No. 21-167

In the Supreme Court of the United States

TIMOTHY DASLER,

Petitioner,

v.

JENNIFER DASLER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Vermont

PETITION FOR WRIT OF CERTIORARI

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AUGUST 2, 2021

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QUESTION PRESENTED

Fraud Upon the Court is necessarily a sliding scale. When a state process allows a party to waive their own burden of proof through pre-trial election and an ex-parte action based upon fraud, it allows one party to deprive another party of rights without burden of proof. In this case the moving party need only fabricate probable cause in an ex-parte action to deprive the court of the authority to burden them with proof. In doing so, the court cannot properly function as a result of Vermont State precedent, and an accusation with "no credible factual basis" can result in irreparable harm.

THE QUESTION PRESENTED IS:

Is it Unconstitutional to allow a party to make pre-trial elections that deprive another party their due process rights?

LIST OF PROCEEDINGS

Vermont Supreme Court
No. 2020-146
Dasler v. Dasler
March 5, 2021

Orange County Family Court
No. 74-6-17 Oedm
Dasler v. Dasler
April 1, 2020

Vermont Supreme Court
No. 2018-301
Dasler v. Dasler
July 8, 2019

Vermont Supreme Court
No. 2018-301
Dasler v. Dasler
June 3, 2019

Orange County Family Court
No. 74-6-17 Oedm
Dasler v. Dasler
August 17, 2018

LIST OF PROCEEDINGS (CONT.)

Orange County Family Court
No. 74-6-17 Oedm
Dasler v. Dasler
February 23, 2018

Orange County Family Court
No. 37-5-17 Oefa
Dasler v. Dasler
August 1, 2017

Orange County Family Court
No. 37-5-17 Oefa
Dasler v. Dasler
May 23, 2017

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Dasler respectfully requests review to resolve open issues that cause wildly different interpretations of 5th Amendment protection of Parental Rights. With Federal District Courts abstaining from Domestic Relations cases the Supreme Court remains the only court giving direction to the state courts, leaving Family Court a bit like the Wild West.

Also implicated are varying interpretations of Rule 60, Fraud Upon the Court, and a Full and Fair Opportunity to Litigate. When states adopt Federal rules, Federal precedent should be controlling.

Vermont takes a very narrow view of Fraud Upon the Court and District Court interpretation varies as well. More reasonably, Mr. Dasler proposes a definition focused on cause and effect, akin to N.Y. District Court interpretation.

Mr. Dasler also proposes that when there is parallel civil/criminal litigation and neither a stay, nor immunity is available to prevent prejudice (when pleading the 5th) a Full and Fair Opportunity is implicated. In such instances, Rule 60 should be interpreted to provide a fail-safe to allow the accused to come back in a supplemental hearing to present the excluded evidence and allow the court to determine what equitable remedy should be available if the previously excluded evidence would change the result of the prior judgement.

OPINIONS BELOW

The Supreme Court of Vermont issued its final order on March 5, 2021. (App.1a). The Vermont Superior Court, Family Court issued its opinion on January 23, 2020. (App.9a). In summary, the Relief From Judgement Appeal resulted in affirming the lower court decision with no change. Although Justice Robinson acknowledged that Mr. Dasler's argument about the Hobson's choice and Rule 60(b)(6) as the only form of relief was a "new argument", the court did not find that it should disturb the discretion of the lower court in a Rule 60 motion or that the 1 year time limit was excepted by these circumstances.

The court did not find that the lower court was obligated to provide any avenue for Mr. Dasler to litigate without prejudice in Family Court while Ms. Dasler was working both Civil and Criminal courts as an interested party.

JURISDICTION

This petition is being filed within 150 days of the Supreme Court of Vermont final order dated March 5, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amendment. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amendment. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 V.S.A. § 668a

> (c) If a custodial parent refuses to honor a non-custodial parent's visitation rights, the court shall enforce such rights unless it finds good cause for

the failure or that a modification of the visitation rights is in the best interests of the child. Unless restoration of the visitation is not in the best interests of the child, enforcement of the visitation rights shall include the restoration of the amount of visitation improperly denied. When a party files a motion for enforcement of parent-child contact under this subsection, the court shall conduct a hearing within 30 days of service of the motion.

(d) A person who violates this section may be punished by contempt of court or other remedies as the court deems appropriate, including awarding attorney's fees and costs to the prevailing party.

(e)(1) If a custodial parent refuses to honor a non-custodial parent's visitation rights without good cause, the court may modify the parent-child contact order if found to be in the best interests of the child. Good cause shall include:

(A) a pattern or incidence of domestic or sexual violence;

(B) a reasonable fear for the child's or the custodial parent's safety; or

(C) a history of failure to honor the visitation schedule agreed to in the parent-child contact order.

(2) A custodial parent, upon a showing of good cause as defined in subdivision (1)(A) or (B) of this subsection, may receive an ex parte order suspending a noncustodial parent's visitation rights until a court hearing is held. A hearing shall be held within 14 days from the issuance of the order.

