No. 18-1864

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE THE HONORABLE JOHN DAN KEMP, THE HONORABLE ROBIN F. WYNNE, THE HONORABLE COURTNEY HUDSON GOODSON, THE HONORABLE JOSEPHINE L. HART, THE HONORABLE SHAWN A. WOMACK, THE HONORABLE KAREN R. BAKER, and THE HONORABLE RHONDA K. WOOD

THE HONORABLE JOHN DAN KEMP, THE HONORABLE ROBIN F. WYNNE, THE HONORABLE COURTNEY HUDSON GOODSON, THE HONORABLE JOSEPHINE L. HART, THE HONORABLE SHAWN A. WOMACK, THE HONORABLE KAREN R. BAKER, and THE HONORABLE RHONDA K. WOOD, Defendants-Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, Respondent

THE HONORABLE WENDELL GRIFFEN, Plaintiff-Real Party in Interest

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From the United States District Court for the Eastern District of Arkansas

The Honorable James M. Moody Jr., Presiding

Case No. 4:17-cv-639-JM

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Michael J. Laux
E. Dist. Arkansas Bar No. 6278834
400 W. Capitol Avenue, Suite 1700
Little Rock, AR 72201
Telephone: 501.242.0750
Facsimile: 501.372.3482
Email: mlaux@lauxlawgroup.com;
mikelaux@icloud.com

Austin Porter, Jr., No. 86145
PORTER LAW FIRM
323 Center Street, Suite 1035
Little Rock, AR 72201
Telephone: 501.224.8200
Email: aporte5640@aol.com

Attorneys for Plaintiff-Real-Party-in-Interest Hon. Wendell Griffen

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STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(B)

The Panel decision issuing mandamus to reverse the district court's denial of motions to dismiss is the only such use of mandamus we have located in this Court's history and contravenes controlling decisions of the Supreme Court and this Court. *See, e.g.*, *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367 (2004); *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394 (1976); *Will v. United States*, 389 U.S. 90 (1967); *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014) (*en banc*); *Auer v. Trans Union, LLC*, 834 F.3d 933, 936 (8th Cir. 2016). These authorities agree mandamus is only for "extraordinary cases" to remedy a district court's "usurpation of power" where the petitioner has no other adequate means for relief.

The Panel decision, in contrast, uses mandamus for plenary appellate review of a district court's motion-to-dismiss denial. Alternative means of relief remain available to petitioners who sought mandamus to stop discovery, but never requested the district court limit the scope of discovery. The Panel decision leapfrogged these unripe discovery issues and decided the merits, concluding Respondent Judge Wendell Griffen's complaint did not state a claim for relief.

If mandamus can be used this way, this Court will surely be flooded by mandamus petitions of Rule 12(b)(6) losers, and bedrock law guarding against

piecemeal appeals will be decimated. The Panel decision therefore also involves matters of exceptional importance, justifying en banc rehearing.

INTRODUCTION

Arkansas Circuit Judge Wendell Griffen sued the Arkansas Supreme Court and its Justices after they permanently banned him from presiding over capital-punishment cases because Judge Griffen, who is an ordained Baptist pastor, exercised his First Amendment rights by participating in silent prayer as a private citizen at an anti-death-penalty vigil on April 14, 2017. The district court ruled Judge Griffen asserted plausible civil-rights claims that overcame multiple motions to dismiss. The Justices did not ask the district court to limit the scope of discovery. Instead, they took an interlocutory appeal—disguised as a mandamus petition—by which the Justices ostensibly sought to prevent discovery into their internal deliberations, but that in fact mostly re-argued their unsuccessful motions to dismiss. A majority of the Panel granted the petition by jumping straight to the merits, reversing the district court, and ordering it to dismiss Judge Griffen's claims. This is not what mandamus is for, as Judge Kelly explained in dissent.

Mandamus is an extraordinary remedy, not a substitute for ordinary appellate review, and is available only where the district court clearly abuses its discretion or "usurp[s] judicial power." *In re Shalala*, 996 F.2d 962, 964 (8th Cir.

1993). In addition, mandamus petitioners must demonstrate they will be irreparably harmed and have no adequate alternative means to secure relief save mandamus. *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367, 380–81 (2004).

