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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000622

The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ the King, Waccamaw; Church of The Cross, Inc. and Church of the Cross Declaration of Trust; Church of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; The Church of St. Luke and St. Paul, Radcliffeboro; The Church of Our Saviour of the Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church of the Good Shepherd, Charleston, SC; The Church of The Holy Cross; The Church of The Resurrection, Surfside; The Protestant Episcopal Church of The Parish of Saint Philip, in Charleston, in the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens of The Parish of St. Matthew; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis;

Vestry and Church Wardens of the Episcopal Church of The Parish of Christ Church; Vestry and Church Wardens of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews,, ...

Respondents,

v.

The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina, ... Appellants.

MOTION TO RECUSE THE HONORABLE JUSTICE KAYE G. HEARN FROM PARTICIPATION IN THE REHEARING PETITION; MOTION FOR VACATUR OF OPINION OF JUSTICE HEARN AND FAILING THAT, MOTION BY NON-PREVAILING PARISHES AND THE DIOCESE TO VACATE ALL OPINIONS IN THIS MATTER; AND MOTION FOR CONSIDERATION OF THIS MOTION BY THE FULL COURT AND FOR OTHER RELIEF

The Respondents in this appeal are, simultaneously with the filing of this motion, also filing their Petition for Rehearing in this matter. Hence, the Respondents in this appeal will herein be referenced as "Movants." Unless otherwise specified, all Respondents are "Movants." This motion is filed pursuant to the South Carolina Rules of Appellate Procedure and the Judicial Canons, as well as the Constitutions of the United States and of South Carolina. The Court should grant this motion as set forth below. As an initial matter, as set forth below at page 18, the full Court should consider this Motion.

Movants and their counsel do not lightly make this motion. The twenty six South Carolina attorneys who have signed it do so because of their respect for the judicial system, not in derogation of it. Scholars write of the difficult decisions confronting lawyers and judges that attend a recusal motion. None of the undersigned members of the bar are free from their own biases and if they were to move to the bench, those biases would follow them. Justice Cardozo aptly noted that "[t]he great tides and currents which engulf the rest of men do not turn aside and

pass judges by. "*The Nature of the Judicial Process*, 168 (1924). While Movants strongly assert that they do not seek to impugn Justice's Hearns personal judicial integrity, nevertheless scholars studying the subject of recusal report that judges frequently view motions to recuse as personal attacks and become very defensive. *See* Michael W. Martin, *Current Issues in Judicial Disqualifications Symposium*, 30 Rev. Litig.639, (2010-2011) (noting scholars finding "error in the commonly held view that disqualification motions and attorney allegations of partiality or bias are an affront to the individual judge's personal judicial integrity...").

This "disqualification paradox" creates the reluctance Movants and their counsel have in filing this recusal motion. In taking their oath of judicial office, judges commit themselves to being, and appearing to be, impartial; yet, the disqualification rules give them the task of finding themselves impartial, or not appearing to be impartial. This inherent tension suggests that most judges would find themselves impartial despite facts that might cause parties to reasonably question the judge's impartiality. *Id.* (citing to Charles Geyh, *Why Judicial Disqualification Matters. Again*, 30 REV. LITIG. 671, 695 (2011)). "Jurists-particularly at the Supreme Court level-have occasionally shown a disturbing defensiveness..." regarding recusal motions. Id. (citing Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification-and a Stronger Conception of the Appearance Standard Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 Rev. LITIG. 733, 739 (2011). The law has changed rather dramatically in recent decades generally regarding disqualification of a judge, perhaps to address the above paradox. *See Id.*, noting "seismic shifts in the judicial recusal landscape since 2001."

Though perhaps difficult for Justice Hearn, and maybe other Justices of the Court to accept, this motion is not made to impugn Justice Hearn's integrity or that of this Court, it is

made to strengthen it. As Justice Holmes stated, "[o]ne may criticize what one reveres." "The Path of the Law," 10 *Harv. L. Rev.* 457, 473 (1897). Without public confidence in the court, the rule of law itself, is imperiled. *Liljeberg v Health Services Acquisition Corp.*, 486 U.S. 847, 861, 108 S. Ct. 2194, 2203 (1988) (It is appropriate for a court to consider "the risk of undermining the public's confidence in the judicial process. We must continually keep in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" citation omitted.)

> Counsel for a party who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court. Judges are not omniscient and, despite all safeguards, may overlook a conflict of interest.

In Re Bernard, 31 F.3d 842, 847 (9th Cir. 1994) (Kozinski, J.)

Movants and their counsel respectfully make this motion based on the facts, the law and the opinion of experts in this field.

As explained below, Justice Hearn had a duty to disclose various facts concerning her relationships with the Appellants and with a Respondent. Further, based on the facts and her relationships, she had a mandatory duty to recuse. Justice Hearn did not disclose the relationships nor did she ultimately recuse herself.

"In general, 'every person has a right to presume that every other person will perform his duty and obey the law.'" *Webb v Special Elec. Co.*, 63 Cal. 4th 167, 186, 370 P.3d 1022, 1034 (2016). Movants had the right to presume that Justice Hearn, in the end, would not participate in the decision in this matter. However, she did participate, and she penned an opinion favoring the Appellants.

