IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. DAUGHERTY, Contestant, v. FULTON COUNTY REGISTRATION AND ELECTION BOARD, DEKALB COUNTY REGISTRATION AND ELECTION BOARD, COFFEE COUNTY BOARD OF REGISTRATION AND ELECTIONS, GEORGIA STATE ELECTION BOARD, BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, RAPHAEL G. WARNOCK, AND THOMAS JONATHAN OSSOFF, Defendants.	CIVIL ACTION NO: 2021CV344953

REPLY IN SUPPORT OF VERIFIED APPLICATIONS FOR ADMISSION PRO HAC VICE

INTRODUCTION

"The right to counsel is an important interest which requires that any curtailment of the client's right to counsel of choice be approached with great caution." *Clough v. Richelo*, 274 Ga. App. 129, 132 (2005) (citations omitted). As such, Georgia's Uniform Superior Court Rule 4.4 provides that applications to appear *pro hac vice* should ordinarily be granted. Ga. Uniform Super. Ct. R. 4.4(D)(3). Contestant Michael Daugherty's request that this Court take the unusual step of denying the *pro hac vice* admissions of the three out-of-state attorneys that Senator Raphael Warnock has chosen to represent him—Amanda Callais, John Geise, and Zachary Newkirk (the "Subject Attorneys")—should be denied.

Mr. Daugherty makes this extraordinary request, *not* because he contends that the Subject Attorneys are unqualified or have engaged in any conduct that would be detrimental to the fair

proceeding of this action, but because Mr. Daugherty contends that other attorneys from the same law firm, in other cases in other states, have taken actions that Mr. Daugherty misguidedly construes as unethical or out of keeping with Georgia's rules of professional conduct. *See generally* Contestant's Consolidated Resp. to Mots. For Admission Pro Hac Vice ("Resp."). While it is unusual to even oppose (much less deny) applications for admission *pro hac vice*, doing so on the bases advanced here is virtually unprecedented. Even worse, Mr. Daugherty's objections are based on misstatements and misunderstandings of the facts of those other cases and regarding the alleged conduct of those other attorneys. In actuality, none of what Mr. Daugherty discusses would warrant denial of admission *pro hac vice* for the attorneys who were actually involved, much less other attorneys at their law firm.

All three of the Subject Attorneys are in good standing in the jurisdictions in which they are barred, have previously been admitted *pro hac vice* to Georgia courts where they have practiced without incident, and have never been the subject of any sanctions in any proceedings or the subject of disciplinary action by any Bar or any Court. And while a client's interest in their choice of counsel is always a factor that should be strongly weighted when considering whether to grant a verified *pro hac vice* admission application, it is only heightened in a case such as this, where the proceeding involves a highly specialized area of law and the potential consequences of the action are significant, not just for the individual U.S. Senator on whose behalf the undersigned seeks to appear, but also for the millions of Georgia voters who cast their ballots in support of the Senator's election.

The Senator did not initiate this action, but he must defend against it. And he should be entitled to the counsel of his choice: experienced election law counsel who have defended candidates and elections in contests across the country (including in Georgia last year, when

various challengers advanced several of the same challenges Mr. Daugherty seeks to relitigate here in an effort to undo long-since concluded elections), making the Subject Attorneys uniquely situated to serve as counsel in this case. This Court should reject Mr. Daugherty's attempt to deny Senator Warnock his choice of counsel, give fair consideration to the Senator's attorneys' applications for *pro hac vice* admission, and grant them.

BACKGROUND

Mr. Daugherty waited until January 25, 2021 to initiate this action. At that point it had already been more than three weeks since Georgia voters chose U.S. Senators Raphael Warnock and Jon Ossoff (collectively the "Senators") to represent them in the United States Senate. By then, the election results had been certified. Critically, the Senators had been sworn in and seated. Mr. Daugherty then inexplicably waited another seven weeks even to attempt to perfect service on Senator Warnock, further unreasonably delaying the resolution of these proceedings.[1] Even then, Mr. Daugherty did not comport with the rules of special service required for election contests. *See* Sen. Warnock's Mot. to Dismiss Election Contest at 9–10. But even if service was proper, Mr. Daugherty's contest comes far too late and is not well founded.

A. The Petition

Though contesting the January 5, 2021 runoff election ("January runoff"), the bulk of Mr. Daugherty's allegations stem from the November 2020 general election or election administration decisions that were made months earlier. Moreover, most of those allegations were already the subject of litigation in the weeks following the November election. All of those challenges were roundly rejected by Georgia state and federal courts, including because *even then* several of the

[1] Mr. Daugherty claims to have effectuated service on Senator Warnock on March 15, 2021. To date, Senator Ossoff has not been served.

claims Mr. Daugherty now raises again were too late. *See, e.g.*, *Wood v. Raffensperger*, 1:20-cv-04651-SDG, 2020 WL 6817513 (N.D. Ga. Nov. 20, 2020), *aff'd* 981 F.3d 1307.

The relief that Mr. Daugherty seeks is extraordinary. Months after the election concluded and the Senators have been seated and are serving in Congress, Mr. Daugherty asks this Court to retroactively: (1) declare Senator Ossoff ineligible as a runoff candidate; (2) declare the January runoff results for both Senators invalid and order that two new elections be conducted; (3) permanently enjoin certain voting equipment from being used in future Georgia elections; and (4) grant Mr. Daugherty access to all mail-in ballots, ballot images, and election reports from the November 2020 general election, as well as permission to conduct a forensic review of certain voting equipment used in those elections and the January runoff. *See* Petition for Election Contest at 13–14.

Mr. Daugherty's claims are barred by the equitable doctrine of laches; are moot because the January runoff has passed, the election results Mr. Daugherty seeks to challenge long ago certified, and the Senators sworn in and seated; and fall far short of stating a claim for relief because, even under the liberal pleading standards, they are insufficient to obtain legal relief under Georgia's contest procedures. *See generally* Sen. Warnock's Mot. to Dismiss Election Contest.

B. The *Pro Hac Vice* Applications

On April 19, 2021, in keeping with Georgia Uniform Superior Court Rule 4.4, Senator Warnock's out-of-state counsel, the Subject Attorneys, applied for *pro hac vice* admission in this Court. As part of their applications, they submitted verified applications swearing, among other things, that they have never been sanctioned or disciplined in any formal disciplinary proceedings or by any court, have never had *pro hac vice* applications in Georgia denied or revoked, and are in good standing in the jurisdictions in which they are licensed.

Mr. Daugherty makes much of the fact that Ms. Callais has previously applied for (and been admitted) *pro hac vice* in state or federal courts in Georgia on 15 prior occasions. Ms. Callais made no attempt to hide this fact; it is clear from the face of her *pro hac vice* application. *See* App. for Pro Hac Vice Admission of Amanda Callais at 2–4. Mr. Daugherty fails to note the unusually active past election cycle for election contests and challenges to the processes and procedures for Georgia elections. In fact, *nine* of Ms. Callais's prior admissions involved *defending* either the 2020 presidential election results or the January runoff election process in cases that not only involved many of the same allegations Mr. Daugherty makes here, but most also were explicitly based on a voting rights case that Ms. Callais litigated in 2019 and 2020.[2] In other words, each of those nine cases were intimately related, and in each Ms. Callais brought unique expertise to the matters at issue. Mr. Geise's *pro hac vice* application similarly made clear that he had previously applied for and been admitted *pro hac vice* in state or federal court in Georgia three times, all in cases that involved defending the voting process for the January runoff from baseless attacks. And Mr. Newkirk's application evidenced that he had previously applied for and been admitted *pro hac vice* in Georgia twice in voting rights cases. All of the attorneys' Georgia appearances have been confined to their well-defined specialty of election law and voting rights, including election contests like the one Mr. Daugherty has filed here.

[2] *Ga. Republican Party, Inc. v. Raffensperger*, 1:20-cv-5018-ELR (N.D. Ga. 2020); *Wood v. Raffensperger*, 1:20-cv-05155-TCB (N.D. Ga. 2020); *Wood v. Raffensperger*, 1:20-cv-04651-SDG (N.D. Ga. 2020); *Pearson v. Kemp*, 1:20-cv-04809-TCB (N.D. Ga. 2020); *Brooks v. Mahoney*, 4:20-cv-00281 (S.D. Ga. 2020); *12th Cong. Dist. Republican Comm. v. Raffensperger*, 1:20-cv-180-JRH-BKE (S.D. Ga. 2020); *RNC v. Raffensperger*, No. 2020cv343319 (Fulton Cnty. Sup. Ct. 2020); *Boland v. Raffensperger*, 2020cv343018 (Fulton Cnty. Sup. Ct. 2020); *Trump v. Raffensperger*, 2020cv343255 (Fulton Cnty. Sup. Ct. 2020). The majority of these cases involved claims based on a publicly-filed settlement agreement with election officials. *Democratic Party of Ga., Inc. v. Raffensperger*, 1:19-cv-5028-WMR, ECF No. 56-1 (N.D. Ga. Mar. 6, 2020).

On April 27, the State Bar of Georgia acknowledged that the Subject Attorneys had paid the required fees and complied with Appendix A of Rule 4.4, which requires applicants to identify any *pro hac vice* denials or revocations, as well as other disciplinary proceedings. *See* Exs. A, B, C. These acknowledgments were served on all counsel in this case on May 4.

On May 5, Mr. Daugherty filed his objections to the Subject Attorneys' *pro hac vice* applications. He alleges, without basis, that their admission should be denied because: (1) Ms. Callais has applied for (and been granted) *pro hac vice* admission in Georgia state and federal court several times; (2) other attorneys employed by the Subject Attorneys' same law firm who are *not* seeking admission here are "likely" to be called as witnesses to support Mr. Daugherty's claims related to Dominion voting systems;[3] (3) another Perkins Coie attorney who is also not seeking admission in this case "threatened . . . criminal prosecution" in connection with an election audit in Arizona; and (4) other firm attorneys, also not seeking admission here, were the subject of an order of sanctions from the Fifth Circuit that resulted from a disagreement about proper appellate procedure. A motion for reconsideration of that order has been filed.

LEGAL STANDARD

Under the Georgia Uniform Superior Court Rules, this Court can admit eligible attorneys "to appear in a particular proceeding." Ga. Uniform Sup. Ct. R. 4.4(B). While this Court has the discretion to deny *pro hac vice* applications if, for instance, an admission "may be detrimental to the prompt, fair, and efficient administration of justice" or an applicant has appeared "as to constitute regular practice in this state," applications for *pro hac vice* admission "ordinarily should

[3] As will be discussed, this assertion appears to be based on Mr. Daugherty's misunderstanding of the issues involved in an unrelated New York matter in which these other attorneys served as counsel.

be granted." *Id.* 4.4(D)(3). A party objecting to an application for *pro hac vice* admission "must file with its objection information establishing a factual basis for the objection." *Id*. 4.4(D)(2).[4]

ARGUMENT

Mr. Daugherty's objections to the Subject Attorneys' *pro hac vice* applications should be rejected. First, Mr. Daugherty's argument that Ms. Callais's past *pro hac vice* admissions in Georgia amount to regular practice ignores that all of these past admissions were limited in scope to her area of expertise, the majority of those cases were immediately and directly related to each other and this case, and her appearance in them falls far short of the type of practice that could be construed as regular practice in Georgia. Notably, *none* of Mr. Daugherty's other objections involves any attorney who is actually seeking admission in this case. Instead, they involve the alleged conduct of other attorneys in other cases in other states, and have no bearing on the propriety of the admission of the Subject Attorneys here. Even worse, they repeatedly mischaracterize the cases and conduct at issue, none of which would warrant the extraordinary relief of denying *pro hac vice* admission, even *if* those other attorneys were seeking to participate in this case. *See* Ga. Uniform Sup. Ct. R. 4.4(D)(3) (stating *pro hac vice* admission "ordinarily should be granted"). The Court should reject Mr. Daugherty's objections to the admission of the Subject Attorneys and grant their applications for admissions *pro hac vice* to appear for their client.