As Judge Kelly observed in dissent, the Justices "did not ask the district court to limit the scope of discovery, … or to shield disclosed records from public view …." Slip op. at 14 (Kelly, J., dissenting). Rather, the Justices "only asked the district court to dismiss the suit on the merits," when they "have not attempted to exhaust their 'adequate means' in the district court." *Id.* The Panel majority did *not* find that the district court abused its discretion or usurped its authority, *nor* did it identify any immediate or irreparable harm that would result absent mandamus. Therefore, the Panel decision should be vacated and rehearing granted, lest mandamus be used to circumvent the final-judgment rule. If this Court grants such an end-around to state supreme court justices, fairness will require the Court afford the same treatment to all future litigants, opening the floodgates to a swell of mandamus petitions from district court denials of motions to dismiss.

BACKGROUND

As detailed in Judge Griffen's complaint,[1] on April 14, 2017, the same day Judge Griffen participated (in his pastoral capacity, without wearing judicial robes

[1] The Complaint (ECF No. 1 below) is attached as Exhibit A.

or mentioning his position as a judge) in a silent prayer vigil opposing the death penalty, he was assigned a case brought by McKesson Medical-Surgical Inc. ("McKesson"). McKesson alleged the State of Arkansas had purchased McKesson's drugs under false pretenses and sought a TRO to prevent the State from using the drugs in connection with the scheduled executions of eight inmates. After Judge Griffen granted the TRO based on well-established property and contract law, the Arkansas Attorney General applied to the Arkansas Supreme Court, *ex parte*, on Saturday, April 15th, for an order vacating the TRO and removing Judge Griffen from only the *McKesson* case, not all death-penalty cases forever.

Instead, on Monday, April 17th, the Arkansas Supreme Court, acting *sua sponte*, going well beyond the narrow relief sought, and without providing notice it was considering banning Judge Griffen from all death-penalty cases, issued Order 17-155 (the "Disqualification Order"), barring Judge Griffen from hearing *any* case involving the death penalty or the State's execution protocol *for all time*. Worse, by the time the Supreme Court issued the Disqualification Order, the Attorney General's petition was moot because McKesson sought voluntary dismissal of its

action that same day.[2] (*See* Compl. ¶¶ 21–38.) No exigency could have motivated the Disqualification Order, because when it was issued an Arkansas federal district court had already stayed the executions.[3] (Compl. ¶ 45.)[4]

Judge Griffen sued the Arkansas Supreme Court and the Justices, seeking declaratory and injunctive relief on claims of First Amendment retaliation, denial of procedural due process, and violation of equal protection rights, all under 42 U.S.C. § 1983. Judge Griffen also alleged violations of the Arkansas Religious Freedom Restoration Act and a civil conspiracy. The Justices brought several motions to dismiss, and the district court mostly denied them. Although the district court held Judge Griffen's claim against the Arkansas Supreme Court itself was barred by state sovereign immunity and injunctive relief against the Justices was unavailable, the court concluded Judge Griffen had stated a claim for declaratory relief against the Justices under each of his theories. Judge Griffen served document requests on the Justices on April 13, 2018. Rather than moving for

[2] When McKesson re-filed the action two days later, the new judge assigned granted a TRO, just as Judge Griffen had.

[3] *See McGehee v. Hutchinson*, Case No. 4:17-cv-179-KGB (E.D. Ark.).

[4] Notably, the last time Judge Griffen ruled on the death penalty, just weeks before the Disqualification Order, he demonstrated his ability to follow the law despite his religious and moral beliefs by dismissing nine inmates' complaint challenging the constitutionality of their execution method. (Compl. ¶¶ 14–15.)

protective orders with the district court, the Justices petitioned this Court for mandamus.