I. The Facts Relating to This Motion.

This case has been challenging emotionally, spiritually, and financially to thousands of people in South Carolina. One of those people is Justice Hearn. Like all of her current and former fellow parishioners, this dispute was and is important to Justice Hearn. However, only a limited number of those people were actively engaged in the debate of the underlying issues. An even smaller handful of people left their parish homes and started new parishes because of the issues involved in this case. One of those people is Justice Hearn. This case was important to Justice Hearn, and she and her husband were actively involved in the debate of the issues and were leaders in developing a new parish after leaving their prior one. Over several years, Justice Hearn developed opinions, advocated for these opinions, and took action based on the outcomes of decisions central to this case. These actions are to be expected by any interested parishioner. However, they should have led Justice Hearn to publicly disclose them, and she should not have rendered judgment in this case. Movants rely on the facts set forth below, and on the affidavits attached hereto in support thereof.

St. Paul's Conway

Justice Hearn and her husband, George, were members of St. Paul's Conway, for many years, at least since 1998. *See* Ex. 1, Julian "Tripp" Jeffords Affidavit. *See also* Ex. 2, Depo. of George Hearn p. 15 (tracing his membership to the early 1980s). The Hearns actively participated in the life of the church. *See* Ex. 1, Affidavit of Jeffords. *See also* Ex. 2, Depo. of G. Hearn generally. St Paul's Conway is a party plaintiff to this action.

Leading up to the disaffiliation of St. Paul's Conway from The Episcopal Church ("TEC"), a group of St. Paul's parishioners vocally aligned themselves with the views of The Episcopal Church and against those of the Diocese and the majority of St. Paul's. *See* Ex. 1,

Affidavit of Jeffords. The opposition group included the Hearns and their friends, Rebecca and Richard Lovelace. *Id.* This opposition group spoke publicly in opposition to Bishop Lawrence and the direction of the Diocese and Justice Hearn also spoke publicly to various actions taken by St. Paul's rector, with whom the group disagreed. *Id.*

After disaffiliation of the Diocese and St. Paul's from TEC was announced in January, 2013, the Hearns no longer attended St. Paul's Conway. *See* Ex. 1, Affidavit of Jeffords. Rebecca Lovelace was called as a witness at trial by The Episcopal Church in South Carolina ("TECSC"). *See* Trial transcript p. 1490, R. 757. George Hearn was deposed as a witness in this case.

The Episcopal Forum

The Episcopal Forum ("Forum") is a group of people in South Carolina who advocate for stronger ties with TEC, take positions on the governance structure of TEC, and uphold the Constitution and Canons of The Episcopal Church. *See* Ex. 3, Forum Newsletter. The Forum's website states: "The 'Forum' is a 501(c)3 nonprofit corporation affiliated with *The Episcopal Church in SC* which is the southern SC diocese of *The Episcopal Church* worldwide."

The Forum has been opposed to Bishop Lawrence and his leadership regularly since 2007. *See* Ex. 4, Forum letter dated September 14, 2007. The Forum has existed since at least 2007, when it opposed the election of Mark Lawrence as bishop. *Id.* The Forum took public positions on the structure of TEC, the authority of bishops, and the disassociation of dioceses from TEC as early as 2007. *See* Ex. 5, newsletter dated September 17, 2007. Today, the Forum continues to have the mission to support TEC and TECSC, both parties to the case. *See* Ex. 6, mission statement on website June 25, 2017. The Forum has reserved seating at TECSC conventions. *See* Ex. 7, Affidavit of Karen Kusko.

Justice Hearn has been a member of the Forum for at least ten years and allowed her name to be included on published membership lists. *See, e.g.,* membership lists dated March 15, 2007, March 16, 2010, April 7, 2014, and April 21, 2017, attached as Exs. 8, 9, 10, and 11. The Forum ceased publishing its membership list this summer. In 2010, the Forum, of which Justice Hearn was a member at the time, corresponded with TEC and its subdivisions regarding the Forum's positions on the issues and actions decided in this case. *See* Ex. 12, 8/24/10 EFSC Letter to HOB and Executive Council; Ex. 13, 10/25/10 Executive Council Letter to EFSC; and Ex. 14, 11/9/10 EFSC Letter to The Province IV House of Bishops. In 2012, the President of the Forum posted an article on the Forum's website criticizing the *All Saints* opinion in much the same way as Justice Hearn's opinion. *See* Ex. 15, All Saints Opinion, 1/9/12. By publishing her membership, Justice Hearn has publicly connected herself to the activities of the Forum.

Public Recognition of Bias

Justice Hearn's bias relating to the issues in this case has been commented on in several friendly and non-friendly public forums. Charleston's *Post and Courier* published an entire article on the subject of Justice Hearn's lack of impartiality related to this case. *See* Ex. 16, Article September 27, 2015. Two popular blogs exist which are devoted to discussing the disaffiliation at issue in this case and both are openly written in a manner supportive of TEC. Scepiscopalians.com noted on April 9, 2014, attached as Ex. 17, that Justice Hearn and her husband were "prominent Episcopalians" and that they "left their longtime parish homes," and specifically noted Justice Hearn's place on the Court. As recently as August 2, 2017, scepiscopalians.com noted the specific impact of the Supreme Court opinion on Justice Hearn's former parish, attached as Ex. 18.

Episcopalschismsc.blogspot.com goes further in identifying Justice Hearn's interest in the case and bias. On December 26, 2015, Hearn was referred to as a "loyal Episcopalian" and that "The Episcopal Church could not have had a better champion," attached as Ex. 19. This website repeatedly references Justice Hearn and her husband's involvement in their parishes and issues. *See* Exs. 20, 21, and 22, posts dated April 16, 2015, August 28, 2015, and September 18, 2015. The website author sees Justice Hearn as "obviously resolved to defend the Church's claims" and TEC's "intrepid advocate, doing, in my opinion, a better job of it than the lawyer." *See* posts dated October 2, 2015 and September 28, 2015, attached as Exs. 23 and 24.