I. Ms. Callais's past admissions do not constitute regular practice in Georgia and do not warrant denial of her *pro hac vice* admission here.

Mr. Daugherty's assertion that Ms. Callais's previous *pro hac vice* admissions constitute regular practice in Georgia—the only direct objection that Mr. Daugherty makes to the admission

[4] Of note, Georgia courts "are mindful of counsel using motions to disqualify as a dilatory tactic." *Hodge v. URFA-Sexton, LP*, 295 Ga. 136, 139 (2014). Such motions lacking in substantial justification and interposed for harassment or delay are impermissible and subject the movant to motions for reasonable attorneys' fees under O.C.G.A. § 9-15-14. *Id.*

of any of the Subject Attorneys seeking *pro hac vice* admission here—should be rejected. Georgia law makes clear that where an attorney provides specialized representation in an area of expertise, repeated *pro hac vice* admission does not constitute regular practice in the state, nor does it indicate that the attorney is using *pro hac vice* admission to evade licensing requirements.

It is undeniable that Ms. Callais's previous admissions have been in her area of expertise, in many cases on behalf of the same clients and to address the same issues in the same election cycle. Simply put, these circumstances do not amount to "regular practice" in Georgia under Rule 4.4(D)(3)(d).

Mr. Daugherty recognizes that Ms. Callais's legal practice focuses on representing elected officials, candidates, and political committees in voting rights and election law matters, including in election contests. Not only has all of Ms. Callais's work in Georgia been related to that narrow area of expertise, much of it has been related to the same issues, that were repeatedly the subject of litigation in the highly contentious 2020 election cycle.

Specifically, as part of Ms. Callais's election law work, in 2019, she represented the Democratic Party of Georgia, DSCC, and DCCC in *Democratic Party of Georgia, Inc. v. Raffensperger*, 1:19-cv-5028-WMR (N.D. Ga 2019), which challenged Georgia's signature-matching regime for absentee ballots. That lawsuit was resolved in March 2020 when Ms. Callais's clients and the Georgia state defendants entered into a settlement agreement. *See Democratic Party of Ga., Inc.*, 1:19-cv-5028-WMR, ECF No. 56-1. In the wake of the 2020 presidential election, Republican voters and party committees filed several federal cases and state contests challenging the presidential election results, many of which raised claims explicitly based on the signature matching procedures resulting from that settlement agreement. *See Wood*, 1:20-cv-04651-SDG; *Pearson*, 1:20-cv-04809-TCB; *Brooks*, 4:20-cv-00281; *Boland*, 2020cv343018; *Trump*,

2020cv343255. Because of her knowledge and expertise in election law, as well as her very specific familiarity with the challenged settlement agreement and representation of parties to it, Ms. Callais appeared *pro hac vice* on behalf of multiple Democratic political committees, and presidential electors to defend the settlement agreement and the presidential election results against these frivolous lawsuits. Even though every one of those lawsuits was dismissed, four more challenges were brought shortly thereafter attacking the January run-off election procedures on largely the same bases. *See Ga. Republican Party,* 1:20-cv-5018-ELR; *Wood,* 1:20-cv-05155-TCB; *12th Cong. Dist. Republican Comm.*, 1:20-cv-180-JRH-BKE; *RNC*, No. 2020cv343319. Ms. Callais was the logical choice to continue to represent the Democratic Party committee's interests in these challenges and did so.[5]

Mr. Daugherty's present contest raises many of the same challenges that these prior cases raised (unsuccessfully). Each of the other matters in which Ms. Callais appeared in Georgia involved voting rights and election law matters.[6] None of the cases in which Georgia courts granted Ms. Callais's *pro hac vice* admission is still pending.[7]

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[5] Mr. Geise, also an experienced election law attorney with expertise in this area, appeared in most of these lawsuits as well. *12th Cong. Dist. Republican Comm.* 1:20-cv-180-JRH-BKE; *Ga. Republican Party*, 1:20-cv-5018-ELR; *RNC*, 2020cv343319.

[6] Notably, two of these appearances were in the same case, though at different stages of the litigation. *See Schmitz v. Fulton Cnty. Bd. of Registration & Elections*, 2020CV339337-JCB (Fulton Cnty. Sup. Ct. 2020); *Schmitz v. Fulton Cnty. Bd. of Elections & Registration*, A21A0595 (Ga. App. Ct. 2020). The Democratic Party of Georgia again retained Ms. Callais to represent it in a case concerning specialized disputes concerning timely access to elections records. *Democratic Party of Ga v. Clayton Cnty. Bd. of Elections*, 2020CV02739-10 (Clayton Cnty. Sup. Ct. 2020). The other two matters also were voting rights cases. *New Ga. Project v. Raffensperger*, 1:20-cv-1986-ELR (N.D. Ga. 2020); *Anderson v. Raffensperger*, 1:19-cv-3263-MLB (N.D. Ga. 2020).

[7] One post-election challenge remains pending in the U.S. Court of Appeals for the Eleventh Circuit. *Wood v. Raffensperger*, No. 20-14813 (11th Cir. 2020). Ms. Callais was admitted *pro hac vice* to the federal district court, but she is a member of the Eleventh Circuit and did not need to seek admission there. Further, while the *Trump v. Raffensperger* election contest petition was

Georgia courts have rejected objections to *pro hac vice* admission, even when the out-of-state lawyer seeking admission is involved in multiple *pending* proceedings (much less in resolved related proceedings). In *CSX Transp., Inc. v. McCord*, 202 Ga. App. 365 (1991), a defendant objected to an out-of-state lawyer's admission because the lawyer was involved in at least *ten pending* cases in Georgia. The court rejected defendant's argument, reasoning "the activities of the out-of-state attorney in Georgia appear to be limited to cases within a narrow specialty in which he has a genuine expertise and there is no indication that he is involved in using our provision for *pro hac vice* appearances to circumvent our licensing requirements or conduct a general practice of law." *Id*. at 367–68. The same rationale requires rejection of Mr. Daugherty's objections here. Not only are each of the suits in which Ms. Callais has previously been admitted within "a narrow specialty in which [s]he has a genuine expertise," *id*. at 367, the majority of them involve the same legal claims, arguments, and factual allegations that Mr. Daugherty alleges here, making Ms. Callais's request for *pro hac vice* admission (and Senator Warnock's engagement of her as counsel) all the more distinguishable from the characteristics of someone with a regular practice in Georgia.

In sum, Ms. Callais's *pro hac vice* appearances in Georgia are for good reason. They relate to her area of expertise as well as a discrete set of cases that arose out of the 2020 election cycle due to continued and persistent legal actions brought by litigants like Mr. Daugherty. They do not constitute a regular practice in Georgia, nor do they indicate an effort by the lawyer to avoid licensing requirements by using the *pro hac vice* process to conduct a regular practice. Mr. Daugherty's objection to the admission of the Subject Attorneys on this ground should be rejected.

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dismissed, motions for attorneys' fees from defendants not represented by any of the undersigned remain pending.

II. Mr. Daugherty's additional objections are meritless and do not even involve the attorneys seeking admission in this case.

As a threshold matter, none of Mr. Daugherty's other objections involve the actual attorneys seeking admission in this case. Instead, Mr. Daugherty launches a series of accusations about other attorneys also affiliated with the Subject Attorneys' law firm, about conduct he contends they engaged in while involved in different matters, and in other states. These entirely unrelated objections should be rejected as a basis for denying *pro hac vice* admission of the Subject Attorneys for that reason alone.

It is well-settled that "[b]asic fairness will not permit the disqualification of an attorney because of [alleged] wrongdoing imputed to the attorney by reason of his status when as a matter of fact no wrongdoing exists." *Blumenfeld v. Borenstein*, 247 Ga. 406, 408, 276 S.E.2d 607, 609 (1981). Yet this is exactly what Mr. Daugherty attempts to do here. Taken to its logical end, if Mr. Daugherty's attempt to impute alleged wrongdoing were to succeed, then no attorney from any firm or government agency that employed any attorney who had ever been the subject of discipline could ever be admitted *pro hac vice* in Georgia, no matter how immaculate their record and no matter their expertise.[8] This Court should decline to entertain such unprecedented and all-encompassing reasoning and reject his opposition.

[8] This includes the U.S. Department of Justice. *See, e.g.*, *New York v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 694 at 2–3 (S.D.N.Y. May 21, 2020) (ordering sanctions against Department of Justice attorneys for their "admitted failure to review and produce hundreds of documents that should have been disclosed prior to trial"). And it could even include the Georgia Attorney General's Office. *See, e.g.*, Aaron Gould Sheinin, *Judge orders ethics chief, AG's office to pay $20K in sanctions*, The Atlanta Journal-Constitution (Sept. 3, 2014), *available at* https://www.ajc.com/news/judge-orders-ethics-chief-office-pay-20k-sanctions/uAwGonJNBPeWSTVthYfC6L/.

In any event, Mr. Daugherty consistently misrepresents the facts of the matters he claims support the need to deny *pro hac vice* admission here. None fairly evidence that granting *pro hac vice* admission "may be detrimental to the prompt, fair, and efficient administration of justice." Ga. Uniform Sup. Ct. R. 4.4(D)(3)(a). That would be true *even if* the attorneys involved in those other matters were seeking admission here (which they are not).

For example, Mr. Daugherty contends that the *pro hac vice* admissions should be denied because a Perkins Coie attorney in Phoenix sent a letter, together with several other lawyers representing civil rights organizations, to a company known as "Cyber Ninjas," which is in the process of conducting a widely-criticized post-election audit in Maricopa County. Resp. at 5. Mr. Daugherty's specific objection seems to be that Perkins Coie attorneys "threaten[ed]" criminal prosecution against Cyber Ninjas. *Id*. But this is not true. The letter specifically addressed public reports about alarming procedures that Cyber Ninjas had publicly indicated it was likely to use in conducting the audit, expressing the concerns of the civil rights' community, and cautioning that some of the tactics Cyber Ninjas had outlined could violate federal and state law by intimidating voters and expose Cyber Ninjas to civil and criminal liability. *See, e.g.*, 42 U.S.C. § 1985(3), 52 U.S.C. § 10307(b), A.R.S. § 16-1006(A)–(B), A.R.S. § 16-1013(A)(1). The signatories to the letter did not themselves threaten criminal prosecution; they simply demanded that Cyber Ninjas retain and not destroy documents that could be relevant to imminent civil litigation.

Sixteen days later, a lawsuit was brought against Cyber Ninjas in Arizona State Court, in which the Court itself expressed concern about the legality of Cyber Ninjas' tactics and required it to produce further information to better inform the public about these important issues. *Ariz. Democratic Party v. Fann*, CV2021-006646, Minute Entry (Maricopa Cnty. Super. Ct. Apr. 28, 2021). Notably, the Department of Justice, too, has now gotten involved, expressing similar

concerns about the audit as those expressed in the letter with which Mr. Daugherty takes issue, and is reportedly considering legal action of its own. Ex. D.[9]

Mr. Daugherty similarly misunderstands an unrelated New York legal proceeding, which he claims give rise to an irreconcilable conflict of interest on the part of the Subject Attorneys, because different attorneys from their firm appeared in that contest and, Mr. Daugherty claims, will be called (presumably by him) as witnesses in this case. The case to which Mr. Daugherty refers involved post-election proceedings in New York's 22nd Congressional District, which followed an extraordinarily close election that was decided by a 109-vote margin between the top two candidates out of more than 300,000 votes cast. Those proceedings focused on several problems in *New York's* election administration, which themselves were well-documented by the Department of Justice.[10] In that case, several other attorneys from the Subject Attorneys' law firm represented the campaign for the incumbent congressman, Representative Anthony Brindisi, who trailed his challenger by a small margin.