The Justices' mandamus petition made two primary arguments: first, they argued mandamus is "appropriately issued … to review discovery orders against high-ranking government officials," though the district court issued no discovery orders against the Justices. *See* Petition at 9. Second, the Justices at great length rehashed the same arguments made below, asking this Court for an interlocutory reversal of the district court's denial of their motions to dismiss. *See id.* at 14 (complaining "of the absence of a legally cognizable cause of action"). In opposition, Judge Griffen did not re-argue the grounds supporting the sufficiency of his complaint because it was neither necessary nor appropriate to do so. Rather, Judge Griffen's opposition explained the inappropriateness and prematurity of the Justices' mandamus petition, including the absence of any imminent or irreparable harm facing the Justices, who have yet to move the district court to limit discovery.[5]

[5] Judge Griffen extensively briefed his arguments against dismissal in the district court, and he disagrees with the motion-to-dismiss arguments the Justices made in their petition. But because merits arguments were not necessary to defeat the mandamus petition, Judge Griffen did not focus on them in opposition. Thus, when the Panel majority reversed the district court's motion-to-dismiss denials under the guise of mandamus, it was without the benefit of Judge Griffen's views on the merits, which systematically refute the arguments made by the Justices and

The Panel majority began its analysis (at page 5) with a one-page, high-level overview of the mandamus standards, stating it "express[es] no view" on the discovery issues raised by the Justices because, in the Panel majority's view, none of the complaint's claims should have survived motions to dismiss. The balance of the Panel decision attacks Judge Griffen's complaint on the merits, largely adopting the positions from the Justices' briefing.

Judge Kelly's dissenting position—that this is not what mandamus is for – concisely captures the gist of this petition for rehearing. Judge Kelly noted that the Justices were *not* seeking review of *any* discovery order compelling them to disclose privileged information, which might have been a better posture for mandamus. Slip op. at 14. Judge Kelly observed the Justices' petition had not even asked for relief or protections from discovery, but simply sought reversal of the district court, when the Justices "have not attempted to exhaust their 'adequate means' in the district court." Because of the absence of irreparable harm and available alternative paths to relief for the Justices, Judge Kelly concluded mandamus was inappropriate.

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adopted by the Panel. Judge Griffen is forbidden by Eighth Circuit rule 35A from incorporating by reference his brief below opposing the motions to dismiss, and as expressed in this petition for rehearing, the arguments in that brief are not necessary to dismiss the mandamus petition. But if the Court wishes to satisfy itself that Judge Griffen's claims are plausibly pled, his brief (located at ECF No. 37 below) demonstrates why the district court denied the Justices' motions.

ARGUMENT

Mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Auer v. Trans Union LLC*, 834 F.3d 933, 936–37 (8th Cir. 2016) (quoting *Cheney*, 542 U.S. at 380). The extraordinary case is one "where there is a clear abuse of discretion or a usurpation of judicial power." *In re Shalala*, 996 F.2d 962, 964 (8th Cir. 1993). Extraordinariness further requires the Justices to show (1) they have "no other adequate means to attain the relief" they seek, a "condition designed to ensure that the writ will not be used as a substitute for the regular appeals process"; (2) their right to issuance of the writ is clear and indisputable"; and (3) "the writ is appropriate under the circumstances." *Cheney* 542 U.S. at 380–81.

The Panel majority erred in granting the Justices' mandamus petition, which was nothing more than an ordinary and improper interlocutory appeal and did not even claim the district court usurped its judicial power. The majority's decision is ironic, because the Panel reached the merits of Judge Griffen's constitutional claims without the benefit of Judge Griffen's views on the merits. So it was a rush to judgment and denial of due process by the Justices that initially gave rise to Judge Griffen's claims and now a rush to judgment by the Panel majority is

denying Judge Griffen due process once more.[6] Further, neither the Justices nor the Panel decision identified any irreparable harm, and any appropriate relief should have been sought in the district court first. The Court should vacate the Panel decision and grant rehearing *en banc* to rectify this clear procedural error and avoid drowning in a sea of mandamus petitions sure to follow future district court denials of motions to dismiss.

