvious conflict of interest. *See* p. 3, *supra*.

federal copyright termination rights, all the while arguing that Petitioners have no standing.

As Petitioners have noted before, Respondent's arguments regarding subject matter jurisdiction and standing are based upon the repeated mischaracterization that Petitioners are somehow seeking to "re-litigate" the 2004 annulment of her first marriage. But as Petitioners have clearly and repeatedly stated, and as the Opinion notes, they have no interest in undoing that annulment. The Opinion's holding that Petitioners are not bound, however, by the factual findings in Respondent's 2004 *in rem* proceeding, to which they or their father were neither joined as parties nor could have intervened, is based upon well-established law (reiterated in Section VI below). Respondent's unsupported arguments regarding subject matter jurisdiction and standing reflect nothing more than an attempt to pivot away from the unbending truth that her *post-hoc* 2004 annulment of her first marriage cannot be used to retroactively validate her facially bigamous marriage to Brown in 2001.

c. The Opinion Is Not a Postmortem Annulment.

Likewise, Respondent's characterization of the Opinion as effectuating a postmortem annulment is yet another contorted deflection. It is the regular and ordinary duty of the probate court to determine the heirs to an estate, including a determination of whether an individual is or is not a surviving spouse under the Probate Code. *See e.g., Day,* 216 S.C. 334, 58 S.E.2d 83 (1950) (determining spousal status in the circuit court in connection with determining eligibility for post-death benefits); *Ex parte Blizzard*, 185 S.C. 131, 193 S.E. 133 (1937) (determining competing surviving spouse claims in context of probate proceedings); *Hallums*, 74 S.C. 407, 54 S.E. 613 (1906) (same). Respondent's partial quotations from the probate code regarding divorce and annulment willfully omit the foundational question which, of course, is whether the two individuals were ever legally married.

VI. THE COURT CORRECTLY APPLIED THE IN REM AND COLLATERAL ESTOPPEL DOCTRINES.

Here, again, Respondent completely mischaracterizes Petitioners' arguments regarding the 2004 annulment order in an attempt to distract this Court from the simple truth that the preclusion doctrines do not allow Respondent to bind Petitioners to the factual findings in a proceeding to which Petitioners and their father were not and could not have been parties. Yet again, Respondent never asserts that the Court overlooked or misapprehended her arguments here, and persists in simply rehashing arguments already thoroughly considered and rejected by the Court. Because the Court's Opinion on these basic questions of fundamental black-letter law is entirely correct, Respondent's Petition must be denied.

A. Petitioners are not bound by the factual findings contained in the *in rem* Annulment Order.

As to the preclusive effect of the 2004 *in rem* annulment order, Respondent continues to obfuscate the issue by conflating the binding effect of the annulment itself (*i.e.,* that Respondent's first marriage was irrevocably dissolved in 2004) with the non-preclusive effect of the Order's findings of fact, including her first husband's wholly unproven bigamy, amongst a laundry-list of annulment grounds.[37]

It is settled law that annulment orders are *in rem* orders. *Carnie v. Carnie*, 252 S.C. 471, 167 S.E.2d 297 (1969). As such, it "is binding on the world, including nonparties, only as to the decision regarding status, but it is not conclusive or binding on nonparties as to the underlying facts upon which the decision is based, even those facts that are essential to its determination…".[38] Thus, the 2004 annulment order, as a judgment *in rem*, binds the entire

[37] R. pp. 293-296, Joint Stipulation, Exhibit 12.

[38] Op. at 9; Shearouse Adv. Sh. No. 24 at 23.

world as to its dissolution of Respondent's first marriage on April 15, 2004. As noted in the Opinion, Petitioners have no interest in "revivifying" that marriage, and none of the relief requested by Petitioners would have that effect.[39]

Respondent's straw-man "re-litigation" argument keeps reappearing because her spousal claim hinges on improperly binding Petitioners to the Order's purported fact findings, even though Petitioners (like Brown) were not and could not have been parties to her annulment action.[40]

Respondent's do-or-die position on the preclusive effect of the *in rem* Order's "findings" is absolutely contrary to law. As this Court correctly pointed out, the issue is well settled.[41] The United States Supreme Court has held that "[e]stablishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world . . . ." *Becher v. Contoure Labs.*, 279 U.S. 388, 391, 49 S. Ct. 356, 357, (1929) (citation omitted); *see also Gratiot County State Bank v. Johnson*, 249 U.S. 246, 39 S. Ct. 263, (1919) ("judgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto") (citations omitted). As a judgment *in rem*, the Annulment Order is "not conclusive as to a fact upon which the judgment is based in any subsequent action . . . except as to persons who have appeared and actually litigated the question of the existence of the fact." Restatement (First) of Judgments § 73 (1942), cmt. c.[42]

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[39] Op. at 8; Shearouse Adv. Sh. No. 24 at 22.

[40] Indeed, Respondent admits that Brown "had no standing" to participate in Respondent's annulment action of her first marriage. Pet. for Rehearing p. 12, Resp. Br. p.7.

[41] Op. at 9-10; Shearouse Adv. Sh. No. 24 at 23-24.

[42] The Restatement is "consistently followed" in South Carolina. *Kunst v. Loree*, 404 S.C. 649, 656, 746 S.E.2d 360, 363 (Ct. App. 2013).