Mr. Daugherty seems focused on a particular piece of testimony offered by a witness that *one* of the machines in use in Oneida County in that election mistabulated ballots in the multiple recanvasses of that election.[11] Ex. E. But again, he misunderstands (and, as a result, misconstrues) the facts. In the New York case, out of around one thousand votes that had been recanvassed and

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[9] *See also* Bob Christine, *US Justice Department worried about Arizona Senate recount*, Wash. Post (May 5, 2021), *available at* https://www.washingtonpost.com/politics/us-justice-department-worried-about-arizona-senate-recount/2021/05/05/97bdfd70-ae0a-11eb-82c1-896aca955bb9_story.html.

[10] Mark Weiner, *US Department of Justice: Oneida County violated voter rights in NY-22 election*, SYRACUSE POST-STANDARD (Mar. 24, 2021), *available at* https://www.syracuse.com/politics/2021/03/us-department-of-justice-oneida-county-violated-voter-rights-in-ny-22-election.html

[11] Oneida County uses ImageCast Ballot Marking Devices, which are created by Dominion Voting. Voting Systems, Oneida County (accessed May 14, 2021), *available at* https://www.ocgovboe.net/election-information/voting-systems/.

counted by hand, *nine* valid votes for one of the congressional candidates were misread by that single machine as undervotes. *Id*. at ¶ 13. The mistabulation was almost certainly the result of user error, and there is no evidence that it is indicative of some systemic issue with voting machines, in New York, or elsewhere.

Here in Georgia, meanwhile, courts rejected time and again claims like Mr. Daugherty's seeking to call into doubt the outcome of elections in the 2020 election cycle. Notably, three different tabulations of ballots cast on ballot-marking devices and by hand-marked paper ballots alike have taken place here in Georgia, with all arriving at the same results in the November 2020 general election. Indeed, in discussing the 2020 general election, Secretary of State Brad Raffensperger stated that "Georgia's voting system has never been more secure or trustworthy."[12] And, even in the New York case, where there was actual evidence that some votes had been miscounted, the New York courts denied the Congressman's request for a recount.

Thus, Mr. Daugherty's contention that the New York case provides crucial evidence to support his claim in this case is not well-founded. But even if the New York case were relevant, Mr. Daugherty fails to explain why Perkins Coie attorneys (and not, for example, elections officials and the actual declarants in that case) would be required to appear as witnesses to provide such testimony.[13] Mr. Daugherty offers no evidence that Perkins Coie attorneys are "necessary" witnesses under Georgia Rule of Professional Conduct 3.7; as Georgia courts have recognized, "[i]t is axiomatic that a witness testifying as to the existence of a fact must testify from [her] own

[12] Brad Raffensperger, *Opinion: Brad Raffensperger: Georgia's election results are sound*, Wash. Post (Nov. 21, 2020), *available at* https://www.washingtonpost.com/opinions/2020/11/21/brad-raffensperger-georgia-results-2020-election-trustworthy/.

[13] There is a further irony in Mr. Daugherty's insistence that, should this matter go forward, he would have to call Perkins Coie lawyers to provide crucial evidence to make his case, when he apparently believes that any lawyer affiliated with the firm is so untrustworthy that they should be denied *pro hac vice* admission due to their mere association with the firm.

firsthand knowledge." *State v. Parks*, 350 Ga. App. 799, 809–10 (Ga. App. 2019) (quotations and citations omitted).

Mr. Daugherty also cites a letter from three Republican congressmen to the Chair of the Committee on House Administration in his response, making the sweeping claim that Perkins Coie lawyers as a whole "disregard" conflicts of interest rules. Resp. at 6. But this argument is also misplaced. Again, the letter does not involve any of the Subject Attorneys who seek admission here. Further, the letter, which was issued by partisan actors in the context of a congressional election contest, is effectively a press release, attempting to sway public opinion. It was not written by any of the actual parties to that case, it is not a formal disciplinary complaint or anything resembling one, and no one has credibly contended that it states an actual ethical violation. This is for good reason: the letter, which purports to be grounded in the American Bar Association's Model Rule of Professional Conduct 1.7, misconstrues the rule. Rule 1.7 prohibits a lawyer from representing a client "if the representation involves a concurrent conflict of interest," such as when clients "will be directly adverse" to each other or if there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Rule 1.7(a). The Rule explicitly permits representation when certain circumstances are met, such as when "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Rule 1.7(b)(3). This was true of the House contest proceedings. And, indeed, no party in that contest ever moved for any remedial action due to any perceived conflict of interest under Rule 1.7 raised by the Republican congressmen.

Finally, Mr. Daugherty cites to an order granting a sanctions motion by a 2-1 divided panel of the U.S. Court of Appeals for the Fifth Circuit in connection with an appeal arising out of a case

in Texas. Once again, none of the Subject Attorneys who seek admission here was involved in that case. In addition, a motion for reconsideration of that order has been filed, fully brief, and is still pending for decision. But even if the order is not reversed or reconsidered, the conduct at issue would not provide a justifiable basis for denying *pro hac vice* admission of even the attorneys who were named in that order, much less attorneys who are only their colleagues. The attorneys involved in the Fifth Circuit case are represented by outside counsel, including a former U.S. Solicitor General, who explains in the motion for reconsideration that the conduct at issue was far removed from what courts normally deem sanctionable. Instead, it involved a disagreement about a proper interpretation and course of appellate procedure. The path that the sanctioned lawyers took was described as permissible in the Federal Court Appellate Manual, *see Texas All. for Retired Ams. v. Hughs*, No. 20-40643, Mot. for Reconsideration at 16 (5th Cir. Mar. 25, 2021) (attached hereto as Ex. F), and even the lawyers who sought the sanctions appeared to acknowledge in their briefing that the issue was that the sanctioned lawyers picked the wrong procedural vehicle, *see* Reply in Support of Mot. for Reconsideration at 1 (5th Cir. Apr. 12, 2021) (attached hereto as Ex. G). At no point did the attorneys in that case intend to mislead the Court. *See* Exs. F–G. Indeed, the order was not even predicated on a finding of bad faith; the lawyers who sought sanctions argued and continue to argue that sanctions are proper even if the actions were undertaken entirely in *good faith*. *Id.* In any event (and even if the order is not reversed or modified in reconsideration), the fact that other attorneys made what a Fifth Circuit panel viewed as an erroneous procedural decision in another case would not be reason to flatly deny *their* motion for *pro hac vice* in this case, *if* they sought it. But, again, these are not the circumstances before this Court. Rather, Mr. Daugherty seeks to disqualify different lawyers entirely on this basis. This objection, like the others, should be rejected.

CONCLUSION

Mr. Daugherty's objections to the applications for *pro hac vice* admission in this Court are based on misunderstandings and misstatements of fact. The applications for *pro hac vice* admission should be granted.

Dated: May 18, 2021

By:/*s/ Adam M. Sparks*

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Joyce Gist Lewis
Georgia Bar No. 296261
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Georgia Bar No. 341578
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Counsel for Senator Warnock

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John Geise*
Zachary Newkirk*
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znewkirk@perkinscoie.com

**Pro Hac Vice Applications Pending*

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. DAUGHERTY, Contestant, v. FULTON COUNTY REGISTRATION AND ELECTION BOARD, DEKALB COUNTY REGISTRATION AND ELECTION BOARD, COFFEE COUNTY BOARD OF REGISTRATION AND ELECTIONS, GEORGIA STATE ELECTION BOARD, BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, RAPHAEL G. WARNOCK, AND THOMAS JONATHAN OSSOFF, Defendants.	CIVIL ACTION NO: 2021CV344953

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing ***Reply in Support of Verified Applications for Admission Pro Hac Vice*** upon all judges, clerks, and opposing counsel of record via the Odyssey eFile electronic filing system.

Dated: May 18, 2021

/s/ Adam M. Sparks
Adam M. Sparks
Georgia Bar No. 341578

Exhibit A

State Bar of Georgia

Office of the General Counsel

PAULA J. FREDERICK
General Counsel

MERCEDES G. BALL
LEIGH BURGESS
WILLIAM V. HEARNBURG, JR.
JAMES S. LEWIS
JENNY K. MITTELMAN
ANDREEA N. MORRISON
ADRIENNE D. NASH
WILLIAM D. NESMITH, III
WOLANDA R. SHELTON
JOHN J. SHIPTENKO

April 27, 2021

The Honorable Emily K. Richardson
Superior Court of Fulton County
185 Central Avenue SW
Suite JCT-5755
Atlanta, GA 30303

RECEIVED
APR 03 2021
5/3/2021

Re: Application for Admission *Pro Hac Vice* of Ms. Amanda R. Callais, Michael J. Daugherty v. Fulton County Registration and Election Board, et al., Superior Court of Fulton County, Civil Action File No. 2021CV344953

Dear Judge Richardson:

Ms. Amanda R. Callais filed an application for admission *pro hac vice* with the Superior Court of Fulton County in the above-referenced case. Pursuant to Rule 4.4 of the Uniform Superior Court Rules, Ms. Callais served the Office of the General Counsel of the State Bar of Georgia with the required fees and a copy of the application. Based upon my review, Ms. Callais has paid the required fees and it appears as though the application complies with Appendix A of Rule 4.4.

By copy of this letter, I request that Ms. Callais and/or Mr. Sparks, sponsor, serve a copy of this letter on all parties, as this case is e-filed and my office is not a party to the case. If Ms. Callais is admitted *pro hac vice,* we ask that Ms. Callais notify this office once this case is closed.

Yours truly,

John J. Shiptenko
Senior Assistant General Counsel

JJS/ksj
c:
Amanda Callais
Adam Martin Sparks

Exhibit B

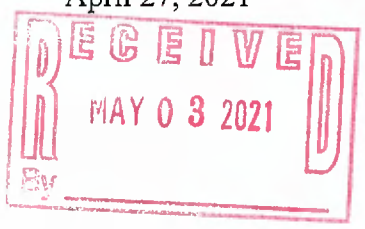
State Bar of Georgia

Office of the General Counsel

PAULA J. FREDERICK
General Counsel

MERCEDES G. BALL
LEIGH BURGESS
WILLIAM V. HEARNBURG, JR.
JAMES S. LEWIS
JENNY K. MITTELMAN
ANDREEA N. MORRISON
ADRIENNE D. NASH
WILLIAM D. NESMITH, III
WOLANDA R. SHELTON
JOHN J. SHIPTENKO

April 27, 2021



The Honorable Emily K. Richardson
Superior Court of Fulton County
185 Central Avenue SW
Suite JCT-5755
Atlanta, GA 30303

Re: Application for Admission *Pro Hac Vice* of Mr. John Geise, Michael J. Daughery v. Fulton County Registration and Election Board, et al., Superior Court of Fulton County, Civil Action File No. 2021CV344953

Dear Judge Richardson:

Mr. John Geise filed an application for admission *pro hac vice* with the Superior Court of Fulton County in the above-referenced case. Pursuant to Rule 4.4 of the Uniform Superior Court Rules, Mr. Geise served the Office of the General Counsel of the State Bar of Georgia with the required fees and a copy of the application. Based upon my review, Mr. Geise has paid the required fees and it appears as though the application complies with Appendix A of Rule 4.4.

By copy of this letter, I request that Mr. Geise and/or Mr. Sparks, sponsor, serve a copy of this letter on all parties, as this case is e-filed and my office is not a party to the case. If Mr. Geise is admitted *pro hac vice,* we ask that Mr. Geise notify this office once this case is closed.

