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Jun 24 2021

S.C. SUPREME COURT

# The State of South Carolina
# In The Supreme Court

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Appeal from Charleston County
Hon. J.C. Nicholson, Circuit Court Judge
Appellate Case No. 2017-001996

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John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11, John Doe 193, Father Doe 194, John Doe 194, John Doe 245 and Father Doe 245, and John Doe 297,

Appellants,

v.

The Bishop of Charleston, a Corporation Sole; Robert Gugliemone, 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,

Respondents.

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# Motion to Recall Remittitur and accept Petition for A Writ of *Certiorari* To the Court of Appeals

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Attorney for Plaintiffs – Appellants

Other Counsel of Record:

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Gordon & Rees
40 Calhoun Street Suite 350
Charleston SC 29401
Attorneys for Respondent David K. Haller

The fee for this motion will be sent by mail.

On June 24 the Court of Appeals issued the remittitur in this appeal.

On June 14, counsel had served, and thought he had filed, a Petition for *Certiorari* to the Court of Appeals. Upon investigation, counsel discovered that the Supreme Court had not accepted the June 14 filing due to the file transfer method by which counsel sent the voluminous record on appeal and other documents associated with the Petition.

The Court had attempted to alert counsel to the method the court preferred for accepting a voluminous filing. Counsel's mother passed away June 12 in Minnesota, and since the 12th counsel has been out of South Carolina dealing with the family matters in Minnesota related to her death. Counsel is still in Minnesota and has not yet set a date to return to his office in South Carolina. Only this morning did counsel become aware that the means of transmission for the Petition for *Certiorari* was not the means preferred by the Court. The omission was inadvertent.

The Petition itself was sent again this morning by email to supctfilings@sccourts.org, and is attached to this motion, in the same form and with the same typographical errors as submitted June 14.. In addition, today a link has been sent to the Court by the OneDrive means preferred by the Court for a voluminous filing. All counsel were served with the Petition on June 14, and are

again served with this motion, as the accompanying Proof of Service reflects, along with the Court of Appeals.

Conclusion

With apologies to the Court and counsel, we ask that the Court recall the remittitur, accept the Petition as of June 14, and continue to process this appeal.

Respectfully submitted,

Gregg Meyers, SC Bar No. 9908
Of Counsel, Pierce Herns Sloan & Wilson LLC
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greggmeyers@phswlaw.com

November 13, 2017

Ruth Weese
1554 Chastain Road
Johns Island, SC 29455
County: Charleston (Circuit: 9)

Re: Doe 202 v North Charleston et al., 2014-CP-0-4591

Dear Ms. Weese:

You were the court reporter during the first week of two week trial that began October 2, 2017.

This is to request the transcript of the proceedings in that trial from the week of October 2 to Friday, October 6.

Of course I will be responsible for the fees associated with that transcript. Please consider this my order for the transcript.

Thank you very much.

Sincerely,

Gregg Meyers

c: Counsel for Respondents

November 13, 2017

Joyce Reuger
P.O. Box 1472
Johns Island , SC 29457
County: Charleston  (Circuit: 9)

Re: Doe 202 v North Charleston et al., 2014-CP-0-4591

Dear Ms. Reuger:

You were the court reporter during the second week of a two week trial that began October 2, 2017. Your portion began October 9 and went until October 13.

This is to request the transcript of the proceedings in that trial from the week of October 9 to Friday, October 13.

Of course I will be responsible for the fees associated with that transcript. Please consider this my order for the transcript.

Thank you very much.

Sincerely,

Gregg Meyers

c: Counsel for Respondents

November 13, 2017

Hon. Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Doe 202 v North Charleston et al., 2014-CP-0-4591

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal and Amended Notice of Appeal in the case captioned above.

Also enclosed are the following:

1. Proof of service of the Notice of Appeal and Amended Notice of Appeal on counsel for the Respondents,

2. A copy of the jury verdict in the case, from which appeal is taken. The two other orders in the case are contained only in the transcript, which has been requested,

3. A filing fee of $100,

4. A copy of the letter to the clerk of the lower court filing the notice of appeal. And

5. A copy of two letters to the court reporters who, combined, covered the trial ordering the transcript of the proceedings below.

Please file this notice with the Court. Thank you very much.