Justice Hearn also shared her personal views on the issues involved in the case. In late 2012, one of TECSC's lawyers of record in this very case, and one of Justice Hearn's former law clerks, shared the Justice's views with a third party. Walker Humphrey emailed a TEC-aligned priest that Justice Hearn had forwarded Humphrey emails about people "being labeled as outcasts," as well as her parish's plans for worship after leaving St. Paul's Conway. *See* Ex. 25 D 010770-010771. The email further states: "She also told me about the plan to use the chapel for continuing services, and I believe they asked Holy Cross-Faith Memorial for help. I think it's a good arrangement, and I hope Trip Jeffords, the rector at St. Paul's, is accommodating. I've seen some postings on St. Pauls' Facebook page which shows it's been gone for far longer than I thought." *Id.* Movants understand that if Justice Hearn's opinion controlled, St. Anne's, Justice Hearn's current church, could receive from TEC either title or the right to use the church property formerly owned by St. Paul's, Justice Hearn's former church

St. Anne's and The Episcopal Church in South Carolina

After St. Paul's Conway disassociated from TEC, Justice Hearn and her husband were part of a group that started St. Anne's. *See* Ex. 2, Depo. of G. Hearn at pp. 18-20. George Hearn

was a member of the three-person steering committee for the new group called St. Anne's and later became a member of the mission committee overseeing St. Anne's in 2014. *See* Ex. 2, Depo. of G. Hearn at pp. 18-19, 25.

George Hearn was elected to attend two conventions of TECSC in January and March of 2013. Mr. Hearn purported to attend the first convention as a delegate from St. Paul's, even though he no longer attended St. Paul's and was on the mission committee for St. Anne's. At the convention, Mr. Hearn signed a declaration of conformity to The Episcopal Church and voted to purportedly amend all of the diocesan governing documents that are at issue in this case. *See* Ex. 2, Depo. of G. Hearn at pp. 25-26, 28, 43-45, 47-59.

Justice Hearn continues to be an active member and lay leader at St. Anne's today. The current website for St. Anne's includes pictures of Justice Hearn singing in the choir. *See* www.stanneconway.org, last visited on August 21, 2017. Justice Hearn was listed on the same webpage as a service participant the week the Supreme Court issued its opinion in this case.

Evidence of Bias in the Current Opinion

There is evidence of Justice Hearn's personal views and bias in her decision in this case. Justice Hearn found that it was "clear from the record that doctrinal issues concerning....the role of women were the trigger" for the disassociation. *See* Opinion p. 37. A complete and thorough review of not just the Record on Appeal, but the entire trial transcript uncovers no mention of the role of women. George Hearn stated that the role of women in the church was an issue to him in leaving St. Paul's Conway, but this deposition testimony was not introduced at trial. *See* Ex. 2, Depo. of G. Hearn pp. 27-28.

In another section of her opinion, Justice Hearn strongly criticizes Bishop Lawrence by arguing that Lawrence joined an effort to lead his prior diocese, San Joaquin, out of TEC. *See*

fn. 23. The record on appeal and trial transcript are devoid of such information. The published opinions on the San Joaquin case never mention Lawrence at all. In his deposition, which was not part of the record, Lawrence testified that he left San Joaquin before taking any position on their disassociation. *See* Ex. 26, Depo. of Mark Lawrence pp. 177-79, 183-84.

Further, Justice Hearn states in fn. 14 "although there can be no question that the individual parishes have been affiliated with the National Church for decades, the trial court found in its order that '[n]one of the Plaintiff parish churches have ever been members of [the National Church].'" The record is clear that the trial court was right. The clerk of the Supreme Court specifically asked for Requests to Admit to be supplemented in the record. On October 8, 2013, TEC admitted "[p]arish churches are not members of The Episcopal Church." *See* Ex. 27, Requests for Admission dated October 8, 2013. This same admission appeared in the Record on Appeal already at R. pp. 81 & 630. This finding in Justice Hearn's opinion exists despite the clear admission from the party itself.

Justice Hearn states that the Diocese did not disassociate because its amendment of its corporate documents was trumped because "the National Church has promulgated its own set of rules concerning corporate governance, including changes to the bylaws." Op. at 14. However, TEC has no governance provisions in its constitution (R.1532) and canons (R.1703) which speak at all to the ability of a Diocese to amend its governance documents or that require the Diocese to secure approval for such amendments from anybody. There is no reference at all to a Diocese's Constitution and Canons or to its articles of incorporation or bylaws. In fact, it was undisputed that interference ("regulation or control") with a Diocese's internal policy or affairs was forbidden to TEC's provincial synods. R.783-84. There was no provision here like that in *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich,* 426 U.S. 696 (1976),

where a Diocese submitted its governance documents, either originally or when amended, to any other body for approval. 426 U.S. at 715, n. 9.

Justice Hearn As A Party

Under the laws of South Carolina, Justice Hearn is considered a party to this action and should not hear this case. The positions taken by the Defendants in the litigation are clear. TECSC stated in responses to Interrogatories "that members of [TECSC] are persons." *See* Exs. 28 and 29, Response to St. Philip's Interrogatories Nos. 5 and 6, and Response to Request for Admission No. 3. St. Anne's in Conway was an unincorporated association until at least April 1, 2013. Justice Hearn was a member of St. Anne's at least by the beginning of 2013. *See* Ex. 2, Depo. of G. Hearn p. 18.