(f) All parent-child contact orders issued by the family division of the superior court in connection with a divorce or parentage proceeding shall bear the following statement: "A PERSON WHO FAILS TO COMPLY WITH ALL TERMS OF THE CURRENT ORDER GOVERNING PARENT-CHILD CONTACT MAY BE SUBJECT TO CONTEMPT OF COURT CHARGES. THE COURT MAY IMPOSE ADDITIONAL REMEDIES, INCLUDING A MODIFICATION OF THE CURRENT PARENT-CHILD CONTACT ORDER IF FOUND TO BE IN THE BEST INTERESTS OF THE CHILD."

15 V.S.A. § 665–Rights and responsibilities order; best interests of the child

(a) In an action under this chapter, the court shall make an order concerning parental rights and responsibilities of any minor child of the parties. The court may order parental rights and responsibilities to be divided or shared between the parents on such terms and conditions as serve the best interests of the child. When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent.

(b) In making an order under this section, the court shall be guided by the best interests of the child and shall consider at least the following factors:

(1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection, and guidance;

(2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs, and a safe environment;

(3) the ability and disposition of each parent to meet the child's present and future developmental needs;

(4) the quality of the child's adjustment to the child's present housing, school, and community and the potential effect of any change;

(5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;

(6) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;

(7) the relationship of the child with any other person who may significantly affect the child;

(8) the ability and disposition of the parents to communicate, cooperate with each other, and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided; and

(9) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.

(c) The court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent, or the financial resources of a parent.

(d) The court may order a parent who is awarded responsibility for a certain matter involving a child's welfare to inform the other parent when a major change in that matter occurs.

(e) The jurisdiction granted by this section shall be limited by the Uniform Child Custody Jurisdiction and Enforcement Act, if another state has jurisdiction as provided in that act. For the purposes of interpreting that act and any other provision of law which refers to a custodial parent, including 13 V.S.A. § 2451, the parent with physical responsibility shall be considered the custodial parent.

NH Rev Stat § 461-A:11. Modification of Parental Rights and Responsibilities.–

I. The court may issue an order modifying a permanent order concerning parental rights and responsibilities under any of the following circumstances:

(a) The parties agree to a modification.

(b) If the court finds repeated, intentional, and unwarranted interference by a parent with the residential responsibilities of the other parent, the court may order a change in the parental rights and responsibilities without the necessity of showing harm to the child, if the court determines that such change would be

in accordance with the best interests of the child.

(c) If the court finds by clear and convincing evidence that the child's present environment is detrimental to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the harm likely to be caused by a change in environment.

(d) If the parties have substantially equal periods of residential responsibility for the child and either each asserts or the court finds that the original allocation of parental rights and responsibilities is not working, the court may order a change in allocation of parental rights and responsibilities based on a finding that the change is in the best interests of the child.

(e) If the court finds by clear and convincing evidence that a minor child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature minor child as to the parent with whom he or she wants to live. Under these circumstances, the court shall also give due consideration to other factors which may have affected the minor child's preference, including whether the minor child's preference was based on undesirable or improper influences.

(f) The modification makes either a minimal change or no change in the allocation of parenting time between the parents, and the court determines that such change would be in the best interests of the child.

(g) If one parent's allocation of parenting time was based in whole or in part on the travel time between the parents' residences at the time of the order and the parents are now living either closer to each other or further from each other by such distance that the existing order is not in the child's best interest.

(h) If one parent's allocation or schedule of parenting time was based in whole or in part on his or her work schedule and there has been a substantial change in that work schedule such that the existing order is not in the child's best interest.

(i) If one parent's allocation or schedule of parenting time was based in whole or in part on the young age of the child, the court may modify the allocation or schedule or both based on a finding that the change is in the best interests of the child, provided that the request is at least 5 years after the prior order.

II. Except as provided in RSA 461-A:11, I(b)-(i) for parenting schedules and RSA 461-A:12 for a request to relocate the residence of a child, the court may issue an order modifying any section of a permanent parenting plan

based on the best interest of the child. RSA 461-A:5, III shall apply to any request to modify decision-making responsibility.

III. For the purposes of this section, the burden of proof shall be on the moving party.

5 V.S.A. § 650. Legislative findings and purpose

The legislature finds and declares as public policy that after parents have separated or dissolved their civil marriage, it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or a parent is likely to result from such contact. The legislature further finds and declares as public policy that parents have the responsibility to provide child support, and that child support orders should reflect the true costs of raising children and approximate insofar as possible the standard of living the child would have enjoyed had the family remained intact.

22 U.S.C.S. § 9003

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

STATEMENT OF THE CASE

A. Statement of Facts

Mr. and Ms. Dasler were married in 2012 and had a child in 2015. Both parties were involved in their daughter's daily care. There were no allegations of abuse until Mr. Dasler told Ms. Dasler he was leaving on 5/12/17.

The parties agreed on 5/12/17 that Mr. Dasler would take the child for the first overnight, and separated for the workday (6/12/18 transcript Pg. 86).

Ms. Dasler left work early that afternoon seeking to intercept Mr. Dasler, and called him to get his location, later alleging Mr. Dasler attempted to "abduct" the child (2/28/18 Motion to Correct and Reconsider Pg. 24, and 12/12/17 Pg. 4, 11). Although she claimed in later testimony that she could hear the minor child in the background (2/28/18 Motion to Correct and Re-Consider 43-44, 6/11/18 Pg. 112) her Relief From Abuse Complaint affidavit on 5/15/17 said she "checked daycare" to confirm whether or not the child was there AFTER the call with Mr. Dasler, which is completely at odds with the later claims that she could hear the child on the call.