Sincerely

Gregg Meyers

c: Counsel for Respondents

November 13, 2017

Hon. Julie A. Armstrong
Clerk of Court
Charleston County Circuit Court
100 Broad Street
Charleston SC 29401

Re: Appeal in 2014-CP-10-4591, Doe 202 v. North Charleston et al.

Dear Julie:

Enclosed for filing is a Notice of Appeal and Amended Notice of Appeal in the case captioned above, tried before Judge Jefferson.

Also enclosed are the following:

1. A copy of the Proof of Service of the Notice of Appeal and Amended Notice of Appeal on counsel for the Respondents,

2. A copy of the one written order involved in the appeal, the other orders not being written, other than the jury verdict, which is attached, and

3. A copy of the letter to the Clerk of the Court of Appeals.

Please file these notices with the Court. Thank you very much, and best personal regards.

Sincerely

Gregg Meyers

c: Counsel for Respondents

November 13, 2017

Chris Dorsel
Senn Legal, LLC
3 Wesley Drive
Charleston SC 29407

Re: Appeal of orders

Dear Counsel:

Enclosed for filing is a Notice of Appeal and Amended Notice of appeal and related documents in what we have been calling the Diocese and Lawyer cases.

I have ordered the transcript of the proceedings.

Best personal regards.

Sincerely

Gregg Meyers

Encl.
Notice of Appeal
Amended Notice of Appeal

c: Counsel for Respondents

# The State of South Carolina
# In The Supreme Court

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Appeal from Charleston County
Hon. J.C. Nicholson, Circuit Court Judge
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**Jun 24 2021**

S.C. SUPREME COURT

John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11, John Doe 193, Father Doe 194, John Doe 194, John Doe 245 and Father Doe 245, and John Doe 297,

Appellants,

v.

The Bishop of Charleston, a Corporation Sole; Robert Gugliemone, 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,

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# Petition for A Writ of *Certiorari* To the Court of Appeals

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Henry W. Frampton, IV
Gordon & Rees
40 Calhoun Street Suite 350
Charleston SC 29401
Attorneys for Respondent David K. Haller

# Index

# Table of Cases

# Certificate of Counsel

Petitioner's counsel certifies that on May 13, 2021, the Petition for Rehearing was denied by the Court of Appeals. R. App. 3061.

# Questions Presented

1. Have the lower courts erred in determining that because *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984), predated SCRCP 23 that class counsel owed no fiduciary duty to absent class members in pleading a class action, or settling a class action, instead finding class counsel owed no duty to the class until an attorney-client relationship was formed at class certification?

2. Have the lower courts erred in concluding appellants were not damaged when the collusive change to the notice program deprived appellants of the benefit of the defenses waived for class members?

3. Has the Court of Appeals erred in determining that there had been "adequate time for discovery" as to damages, when even the trial court recognized that full discovery has not been permitted in any case and in two cases no discovery at all has yet been permitted and a separate discovery schedule was needed for those cases?

# Statement of the Case

This appeal turns on the first question presented: whether SCRCP 23 eliminated the fiduciary obligations that (until the trial court's ruling in this action) imposed as a matter of law on counsel who allege a class action; or who reach a class settlement; or who move to certify a class. Other issues are subsidiary to that novel question and are properly remanded for reconsideration if in considering the first question presented the court overturns the lower courts.[1] E.g., *Doe v. Howe*, 367 S.C. 432, ___, 626 S.E.2d 25, 27-28 (2005) (vacating and remanding decision on breach of fiduciary duty for ambiguity in the trial court's rationale).

[1] Subsidiary questions that will be briefed if the Petition is granted will include the lower

The record below is full of irregularities from the 2006 class settlement at issue in this appeal. On this record, it must be presumed that the class action was collusive. A class settlement was reached seven months after the class case was filed, without a single motion having been argued or decided, or a single deposition taken. (Compare, R. App. 256, the Charleston class complaint filed December 2, 2005, with R. App. 592 – 595, the June 14, 2006, handwritten class settlement agreement reached in mediation).