Members of unincorporated associations are responsible for judgments against the association. *See* S.C. Code Ann. §15-35-170. Thus, under the position taken by TECSC, Justice Hearn could be personally liable for any judgment entered against TECSC, at least until April 1, 2013, at a minimum, when St. Anne's incorporated. When this lawsuit was filed, either Justice Hearn was a member of TECSC under its interpretation of membership, or Justice Hearn was a member of the unincorporated association St. Anne's, which was itself a member of another unincorporated association, The Episcopal Church in South Carolina.

TEC takes the position that individual parishes are not members of TEC. *See* Ex. 27, Response to Church of Our Savior, et al. Request for Admission No. 2. Individuals are members of TEC.[1] TEC cannot bring diversity actions in federal court because its citizenship is that of its

[1] In its November 2013 answer to the Diocese's First Interrogatories, question 5, "who do you contend are members of the unincorporated association known as The Episcopal Church and on what documents do you base your response?", TEC's answer is "See Church Canon I.17(1)(a)." That canon provides that baptized individuals are members. R. 1576.

individual members. *Brown v. Protestant Episcopal Church in the United States of America*, 8 F.2d 149 (1925). Justice Hearn is a member of TEC, and she is a member of the unincorporated association, TECSC.

In addition, Justice Hearn was previously a member of Plaintiff St. Paul's Conway until late 2012 or early 2013. *See* Exs. 2 and 1, Depo. of G. Hearn p. 18 & Jeffords Affidavit. Thus, when St. Paul's Conway joined the lawsuit on January 22, 2013 as a plaintiff, Justice Hearn was either still a member of a Plaintiff parish, or had only just withdrawn her membership within weeks over the issues involved in the lawsuit.

TEC and TECSC, the two Defendants, are unincorporated associations. Members of an unincorporated association are parties to the action involving the unincorporated association. *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E. 651 (1936); *accord, Crocker v. Barr*, 305 S.C. 406, 409, 409 S.E.2d 368, 370 (1991). Once the association is before the court, the rights of its members will be determined in the state court action. *Graham v. Lloyd's of London*, 296 S.C. 249, 371 S.E.2d 801 (1988). Neither TEC nor TECSC are legal entities "separate from the persons who compose [them]." *Graham*, 296 S.C. at 255, 371 S.E.2d at 804; *Medlin v Ebenezer Methodist Church*, 132 S.C. 498, 129 S.E. 830 (1925). Judgment in a state court action is entered against members of an unincorporated association *individually*. *Crocker*, 305 S.C. at 409, 409 S.E.2d at 370; *Elliott*, 181 S.C. 84, 186 S.E. 651.

Expert Opinions[2]

Lawrence J. Fox and Nathan Crystal have been attorneys, teachers, authors, and experts in legal ethics and professional responsibility for most of their professional lives. This has included leadership positions in the professional ethics bodies of the American Bar Association

[2] *See* Affidavits of Lawrence J. Fox and Nathan Crystal, attached as Exs. 30 and 31.

and the South Carolina Bar. They have reviewed the material submitted to this Court and have concluded:

Justice Hearn is disqualified from participation in this case because Justice Hearn's impartiality might reasonably be questioned, because Justice Hearn is biased in favor of the defendants and because Justice Hearn has personal knowledge of disputed evidentiary facts.

Justice Hearn and her husband have an economic interest and more than a "de minimus" interest in this case that is substantially affected by the proceeding.

Justice Hearn failed to attempt to comply with the remittal provision of the Judicial Ethics Canon.

Justice Hearn's participation, applying an objective bias standard, violates the due process rights of the Plaintiffs under the United States Constitution.

Justice Hearn's disqualification is not waived because she did not follow the procedure for waiver of disqualification, her participation was a structural error in the proceedings which is not subject to waiver and in any event, the waiver provisions do not apply where there is personal bias or prejudice.

II. The Basis of Justice Hearn's Duties To Disclose and Recuse and to Refrain from Participation in any Rehearing Petition.

The due process clauses of the United States and South Carolina Constitutions, as well as the Judicial Canons and law of South Carolina, required that Justice Hearn make disclosures and disqualify herself from participation in this matter. Because she did neither, and instead participated by writing an opinion favoring the Appellants, her opinion should be stricken and vacated. These same precepts preclude Justice Hearn from participating in the Rehearing Petition in this matter.

A. Constitutional and Structural Bars to Justice Hearn's Participation.

As stated by the United States Supreme Court, "[u]nder our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.,* 566 U.S. 868 (2009) (citing *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)). In *Caperton,* the Supreme Court held that the Fourteenth Amendment was violated when one of the majority justices of the West Virginia Supreme Court refused to recuse himself due to receiving large campaign contributions from, and through the efforts of, the corporation's principal. The Supreme Court held that actual bias and prejudice need not be shown in order to establish a constitutional deprivation of due process. Objective standards may require recusal whether or not actual bias on the part of a judge exists or can be proved. The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process, the *Caperton* Court held.

The *Caperton* Court held that the true constitutional test was not actual prejudice or actual bias, but the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the [***1214] guarantee of due process is to be adequately implemented." *Id.*, citing *Withrow*, 421 U.S., at 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712. It is respectfully submitted that the "Facts" section above show this objective constitutional test precludes Justice Hearn from rendering a decision in this matter.