The court ultimately accepted Ms. Dasler's version of events it is incontrovertible that Mr. Dasler had repeatedly tried to escape conflict with Ms. Dasler numerous times, and Ms. Dasler left work early seeking Mr. Dasler out. Even then, Ms. Dasler was seeking Mr. Dasler and he was avoiding conflict. While Ms. Dasler claims Mr. Dasler lied about his

whereabouts it is clear that she checked for him at 2 destinations (daycare, then home) on his stated route. At no point is Mr. Dasler pursuing Ms. Dasler, but she is pursuing him.

Ms. Dasler admits that her kidnapping fear is rooted in her childhood when cousins were kidnapped by their father in the midst of a divorce (2/16/18 transcript Pg. 83). This has nothing to do with Mr. Dasler, however, it does explain why she repeatedly makes unfounded kidnapping accusations and claims Mr. Dasler is a "flight risk" while seeking to prevent him from being alone with the child after he said he was leaving (12/12/17 motion pg. 4, 8, 9, and 13, 12/6/18 Pg. 3, 2/28/18 Motion to Reconsider Pg. 24 and 2/16/18 transcript Pg. 64).

Mr. Dasler's 1/20/20 Motion for Relief from Judgment (subject of this appeal) lays out the cell phone evidence later uncovered that shows Ms. Dasler called an attorney to arrange the relief from abuse filing BEFORE there was probable cause, then set out on an intercept course for Mr. Dasler, and followed Mr. Dasler to multiple points on his stated route in order to fabricate probable cause. The attorney she called was only involved in the case insofar as he signed her Relief From Abuse paperwork the next business day before the court opened, and her call log indicates this was arranged before she had probable cause.

Ms. Dasler admits she physically confronted Mr. Dasler, and physically took the child, body blocked Mr. Dasler, and repeatedly used physical force against Mr. Dasler to prevent previously agreed upon parent child contact. She states her reason for using force was the fear of him putting the child to bed late. Ms. Dasler claims Mr. Dasler then pushed her, left, and

both parties called the police. No photos or other evidence of injuries have ever been presented. Mr. Dasler has not testified about this incident because there are charges pending, however, he pled not guilty (accepted a lesser plea after the divorce order) and denied her accusations. (6/11/18 Transcript Pg 112, 2/28/18 Motion to Reconsider Pg. 45, 66-71, and 6/12/18 Transcript Pg. 88-89)

Mr. Dasler was arrested, and Ms. Dasler filed a Complaint for Relief from Abuse on Monday 5/15/17 (the next day the court was open). Consequently Mr. Dasler was stripped of parental rights and visitation by temporary ex-parte order signed by the judge 5/23/17 based solely on the 5/12/17 accusation. A hearing date on a final Relief From Abuse order was scheduled for 6/6/17, but delayed until 8/1/17. In the meantime the only option for Mr. Dasler to have any contact with the child was mediation with Ms. Dasler.

The 6/9/17 Stipulate Re: Parent Child Contact was the result of mediation. Ms. Dasler only allowed Mr. Dasler 4 hours per week with the promise of "normalizing contact", however, Ms. Dasler would use this weekly contact as a platform for 7 more motions totaling 170 pages seeking to further restrict Mr. Dasler's contact. These accusations were either unfounded, proven false, or did not seek to prevail by providing evidence or sufficient detail of any accusation. For example; when accusing Mr. Dasler of sending abusive, harassing, insulting, frightening, humiliating, hateful, rude, and mean text and emails in motions between 12/5/17 and 2/28/18 they never provided any such evidence. While saying visits weren't 'safe' they failed to detail why exactly they weren't safe.

Ms. Dasler's self-award of the role of custodial parent (through the 5/15/17 ex-parte action) allowed her to dictate the terms of visitation. She chose to have 4 exchanges per week face to face, using this to fuel the accusations in motions throughout 2017-early 2018. Ms. Dasler even instructed daycare to go in to "lockdown" if Mr. Dasler arrived when he otherwise could have had visitation with her in her daycare setting (2/28/18 Motion to Stay Visitation Pg. 18-19). Ms. Dasler had many options to avoid face-to-face interactions but allow visitation, but she insisted upon the arrangements that drove conflict giving her ample opportunity for additional false allegations in the hopes of strengthening her custody case.

In VT Family Court the accuser continues to benefit from driving conflict (*see Cabot* below). Having obtained any restriction on the child's contact with the other parent, whether or not there was a finding that parent was unfit, the custodial parent continues to be counted as "primary caregiver" the longer this arrangement continues (8/17/18 Order Pg. 22). In theory the statute considering "best interest of the child" 15 V.S.A. § 665 penalizes a parent for not being willing to "foster a relationship" with the other parent, however, in VT the court is "not free to punish" (*Cabot*, 166 Vt. 485, 488, 697 A.2d 644, 646 (1997)) a parent who refuses contact in violation of court order and contrary to the child's best interest (*also see Knutsen*), nor can it award joint custody to shield the child from the harm caused by a parent abusing parental rights/contact (as in *Cabot*).