This explicit rule makes perfect sense given that family court proceedings often involve provocative and highly prejudicial allegations by spouses in a proceeding where no one else may appear.[43]

Thus, the Opinion's conclusion that Petitioners cannot be bound by the Annulment Order's findings (a "kitchen sink" list drafted by Respondent's counsel in a default setting) squarely rests upon the dispositive rule governing *in rem* judgments.[44] Respondent continues to ignore this settled law.

Respondent weakly tries to erase the distinction between an *in rem* change in marital status (which is binding on the world) and a finding of fact or law in an *in rem* order (which is not) by redefining "status" to include the unproven factual finding of her first husband's supposed bigamy.[45] This is the real "semantical feint"[46] that must be rejected. Respondent purposefully ignores that Petitioners concede and the Opinion acknowledges the "annulled" status of Respondent's first marriage as of April 15, 2004, notwithstanding that the factual findings in this *in rem* proceeding do not bind Petitioners. Respondent's parade of hypothetical horribles bears no resemblance to nor finds any support in any judicial doctrine Petitioners have been able to find, and, unsurprisingly, Respondent cites not a single case in Section XI of her Petition.[47]

Under South Carolina law, a "status" determination in an *in rem* divorce decree or

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[43] As noted in Petitioner's initial brief, pp. 16-17, Respondent's desire to bind third-parties to the factual findings contained in an *in rem* order is not only wholly unprecedented but dangerous, particularly as to the reputations and interests of third-parties who are unable to intervene in the subject proceeding to protect themselves.

[44] Op. at 10; Shearouse Adv. Sh. No. 24 at 24.

[45] Resp. Pet. for Rehearing, pp. 30-33; Resp. Br. p. 25; Resp. Ret. p. 18.

[46] Resp. Br. p. 8.

[47] Pet. For Rehearing, pp. 29-33.

annulment order includes only the determination of whether the marriage is dissolved as of the order's date – not any other issue. *Johns v. Johns,* 309 S.C. 199, 204, 420 S.E.2d 856,860 (Ct. App. 1992) *State v. Sellers,* 140 S.C. 66, 134 S.E. 873, 877 (1926). According to the Restatement, the existence of a status determined by an *in rem* judgment excludes any "fact upon which the judgment is based." Restatement (First) of Judgments §73 (1942), note a, cmt. c Likewise, the U.S. Supreme Court holds that the status determination in an *in rem* order excludes any "subsidiary questions of law on which it is based[.]" *Gratiot,* 249 U.S. at 248, 39 S.Ct. at 263.[31] By conflating a "status" determination (*i.e.*, dissolution) with "subsidiary questions" (*e.g.*, alleged bigamy), Respondent attempts to reverse United States Supreme Court and South Carolina precedent and undo the obvious distinction between an *in rem* status determination and a subsidiary finding of fact or law. *Id.* No authority supports this radical departure, and this Court's Opinion rightly rejected it.

Nor do Respondent's unsupported arguments regarding collateral estoppel provide any specific point misapprehended or overlooked by the Court. As the Opinion rightly notes, the doctrine of collateral estoppel is simply not applicable.[48] Respondents do not even begin to satisfy the elemental requirements of collateral estoppel because: (a) neither Petitioners nor Brown were a party or in privity with a party to the 2004 Annulment Action wherein (b) her first husband's alleged bigamy was never "actually litigated", since he defaulted, and the family court just adopted Respondent's unopposed hearsay and proposed order.[49] Collateral estoppel simply does *not* apply to either situation under clear South Carolina law. *See Carolina*

[31] Cited by Resp. at Br. p. 26.

[48] Op. at 11; Shearouse Adv. Sh. No. 24 at 25.

[49] Respondent misses the mark when she claims that Mr. Brown "accepted the benefits" of the family court order, inasmuch as Mr. Brown just pointed out that Respondent had made judicial admissions. Pet. for Rehearing, pp. 32-33.

Renewal, Inc. v. SC Dep't ofTransp., 385 S.C. 550,554 684 S.E.2d 779, 782 (Ct. App. 2009); *Palm v. Gen. Painting Co.,* 302 S.C. 372, 396 S.E.2d 361 (1990).

CONCLUSION

Perhaps in an attempt to garner sympathy, Respondent repeatedly and rhetorically asks when she could marry with confidence again. The question, however, is not rhetorical. This Court's thorough, well-reasoned Opinion is consistent with South Carolina marital law and constitutional due process and is easy to comply with. A person in South Carolina who previously obtained a marriage license and engaged in a marriage ceremony may legally marry again after obtaining an annulment or divorce of his or her prior marriage. To be fair, a decade of convoluted litigation could have been avoided if Respondent had simply annulled her first marriage (instead of concealing it) before attempting to marry James Brown in 2001, or, alternatively, if Respondent and Brown had opted to marry after she secured the 2004 annulment of her first marriage. Of course, neither happened.

Instead, by 2004, James Brown had filed his own action against Respondent, based upon her bigamy, which was resolved with her promise to never even claim to be his common-law wife. And by the time of Brown's death in 2006, the two were already living apart in opposite ends of the country. As such, Respondent is excluded from James Brown's will. All of Respondent's unsupported and self-serving claims regarding Mr. Brown's supposed intentions as to her thus ring hollow.

For all of the foregoing reasons, Petitioners respectfully request that the Court deny Respondent's Petition for Rehearing, and preserve its well-reasoned unanimous Opinion, affirming South Carolina's long-standing public policy against bigamy, and in favor of the sanctity of marriage and essential due process.

Respectfully submitted,

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