After the settlement, the parties did not submit the class settlement for approval as required by SCRCP 23. Instead, through less-than-candid procedures outside of SCRCP 23 the parties moved the class settlement to a preferred judge in another circuit. E.g., R. App. 315 (first motion to approve class settlement, made in Dorchester County). Pertinent to this appeal, after filing a motion to certify the class, but before class certification, the parties agreed to change the notice program for the class from the nationwide notice originally proposed (R. App. 317, proposing notice in *USA Today*) to (in effect) notice in only South Carolina (R. App. 324, eliminating notice in *USA Today*), essentially eliminating any chance of notice to persons such as appellants, who resided outside of South Carolina. The motion to certify was amended for that change to the notice program. (R. App. 322).

The lack of nationwide notice was one of the objections made by other abuse victims who objected to aspects of the proposed class settlement. (R. App. 369, 383). While no explanation about the change to the notice program was given to the trial court reviewing the class settlement, and neither inquiry nor order was made by that court even after the objections to

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court's conclusion that, as out-of-state residents, appellants were not within the class definition; that John Doe 193 could make no claim for breach of fiduciary duty; that the lower court's "alternative pleading" theory barred appellants who resolved their claims against the Diocese from making a claim against class counsel.

the change to the notice program brought it to her attention, class counsel later represented in these proceedings (in a 2014 hearing) that the change was made by class counsel to accommodate a request by the Bishop of Charleston, his supposed adversary. R. App. 2435.[2]

Despite a 2009 order from the Supreme Court, R. App. 85, no final order has ever been entered in the class action case, so no appellate review has ever occurred of the conduct of the class action.[3] (E.g., R. App. 474 – 481: a final accounting was proposed to the trial court by class counsel in March 2008 but never acted upon).

A series of cases are consolidated in this appeal. The earliest were filed in 2010,[4] the most recent cases were filed in 2015 and 2016,[5] after remand of *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (S.C. 2014), the first appeal related to how the absent class members' interests were not protected. Despite the holding of *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (S.C. 2014),[6] full discovery as to class counsel's conduct has not been permitted in any case. Judge Nicholson

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[2] Counsel for class counsel: "Our testimony will be that we proposed that [nationwide notice] to the Bishop and that the Bishop said, no, that's too expensive."

[3] Implicit in this appeal is whether the collusive strategy of ignoring S.C. Supreme Court orders, such as the 2009 order to conclude the class action, or the holding of *Doe v. Bishop*, discussed below, is as acceptable to the Supreme Court as it has been to the lower courts.

[4] E.g., R. App. 532, 2010 complaint for John Doe 2 and Jane Doe 4.

[5] E.g., R. App. 1208 (Complaint for Jane Doe 240); R. App. 1230 (Complaint for John Doe 240); R. App. 1253 (Complaint for John Doe 245 and Father Doe 245); R. App. 1346 (Complaint for John Doe 297).

[6] *Doe v. Bishop*, 754 S.E.2d at 501 (S.C. 2014): "Should appellants establish on remand that they were denied due process owing to lack of notice or because of inadequate representation in the class action proceedings, and that the statute of limitations was tolled, they may proceed to further prosecution of their claims." While that opinion presumes that class counsel owed a duty to absent class members, the lower courts disagree.

acknowledged that the 2015 and 2016 cases, in which no discovery had been done, would require a further order of the court to permit discovery. R. App. 188. Nevertheless, in its brief decision, the substance of which is on two pages, the Court of Appeals determined there had been "adequate time for discovery." R. App. 3030, making no distinction among cases with different complaints.

Summary judgment was granted in 2017 as to the claimed breaches of fiduciary duty by class counsel. R. App. 203. The trial court found class counsel owed no fiduciary duty to absent class members until a court certified a class, R. App. 217, discounting the obligations imposed at pleading by *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984). The rationale to discount those cases was because those cases were decided before the 1985 implementation of the Rules of Civil Procedure[7] and because no class had been certified in the class case giving rise to those decisions. R. App. 217. The order contains no analysis about how SCRCP 23 changed those case holdings, and none is apparent.

Without a fiduciary duty owed by class counsel at any time before formal class certification, the trial court found that the pre-certification collaboration among the parties to change the notice program for the effective purpose of excluding class members who resided outside of South Carolina could not constitute aiding and abetting breach of fiduciary duty by the Diocese defendants. R. App. 193. For its part, the Court of Appeals refused to rule on the alleged breach of fiduciary duty claims made against the Diocese.

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[7] The order contains no analysis about how SCRCP 23 changed those case holdings, and none is apparent.