I. MANDAMUS IS NOT APPROPRIATE FOR INTERLOCUTORY APPEALS OF MOTION TO DISMISS DECISIONS ABSENT USURPATION OF JUDICIAL POWER AND IRREPARABLE HARM

A district court's denial of a motion to dismiss is almost never reviewable by mandamus. *In re Lombardi*, 741 F.3d 888, 895 (8th Cir. 2014) (en banc). By congressional mandate, our judicial system has a strong policy against piecemeal appeals, because almost invariably a petitioner's rights can be adequately vindicated after final judgment. *Cheney*, 542 U.S. at 380 (mandamus "may not be used as a substitute for the regular appeals process"); *In re Lloyd's Register N.*

[6] When normal judicial processes are short-circuited and issues are decided prematurely without all parties having fair opportunity to be heard, things tend to get missed, such as the *Hunt* decree that gives Judge Griffen "the same rights as all other judges in the district with regard to assignment of civil and criminal cases." *Hunt v. Arkansas*, No. PB-C-89-0406, Decree at 6 (E.D. Ark. Nov. 7, 1991) (*see* Compl. ¶ 47).

Am., Inc., 780 F.3d 283, 288–89 (5th Cir. 2013) ("unrecoverable litigation costs are not enough to make … relief inadequate. … There has to be a greater burden, some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable.") (citation omitted). Mere legal error in denying a motion to dismiss is not grounds for mandamus, so long as "the order of [the judge], whether right or wrong, was one which he had the authority to make." *Hydraulic Press Mfg. Co. v. Moore*, 185 F.2d 800, 802 (8th Cir. 1950) ("[T]his Court cannot properly issue a writ the only effect of which would be to evade those conditions and thwart Congressional policy against piecemeal appeals"); *accord Will v. United States*, 389 U.S. 90, 98 n.6 (1967) ("Courts faced with petitions for peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of non-appealable orders on the mere ground that they may be erroneous.").[7]

The rare case where mandamus "may be warranted" to correct an "erroneous denial" is only "in extraordinary circumstances where continued litigation would have significant unwarranted consequences." *Lombardi*, 741 F.3d at 895 (citing *Abelesz v. OTP Bank*, 692 F.3d 638, 650–53 (7th Cir. 2012)). Courts typically issue mandamus to reverse denials of motions to dismiss only where the district

[7] Here, the district court did not err, but the mandamus petition would be dismissible even if it had.

court usurped authority by exercising jurisdiction it did not have and where petitioners articulated significant irreparable harms that would have inevitably followed.[8]

For example, in *Abelesz*, Holocaust survivors sued Hungarian banks for $75 billion, alleging a scheme to expropriate Jewish property during the Holocaust. 692 F.3d at 644–45. Despite an obvious lack of contacts with the forum, the district court denied the banks' motions to dismiss, finding general personal jurisdiction over the banks. The Seventh Circuit issued mandamus ordering dismissal of the complaints, concluding there was no "colorable argument" for the district court's exercise of general jurisdiction, and noting the "district court simply refused to engage with relevant case law." *Id.* at 653. Without jurisdiction, the Seventh Circuit refused to let the massive case proceed, since survivors sought "compensation for events that occurred on another continent more than 65 years ago [in a] case [with] appreciable foreign policy consequences, and [with] financial stakes [totaling] nearly 40 percent of Hungary's annual gross domestic product." *Id.* at 651. In other words, the Court intervened to curtail an obvious usurpation of judicial power that would have had enormous consequences.

[8] We have located no decision from the Eighth Circuit, save the Panel decision, reversing a district court's denial of a motion to dismiss by a writ of mandamus.

The Second Circuit's decision in *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30 (2d Cir. 2014), is similar. There, plaintiffs brought sexual-abuse claims in Vermont that would have been time-barred in New York. The district court assumed general personal jurisdiction over the Diocese in Vermont, and therefore denied the Diocese's motion to dismiss. *Id.* at 33. The Second Circuit concluded general personal jurisdiction was obviously lacking. Irreparable harm was certain if the case proceeded, because the district court had issued a discovery order requiring disclosure of the Diocese's confidential files. *Id.* at 36 (noting that "once the cat *is* out of the bag, the right against disclosure cannot later be vindicated").

The Panel decision is nothing like these cases. The district court plainly had jurisdiction, and its denial of the motions to dismiss was no usurpation of power. The Panel decision does not suggest otherwise. Rather, the Panel majority focuses exclusively on the plausibility of Judge Griffen's claims and undertakes a Rule 12(b)(6) analysis. Even if the district court had erred in denying the motions to dismiss, which it did not, no one disputes that the district court had the power to act. *Auer*, 834 F.3d at 936 (denying mandamus where "account of how the district court overstepped its bounds [was], in truth, nothing more than a list of ways [they]

think the district court misapplied the standards for ruling on [dispositive] motions.").