In addition to this objective constitutional test, the United States Supreme Court has held that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016), (citing *In re*

Murchison, 349 U.S. 133, 136-37 (1955).) "This objective risk of bias is reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'" *Id* at 1906. This scenario is also present here and represents an additional structural and insurmountable due process problem. *See supra*, "Facts," relating to Justice Hearn actually being a party to this very action and affidavits of Fox and Crystal, that Justice Hearn has a personal interest in the outcome.

Similarly, under the *Caperton* test, the conflicts of Justice Hearn's spouse must be imputed to the Justice herself for federal due process purposes. As explained above, George Hearn was a critical player in the underlying events of this case, and he was even a witness in this case for he provided deposition testimony in support of one of the parties. Indeed, it appears that the federal recusal statute and the recusal requirements of almost every state—including South Carolina, *see infra*—require recusal whenever a judge's spouse has more than a de minimis interest in a case or is likely to be a material witness in the case. *See Adair v. State, Dep't of Educ.*, 474 Mich. 1027, 1033–34 (2006). Due process requires no less.

As a result of the *Caperton* test of an "unacceptable risk of actual bias" being met, in addition to Justice Hearn effectively ruling in favor of her interests in her own case as prohibited by *In re Murchison*, Justice Hearn was and is under a mandatory duty to disqualify herself from participation in this matter. As a result, her opinion in this case should be vacated.

In *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the issue presented was whether the justice's denial of a recusal motion and his subsequent participation in the proceedings violated the due process clause of the 14th Amendment. The facts of the *Williams* case span almost 30 years. It began when Williams, and a friend, Draper, were arrested and charged with murder. At the time of the arrest, Ronald Castille was the district attorney. The prosecutor in the District

Attorney's office wanted to seek the death penalty against Williams. To do so, he had to get the approval of the DA, Castille. Castille signed the prosecutor's memorandum, stating "approved to proceed on the death penalty." Williams was subsequently convicted and sentenced to death. For the next 26 years, the conviction and sentence were upheld on appeal, state post-conviction review, and federal habeas review.

In 2012, Williams' attorneys discovered that the prosecutor procured false testimony from Draper, suppressed evidence regarding Williams' relationship with the victim, and failed to disclose a benefit that Draper received for the testimony against Williams. He then filed a petition for Post-Conviction Relief pursuant to Pennsylvania statute. The court of common pleas ordered the District Attorney's office to produce "previously undisclosed files of the prosecutor and police." In those files was the sentencing memorandum with Castille's approval for the prosecutor to seek the death penalty. The court of common pleas, in light of the evidence of false testimony, suppression of evidence, and the prosecution's failure to disclose a benefit provided to a witness against Williams, stayed the execution and ordered a new sentencing hearing. The Commonwealth then submitted an emergency application to the Pennsylvania Supreme Court to vacate the stay of the execution. At the time the emergency petition was filed with the Supreme Court, Castille was serving as Chief Justice. Williams filed a response to the Commonwealth's petition as well as a Motion for Recusal. Chief Justice Castille denied the motion for recusal and the State Supreme Court vacated the court of common pleas' order. Chief Justice Castille joined the majority opinion, which reinstated the death sentence, and also authored a concurrence.

Williams petitioned for certiorari to the United States Supreme Court, which was granted. Before the United States Supreme Court, Williams argued that Castille's decision as the District Attorney to seek the death penalty barred him from acting as Chief Justice and deciding the

petition to overturn his sentence because he was, in essence, acting as both the accuser and the judge in the case. The Supreme Court agreed, holding that under the Due Process Clause, there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case (*Id.* at 1905). The Court held: "Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias." (*Id.* at 1908.).

The question then became, "whether Williams is entitled to relief." (*Id.* at 1909.) The Court observed: "In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive." (*Id.* (emphasis added).) The Court went on to hold that "[A]n unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." *Id.* (emphasis added). The Court remarked that "[t]he deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision making process." *Id.* Thus, it "does not matter whether the disqualified judge's vote was necessary to the disposition of the case." *Id.* The result was a vacating of the opinion, and a rehearing awarded.

Here, Justice Hearn did cast the deciding vote as to most of the parishes. Because of this, the Movants request the following relief: 1) that her opinion be vacated; and 2) that she not be permitted to participate with regard to the Petition for Rehearing.

B. Judicial Canons Bar Justice Hearn's Participation in the Matter and Require that Justice Hearn's Opinion be Vacated.

Judicial Canon 3E(1)(a) specifically provides that the judge "*shall* disqualify himself or herself" when "(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." The word "shall" is mandatory, and as is set forth above in the "Facts" section of this Motion, Justice Hearn meets this standard.

Similarly, the South Carolina canons, like federal due process law, impute the conflicts of Justice Hearn's husband to Justice Hearn herself. Canon 3E(1)(d) provides that a judge "shall" disqualify herself where "the judge's spouse," *inter alia*, "is a party to the proceeding, or an officer, director or trustee of a party," "is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding," or "is to the judge's knowledge likely to be a material witness in the proceeding." Here, George Hearn *was in fact a material witness* in the case. And he undoubtedly has more than a de minimis interest in the case, given his role in the underlying dispute, his leadership position within St. Anne's, and the fact that St. Anne's could receive the right to possession or use of the property formerly owned by St. Paul's. Thus under Canon 3E(1)(d), Justice Hearn must be recused.

Judicial Canon 3F, Remittal of Disqualification, provides that if a judge is disqualified under the terms of 3E, he "*may* disclose on the record the basis of [his] disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification *other than personal bias or prejudice concerning a party*, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the

judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding." As can be seen by the emphasized language from the Canon, the only bases of disqualification that cannot be waived under this Judicial Canon paragraph are "personal bias" and "prejudice concerning a party." Put simply, disqualification of Justice Hearn under the Canons is mandatory, and cannot be waived. Both Nathan Crystal and Lawrence Fox have concluded that Justice Hearn is personally biased.