Yours truly,

John J. Shiptenko
Senior Assistant General Counsel

JJS/ksj
c:
John Geise
Adam Martin Sparks

Exhibit C

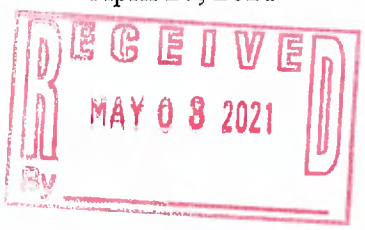
State Bar of Georgia

Office of the General Counsel

PAULA J. FREDERICK
General Counsel

MERCEDES G. BALL
LEIGH BURGESS
WILLIAM V. HEARNBURG, JR.
JAMES S. LEWIS
JENNY K. MITTELMAN
ANDREEA N. MORRISON
ADRIENNE D. NASH
WILLIAM D. NESMITH, III
WOLANDA R. SHELTON
JOHN J. SHIPTENKO

April 27, 2021



The Honorable Emily K. Richardson
Superior Court of Fulton County
185 Central Avenue SW
Suite JCT-5755
Atlanta, GA 30303

Re: Application for Admission *Pro Hac Vice* of Mr. Zachary J. Newkirk, Michael J. Daugherty v. Fulton County Registration and Election Board, et al., Superior Court of Fulton County, Civil Action File No. 2021CV344953

Dear Judge Richardson:

Mr. Zachary J. Newkirk filed an application for admission *pro hac vice* with the Superior Court of Fulton County in the above-referenced case. Pursuant to Rule 4.4 of the Uniform Superior Court Rules, Mr. Newkirk served the Office of the General Counsel of the State Bar of Georgia with the required fees and a copy of the application. Based upon my review, Mr. Newkirk has paid the required fees and it appears as though the application complies with Appendix A of Rule 4.4.

By copy of this letter, I request that Mr. Newkirk and/or Mr. Sparks, sponsor, serve a copy of this letter on all parties, as this case is e-filed and my office is not a party to the case. If Mr. Newkirk is admitted *pro hac vice,* we ask that Mr. Newkirk notify this office once this case is closed.

Yours truly,

John J. Shiptenko
Senior Assistant General Counsel

JJS/ksj
c:
Zachary Newkirk
Adam Martin Sparks

Exhibit D

U.S. Department of Justice
Civil Rights Division

May 5, 2021

VIA EMAIL

The Honorable Karen Fann
President, Arizona State Senate
1700 West Washington Street, Room 205
Phoenix, AZ 85007

Dear Senator Fann:

I write regarding issues arising under federal statutes enforced by the United States Department of Justice that are related to the audit required by the Arizona State Senate for the November 2020 federal general election in Maricopa County. News reports indicate that the Senate subpoenaed ballots, elections systems, and election materials from Maricopa County and required that they be turned over to private contractors, led by a firm known as Cyber Ninjas.

The Department has reviewed available information, including news reports and complaints regarding the procedures being used for this audit. The information of which we are aware raises concerns regarding at least two issues of potential non-compliance with federal laws enforced by the Department.

The first issue relates to a number of reports suggesting that the ballots, elections systems, and election materials that are the subject of the Maricopa County audit are no longer under the ultimate control of state and local elections officials, are not being adequately safeguarded by contractors at an insecure facility, and are at risk of being lost, stolen, altered, compromised or destroyed.[1] Federal law creates a duty to safeguard and preserve federal election records. The Department is charged with enforcement of provisions of the Civil Rights Act of 1960, 52 U.S.C. §§ 20701-20706. This statute requires state and local election officials to maintain, for twenty-two months after the conduct of an election for federal office, "all records and papers" relating to any "act requisite to voting in such election…" *Id.* at § 20701. The purpose of

[1] *See, e.g.*, https://www.azfamily.com/news/investigations/cbs_5_investigates/security-lapses-plague-arizona-senates-election-audit-at-state-fairgrounds/article_b499aee8-a3ed-11eb-8f94-bfc2918c6cc9.html; https://www.azmirror.com/2021/04/23/experts-raise-concerns-about-processes-transparency-as-election-audit-begins/; https://tucson.com/news/local/arizona-senate-issues-subpoena-demanding-access-to-2-million-plus-ballots-cast/article_a426fc7b-60d8-5837-b244-17e5c2b2ddb4.html; https://www.azmirror.com/2021/02/26/judge-sides-with-senate-says-maricopa-must-turn-over-election-materials-for-audit/

these federal preservation and retention requirements for elections records is to "secure a more effective protection of the right to vote." *State of Ala. ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 853 (M.D. Ala. 1960*), aff'd sub nom. Dinkens v. Attorney General*, 285 F.2d 430 (5th Cir. 1961) (per curiam), *citing* H.R. Rep. 956, 86th Cong., 1st Sess. 7 (1959); *see also* Federal Prosecution of Election Offenses, Eighth Edition 2017 at 75 (noting that "[t]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes").[2]

If the state designates some other custodian for such election records, then the Civil Rights Act provides that the "duty to retain and preserve any record or paper so deposited shall devolve upon such custodian." 52 U.S.C. § 20701. The Department interprets the Act to require that "covered election documentation be retained either physically by election officials themselves, or under their direct administrative supervision." *See* Federal Prosecution of Election Offenses at 79. In addition, if the state places such records in the custody of other officials, then the Department views the Act as requiring that "administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records, including the right to physically access" such records. *Id*. We have a concern that Maricopa County election records, which are required by federal law to be retained and preserved, are no longer under the ultimate control of elections officials, are not being adequately safeguarded by contractors, and are at risk of damage or loss.

The second issue relates to the Cyber Ninjas' statement of work for this audit.[3] Among other things, the statement of work indicates that the contractor has been working "with a number of individuals" to "identify voter registrations that did not make sense, and then knock on doors to confirm if valid voters actually lived at the stated address." Statement of Work at ¶ 2.1. The statement of work also indicates that the contractor will "select a minimum of three precincts" in Maricopa County "with a high number of anomalies" in order "to conduct an audit of voting history" and that voters may be contacted through a "combination of phone calls and physical canvassing" to "collect information of whether the individual voted in the election" in November 2020. Statement of Work at ¶ 5.1. This description of the proposed work of the audit raises concerns regarding potential intimidation of voters. The Department enforces a number of federal statutes that prohibit intimidation of persons for voting or attempting to vote. For example, Section 11(b) of the Voting Rights Act provides that "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote…" 52

[2] *See* https://www.justice.gov/criminal/file/1029066/download

[3] *See* https://www.washingtonpost.com/context/cyber-ninjas-statement-of-work/2013a82d-a2cf-48be-8e9f-a26bfd5143e5/

U.S.C. § 10307(b). Past experience with similar investigative efforts around the country has raised concerns that they can be directed at minority voters, which potentially can implicate the anti-intimidation prohibitions of the Voting Rights Act. Such investigative efforts can have a significant intimidating effect on qualified voters that can deter them from seeking to vote in the future.

We would appreciate your response to the concerns described herein, including advising us of the steps that the Arizona Senate will take to ensure that violations of federal law do not occur.

Sincerely,

Pamela S. Karlan
Principal Deputy Assistant Attorney General
Civil Rights Division
pamela.karlan@usdoj.gov

cc: Glenn McCormick, Acting United States Attorney for the District of Arizona
Mark Brnovich, Arizona Attorney General
Katie Hobbs, Arizona Secretary of State
Stephen Richer, Maricopa County Recorder

Exhibit E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

CLAUDIA TENNEY, Petitioner,	:	INDEX NO. EFC-2020-1376
-against-	:	(Justice DelConte)
OSWEGO COUNTY BOARD OF ELECTIONS, et al., Respondents.	:	***AFFIDAVIT OF LUCY MACINTOSH***
For an Order, etc.	:	

LUCY MACINTOSH, being duly sworn, deposes and says:

1. I am over 18 years of age, of sound mind, and otherwise competent to make this Affidavit. The evidence set out in the foregoing Affidavit is based upon my personal knowledge unless expressly stated otherwise.
2. I worked as the campaign manager for the Brindisi for Congress campaign throughout the 2020 election cycle and I continue to work for Brindisi for Congress during this post-election period. I participated in the canvasses held by the Oneida County Board of Elections on December 21, 22, 23, 28, and 29, 2020 and on January 27, 28 and 29, 2021 as a designated observer on behalf of Anthony Brindisi ("Brindisi").
3. As part of the canvassing process, the Oneida County Board of Elections reviewed each affidavit or absentee ballot envelope to determine whether the ballot inside would be opened, cast, and counted.
4. If a ballot was to be opened, cast, and counted, this process would begin at the counting tables. First, Oneida County Board of Elections staff would open the ballots in front of observers for Brindisi and Claudia Tenney ("Tenney").

5. Once an absentee or affidavit ballot envelope was opened, the observers had the opportunity to object to the face of the ballot, if necessary.
6. The Oneida County Board of Elections staff would then rule on the objection, if any, and determine whether the ballot would be counted.
7. If the Oneida County Board of Elections staff ruled the ballot was to be counted, they would read the ballot aloud along with the vote for the 22nd Congressional District race. The Tenney and Brindisi teams, along with members of the Board of Elections, would confirm that the numbers matched for each Election District throughout the process.
8. At the end of each day, Oneida County Board of Elections staff would take any ballots that had been hand counted at the counting tables at the canvassing location back to the Oneida County Board of Elections Office for machine tabulation.
9. In most instances, the results of the machine tabulation were different than those tabulated at the counting tables by hand.
10. For example, on December 21, 2020, the manual tabulation at the table resulted in 33 votes for Claudia Tenney ("Tenney"), 49 votes for Representative Anthony Brindisi ("Brindisi"), and 3 "undervotes," but the machine tabulation resulted in 33 votes for Tenney, 47 votes for Brindisi, and 5 "undervotes."
11. On December 22, 2020, the manual tabulation at the table resulted in 92 votes for Tenney, 125 votes for Brindisi, and 11 "undervotes," but the machine tabulation resulted in 91 votes for Tenney, 122 votes for Brindisi, and 15 "undervotes."
12. On December 28, 2020, the manual tabulation at the table resulted in 103 votes for Tenney, 50 votes for Brindisi, and 7 "undervotes," but the machine tabulation resulted in 103 votes for Tenney, 49 votes for Brindisi, and 8 "undervotes."

13. On January 27, 2021, the manual tabulation at the table resulted in 133 votes for Tenney, 40 votes for Brindisi, and 8 "undervotes," but the machine tabulation resulted in 133 votes for Tenney, 39 votes for Brindisi, and 9 "undervotes."
14. On January 28, 2021, the manual tabulation at the table resulted in 77 votes for Tenney, 72 votes for Brindisi, and 7 "undervotes," but the machine tabulation resulted in 77 votes for Tenney, 71 votes for Brindisi, and 8 "undervotes."
15. Throughout this process, the Brindisi Campaign and the Tenney Campaign conferred at the counting tables or the Oneida County Board of Elections Office to confirm that they had the same hand count. The two campaigns reached agreement on the hand count for each day of the second and third recanvasses.

Lucy MacIntosh

Lucy MacIntosh

Sworn to before me this 01 day of
February 2021

CERTIFICATE IS ATTACHED

Notary Public

JURAT

State/Commonwealthof FLORIDA)
)
☐City ☑County of palm beach)

On 02/01/2021, before me, Eddy Petit-Bois ,
Date *Notary Name*

the foregoing instrument was subscribed and sworn (or affirmed) before me by:

Lucy MacIntosh.
Name of Affiant(s)

❑ Personally known to me **-- OR --**

❑ Proved to me on the basis of the oath of _____ **-- OR --**
Name of Credible Witness

☑ Proved to me on the basis of satisfactory evidence: driver_license
Type of ID Presented

WITNESS my hand and official seal.