In a brief opinion, the Court of Appeals affirmed. R. App. 3029. The Court made no distinction among the complaints, which have evolved over time and more explicitly addressed the "alternative pleading" argument accepted by the Court of Appeals. Class counsel had first begun making that "alternative pleading argument" in 2014, R. App. 2407, so successive complaints in 2015 and 2016 grew more explicit about the request for only one recovery, as opposed to alternative claims for liability. In other words, not all complaints are identical.

A petition for rehearing was denied by the Court of Appeals. R. App. 3061 .

# Argument

1. SCRCP 23 makes no change to the holdings of *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984). A fiduciary duty to absent members of a class begins at pleading a class action.

For the core question in this petition — the duty owed by class counsel upon pleading a class action, and the subsidiary issues that derive from the core issue — even though it might be helpful to bench and bar for the Court to do so, the Court need not wade into the extensive evidence of collusion or the judge-shopping that occurred in this record. Every court other than this Court (in 2014) has studiously avoided addressing how class counsel placed their own financial interests ahead of the class and deliberately compromised the interest of the absent class members they undertook to represent so as to accommodate a request of their "adversary." Full discovery has not been permitted into class counsel's class representation.

But if there is no duty to absent class members until certification, then class counsel can presumably manipulate the class action as exemplified not only in this record but also as exemplified in *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984).

As the case stands at present, it is apparently accepted that such manipulative conduct by class counsel is permitted, since class counsel has been construed to have no duty to the class prior to formal class certification.

Nothing about SCRCP 23 changes the rationale of *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) or *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984). SCRCP 23(d) requires a motion to certify a class be made "as soon as practicable" after the class action is filed. SCRCP 23(c) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

SCRCP 23 embodies the Due Process obligations that protect absent class members. *Premium Investment Corp. v. Green*, 283 S.C. 484, ___, 324 S.E.2d 72, 76 (Ct. App. 1984): (internal citations omitted, emphases added) held:

> a plaintiff who sues on behalf of a class ***and the attorney representing the class assume a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action***. The class representative also surrenders the right to settle the action in return for individual gain, alone.
>
> If the class representative ***or class counsel*** breaches the fiduciary duties he assumes and receives and retains benefits flowing from the breach, he holds what he receives upon a constructive trust for the class. This is true although the benefit received by the class representative is not at the expense of the class. Under no circumstances will the fiduciary be permitted to profit from a breach of his duty as fiduciary.

See also, *Tilley v. Pacesetter Corporation*, 355 S.C. 381, ___, 585 S.E.2d 292, 302 (2003) (class definition "a strategy choice" that the parties and class counsel "have to live with.")

These holdings are consistent with Fed. R. Civ. P. 23, on which the South Carolina Rules are modeled. The Notes to SCRCP refer specifically to the federal rules of civil procedure, which have long held that counsel undertakes a fiduciary duty upon pleading a class action. E.g., *Cohen*

*v Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549, 69 S.Ct. 1221, 1227 (1949)

> a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated.

Until the trial court in this case concluded that it no longer had effect, *Premium Investment* held that upon *pleading* a class action class counsel assumes fiduciary duties to absent members of the class. Upon class *certification*, class counsel assumes an attorney-client relationship with class members, present and absent.

The commentary to SCRCP 23(d) reinforces the identical point:

> This Rule requires those seeking to maintain an action on behalf of a class to notify members of the class of the pendency of the action.

That obligation is on "those seeking to maintain," not just on "certified" class actions. As reflected in the Ethics Watch article by Professor Freeman from September 2007, R. App. 2092 – 2093, discussing both *Premium Investment* and *Green*:

> In essence, the Supreme Court in *Green* held that a fiduciary obligation is owed by class counsel to putative class members so long as the case is postured as a class action regardless of whether a formal certification order has been issued.

Professor Freeman advised "so long as the caption claims the case is a class action, unless and until the class certification motion is denied or the class is decertified, class counsel must assume that a duty of loyalty and fair dealing is owed to absent class members." *Id*. Yet the trial court and Court of Appeals disagreed.

Given the divergence between Professor Freeman's academic commentary, Professor Virzi's affidavits attached to the various complaints (E.g., R. App. 1045 – 1046), and the orders of the trial court and Court of Appeals, it obviously needs clarified by the Supreme Court if class counsel does or does not assume a fiduciary obligation upon alleging a class. Or moving to

certify a class. Or reaching a class settlement. The Petition should be granted to provide that clarity.