Ms. Dasler's suspension of visitation and Relief from Abuse filings were adjudicated on 8/1/17(while

Mr. Dasler pled the 5th). The court reaffirmed the prior order to "normalize contact", and end ended the suspension of visitation (which Ms. Dasler implemented without court approval, and in violation of the standing order at that time)

Between separation on 5/12/17, and the June 2018 Final Divorce Hearings, Ms. Dasler's 3 additional criminal complaints and 7 filings seeking to obstruct Mr. Dasler's contact (all within 9 months of separation) were rejected.

It should be noted that Mr. Dasler started recording interactions after the 5/12/17 accusation, and each of the subsequent accusations were disproven. Whether it was an attempt to get the child on a restraining order with the black eye accusation of 7/19/17, the stalking accusation of 11/11/17, the 2/25/18 call to police, or the other numerous claims in the 170 pages of filings, Ms. Dasler has failed to accomplish the same fraud even with her parents corroborating stories like the "black eye" that never was.

In 200+ pages of filings to date, the only accusation the court accepted is the one made prior to Mr. Dasler recording, the one on 5/12/17 which is the subject of this Relief from Judgement motion where Mr. Dasler seeks an opportunity to present a case.

So strong is the protection for the self-proclaimed victim that even this mountain of unfounded allegations fails to lead the court to doubt Ms. Dasler so long as Mr. Dasler is silenced on the initial allegation. Consequently, the court fails to hold Ms. Dasler to account for violating orders and filing false and unfounded accusations. Instead the court ordered Mr. Dasler not to record exchanges, and held the recordings against

Mr. Dasler as "exacerbating the parties' challenges" rather than recognizing that it was necessary in his defense.

In the final ruling the court found that while Ms. Dasler's many attempts to restrict parental contact were not found to be accurate, they were in good faith. Mr. Dasler, on the other hand, would be penalized for simply being "ginger" in communication, and counted that as contrary to the child's interest under 15 V.S.A § 665.

Considering the frequency of accusations, pending criminal trial, and a restraining order it would appear that Mr. Dasler was caught in a double bind with the court. One word that could be construed as harassing or threatening would land him in jail and suspend parental contact. In spite of her accusations it actually found him on the other extreme of "gingerly avoid[ing] discussing parenting issues directly", and relied on the child's therapist to sort through parenting issues (8/17/18 Order Pg 22) and still held that against him. Amidst all the claims of high-conflict and danger, he's actually punished for being too mellow in the face of these attacks and legal restrictions.

This only highlights how subjective the scrutiny is when courts are compelled to pick a 'favorite' to justify stripping one parent's rights rather than being compelled to craft orders seeking to preserve the rights of the parties.

In the divorce hearing Ms. Dasler's counsel (Attorney Loftus) questioned Mr. Dasler about the content of an email urging Ms. Dasler to get mental health treatment. Mr. Dasler subsequently testified about Ms. Dasler's mental health issues that have been life

threatening to both parents, and prompted emergency police and medical response (6/12/18 201-210 and 226-231).

Because Mr. Dasler did not raise Ms. Dasler's mental health issues prior to cross examination, the court did not put any weight on the issue, although, it accepted Mr. Dasler's version of events (8/17/18 Order Pg 10).

In weighing the factors of the "best interest" of the child the court relied on 3 factors, which it found to "slightly favor" Ms. Dasler. All factors rely on Ms. Dasler's control over the process and obstruction of Mr. Dasler's rights. None constitute harm to the child that justifies interference of parental rights (8/17/18 Order Pg 17).

The court found that Ms. Dasler was primary caregiver because she alienated Mr. Dasler for 9 months while he awaited a hearing in which he could actually testify (8/17/18 Order Pg 21). Having only met 'probable cause' for the initial accusation she was able to compound that by stalling "normalization of contact", and violating court ordered contact. This is why the Mediation agreement and subsequent order in June 2017 did not result in "normalization" without 2 more hearings where Mr. Dasler had to defend the order without just cause.

In considering 15 V.S.A. § 665(9), evidence of abuse, the court ignored her admissions of stalking Mr. Dasler, her admission of attempts to physically control him., and excused her incontrovertible violations of the court order. Without Mr. Dasler being able to raise the issues of Ms. Dasler's history of violence and mental health issues, as cited in his Relief from

Judgement Motion, the court could not fairly consider this factor.

In the courts final conclusion on custody, the dominant factor was the temporary ex-parte order (obtained through fraud) that allowed Ms. Dasler's self-award of the "primary caregiver" role. Two factors that "slightly favor" Ms. Dasler were Ms. Dasler's "ginger" communication (resulting from the legal constraints of Ms. Dasler's litigiousness, and steady flow of accusations), and the allegation of abuse that Mr. Dasler was unable to defend against due to the Hobson's choice described previously.