Further, even if the facts were different and Justice Hearn believed her impartiality could not reasonably be questioned, the Canon commentary under Canon 3E goes on to state that the judge "*should* disclose on the record the information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Here, Justice Hearn made no disclosures, although it is beyond argument that she knew or should have known of various considerations which should have been publicly disclosed by her. Thus, there can be no waiver of other disqualification grounds within the Canons, *viz*, Canons 3E1c, and 3E1d(i), (iii), all of which are supported by the "Facts" section of this motion, *supra.*

Lastly, "[w]hen a judge fails to disclose information to the parties that the judge knew or should have known, this failure to disclose could provide the basis for a motion to disqualify." *See* Leslie W. Abramson, *Appearance of Impropriety Deciding When a Judge's Impartiality Might Reasonably be Questioned,"* 14 Geo. J. Legal Ethics 55, 69 (2000). Hence, according to the Canons, Justice Hearn must be disqualified and her opinion vacated.

C. South Carolina Supreme Court Precedent Also Supports Disqualification.

This Court in *In re Underwood*, 417 S.C. 433, 790 S.E.2d 761 (2016) noted the mandatory nature of both the disclosure and disqualification duties of Judges under the Canons. There, the Judge in mitigation offered that she felt the issues concerning her duties were waived when no one raised any complaints to her about her handling of the matter. This Court noted:

> Respondent asserts she thought that she was complying with the remittal requirements by announcing her conflict before court and proceeding when no objections were voiced. She now recognizes that remittal requires that the disclosure be made on the record to each defendant, that each defendant be given time to consider the matter with counsel, and that the defendant's decision on the matter be placed on the record. Respondent also incorrectly believed that when defendants requested she take their plea and/or knew her connection with the Sheriff's Department that the conflict was waived and she could take the plea. Respondent now recognizes that in these situations she was required to comply with the requirements of Section 3F of Canon 3.

Id.[3] Hence, this Court correctly strictly applied the Canons there and should likewise do so here.

Further, in *Davis v. Parkview Apartments,* 409 S.C. 266, 762 S.E.2d 535 (2014) this Court addressed a motion to disqualify a judge. There, the alleged "prejudice" of the judge was due to certain social relationships he had with the attorneys and attorneys' families. This Court found that "[n]one of the disqualification situations outlined in Canon 3E were present here." Given that only the social relationships were at issue, "under the Rules the circuit judge was not required to disclose any of these relationships with counsel, nor recuse himself." By negative implication, since in this case the facts and relationships are very different, the opposite conclusion is required.

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[3] The Canons were adopted in 1991. Older authority opining that personal bias can be waived is thus inapposite. *See, e.g, Butler v. Sea Pines Plantation*, 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984)(bias and prejudiced deemed waived).

Lastly, this Court has not hesitated to reverse and remand for a new trial where there is an allegation of bias made to this Court and this Court finds that the Record does not support the factual findings of a judge. *See Ellis v. Proctor & Gamble*, 315 S.C. 283, 433 S.E.2d 856 (1993) (findings of master not supported by record, judge alleged to be biased, trial reversed). As shown above in the "Facts" section of this motion, Justice Hearn recited as "fact" some events that nowhere appear in the Record on Appeal or in the trial transcript. Hence, Justice Hearn must be disqualified and her opinion vacated.

III. Timeliness Concerns Cannot Bar this Recusal Motion.

Timeliness concerns cannot bar consideration of this recusal motion. The plain text of the Canons makes clear that disqualification *cannot be waived* for reasons of personal bias and prejudice concerning a party. In light of the active participation of Justice Hearn and her husband in the facts giving rise to this case – including Justice Hearn's participation in an Episcopal Church institution that has pushed for sanctions against Bishop Lawrence, and her husband's leadership of St. Anne's – Justice Hearn has both actual and apparent bias, and this conflict cannot be waived.

This Court's decision in *Davis*, 409 S.C. at 289, does not require a different result. To be sure, *Davis*, citing *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C. 1975), notes in *dicta* that the "timeliness of the motion [to disqualify] is questionable." *Davis*, 409 S.C. at 289. Of course, federal courts, ***unlike*** South Carolina state courts, have statutes that guide them on issues of timeliness. In fact in *Duplan*, the district court noted this, stating: "This court is of the opinion that Canon 3C is intended to be utilized by every judge at the outset of every case as a checklist to assist him in determining whether he should at that point disqualify himself from any participation in the proceedings." Once the judge becomes active in the proceeding, he "has

the benefit of statutory guidance as to when and under what conditions he should disqualify himself." The district court went on to state that "once a federal judge has commenced his deliberations in a particular action, any challenge to his continued consideration of that matter, based on grounds for which Congress has provided a remedy, must employ those remedies and not the Code of Judicial Conduct". *Duplan* 400 S. Supp. at 505(emphasis added.) 28 U.S.C. §§ 144 and 455 govern recusal in federal court after the judge takes the case. One of these statutes, Section 144, has an explicit timeliness requirement, and the other, Section 455, is the one for which many courts imply a timeliness requirement.