The collusive changes to the notice program matter. Absent class members were deliberately excluded from any chance of participation. Class counsel claimed in the record to have secured for all class members, known and unknown, the same agreement from the Diocese as was extended to class members: that the Diocese would waive its available defenses, including the statute of limitation and charitable immunity.[8] But no written order secured that relief, so any class member who files an independent action against the Diocese must confront the defenses waived for class members.[9] In many cases, that failure is fatal to an abuse victim being able to make a claim.[10]

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[8] Compare, R. App. 2312, in discussing four known abuse victims that had not been located and, as counsel for the Diocese put it, "anybody else who has kind of, lack of a better word, comes out of the woodwork," class counsel responded with the claim, R. App. 2314, that the Diocese had supposedly agreed, that "if anybody has been missed" the Diocese "waives all the same defenses.") No order secured that relief.

[9] Although class counsel was aware of such claims, e.g., R. App. 409, 482, nothing in the class settlement provided for persons such as John Doe 193, who alone among appellants (a) resides within South Carolina and (b) had no memory of his abuse until 2010 (R. App. 1708, 2454). His complaint begins at R. App. 760. Unique among appellants, Doe 193 might conceivably avoid the statute of limitations under authority of *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000). Judge Nicholson held he had not received Due Process in the class action. R. App. 179. But like every other appellant he is exposed to the other defenses the Diocese otherwise waived for the class. Had class counsel actually secured the relief he claimed for the clients he undertook to represent, none of these cases would be necessary.

[10] The trial court concluded that there was no claim against class counsel because the failure by class counsel left the appellants in the same place they would have been without any class action case having been filed, R. App. 210, a truism that if accepted would nullify any claim for legal malpractice or breach of fiduciary duty. Such cases are *always* about a duty voluntarily assumed, conduct that would not exist but for the duties assumed.

As a result, even though class counsel undertook to represent appellants, class counsel cooperated with the Diocese to deprive appellants of any chance of obtaining the benefit of the defenses waived for class members. Those defenses explicitly included charitable immunity and the statute of limitations.

Without action by this Court, class counsel was, and future class counsel will be, entirely free to replicate the conduct in this record to remove notice so as to exclude absent class members, and arrange for the fee to be the highest priority of the class action. Additionally, class counsel would be free to replicate the conduct described in *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984), where a class was pleaded for effect and used to benefit counsel and the putative class representative. If the court does not accept the Petition, any class action can be manipulated however class counsel chooses, provided that manipulation is done prior to class certification.

2. The lower courts erred in concluding appellants were not damaged when the collusive change to the notice program deprived appellants of the benefit of the defenses waived for class members.

Among the subsidiary issues in this Petition are that the plaintiffs had no evidence of damage from any conduct by the lawyers. R. App. 210 (in the trial court); R. App. Court of Appeals decision at p. 3, R. App. 3030. "Damages in an action for breach of a fiduciary duty are those proximately resulting from the wrongful conduct of the defendant. " *Moore v. Moore*, 360 S.C. 241, 253 (Ct. App. 2004). Because class counsel was construed to owe no duty to absent class members until certification, the lower courts did not consider the damage from class counsel's failures in (a) altering the notice program at the Bishop's request to deliberately exclude appellants, and then (b) failing to mitigate that damage by securing in a written order the waiver of defenses they claimed to have secured for each class member. Each is a cognizable

damage, as set forth in the affidavits of Mr. Virzi. E.g., R. App. 1045 – 1046. Each absent class member is now compelled to confront the powerful defenses that the Diocese otherwise had waived.

3. The Court of Appeals erred in determining that there had been "adequate time for discovery" as to damages and class counsel's conduct

As noted above, the trial court recognized that cases filed in 2015 and 2016 required a separate discovery order, as no discovery had been done. R. App. 188. If class counsel assumes a fiduciary duty to absent class members of the class upon pleading, the Court of Appeals plainly erred in concluding there had been "adequate time for discovery," R. App. 3030, and the case should be remanded for further proceedings.

# Conclusion

The petition for *certiorari* should be granted on the questions presented and the subsidiary issues that will be briefed if the Petition is granted.

Respectfully submitted,

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