B. 2019 Vermont Supreme Court Appeal

On appeal to the VT Supreme Court Mr. Dasler requested the restraining order be included in the record for him to reference in his brief, and requested a copy of the audio exhibit from the hearing. During the divorce hearing it was clear that the court was referencing the restraining order file (RFA) while at the bench in the hearing (6/11/18 Transcript Pg. 116), but the VT Supreme Court excluded the restraining order file from the record on appeal with exception of the transcript that Ms. Dasler submitted with her 2/28/18 motion after the judge ruled in the hearing on 2/16/18 that the restraining order was not going to be re-heard in the temporary custody hearing, thus they submitted the transcript in a motion anyways.

The VT Supreme Court did not recognize the factual errors because modifying evidence is excluded. In considering the court's factual findings, we "view[] the evidence in the light most favorable to the prevailing party and exclud[e] the effect of modifying

evidence." *Cabot v. Cabot*, 166 Vt. 485, 497 (1997) (quotation omitted).

In excluding all modifying evidence the court simply wouldn't know whether or not the findings are reasonable or even plausible in light of the evidence because the evidence isn't reviewed any further than to verify that there is at least some evidence to support the finding.

The SCOV did not find issue with the Hobson's choice faced by lack of protection while facing parallel litigation fueled by the same party.

C. Resolution of Criminal Charges

Mr. Dasler signed a No Contest Plea to lesser charges of Disturbing the Peace late in 2019, allowing him to finally be free of the Hobson's choice, and he presented the 1/20/20 Motion for Relief from Judgement soon after.

D. Relief From Judgement Motion

Mr. Dasler's 1/20/20 Motion presents the argument that he did not have a fair opportunity to litigate. The constitutional deficiencies may not have been clear while he pled the 5th, and the court may have simply presumed it was a case of his word against hers. The existence of evidence of her fraud, however, was unavailable until after the Final Divorce Hearing and presents a much stronger case than one word against another.

The cell phone evidence establishes that Ms. Dasler set up the Relief From Abuse filing BEFORE she had probable cause, then called Mr. Dasler seeking his location, and location data proves she followed

him to multiple locations on his route before cornering him alone. Consistent with her earlier affidavit (and not the later version accepted by the court), Ms. Dasler checked on the child at daycare and decided to leave the child for Mr. Dasler to pick up and follow him to the marital home to corner him so she could fabricate cause for the RFA that she already arranged.

Mr. Dasler's own testimony was also excluded, so he could not have fairly defended himself, and taken with Ms. Dasler's admission of using physical force to control Mr. Dasler, indicates that she was not only the aggressor, but applied greater force than Mr. Dasler and prevailed as he fended off her attacks.

Every element that favors Ms. Dasler in this case would necessarily be shifted if the court recognized that even the initial accusation was based upon fraud. This was never a case of a scared mother abused by her spouse. Rather it much more resembles the Amy Cooper effect, which became famous in recent times where Amy was caught on video calling 911 falsely alleging a man threatening her because she didn't want him challenging her for having her dog off leash in the park. That is precisely how Ms. Dasler has repeatedly used the Vermont Family Court, and as described earlier in *Knutsen*, the SCOV precedent renders the Family Court utterly incapable of addressing such abuse, nor is it able to shield children from that form of harm.

If a hearing were granted, and Mr. Dasler was free to litigate, he would be able to present her history of abuse, life threatening mental health issues, present the Police Reports supporting prior incidents, and actually defend himself against the allegations of abuse. The court could craft an order that more

reasonably reflects the needs of the child in light of a more accurate rendering of the environment that the child lives in.

The court focused on the 1 year time limit, concluding that Mr. Dasler had not presented a case for Fraud Upon the Court or inconsistencies with due process.

Mr. Dasler contends, as described in above (under the Reasons For Granting The Writ), when the state statute and precedent allow a party to use pre-trial election and ex-parte action to grant themselves a change of status that denies due process to the accused, Fraud Upon The Court is met. Ms. Dasler shifted the burden to Mr. Dasler, and the court was deprived of the authority to burden her with justifying her self-award of rights rather than requiring that Mr. Dasler rebut her self-award with a showing of harm. She very clearly subverted the machinery of the court.

Moreover, nothing in the court's findings approach a standard that justifies interfering with Mr. Dasler's parental rights, and the statute and precedent compelling the court to infringe on rights is Unconstitutional and inconsistent with due process (also as described under Reasons For Granting the Writ)

REASONS FOR GRANTING THE PETITION

I. SUMMARY OF ARGUMENT

1. Resolve disparity between state interpretation of 14th Amendment Rights. In this case, the erroneous interpretation of the Vermont courts led to additional action, which also highlights a lower standard of protection that extends to Rule 60 actions, interpretation of Fraud Upon the Court, and what constitutes an Opportunity to Be Heard. All of which have been interpreted differently in state and Federal courts.

2. In the case at bar, the Supreme Court of Vermont (hereafter SCOV) constrained this case with precedent erroneously interpreting Parental Rights under the Constitution, Rule 60 action, and what constitutes an Opportunity to Be Heard. This allowed one party to a suit to deprive the court of discretion to preserve the rights of an adverse party to the suit. The appeal in this case was heard by the Rocket Docket, which is a sub-panel that is created specifically to apply precedent, and the proceeding foreclosed a legitimate challenge to court precedent. In this proceeding, only one justice reads the brief while the rest get a summary prepared by Staff Attorneys who also draft the opinion. Oral argument is 5 minutes, so the opportunity to present directly to the justices is extremely limited, and does not constitute a realistic opportunity to present a challenge to Vermont precedent that defined this case.