Hence, the *Davis* Court should not have been guided by federal cases that have a statutory overlay leading them to certain decisions regarding timeliness. Regardless, the reason that the timeliness was deemed questionable by the *Davis* Court is that the party there moved for recusal on the basis of impartiality nearly two years after the judge disclosed the bulk of the relationship involved. Here, Justice Hearn never made any disclosures. Further, the Plaintiffs had a good faith basis to believe she would ultimately adhere to her obligations and not rule in the case. In any event, the structural constitutional problems in this matter cannot be waived or dismissed via timeliness on due process of law grounds. The vacatur must occur in this particular case, regardless, because of the compelling constitutional grounds[4].

Even if the Court were to conclude that this motion is untimely with respect to whether it should *vacate* Justice Hearn's prior opinion in this case, timeliness concerns undoubtedly cannot bar Movants' request for Justice Hearn's *prospective recusal.* In other words, timeliness concerns cannot justify Justice Hearn's continued participation in this case notwithstanding her

[4] *See In re Chavez*, 130 S.W.3d 107 (Tex. Ct. App. 2003)(motions to disqualify based on bias and prejudice not subject to timeliness due to Texas constitutional concerns.

bias and conflict of interest. The United States Court of Appeals for the Third Circuit, for example, has recognized this point in two separate cases involving the federal recusal statute, holding that when a motion for recusal is "presented to the [judge] prior to a proceeding over which the judge would preside," the motion cannot be denied for lack of timeliness, lest a judge who has an actual or apparent bias be allowed to continue to preside over the case. *United States v Furst*, F.2d 588, 581 (3d Cir. 1989). The *Furst* Court explained that "authorities dealing with situations in which recusals were sought to upset what had already been done" are inapposite when a party seeks prospective recusal. *Id.*

Similarly, in *In re Kensington Int'l*, 368 F.3d 289 (3d Cir. 2004), the Court required the district court to recuse itself prospectively even though a party had moved for recusal 22 months after learning about the grounds for recusal. *Id.* at 316-17. The *Kensington* Court emphasized that the federal recusal statute requires a weighing of the "competing institutional interest in avoiding the appearance of impropriety, on the one hand, and avoiding the abuse of [recusal] procedure, on the other." *Id.* Here, just as in *Kensington*, because "the seriousness of the grounds for recusal that exist on this record far outweighs any significance" of the timeliness of the recusal motion, this Court cannot "have the issue of timeliness trump what [it] ha[s] concluded are the principles of [the federal recusal statute]." *Id.* at 317. Put simply, the judicial system cannot tolerate a judge with an actual or apparent bias to continue to sit on proceedings after a recusal motion is brought. *See Also Bradley v. Milliken*, 426 F. Supp. 929, 931 (E.D. Mich. 1977) (holding that plaintiffs' motion "is untimely" but nonetheless addressing the merits because "[w]ere plaintiffs' assertions grounds for recusal, we could not sit on this case regardless of any implied waiver or the untimeliness of the motion").

IV. This Motion Should Be Decided by the Full Court, Not by Justice Hearn Alone.

While it is not unusual for a motion for disqualification to be heard by the judge to whom the motion is directed, this should not be the case here. As noted by the Supreme Court in *Williams, supra,* citing *In re Murchison*, 349 U.S. 133, 136-37 (1955), the Courts must adhere to the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'" *Id* at 1906. Here, as noted above, Justice Hearn participated and wrote an opinion directly affecting her favorably as a party and her interests within the meaning of the Canon. As a matter of due process, she cannot continue in such a role by deciding whether she will disqualify herself and nullify her opinion (just as she cannot participate in any future rehearing in this matter). It would thus be a denial of Movant's due process if Justice Hearn is permitted to decide her own disqualification motion alone.

V. Conclusion and Arguments As to Relief Requested.

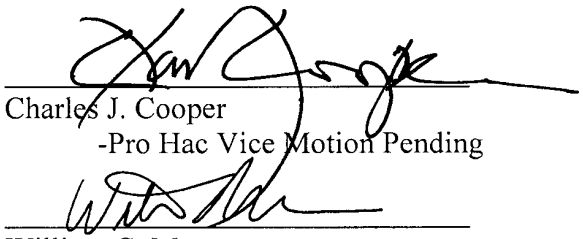
Based on the foregoing, and on the affidavits attached hereto, Movants request that the full Court grant this Motion, and vacate the opinion of Justice Hearn. Movants further request that Justice Hearn not be permitted to participate in the Petition for Rehearing in this case. Should Rehearing without Justice Hearn be deadlocked at 2-2, the Movants further move that the Chief Justice appoint a fifth participant jurist to break the tie. The due process violation would continue if her disqualification from participation in Rehearing simply affirmed the decision in which she participated that caused a violation of due process in the first instance. Failing the above requested relief, Movants who improperly lost their property rights[5] move to vacate all

[5] The Movant Diocese (with the exception of Camp Christopher) and 8 parishes prevailed as to their property.

opinions in this matter, and order rehearing and a new oral argument with a newly constituted Court.[6]

Signature Page(s) Attached

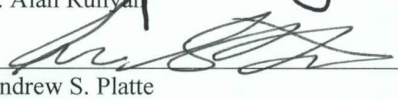
[6] Due to the retirement of former Chief Justices Pleicones and Toal, it is not anticipated that either would ordinarily participate in the rehearing. There are many past examples where rehearing was considered by different justices that those who first heard the case. *See, e.g., Hopkins v. S.C. Dep't of Soc. Servs.*, 313 S.C. 322, 327, 437 S.E.2d 542, 545 (1993); *SCANA Corp v S.C. Dep't of Revenue*, 384 S.C. 388, 389, 683 S.E.2d 468, 468 (2009).