Notably, Title 28 gave the Justices a proper avenue for an interlocutory appeal, and they chose not to use it. 28 U.S.C. § 1292(b) authorizes immediate appeals of orders "involv[ing] a controlling question of law as to which there is substantial difference of opinion" subject to district court certification of the question. Congress's provision of means for interlocutory appeal in limited circumstances underscores the inappropriateness of using mandamus to circumvent those limitations. The Panel decision sanctions the Justice's rule-breaking and the Court should vacate the decision to better respect Congress's dictates.

II. THE JUSTICES FACE NO HARM, IRREPARABLE OR OTHERWISE, FROM DENIAL OF THEIR PREMATURE MANDAMUS PETITION

To obtain mandamus, the Justices needed to show not only that the district court acted outside its authority, but that absent mandamus they would suffer irreparable harm not remediable on normal appeal. *E.g.*, *In re Justices of the Sup. Ct. of Puerto Rico*, 695 F.2d 17, 20 (1st Cir. 1982). The Second Circuit has observed "'the type of harm that is deemed irreparable for mandamus purposes typically involves an interest that is both important to and distinct from the resolution of the merits of the case.'" *Roman Catholic Diocese of Albany*, 745 F.3d

at 36 (quoting *Linde v. Arab Bank, PLC*, 706 F.3d 92, 117 (2d Cir. 2013)). Often, the irreparable harm to be avoided via mandamus is the disclosure of information under a district-court discovery order, because a "remedy after final judgment cannot unsay the confidential information that has been revealed." *Id.* (quoting *In re City of New York*, 607 F.3d 923, 934 (2d Cir. 2010)).

The Panel decision relied heavily on this Court's decision in *In re Lombardi*. But the stark contrast between *Lombardi* (where information disclosure was the issue) and this case (where it is not) demonstrates why mandamus is not appropriate here. *Lombardi* concerned constitutional challenges to Missouri's drug cocktail used for executions, and this Court's mandamus grant specifically addressed a discovery order issued in that case. The *Lombardi* plaintiff death-row inmates sought discovery on the identities of physicians and others involved in executions. The district court ordered disclosure, and this Court, sitting *en banc*, ordered the district court to vacate its discovery order. That case, crucially, concerned a discovery order and information disclosure, and this Court acted to stop the irreparable harm about to occur from disclosure of the practitioners' identities.

Embodying the same principles is the Supreme Court's decision in *Kerr v. U.S. Dist. Ct. for the N. Dist. of Calif.*, 426 U.S. 394 (1976), a class action by

California prisoners against the State's prison system complaining of conditions of confinement. The *Kerr* plaintiffs sought numerous administrative, personnel, and prisoner files. The district court denied the State's request for blanket in camera review prior to disclosure for privilege and confidentiality. The Supreme Court refused to grant mandamus ordering the in camera review, because there were better, less disruptive ways to address the State's confidentiality and privilege concerns in the district court. For example, the district court had invited the State to submit specific documents for review before disclosure and also limited the number of plaintiffs' representatives permitted to view the documents. This, the Court concluded, adequately met the State's concerns, making mandamus inappropriate. *Id.* at 404–05.

The Panel decision identifies *no* irreparable harm the justices would suffer if this litigation continues to discovery. Nor did the Justices in their petition, which only vaguely warned of the dangers of "[e]xposing the Justices' deliberations to discovery." Pet. at 12. But consider what will actually happen if the Court vacates the Panel decision. The Justices' initial disclosures (served before the district court stayed discovery) stated they planned to assert the "deliberative-process privilege" in response to virtually all discovery requests. Thus, if the case returns to the district court, the Justices will likely stand on their discovery objections and confer