3. The Uniform Child Custody Jurisdiction and Enforcement Act (hereafter UCCJEA) forecloses Diver-

sity Jurisdiction of Federal courts. In many cases it compels residents of one case to submit to the authority of a neighboring state (where they have no representation in government). Without significant Federal guidance, state courts have varied wildly in interpretation of Parental Rights under the Constitution. Many states presume equal rights of the parents upon the dissolution of marriage, which can properly be inferred by the limited SCOTUS precedent on parental rights. If marriage doesn't grant parental rights, then dissolution of marriage shouldn't dissolve them. Another cause of action is needed requiring Clear and Convincing Evidence of harm to open the door to disturb equal rights. Many states adopt this view. Vermont, conversely, can strip a parent to 25% visitation after divorce with no showing of unfitness or harm and strip a parent from sole custody to very limited supervised contact with only a preponderance of evidence (and after the claim was re-asserted 7 times and rejected by the court and experts the first 6 times) or sever contact based upon an ex-parte order later proven to have "no credible factual basis" but not restore the rights of the accused when they prevail in the adjudication. This wide disparity in interpretation is unacceptable. Many families across the nation are separated needlessly as courts continue to operate at this lower standard.

If this court set the goal posts as Mr. Dasler requests, a more unified interpretation of child custody actions will allow courts to focus on structuring orders that promote the involvement of fit parents rather than encouraging the battles that need not be fought. Children's protection from abuse and state intervention in parental rights should be equal

regardless of marital status, but interpretations like Vermont's allow what is essentially a private prosecution, often pitting one party with greater financial resources against another who is unable to sustain a defense (certainly not for the span of years and frequency of filings seen in cases cited below).

In these cases, not only is the accuser granted the authority to select medical providers/therapists and conduct essentially a private prosecution where they often have sole access to the evidence (the medical providers) due to Sole Parental Rights based upon ex-parte orders, but the accused has increased child support obligations as a result of being deprived of parental contact. When they need those resources most, in their defense, the state forces them to pay the adverse party while providing no assistance to afford a legal defense. In Mr. Dasler's case, for example, Ms. Dasler's ex-parte action resulted in him paying her more than 1/3 of his income, leaving him with $1,200/month to pay all his bills and fund a defense against the criminal allegations (4 separate complaints in 9 months), relief from abuse hearing, and hundreds of pages of filings seeking to further limit his visitation.

Mr. Dasler can predict the hesitancy to issue a decision that causes a ground shift to courts nationwide, however, many courts already recognize the equal rights of the parties. For those states that do not, the courts would simply be obligated to craft orders that provide equal rights and decrease the judicial burden of these cases. In the *Knutsen* case cited below, for example, there were numerous appeals, many days of hearings at each stage of the case, and this can all be supplanted by use of the pre-existing DCF agencies

to investigate/prosecute abuse allegations. In cases like *Knutsen*, DeSantis, and Mullins (cited below) such state directed action would likely have protected these children, vastly reduced court intervention, and allowed an uninterested state agent to prevent the baseless allegations from being used as the 'low hanging fruit' to disturb parental rights/visitation at a lower standard. States already have a system for this.

II. 14TH AMENDMENT ISSUES

Erroneous interpretations of 14th Amendment Rights to Due Process in Child Custody cases can be summed up as allowing one parent to waive the higher standard of evidence required before state interference with Parental Rights. Child Custody isn't a battle between two parties. There are three parties with equal rights, with the child's interest being central.

There must be a showing of Clear and Credible Evidence of harm before the equal rights are disturbed. This is true regardless of whether a non-parent seeks visitation (as in *Troxel*, 530 U.S. 57(2000)) or on the other extreme when the state seeks to sever Parental Rights (as in *Stanley* 405 U.S. 645(1972), and *Santosky*, 455 U.S. 745(1982)). The outer goal posts are clearly set for the standard of evidence required for intervention in parental rights.

States establishing a lower standard for parent-initiated interference allow one party to volunteer to lower the standard of evidence required for state interference with parental rights. If the child's interest is central, then the identity of the moving party is

irrelevant to the question of the threshold of harm required to open the door.

Unfortunately states have not consistently recognized that the SCOTUS has already established the outer goal posts for the standard of evidence, resulting in a wide disparity in legal standards.

The central 14th Amendment issues, as applied to Child Custody, are

1. There should be a presumption of Equal Rights of parents regardless of marital status, which may be rebutted by Clear and Convincing Evidence of harm.
    A. Equal rights of parents upon dissolution of marriage is presumed at least in NH, MN, D.C., and LA. Clear and Convincing Evidence is required to rebut this presumption.
    B. Conversely, in Vermont, one parent may veto shared parental rights depriving the court of jurisdiction to award shared PRR.
2. When abuse is alleged the due process standard is not dependent on whether the accusation is made by one parent against the other, and the moving parent may not waive the evidentiary standard under guise of "the child's best interest".
    A. By Supreme Court of Vermont precedent, an abuse allegation from one parent against another is considered a "battle between the two parties", and requires

only the Preponderance of Evidence to prevail (cited in detail below).