Notary Public Signature: Eddy Petit-Bois

EDDY PETIT-BOIS
Notary Public - State of Florida
Commission # HH537
Expires on May 17, 2024

Notary Name: Eddy Petit-Bois
Notary Commission Number: HH537
Notary Commission Expires: 05/17/2024
Notarized online using audio-video communication

DESCRIPTION OF ATTACHED DOCUMENT

Title or Type of Document: AFFIDAVIT

Document Date: 02/01/2021

Number of Pages (including notarial certificate): 4

Exhibit F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; DCCC, *Plaintiffs-Appellees*, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, *Defendant-Appellant*.	No. 20-40643

MOTION FOR RECONSIDERATION OR MODIFICATION OF SANCTIONS ORDER ON BEHALF OF MARC E. ELIAS, BRUCE V. SPIVA, SKYLER M. HOWTON, LALITHA D. MADDURI, DANIEL C. OSHER, AND STEPHANIE I. COMMAND

s/Paul D. Clement
PAUL D. CLEMENT
Counsel of Record
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Movants Marc E. Elias, Bruce V. Spiva, Skyler M. Howton, Lalitha D. Madduri, Daniel C. Osher, and Stephanie I. Command

March 25, 2021

CERTIFICATE OF INTERESTED PERSONS

1. No. 20-40643, *Texas Alliance for Retires Americans, et al. v. Hughs*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case:

Plaintiffs-Appellees

a. Texas Alliance for Retired Americans
b. Sylvia Bruni
c. DSCC
d. DCCC

Other Parties

a. Texas Democratic Party
b. Jessica Tiedt

The following attorneys have appeared on behalf of Plaintiffs-Appellees either before this Court or in the District Court:

Marc E. Elias
Bruce V. Spiva
Lalitha D. Madduri
Daniel C. Osher
Stephanie I. Command
Emily R. Brailey
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 800
Washington, D.C. 20005-3960

Skyler M. Howton
PERKINS COIE LLP
500 North Akard Street
Suite 3300
Dallas, TX 75201-3347

Defendant-Appellant

a. Ruth Hughs, Texas Secretary of State

The following attorneys have appeared on behalf of Defendant-Appellant either before this Court or in the District Court:

Ken Paxton
Jeffrey C. Mateer
Ryan L. Bangert
Patrick K. Sweeten
Todd Lawrence Disher
William T. Thompson
Matthew H. Frederick
Kyle D. Hawkins
Judd Stone
OFFICE OF THE TEXAS
ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548

Individuals Subject to the March 11 Sanctions Order

a. Marc E. Elias
b. Bruce V. Spiva
c. Skyler M. Howton
d. Lalitha D. Madduri
e. Daniel C. Osher
f. Stephanie I. Command

The following attorneys are appearing before this Court solely on behalf of the Movants, i.e., Individuals Subject to the March 11 Sanctions Order, and not Plaintiffs-Appellees:

Paul D. Clement
Matthew D. Rowen
KIRKLAND & ELLIS LLP
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-5000

/s/ Paul D. Clement
Paul D. Clement

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule

Treatises

Other Authorities

INTRODUCTION[1]

This motion does not seek reconsideration of this Court's denial of Plaintiffs' motion to supplement the record or the grant of the motion to strike. It seeks reconsideration or modification only of the portion of this Court's March 11, 2021 Order imposing sanctions (the "Sanctions Order"), and it is filed only on behalf of the sanctioned attorneys: namely, Marc Elias, Bruce Spiva, Skyler Howton, Lalitha Madduri, Daniel Osher, and Stephanie Command (collectively, "Movants").

Movants sincerely apologize for the misunderstandings and mistakes that precipitated the Sanctions Order. Movants' litigation decisions were not intended to conceal the denial of the initial motion to supplement the record, but reflected good-faith misunderstandings about the full impact of the earlier denial and the proper vehicle for allowing the merits panel to address the supplementation issue. The rules governing those questions were far from clear, and several authorities supported Movants' interpretation of the ambiguities that the Sanctions Order has now clarified.

---

[1] Movants understand this Court's rules to require that this filing be styled a motion for reconsideration because, *inter alia*, the monetary sanction has not yet been reduced to a sum certain. *See Cruz v. Fulton*, 714 F.App'x 393, 394 (5th Cir. 2018); *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1998). In the event that is incorrect, Movants respectfully request that their motion be construed as a petition for rehearing and rehearing en banc.

Respectfully, Movants submit that appellate courts generally reserve sanctions for egregious misconduct and the disregard of clearly established rules, rather than sanctioning good-faith mistakes based on misunderstandings about complicated and ambiguous rules of appellate practice. As a result, if the Sanctions Order stands, it will have (and, indeed, already has had) outsized collateral consequences on each of the affected attorneys. Movants affirm that they heard and understand the Court's lesson, apologize for disappointing the Court, and respectfully ask the Court to reconsider the Sanctions Order.

BACKGROUND

On September 25, 2020, the district court granted Plaintiffs' request for a preliminary injunction. ROA.1661-1704. Defendant promptly moved this Court to stay that injunction pending appeal and to grant an administrative stay. Doc. #00515581091. In that motion, Defendant argued that although "the district court found" that Plaintiffs had "standing" sufficient for a preliminary injunction, it did so "based entirely on the allegations in Plaintiffs' complaint," which she argued "was erroneous" (because "the preliminary-injunction context" "requires 'evidence in the record'") and dispositive (because "the record contains no evidence to support Plaintiffs' standing"). *Id.* at 8 (citations omitted). A Motions Panel of this Court (Clement, Elrod, and Haynes, JJ.) entered an administrative stay on September 28, 2020. Doc. #00515583262 at 1-2.

The Motions Panel ordered Plaintiffs to respond to Defendant's stay motion by the next day (*i.e.*, September 29, 2020). *Id.* at 2. Plaintiffs did so. Doc. #00515583344. Alongside their opposition, Plaintiffs filed a motion to supplement the record, requesting leave to file three declarations designed to substantiate Plaintiffs' standing allegations and thus answer Defendant's concern about a lack of record evidence. Doc. #00515583497 at 1-2.

On September 30, 2020, Defendant filed a reply, and the Motions Panel issued a per curiam opinion staying the preliminary injunction pending appeal, largely based on the *Purcell* principle disfavoring injunctive relief in the run up to an election. Doc. #00515585161. The Motions Panel noted "some concerns" about Plaintiffs' standing and the district court's application of an insufficiently demanding standard for showing the "standing required to maintain a preliminary injunction." *Id.* at 4-5 n.1. The Motions Panel clarified, however, that it was not resolving the standing issue, but deferring it to the "merits panel." *Id.*

Earlier that same day (September 30, 2020), and before Defendant filed any separate response to Plaintiffs' motion to supplement, the Motions Panel denied the motion in a succinct single-sentence, single-Judge order that did not specify the particular ground for the denial. Doc. #00515584027.

The case then proceeded with briefing directed to the merits panel.[2] Defendant filed her opening brief on January 11, 2021, which renewed the argument that the record before the district court did not support standing. Doc. #00515702648. Plaintiffs filed their response brief on February 10, 2021. Doc. #00515741373. Alongside their response brief, in an effort to respond to Defendant's renewed lack-of-evidence-for-standing argument and to avoid a remand on that issue, Plaintiffs filed a three-page motion to supplement the record, requesting leave to file the same three declarations they had attached to their earlier unsuccessful motion filed during the stay proceedings. Doc. #00515741367. This new motion was substantially similar to that earlier motion, but did not advert to the earlier motion or the denial of that earlier motion, or seek reconsideration of that denial. *See id.* at 1-3.

Two days later, Defendant's counsel sent Movants an email indicating that Defendant viewed the motion as an improper and untimely reconsideration motion and would be filing a motion for sanctions that day. *See* Doc. #00515761093, Exh. 1. Defendant's counsel did not suggest they would withhold their sanctions motion if Plaintiffs amended their motion to advert to the earlier denial. *Id.*

[2] In the interim, Plaintiffs filed a motion to dismiss the appeal of the preliminary injunction as moot, Doc. #00515643282, which Defendant opposed, Doc. #00515655540. The Motions Panel entered a per curiam order carrying the motion to dismiss with the case. Doc. #00515657414.

Defendant then filed a combined "Brief in Opposition to Appellees' Motion to Supplement" and "Motion to Strike, and to Sanction Appellees' Counsel." Doc. #00515744518. As to the former, Defendant argued that Plaintiffs' February 10 motion to supplement should be denied because it amounted to an untimely effort to seek reconsideration of the September 30 single-judge order denying their earlier motion to supplement, which was law of the case, and was otherwise unavailing. *Id.* at 2-7. As to the latter, Defendant argued that Movants were "unreasonable and vexatious" in filing the February 10 motion because that motion "'presents no explanation why' the Court's September order 'w[as] incorrect'" and does "not even mention that they previously filed an identical and unsuccessful motion to supplement." *Id.* at 7-9 (alteration in original; citations omitted). Defendant asked the Court to order Movants "to pay the 'costs, expenses, and attorneys' fees' the Secretary 'incurred because of such conduct'" and "to inform every court before which they are admitted (including *pro hac vice*) that they were found to have violated their duty of candor" and "to do the same when filing a motion or brief in any court within the Fifth Circuit" "for the next two years." *Id.* at 9, 12-13.

Plaintiffs filed a reply in support of their motion to supplement, Doc. #00515750981, and a separate opposition to Defendant's sanctions motion. Doc. #00515752942. In their opposition, Plaintiffs noted that, during the pre-motion conference on Plaintiffs' motion to supplement, Defendant's counsel did not suggest

that they believed the motion would be sanctionable. *Id.* at 3. Plaintiffs also noted that "at no point prior to filing the present motion for sanctions did the Secretary request that Plaintiffs withdraw or amend their Motion," and that Defendant had not provided Plaintiffs "an opportunity for correction." *Id*. at 7.

Defendant filed a reply in support of her sanctions motion on March 1, 2021, continuing to argue for sanctions, disputing Plaintiffs' description of their sanctions discussion, and attaching the parties' pre-motion correspondence relating to sanctions. Doc. #00515761093; *see id.* Exh. 1.

On March 11, 2021, the Motions Panel entered a per curiam order denying Plaintiffs' motion to supplement the record, granting Defendant's "motion to strike portions of Appellees' brief that improperly reference non-record material," and granting Defendant's motion to sanction Movants, albeit with Judge Haynes noting she would deny the sanctions motion. Doc. #00515777153 at 1-2 & n.*. The Court concluded that Movants' "failure to disclose the earlier denial of their motion" was "inexplicable" and "violated their duty of candor to the court," *id.* at 2, and that their decision not to "withdraw[] their motion" immediately after being informed that Defendant intended to move for sanctions "multiplied the proceedings unreasonably and vexatiously." *Id.* at 2-3. The Court ordered each of "[t]he attorneys listed on the February 10, 2021 motion to supplement the record" to pay "(i) the reasonable attorney's fees and court costs incurred by Appellant with respect to Appellees'

duplicative February 10, 2021 motion, to be determined by this court following the filing of an affidavit by Appellant and any response by Appellees, and (ii) double costs." *Id.* at 3 (citing, *inter alia*, 28 U.S.C. §1927); *see also* CA5 Docket Entry, Mar. 11, 2021 (listing the attorneys subject to the sanctions order). The Court encouraged review of the rules concerning the duty of candor to the court and continued legal education directed to that duty. Doc. #00515777153 at 3. Finally, the Court noted that "[f]urther violations of this court's rules may subject the attorneys to further sanctions under this court's inherent powers." *Id.*

SUMMARY OF ARGUMENT

Based on a full understanding of this Court's view of the dispositive effect of the denial of the first motion to supplement and the proper mechanism for seeking its reconsideration, it is clear that Movants misunderstood the impact of that denial and the proper procedural remedy for avoiding foreclosure of that issue. Movants sincerely apologize for those mistakes, and want to emphasize that they never intended to mislead the Court by failing to advert to the earlier denial.

In light of those realities, Movants respectfully request that the Court reconsider its Sanctions Order. Courts—and appellate courts in particular—generally reserve sanctions for the most serious misconduct and circumstances where the governing rules are sufficiently clear that no reasonable lawyer could make the same mistake in good faith. And precisely because appellate sanctions

orders are reserved for the most serious misconduct, such awards carry outsized stigma for the lawyers involved.