with Judge Griffen regarding those objections (which they have not attempted to do). Afterwards, Defendants will be free to move for a protective order or respond to a motion to compel and there explain why they believe Judge Griffen's discovery requests are overbroad or encroach on whatever privilege they then claim. As always, the district court, being closest to the case, will be best positioned to adjudicate the Justices' privilege objections at that time. As in *Kerr*, because the Justices did not first seek a remedy in the district court, mandamus is inappropriate. 424 U.S. at 404–05; *see also United States v. McDougal*, No. 96-2236, 1996 U.S. App. LEXIS 11438 (8th Cir. 1996) (denying President Clinton's request for immediate review of district-court order concerning the press's motion to unseal the president's deposition where the district court had set a briefing schedule on the motion but yet ruled). As Judge Kelly correctly noted in her dissent, the Justices "have not attempted to exhaust their 'adequate means' in the district court," so mandamus was erroneous. Slip Op. at 14.

III. THE PANEL DECISION INVITES A FLOOD OF MANDAMUS PETITIONS CHALLENGING DENIALS OF DISPOSITIVE MOTIONS

The Panel decision blesses the use of mandamus to review denials of motions to dismiss without any suggestion the district court abused its authority or usurped power and without any prospect of irreparable harm to the mandamus

petitioners. The Panel has thus approved mandamus "as a substitute for the regular appeals process," something that both the Supreme Court and this Court have repeatedly warned against. *Auer*, 834 F.3d at 936 (quoting *Cheney*, 542 U.S. at 380.

Whether intended or not, the Panel decision pulls the guardrails from mandamus and signals that future litigants are entitled to seek mandamus from this Court any time they lose a dispositive motion. Clearly, this is not how the well-settled process is supposed to work, and the effects of the Panel decision will be harmful and far-reaching. No matter this Court's view of the merits of Judge Griffen's claims, the Panel decision should not stand.

CONCLUSION

The Panel majority's decision commits serious error, and this Court should vacate the decision and order rehearing *en banc*.

Dated: July 15, 2018

Respectfully submitted,

By: *s/Michael J. Laux*

Michael J. Laux
400 W. Capitol Avenue, Suite 1700
Little Rock, AR 72201
Telephone: 501.242.0750
Facsimile: 501.372.3482
Email: mlaux@lauxlawgroup.com; mikelaux@icloud.com

Austin Porter, Jr., No. 86145
PORTER LAW FIRM
323 Center Street, Suite 1035
Little Rock, AR 72201
Telephone: 501.224.8200
Email: aporte5640@aol.com

Attorneys for Plaintiff-Real-Party-in-Interest Honorable Wendell Griffen

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 21(d)(1) because this brief contains 3780 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

s/Michael J. Laux
Michael J. Laux

STATEMENT THAT BRIEF IS VIRUS-FREE

This brief has been scanned and is virus-free.

s/Michael J. Laux
Michael J. Laux

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2018, I served the foregoing upon all counsel of record for the Petitioners via the CM/ECF system:

Attorneys for Chief Justice Kemp, Justice Wynne and Justice Womack
Robert S. Peck
Center for Constitutional Litigation, P.C.
50 Riverside Blvd., Suite 12A
New York, NY 10096

Attorneys for Justice Hart
Robert L. Henry III
Barber Law Firm
425 W. Capitol Ave., Suite 3400
Little Rock, AR 72201

Kenneth P. Castleberry
Alfred F. Thompson III
Murphy, Thompson, Arnold, Skinner & Castleberry
555 East Main Street, Suite 200
Batesville, AR 72503

Attorneys for Justice Baker
Mr. Tim Dudley
Tim Dudley, Ltd.
114 South Pulaski
Little Rock, AR 72201

Attorneys for Justice Goodson
David H. Thompson, William C. Marra, and Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N.W.
Washington D.C. 20036

Matt Keil
Keil & Goodson
406 Walnut Street
Texarkana, AR 71854

Attorneys for Justice Wood
Christopher O. Murray
David B. Meschke
Brownstein Hyatt Farber Schreck LLP
410 17th Street, Suite 2200
Denver, CO 80202

and upon the following by overnight delivery on July 16, 2018:

The Hon. James M. Moody, Jr.
United States District Court for the Eastern District of Arkansas
500 West Capitol Avenue, Room C446
Little Rock, AR 72201

s/Michael J. Laux
Michael J. Laux

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