B. In Mr. Dasler's home state of NH, the statute requires Clear and Convincing Evidence of harm to disturb parental rights/visitation (NH Rev Stat § 461-A:11), and the rare Federal statute regarding adjudication of parental rights concurs (22 U.S.C.S § 9003)

The UCCJEA requires Mr. Dasler to submit to Vermont Child Custody Law rather than his home state of New Hampshire, and the Federal court's abstention from child custody cases denies Diversity Jurisdiction. Consequently, Mr. Dasler's parental rights are at the mercy of a foreign state that does not recognize his Constitutional Right to due process consistent with either his home state. It is appropriate for the SCOTUS to narrow the goal posts for interpretation of 14th Amendment Rights.

Had the same case been conducted pursuant to NH law, Ms. Dasler would have been required to show Clear and Convincing Evidence of harm to the child in order to strip Mr. Dasler of his rights. Conversely, in Vermont she needed only to veto shared parental rights (15 V.S.A. § 665) and obtain a temporary ex-parte order obstructing Mr. Dasler's parental contact to become "primary caregiver" and shift the burden of proof to Mr. Dasler (8/17/18 Order Pg 22).

> "A parent's right to exercise joint legal custody upon termination of the marriage can be properly inferred from recognizing constitutional doctrine pertaining to related

> familial rights. Once recognized, states must protect that right by providing for a rebuttable presumption of joint decision making."

James W. Bozzomo, *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 HOFSTRA L. REV. 547

> "The presumption that an award of sole custody is in the best interests of the child if parents cannot mutually agree to joint custody is contrary to the longstanding constitutional doctrine: Fit parents are presumed to act in the best interests of their children."

31 HOFSTRA L. REV. 547, 575

The SCOV has declined to even consider the Constitutionality of 15 V.S.A § 665 if the lower court can point to something as minor as "animosity between the parents" to justify an award of Sole Custody to one parent, and the non-custodial parent receiving only 25% visitation with the children without any showing of unfitness or harm (*Bancroft* 154 Vt. 442, 443, 578 A.2d 114, 115 (1990)). The Constitutional question remains unanswered in Vermont unless/until that magical day when parents divorce, refuse to share parental rights, and yet leave the court unable to sniff out some reason to favor one parent as directed by precedent even if that is just the divorcing couple has some animosity (shocker).

SCOV Family Court precedent is littered with alarming cases that define adjudication in that state. These cases indicate the danger to parents and children based upon the low standards of VT Family Court.

In *Knutsen*, 2016 VT 2 and 2017 VT 62, the accuser never prevailed in a hearing, but got a temporary order restricting the accused parent's contact. In spite of multiple hearings rejecting the abuse allegations and the accuser's consistent violation of orders for reunification, the accused could not get visitation restored. The court reasoned that it couldn't award custody to the accused even though it was the "right thing to do". Ultimately the accuser could effectively purchase parental rights because of lack of enforcement of orders (other than paying legal fees, which he could easily afford apparently) and the accuser's ability to simply prevent contact with the accused for 5 years by the time of the 2017 appeal.

In DeSantis, 2011 VT 114 the accused signed a temporary agreement suspending visitation stipulating that was to be "be entirely without prejudice" (while criminal proceedings were pending). 18 months later the charges were dismissed with prejudice, he filed a motion to restore contact, however, the court held against him the time that lapsed since contact (technically not the order, just the lapse in contact caused by the order). It also found that although it couldn't find sexual abuse by Clear and Convincing Evidence to terminate rights, it cited multiple oddities that it conflated with sexual abuse and awarded no visitation, but was remanded with an indication that at least supervised visitation would be necessary without a higher burden of proof.

In *Mullin*, 162 Vt. 250 the non-custodial parent desperately wanted sole custody, and made regular accusations to that end. The first 6 attempts were soundly rejected by all experts involved, and all courts that heard the cases. On the 7th attempt, however,

the accuser found an expert who ignored the older child's claim that mom was coaching them what to say and staging events to make it look like they were afraid of dad. The court accepted this to satisfy 51% certainty to limit the father to supervised contact (after having sole custody in Utah for years), and remanded on appeal to strike the requirement that he admit guilt.

Taken together we can see how an accusing parent can game the system. At 51% certainty, just keep flipping the coin till it comes up heads. Or in the case of Mr. Knutsen, just hang on to the temporary order as long as possible and count on being able to prevail BECAUSE of the harm done to the child. In all of these cases there is injustice done through one parent interfering with the standards required for state infringement with the adverse party's rights, and children suffer as a result.

The standard should be no different for abuse cases regardless if the parents are wed or unwed and regardless of the identity of the moving party. The children's rights and interest in protection is equal, and it is clear that an interested party has tremendous ability to upset that balance when they wield power of parental rights oppressively. The harm done to children is hard to over-state when it is clear, at least in the *Knutsen* case, that even when the court identifies that the accuser is actually the one causing the harm it is somehow unable to reverse course and protect the child.

Paraphrasing *Stanley v. Illinois* and *Santosky v. Kramer*, 'The child registers no gain when taken from a fit parent, in fact the state spites the child's interest and state's expressed goals when it does so.'