The root cause of the error here was Movants' failure to appreciate the full effect of the Motions Panel's denial of the initial motion to supplement and to understand that, if they wanted to preserve the possibility of the merits panel considering the affidavits, Movants needed to seek reconsideration of that denial within 14 days. If Movants had understood that they needed to file a prompt motion for reconsideration, they would necessarily have adverted to the order they sought to have reconsidered. Regrettably, they misperceived that order to be tied to the stay proceedings and did not view it as foreclosing a motion to supplement the record in conjunction with the merits panel's consideration of the standing dispute. To be sure, this Court has now made clear that the earlier denial was dispositive, and Movants fully recognize their obligation to advert to dispositive rulings. Movants' misunderstanding was a product of a genuine mistake on a difficult question with conflicting authority, *see infra*, not bad faith. And while Movants now understand that they picked the wrong vehicle to ask the merits panel to consider the question of supplementing the record, that too was a good-faith mistake stemming from a failure to appreciate the full effect of the earlier denial and the limited procedural avenue for seeking its reconsideration.

The difference between the errors here and the gross misconduct that typically triggers appellate sanctions gives the Court's Sanctions Order a stigmatizing effect that may be greater than intended. This is true of all Movants, but especially when it comes to the more junior lawyers among them. All Movants will need to disclose the Sanctions Order on countless motions for admission and pro hac vice motions for years to come. Reconsidering the Sanctions Order, moreover, will not avoid meaningful consequences for the Movants. The Sanctions Order has already been the subject of a press release by Defendant's counsel and national media discussion. The Order has clarified the law and had its intended deterrent effect; this Court can rest assured of that. Accordingly, Movants respectfully suggest that a reconsideration of the Sanctions Order would be appropriate.

ARGUMENT

I. Appellate Sanctions Are Generally Reserved For Egregious Misconduct.

Courts have ample power to punish lawyer misconduct, but as this Court has repeatedly recognized, "the imposition of sanctions under the court's inherent power is powerful medicine that should be administered with great restraint." *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F.App'x 899, 906 (5th Cir. 2010). "A court should invoke its inherent power to award attorney's fees only when it finds that 'fraud has been practiced upon it, or that the very temple of justice has been defiled.'" *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995) (quoting *Chambers*

v. NASCO, Inc., 501 U.S. 32, 46 (1991)). "Because of the punitive nature of §1927 sanctions," the threshold for imposing them is also high. *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998). They are limited to cases "of bad faith, improper motive, or reckless disregard of the duty owed to the court." *Conner v. Travis Cnty.*, 209 F.3d 794, 799 (5th Cir. 2000) (quoting *Edwards*, 153 F.3d at 246).

Consistent with these principles, cases imposing sanctions, especially on appeal, are few and far between, and are generally reserved for serious misconduct or the violation of clearly established rules. *See, e.g.*, *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 872 (5th Cir. 2014) ("Section 1927 sanctions should be employed 'only in instances evidencing a serious and standard disregard for the orderly process of justice….'" (quoting *FDIC v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994))). This Court, in particular, has declined to impose sanctions even for serious errors of judgment. *See*, *e.g.*, *Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396 (5th Cir. 2020) (frivolous appeal); *Union Pump*, 404 F.App'x at 906 (wiping disks in violation of a protective order).

Appellate sanctions for violating the duty of candor by omitting relevant precedents or facts about the case are particularly infrequent. While courts occasionally impose sanctions for an unjustified failure to cite binding *case law* that forecloses a lawyer's arguments or renders an appeal frivolous, *see, e.g.*, *Katris v. INS*, 562 F.2d 866, 869-70 (2d Cir. 1977) (sanctioning attorney who omitted binding

adverse authority simply because the "decisions were adverse to his position here and that he did not agree with them"), they more often merely admonish lawyers for such omissions, *see, e.g.*, *United States v. City of Jackson*, 359 F.3d 727, 732 n.9 (5th Cir. 2004) (expressing displeasure with, but not sanctioning, attorney whose brief failed to mention a "critical aspect" of a key case); *Thompson v. Duke*, 940 F.2d 192, 194-98 (7th Cir. 1991) (reversing sanctions against attorney who was "imprudent and unprofessional" in failing to mention non-dispositive adverse case).

Decisions imposing sanctions for failing to disclose *prior rulings in the same case and other facts reflected on the docket* are rarer still. In fact, our search did not identify a prior case where a federal appellate court itself imposed sanctions for such an omission,[3] and only one case upholding a district court's imposition of sanctions for such an omission. *See Blackwell v. Dep't of Offender Rehab.*, 807 F.2d 914 (11th Cir. 1987) (per curiam). In *Blackwell*, the lawyer did not disclose in his motion for attorneys' fees that the parties' settlement (that the same district court judge had approved) contained an express release of all claims for attorneys' fees, and the attorney offered no theory why the settlement and prior court order did not preclude his motion. *Id.* at 915-16. More typically, sanctions for such omissions are either denied outright or reversed on appeal as an abuse of discretion. *See, e.g.*, *MAO-*

[3] We also found no opinions of federal appellate courts imposing sanctions on similar facts under Model Rule 3.3, on which this Court relied in the Sanctions Order.

MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co., 935 F.3d 573, 584 (7th Cir. 2019) (reversing duty-of-candor sanctions given "the absence of either affirmative representations or material omissions in the response," while noting that counsel "should have brought" the relevant "supporting materials" to the district court's attention); *Level 3 Commc'ns, LLC v. United States*, 724 F.App'x 931, 936 (Fed. Cir. 2018) (reversing duty-of-candor sanctions after government attorney's omission left district court with the misimpression that a critical project would not be performed, because the attorney's conduct did not evince "the conscious doing of wrong"); *In re Plaza-Martínez*, 747 F.3d 10, 11-14 (1st Cir. 2014) (reversing duty-of-candor sanctions while acknowledging that district court was not unreasonable in thinking "the appellant had been indulging in gamesmanship").

This Court has not previously imposed—or even upheld under a deferential review standard—duty-of-candor sanctions based only on omissions. Instead, the few previous instances in which this Court has imposed or upheld duty-of-candor sanctions involved unequivocal sins of commission that lacked any colorable justification.[4] The cases cited in the Sanctions Order fit that mold. In *Automation*

[4] *See, e.g.*, *In re Ray*, 951 F.3d 650, 651-55 (5th Cir. 2020) (affirming sanctions against attorney whose "fraud, misrepresentation, and misconduct" reflected "an attorney completely devoid of an ethical or moral sense of right and wrong"); *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, 642 F.App'x 373, 375-78 (5th Cir. 2016) (affirming sanctions against attorney who filed a *qui tam* action using documents

Support, Inc. v. Humble Design, L.L.C., 982 F.3d 392, 395 (5th Cir. 2020), the attorney had repeatedly "inundated the district court and our court with rounds of frivolous filings" attempting to overturn a three-year old ruling. In *Engra, Inc. v. Gabel*, 958 F.2d 643, 645 (5th Cir. 1992) (per curiam), the lawyer tried to intervene against the interests of his own bankrupt client months after a bankruptcy court definitively resolved the contingency fee interest he sought to protect through intervention. And in *Renobato v. Merrill Lynch & Co.*, 153 F.App'x 925, 928 (5th Cir. 2005), the court noted that counsel's "somewhat exuberant filing strategy" normally would *not* give rise to sanctions but for a case-long "pattern of behavior" that "include[ed] his delinquency, his violation of the district court's cease-and-desist order, and his repetitive and rambling filings."

More generally, sanctions imposed directly by appellate courts are rare for sound practical reasons. Unlike trial courts that oversee proceedings that can last for years with frequent counsel appearances that allow the presiding judge to provide warnings and assess a pattern of misconduct, appellate courts generally interact with lawyers only episodically and typically observe lawyers in action only once. Appellate sanctions imposed by motions panels are rarer still given that they typically handle preliminary motions only until a merits panel is assigned and never

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covered by a protective order the attorney himself had procured in a separate-but-related pending case).

see the lawyers in person. For these reasons, sanctions imposed by appellate courts are generally reserved for egregious misconduct and the repeated violation of well-established rules.

II. The Mistakes Made Here Do Not Rise To The Same Level And Stem From Good-Faith Misunderstanding About The Effect Of A Motions-Panel Denial.

The mistakes underlying the sanctions imposed here are materially different from the types of misconduct found sanctionable in the cases cited above and more generally. To be sure, simply offering "cit[ations to] … cases where more egregious appellate conduct was sanctioned" does not excuse errors or defeat sanctions. *Coghlan v. Starkey*, 852 F.2d 806, 808 (5th Cir. 1988). But the conduct here is more comparable to that in the cases where sanctions were withheld or reversed. The mistakes are the product of good-faith misunderstandings, not willful disregard of professional responsibilities.

The root cause of the errors here was the Movants' failure to appreciate the full effect of the Motions Panel's denial of the first motion to supplement the record and the available means to seek reconsideration of that denial by a merits panel. The Sanctions Order now makes clear that the denial of the first motion to supplement is a definitive ruling that is law of the case and could only be revisited based on a timely motion for reconsideration directed to the Motions Panel (with a suggestion that the reconsideration motion be held for the merits panel). If Movants had

understood the need for such a prompt reconsideration motion, they would have necessarily adverted to the adverse order they sought to have reconsidered, and failing to do so would indeed be inexplicable. But if that earlier denial was (mis)understood to be a ruling that governed only the stay proceedings and did not bind the merits panel, then the failure to advert to the earlier ruling becomes understandable for what it was—a regrettable but good-faith mistake.

And until the Sanctions Order, the effect of the prior denial was open to reasonable debate. That the denial 1) was issued by a motions panel, 2) via a single-judge order, and 3) on the same day the standing issue was deferred to a merits panel all contributed to reasonable doubt on this score. The Federal Rules of Appellate Procedure provide that "[t]he court may review the action of a single judge." Fed. R. App. P. 27(c). A leading treatise interprets that statement to "indicate[] that a single appellate judge's decision *does not establish law of the case* that binds the court of appeals." 16AA Wright & Miller, *Federal Practice & Procedure Jurisdiction* §3973.3 (5th ed. Oct. 2020 update) (emphasis added). This Court has previously suggested a similar rule. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 176, 194 (5th Cir. 2020) ("[U]nder our circuit's procedures, opinions and orders of a panel with initial responsibility for resolving motions filed in an appeal are not binding on the later panel that is assigned the appeal for resolution.").

There is even authority in the specific context of motions to supplement the record that supports the view that a motions-panel-stage denial of such a motion does not preclude the merits panel from granting an identical motion to supplement the record: The *Federal Court Appellate Manual* states that a "merits panel may allow you to supplement" the record even "after a motion panel has denied" "your initial request to supplement the record on appeal." David G. Knibb, *Federal Court Appellate Manual* §28:18 (7th ed. Mar. 2021 update). That approach is consistent with the realities that a merits panel can always re-examine standing, which must be present at every juncture of the case, *see K.P. v. LeBlanc*, 729 F.3d 427, 438 (5th Cir. 2013), and that lawyers have a "continuing obligation in all cases to notify the Court of events that may impact th[e] Court's jurisdiction," *Sutuc v. Attorney Gen.*, 643 F.App'x 174, 174 (3d Cir. 2016).

We have not found any previous Fifth Circuit decisions rejecting this approach. In contrast, several cases suggest that motions-panel-stage rulings relating to jurisdiction do not bind merits panels. *See, e.g.*, *W. Elec. Co. v. Milgo Elec. Corp.*, 568 F.2d 1203, 1206 & n.6 (5th Cir. 1978); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (Higginbotham, J., concurring); *see also* Wright & Miller §3973.3 ("The least-sticky types of motion-panel ruling[s] are those concerning subject-matter jurisdiction."). While most of the latter authorities deal with denials of motions to dismiss, they underscore the ambiguities surrounding the

issue and contribute to the reasonableness of Movants' good-faith, albeit mistaken, conclusion that the Motions Panel's denial of a motion to supplement did not preclude the filing of an identical motion in conjunction with merits briefing or render such a motion untimely.