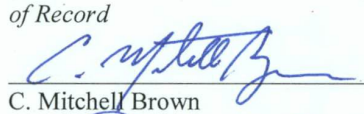
Charles J. Cooper
-Pro Hac Vice Motion Pending

William C. Marra
-Pro Hac Vice Motion Pending
for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*

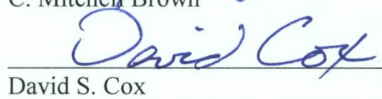
C. Alan Runyan



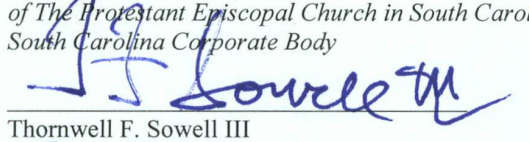
Andrew S. Platte
for *the Diocese and Parishes as Reflected of Record*



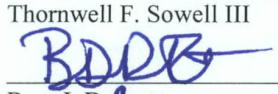
C. Mitchell Brown



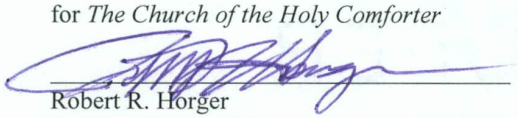
David S. Cox
for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*



Thornwell F. Sowell III

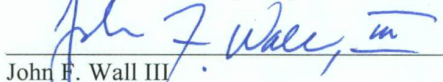


Bess J. Dukant
for *The Church of the Holy Comforter*

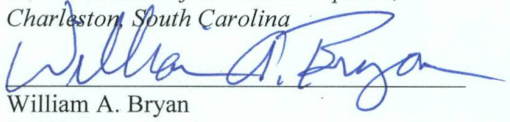


Robert R. Horger
for *The Church of the Redeemer*

William A. Scott
for *The Holy Trinity Episcopal Church*

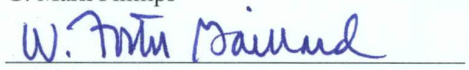


John F. Wall III
for *The Church of the Good Shepherd, Charleston, South Carolina*

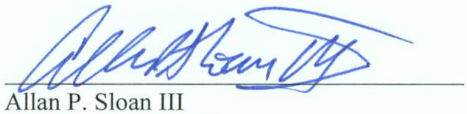


William A. Bryan
for *The Church of the Resurrection, Surfside*

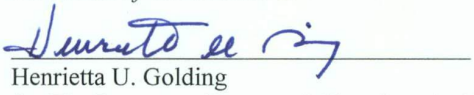
G. Mark Phillips



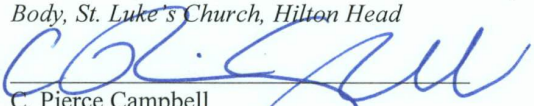
W. Foster Gaillard
for *The Protestant Episcopal Church of the Parish of Saint Philip, in Charleston, South Carolina*



Allan P. Sloan III
Joseph C. Wilson IV
for *Vestry and Church-Wardens of the Episcopal Church of the Parish of Christ Church*

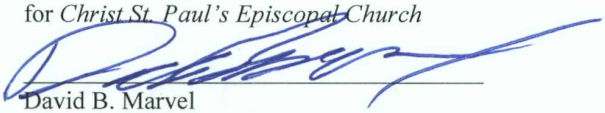


Henrietta U. Golding
for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body, St. Luke's Church, Hilton Head*

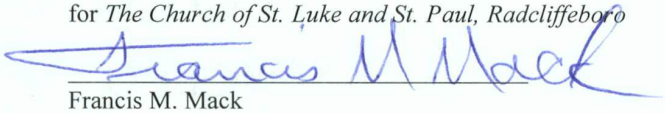


C. Pierce Campbell
for *All Saints Protestant Episcopal Church Inc., St. Bartholomews Episcopal Church and The Church of the Holy Cross*

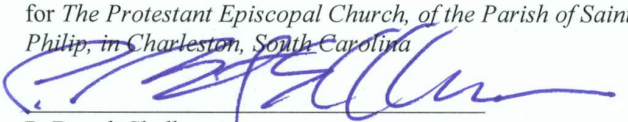
I. Keith McCarty
for *Christ St. Paul's Episcopal Church*



David B. Marvel
for *The Church of St. Luke and St. Paul, Radcliffeboro*

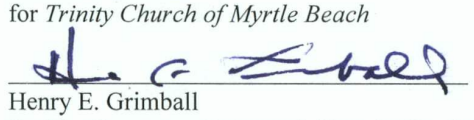


Francis M. Mack
for *The Protestant Episcopal Church, of the Parish of Saint Philip, in Charleston, South Carolina*

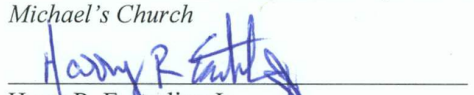


P. Brandt Shelbourne
for *The Vestry and Wardens of St. Paul's Church, Summerville*

Susan P. MacDonald
James K. Lehman
for *Trinity Church of Myrtle Beach*



Henry E. Grimball
for *The Protestant Episcopal Church, The Parish of Saint Michael in Charleston, in the State of South Carolina and St. Michael's Church*



Harry R. Easterling Jr.
for *St. David's Church and St. Paul's Episcopal Church of Bennettsville, Inc.*

Mark V. Evans
for *St. James Church, James Island, South Carolina*

Charles H. Williams

Thomas Davis
for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*

John B. Williams, by J. Mark Phillips, with permission and direction
John B. Williams
for *Trinity Episcopal Church of Pinopolis*