It now appears to be settled by the Sanctions Order both that the Motions Panel denial was law of the case and that the only proper course for preserving the possibility of having the merits panel reconsider that ruling was to file a timely reconsideration motion before the Motions Panel accompanied by a request to hold the reconsideration motion in abeyance for the merits panel.[5] But neither of those things was clearly established at the time Movants filed the second motion to supplement. And given that ambiguity, the failure to mention the denial was a good-faith mistake, not an effort to conceal a previous ruling with obvious dispositive force.

Movants understand that the Sanctions Order reflects concerns not just with failing to advert to the previous denial, but with filing the duplicative and untimely motion and failing to withdraw it when confronted by Defendant. But all those errors stem from a failure to appreciate the dispositive effect of the Motions Panel's earlier denial via a single-judge order. That misunderstanding led Movants to believe that

[5] Perhaps we are mistaken about the availability of even that route for review, but that only underscores the difficulty of the issues.

the second motion to supplement was timely and not hopelessly duplicative, and thus that it did not need to be withdrawn.

In all events, making a duplicative filing based on a misunderstanding of the law is not the stuff of sanctions, as this Court made clear in *Ayala v. Enerco Group*, 569 F.App'x 241 (5th Cir. 2014). *Ayala* held that "[t]he district court abused its discretion in imposing sanctions" where counsel had filed an unnecessary and duplicative second lawsuit but had a colorable basis to believe that the second suit was not foreclosed. *Id.* at 251. In so holding, the Court explained that "[w]hile counsel's justifications for filing the second … action may lack merit, that 'is not a sufficient basis for awarding sanctions.'" *Id.* (citation omitted). Indeed, this Court has often deemed the imposition of sanctions to be a step too far even in cases involving serious misconduct. For instance, in *Sun Coast*, the litigant brought a meritless appeal premised on a frivolous argument that it had forfeited twice, falsely asserted that it had preserved the argument by citing a certain case when it had actually cited a *different* case of the same name, and later filed a "remarkable" motion asserting that this Court "would be guilty of 'cafeteria justice'" if the Court decided the case without holding oral argument. 958 F.3d at 397-98. Despite all that, the Court unanimously held that it was "time for grace, not punishment," and denied the opposing party's motion for sanctions. *Id.*

Finally, it bears emphasis that Movants did not omit reference to the earlier motion to supplement the record and its denial as part of a benighted effort to prevent this Court from learning of an order available to all on the docket. Indeed, given Defendant's zealous advocacy, the chance that this Court would not "learn" of an order entered just a few months earlier in the same appeal is exactly nil. These circumstances make clear that Movants' failure to advert to that order was nothing more than a failure to recognize the order's significance, rather than a scheme to conceal it from the Court. The failure to flag the order is both regrettable and sincerely regretted, but it is not the kind of conduct that merits a severe sanction.

III. Reconsideration Or Modification Of The Sanctions Order Is Warranted.

Sun Coast is not alone in emphasizing the importance of "grace" when it comes to attorney mistakes. That same impulse underlies the numerous decisions that reverse trial-court sanctions, even under an abuse-of-discretion standard, while acknowledging the errors. *See supra*; *cf. In re Shipley*, 135 S.Ct. 1589, 1589-90 (2015) (mem.) (declining to impose sanctions after a motion to show cause, but reminding attorney and the bar of their obligations); *S.O. v. Hinds Cnty. Sch. Dist.*, 794 F.App'x 427 (5th Cir. Feb. 18, 2020) (mem.) (per curiam) (withdrawing opinion that raised potential for sanctions after counsel apologized in the rehearing petition).

The Sanctions Order stopped short of imposing the full sanctions Defendant requested. For example, Defendant requested an order that Movants notify every

court in which they are admitted that they had been sanctioned and preface every material filing within this Circuit for the next two years with a reference to the sanctions. This Court did not go that far. But the stigmatizing effect of a well-publicized sanctions order has nearly the same effect.

As the cases discussed above underscore, appellate sanctions have traditionally been reserved for egregious misconduct. As a result, the imposition of appellate sanctions cannot help but have an outsized stigmatizing effect. As this Court has long recognized, "one's professional reputation is a lawyer's most important and valuable asset." *Montalto v. Miss. Dep't of Corr.*, 938 F.3d 649, 651 (5th Cir. 2019) (quoting *Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997)). And "[i]n this day and age," "sanctions are a badge of reprobation that can haunt an attorney throughout his or her career. They can have ramifications that go far beyond the particular case." *Plaza-Martínez*, 747 F.3d at 14.

The Sanctions Order was premised on the need "to deter future violations." Doc. #00515777153 at 3. But as even Defendant has admitted, "courts need not impose monetary sanctions if some other approach will perform a[] … deterrent function[].'" Doc. #00515761093 at 15 (quoting *Jennings v. Joshua Indep. Sch. Dist.*, 948 F.2d 194, 199 (5th Cir. 1991)). The Court's Sanctions Order has already had a powerful deterrent effect. It has been the subject of a press release, *see* Press Release, Office of the Att'y Gen. of Tex., *AG Paxton: Fifth Circuit Issues Sanctions*

Against Perkins Coie (Mar. 12, 2021), https://bit.ly/3944Arw, and significant attention from news outlets across the country, *see, e.g.*, *Perkins Coie in the Dock*, Wall St. J. (Mar. 16, 2021), https://on.wsj.com/2NzEViG; Dylan Jackson, *Fifth Circuit Sanctions Democratic Election Lawyer Marc Elias in Texas Voting Case*, The Am. Lawyer (Mar. 15, 2021), https://bit.ly/3tzJOaS; Erik Larson, *Top Democratic Election Lawyer Sanctioned in Suit Against Texas*, Bloomberg (Mar. 12, 2021), https://bloom.bg/3s8x9v9. To the extent this Court intended its Sanctions Order to serve as a public admonishment, it can rest assured that it has accomplished that function. The issuance of the Order, even if reconsidered in light of the facts and authorities set forth herein, adequately serves to "chastise" and "admonish" Movants, *e.g.*, *In re Rodriguez*, 891 F.3d 576, 577 (5th Cir. 2018), and "to deter future violations," Doc. #00515777153 at 3, without imposing the long-term professional consequences and stigma associated with sanctions.

The impact of the Sanctions Order is particularly severe on the most junior lawyers among Movants, including Movants Howton, Madduri, Osher, and Command. Not only may it limit their abilities to attract clients or seek certain future opportunities, junior lawyers are also more likely to apply for admission to additional bars and/or to apply for new legal jobs. If and when they do so, they will be ethically required to disclose the Sanctions Order, which may close certain doors to them even though they were not in a position to make the ultimate determinations

about what to file and whether to advert to the earlier denial. In light of all the circumstances, including the authority underscoring both the rarity of appellate sanctions and the ambiguity concerning the effect of the earlier denial (and proper avenue for reconsideration), Movants respectfully request that the Court reconsider its Sanctions Order.

CONCLUSION

The Sanctions Order has precipitated a painful chapter in Movants' professional careers. The Sanctions Order highlighting Movants' error and faulting Movants for that error has been well-publicized. Movants sincerely apologize and reiterate that they never intended to mislead the Court, but respectfully suggest that the deterrent effect this Court intended can be accomplished—indeed, has been accomplished—without imposing sanctions.

Respectfully submitted,

s/Paul D. Clement
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March 25, 2021

CERTIFICATE OF COMPLIANCE

I certify that:

1) This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 5,198 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2.

2) This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

3) Any required privacy redactions have been made pursuant to Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and the motion has been scanned for viruses using Windows Defender and is free of viruses.

March 25, 2021

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF CONFERENCE

I certify 1) that Movants notified counsel for Defendant of their intention to file the Motion for Reconsideration, and 2) that counsel for Defendant informed Movants that Defendant will oppose and will file an opposition.

March 25, 2021

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I did so with the express permission of Paul D. Clement, counsel of record for Movants in this matter. I certify that all participants in this case, including Movants, are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

s/Bruce V. Spiva
Bruce V. Spiva

Exhibit G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; DCCC, *Plaintiffs-Appellees*, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, *Defendant-Appellant*.	No. 20-40643

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OR MODIFICATION OF SANCTIONS ORDER ON BEHALF OF MARC E. ELIAS, BRUCE V. SPIVA, SKYLER M. HOWTON, LALITHA D. MADDURI, DANIEL C. OSHER, AND STEPHANIE I. COMMAND

s/Paul D. Clement
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April 12, 2021

CERTIFICATE OF INTERESTED PERSONS

1. No. 20-40643, *Texas Alliance for Retires Americans, et al. v. Hughs*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case:

Plaintiffs-Appellees

a. Texas Alliance for Retired Americans
b. Sylvia Bruni
c. DSCC
d. DCCC

Other Parties

a. Texas Democratic Party
b. Jessica Tiedt

The following attorneys have appeared on behalf of Plaintiffs-Appellees either before this Court or in the District Court:

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Lalitha D. Madduri
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Defendant-Appellant

a. Ruth Hughs, Texas Secretary of State

The following attorneys have appeared on behalf of Defendant-Appellant either before this Court or in the District Court:

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Individuals Subject to the March 11 Sanctions Order

a. Marc E. Elias
b. Bruce V. Spiva
c. Skyler M. Howton
d. Lalitha D. Madduri
e. Daniel C. Osher
f. Stephanie I. Command

The following attorneys are appearing before this Court solely on behalf of the Movants, i.e., Individuals Subject to the March 11 Sanctions Order, and not the Party-Appellees:

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/s/ Paul D. Clement
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INTRODUCTION

Defendant's opposition confirms that the rules governing the underlying appellate procedural questions were far from clear, and that what happened here is far different from the misconduct that typically generates appellate sanctions. Defendant never confronts the authorities suggesting that decisions of motions panels on non-dispositive procedural motions are not definitive. Indeed, Defendant omits any mention of the federal practice manual indicating there is no law-of-the-case bar in the specific context of motions to supplement the record. *See* Reconsideration.Motion.16 (citing *Federal Court of Appeals Manual*). Instead, Defendant insists that whatever the right answer to the law-of-case question, it was still error for Movants to fail to advert to the prior denial. But confusion over the effect of the prior denial cannot be so easily dismissed. If Movants had understood—as the Court clarified in its March 11 ruling—that the earlier denial was law of the case, and the proper procedural mechanism was to seek reconsideration, Movants' reconsideration motion would have necessarily adverted to the earlier denial.

If anything, Defendant only clouds the issue by suggesting that Movants could have renewed their supplementation request in the merits briefing itself. If Defendant is correct, then Movants were neither late nor duplicative in seeking to re-open the record on standing; they simply picked the wrong vehicle and, by failing to appreciate that they needed to seek reconsideration, failed to advert to the earlier

denial. That omission was not part of an effort to conceal from the Court an order listed on the docket in this very case; such an effort would have been obviously hopeless and futile. Rather, it was a good-faith mistake that bears little resemblance to the misconduct that appellate courts typically sanction.

Defendant argues that bad faith is unnecessary to sanction local-rule violations. But while this Court may have the power to impose sanctions for good-faith violations of ambiguous rules despite conflicting authority, that has not been its practice. Instead, this Court has traditionally reserved sanctions for bad faith and serious misconduct. As a result, sanctions carry an outsized effect. Even Defendant now seems to concede that sanctions against the more junior lawyers may merit reconsideration, despite previously seeking more extensive sanctions against all Movants. Respectfully, given the conceded difficulty of the underlying procedural questions, reconsideration for all Movants would be appropriate.

Finally, Defendant questions the sincerity of Movants' apology. But the centerpiece of her argument is a complaint about a "press release" issued by Movants' law firm. To be clear, there was only one press release in this case and it was issued by the Attorney General. That press release had its intended effect and generated both national coverage and numerous press inquiries. Those inquiries were answered with a statement by Movants' law firm, not a dueling press release. Lest there be any doubt, Movants sincerely apologize for their errors, but

respectfully submit that those errors were made in good faith and that this Court's Sanctions Order should be reconsidered.

ARGUMENT

I. Sanctions Are Generally Reserved For Bad Faith And Serious Misconduct.

Before this case, this Court had never imposed, or even upheld on appeal, duty-of-candor sanctions based only on omissions—let alone omissions of orders appearing on the Court's docket in the same case. *See* Reconsideration.Motion.10-11. Defendant does not contest that point. Defendant likewise does not dispute that "Section 1927 sanctions should be employed 'only in instances evidencing a serious and standard disregard for the orderly process of justice,'" *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 872 (5th Cir. 2014) (citation omitted), or that "the imposition of sanctions under the court's inherent power … should be administered with great restraint," *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F.App'x 899, 906 (5th Cir. 2010). Nor does Defendant dispute the ample cited authorities in which federal appellate courts—including this one—declined to impose sanctions, or reversed sanctions orders, based on acts and omissions significantly less justifiable than the conduct here. *See* Reconsideration.Motion.11-12.

Defendant nonetheless contends that this Court has the power to impose sanctions even for a bare omission and absent bad faith. *See* Opposition.2.

Defendant is certainly correct that this Court's powers are vast. But "the imposition of sanctions … is powerful medicine," *Union Pump*, 404 F.App'x at 906, which is why this Court has traditionally reserved them for bad faith and serious misconduct. *See*, *e.g.*, *Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396 (5th Cir. 2020); *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995).

Defendant cites *In re Moity*, 320 F.App'x 244 (5th Cir. 2009) (per curiam), but that case only illustrates the type of conduct that is typically sanctioned and the differences here. *In re Moity* involved an attorney who "failed to comply with the initial punishment" imposed by a state-court judge "and had to be brought before the state judge a second time" as a result. *Id.* at 249. Things then went from bad to worse in federal court. At a federal-court "contempt hearing" prompted by the attorney's improper conduct towards "a judicial law clerk during a telephone conversation" and "impugning the integrity of two federal judges in a prior brief," the attorney made multiple "misrepresentations to the court." *Id.* at 245. In particular, the attorney "failed to indicate that there were two hearings" in state court, not just one, "the second necessitated by his failure to comply with the initial penalties." *Id.* at 249. Coupled with those misrepresentations, "[t]hese and other omissions left the impression at the [federal] hearing that the state judge had levied a sanction, that Moity learned his lesson and complied, and that the matter was

settled"—when, in reality, exactly the opposite happened. *Id.* No authority even arguably supported those actions.

On appeal, this Court understandably affirmed the district court's sanctions order. But the blatant misrepresentations and omissions about proceedings in a separate court system, combined with abusive conduct toward federal judges and a law clerk, illustrate the kind of misconduct that leads to the relatively rare event of federal-court sanctions. The good-faith mistakes here are different in kind and give the Sanctions Order a disproportionate effect. As the authorities cited in Movants' opening brief underscore, circumstances like these do not warrant an exercise of the Court's power to sanction. *See Sun Coast*, 958 F.3d at 397-98.

II. Defendant Only Confirms That Neither The Effect Of The Prior Denial Nor The Proper Vehicle For Renewing The Request To The Merits Panel Was Clear.

Defendant's opposition underscores that the procedural questions Movants faced in asking the merits panel to supplement the record were difficult, and the answers far from clear.

First, Defendant fails to address the multiple authorities Movants cited supporting the view that a motions-panel-stage denial of a motion to supplement the record does not preclude the merits panel from granting an identical motion to supplement the record. *See* Reconsideration.Motion.16. Nor does Defendant dispute that lawyers have a "continuing obligation in all cases to notify the Court of

events that may impact th[e] Court's jurisdiction," *Sutuc v. Attorney Gen.*, 643 F.App'x 174, 174 (3d Cir. 2016), such as facts that rebut a lack-of-standing argument raised on appeal. And Defendant studiously avoids taking a position on "the application of the law-of-the-case doctrine to a one-judge order," Opposition.6, but confusion concerning the law-of-the-case status of the earlier denial is the root cause of the error here. If the single-judge denial was clearly law of the case, then Movants would have moved for its reconsideration and necessarily adverted to it; one cannot seek reconsideration of a decision without mentioning it. But if the order were not law of the case, then a request for reconsideration would not be strictly necessary, and the merits panel could consider the issue *de novo*. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (rulings at preliminary-injunction stage are not law of the case and thus "are not binding at trial on the merits"); *Keenan v. Donaldson, Lufkin & Jenrette, Inc.*, 575 F.3d 483, 487 (5th Cir. 2009) (concluding that prior ruling was "not 'law of the case' in this appeal," and resolving "the merits" afresh). While Movants understand with the benefit of hindsight that they should have adverted to the prior denial, the failure to do so has a different character if the earlier denial is not law of the case, which is how they understood it in real time.

Second, Defendant suggests that Movants could have "ask[ed] the merits panel to reconsider the earlier denial" of their initial motion to supplement in "their appellees' brief." Opposition.1. If that is correct, then the circumstances

surrounding Movants' noncompliant filing are even less egregious. Movants filed their merits brief and motion to supplement simultaneously and in conjunction with one another. If Movants would have been in compliance by including the supplementation request *in* their merits brief rather than in a separate motion filed *alongside* it, as Defendant now suggests, then the problem is not the timing of their renewed effort to supplement the record or the cost of responding to it, but that Movants chose the wrong procedural vehicle based on a misunderstanding of what belongs in a merits brief versus a separate motion. Put another way, Defendant essentially concedes that it is not improper to renew a request to supplement the record before the merits panel, despite a previous denial by a motions panel, and is agnostic on whether the previous denial is law of the case. Under those circumstances, the choice of the wrong vehicle and the failure to advert to the prior denial, while regrettable and regretted, do not rise to the level of sanctionable misconduct.

Third, Defendant's complaint that Movants did not make an earlier admission of error or withdraw their motion when Defendant first objected is similarly answered by the difficulty and ambiguity surrounding these procedural issues. If it had been clearly settled at the time Movants filed the second motion to supplement the record that the prior denial was law of the case and the only proper procedural mechanism was a timely motion for reconsideration, then Movants' declination to

confess error and withdraw their motion would reflect recalcitrance. But Defendant herself is agnostic on these questions and *affirmatively suggests* that Movants had an alternative avenue to renew their motion—months after the earlier denial—via the merits briefing. In light of those circumstances, Movants' declination to confess error reflects that they were merely on the losing side of a good-faith dispute about a difficult and esoteric question of appellate practice.

III. This Court Should Reconsider Sanctions As To All Movants.

Defendant does not dispute that, because this Court typically reserves appellate sanctions for serious and serial misconduct, imposing appellate sanctions for the conduct here will carry an outsized stigmatizing effect on the affected attorneys. *See* Reconsideration.Motion.19-22. But at least as to the senior lawyers, Defendant argues that such a stigmatizing effect should be welcomed, lest "'parties to other lawsuits … feel freer than … they should feel to flout other' rules in other cases." Opposition.18 (first ellipsis added) (quoting *Chilcutt v. United States*, 4 F.3d 1313, 1325 (5th Cir. 1993)). But there is a critical difference between getting complicated questions wrong and flouting clearly established rules. Courts generally refrain from imposing sanctions in the former situation and even exercise "grace" in the latter context. *Sun Coast*, 958 F.3d at 397-98; *see also S.O. v. Hinds Cnty. Sch. Dist.*, 794 F.App'x 427 (5th Cir. Feb. 18, 2020) (mem.) (per curiam).

Defendant doubts the timing and sincerity of Movants' apology. As to timing, once this Court settled the procedural questions in its March 11 order, Movants filed a timely motion to reconsider and offered a sincere apology. As already noted, the absence of an earlier confession of error was a product of a good-faith dispute about complicated and ambiguous rules, not recalcitrance. As to sincerity, Defendant principally contends that Movants' law firm was less apologetic when it "issued a press release." Opposition.2. But, as noted, only one side to this dispute issued a press release in response to this Court's sanctions order. *See* Press Release, Office of the Att'y Gen. of Tex., *AG Paxton: Fifth Circuit Issues Sanctions Against Perkins Coie* (Mar. 12, 2021), https://bit.ly/3944Arw; Reconsideration.Motion.20-21. That press release had its intended effect of generating substantial national coverage and prompting numerous press inquiries of Movants and their law firm. In response, Movants themselves said nothing, preferring to communicate directly to the Court via a reconsideration motion that prominently included a sincere apology. And Movants' law firm's response to the press inquiries generated by Defendant's counsel's press release did not show a "lack of concern about the behavior of [Movants]," or "announc[e]" that Movants "had done nothing wrong." Opposition.18, 2. It merely noted that the firm "supports our attorneys" and "disagree[s] with the … order of sanctions." Erik Larson, *Top Democratic Election Lawyer Sanctioned in Suit Against Texas*, Bloomberg (Mar. 12, 2021),

https://bloom.bg/3s8x9v9; Opposition.17-18. In short, there is nothing insincere about Movants' apology, and reconsidering the Sanctions Order in light of that apology would avoid the outsized impact of a sanctions order typically reserved for serious misconduct.[1]

Indeed, even Defendant "agrees that relief from sanctions may be warranted with respect to the associates (Madduri, Osher, and Command)." Opposition.19; *accord* Opposition.12 ("[T]his Court might understandably decide to relieve the associates of sanctions."). Movants welcome that acknowledgement and agree that the Sanctions Order is most harmful to those three attorneys, but they respectfully disagree with Defendant that this Court's reconsideration should end there. While Ms. Howton has a different title, she is not significantly more senior than the associates, and she acted under the direction of the partners in filing the relevant pleadings (as she does in all aspects of her practice).[2] And like the associates, Ms. Howton is likely to apply for admission to additional bars and/or jobs—acts that will

[1] Defendant once again raises what she incorrectly perceives to be instances of misconduct by Movants in other cases. Movants disagree with Defendant's characterizations. But, in all events, Defendant's felt-need to reference actions in other cases highlights that the conduct here is well outside the heartland of sanctionable misconduct.

[2] Ms. Howton's title is "counsel," not "of-counsel." Opposition.19. While the terms sound similar, "counsel" is what Movants' firm calls senior associates, while "of counsel" is the title for former partners who have taken on decreased roles. Like associates, counsel operate under the direction and supervision of the firm's partners.

ethically require her to disclose the Sanctions Order, even though she was not in a position to make the ultimate determinations about what to file and what to advert to in the filing(s).

In any event, Movants respectfully request that this Court's reconsideration extend to all the affected attorneys and all the sanctions imposed. The root cause of the errors here was not bad faith or what would have been an obviously futile effort to conceal an adverse order on the electronic docket in the same case, but a failure to fully understand the effect of the prior denial and the proper mechanism for renewing the issue for the merits panel. Movants take full responsibility for that error. By emphasizing that the question was complex, Movants intend not to diminish either their error or their apology, but to clarify the good faith underlying both. Given the wide gap between the facts here and the cases in which this Court has issued its rarely-invoked powers to sanction, and in light of Movants' sincere apology, Movants respectfully ask the Court to reconsider its order.

CONCLUSION

Movants respectfully request that the Court reconsider the Sanctions Order.

Respectfully submitted,

s/Paul D. Clement
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April 12, 2021

CERTIFICATE OF COMPLIANCE

I certify that:

1) This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 2,599 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2.

2) This reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

3) Any required privacy redactions have been made pursuant to Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and the motion has been scanned for viruses using Windows Defender and is free of viruses.

April 12, 2021

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I did so with the express permission of Paul D. Clement, counsel of record for Movants in this matter. I certify that all participants in this case, including Movants, are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

s/Bruce V. Spiva
Bruce V. Spiva