Similarly, 15 V.S.A § 650 indicates the court's duty is to "maximize" contact "unless harmful". Therefore, even by the state definition of the child's interest the only outcome that favors the child is an accurate adjudication of the matter.

"it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or a parent is likely to result from such contact"

More specifically, to the Dasler case, Ms. Dasler's ex-parte action fundamentally shifted the burden of proof to Mr. Dasler. As cited in the Final Divorce Order below (8/17/18 Order Pg. 22) the role of primary caregiver (even when it is slight as in MacCormack below where parents had 50/50 visitation) is given great weight unless the primary caregiver is unfit.

By applying this standard, and relying on the 9 month period after separation (when Ms. Dasler restricted access with an ex-parte order, which she did not prevail on the merits of), the court is effectively confirming that Ms. Dasler's self-award of primary caregiver role through an ex-parte action effectively denied the court jurisdiction to burden her with justifying that award. Instead, Mr. Dasler needed to prove she would be harmful to the child in that role.

The 8/17/18 Order cites on pg 22:

> "[the primary caregiver role] should be entitled to great weight unless the primary custodian is unfit. The exact weight cannot be determined unless there is evidence of the likely effect of the change of custodian

> on the child. In the absence of such evidence, the court should ordinarily find that the child should remain with the primary custodian if that parent is fit."

Harris v. Harris, 149 Vt. 410 (1988), cited with approval, *Alistyen v. Martin*, 2016 WL 1824435; *MacCormack v. MacCormack*, 2015 VT 64 at Para. 13; *Rogers v. Parrish*, 2007 VT 35 Para. 19; *DeBeaumont v. Goodrich*, 162 Vt. 91, 101 (1994).

The court goes on to rely upon this restriction of visitation as the overwhelming factor to award custody, and does not make a finding of harm that justifies interference with Mr. Dasler's parental rights.

> "Based on the foregoing, the court awards Jennifer Dasler primary legal and physical parental rights and responsibilities for Tenley. This decision is primarily based upon the court's conclusion that she has served as Tenley's primary care provider, which the cases cited above afford considerable weight. Many of the other factors are in equipoise" but factors 8 and 9 slightly favor Ms. Dasler." (8/17/18 Order Pg 23).

So not only did Ms. Dasler successfully shift the burden of proof to Mr. Dasler through pre-trial election (vetoing shared parental rights and cited precedent requiring he prove the 'primary caregiver' to be unfit/harmful to restore his rights) and ex-parte action (awarding herself the "primary caregiver" role), but in proving Ms. Dasler would be harmful to the child he still had his hands tied because of the Hobson's choice that he faced due to parallel litigation

and lack of opportunity to challenge the legitimacy of his change of status through ex-parte action.

Just to recap here, in May 2017 Ms. Dasler gets an ex-parte order claiming Mr. Dasler is harmful, which restricts his rights, she does not prevail in justifying the suspension of visitation, but somehow Mr. Dasler's rights cannot be restored unless he proves SHE is unfit/harmful to the child. Her pre-trial elections and ex-parte action prevented the normal functioning of the adjudicative process, and precedent foreclosed the court from burdening Ms. Dasler with prevailing in justifying the interference with Mr. Dasler's rights.

While this initially appears to be a judicial malfunction, which also should be able to be addressed through Rule 60 action, the question of Fraud Upon The Court turns on the question of whether or not there is evidence that Ms. Dasler obtained the ex-parte order through fraud, which subsequently deprived the court of authority to preserve Mr. Dasler's rights. This is further detailed below under the Fraud Upon the Court section below.

Mr. Dasler was unable to present such evidence until after the Final Divorce Hearing because of a combination of the ongoing criminal investigation, which did not uncover evidence until after the Final Divorce Hearing, and Mr. Dasler's Hobson's choice between 5th and 14th Amendment rights while there was no protection in place, and even actual innocence would not restore his parental rights without establishing Ms. Dasler's role as "primary caregiver" was harmful to the child.

The court provided no opportunity for Mr. Dasler to present a defense without prejudice. Even if he waived his 5th Amendment Right and proved "no basis" for the accusation he would still have to prove it would be harmful for Ms. Dasler to retain custody in order to restore his own rights. The burden was fundamentally shifted to Mr. Dasler.

Neither a stay, nor immunity was available to prevent prejudice if he plead the 5th. Ms. Dasler was working directly with the prosecutor, holding sway over plea deals or diversion, and successfully prevented the criminal case from being resolved within a time frame that would allow him to present a Rule 60 motion within 1 year. The No Contest Plea to Disturbing the Peace accepted late in 2019 was not available earlier, and Mr. Dasler had no control over the timing of the resolution, although Ms. Dasler obstructed deals that the prosecution was otherwise willing to consider.

If there is no protection for pleading the 5th, and waiving the 5th would result in prejudice without benefitting the civil case (because actual innocence would not restore his rights), then this Constitutional conflict is a Hobson's choice. In such a scenario there should be no question that Mr. Dasler did not have a fair opportunity to present a case, and should be free to come back to court through a Rule 60(b)(6) motion as the only avenue to present a case. This will be addressed in greater detail under the Opportunity to Be Heard section below.

III. FRAUD UPON THE COURT

Court interpretations of Fraud Upon the Court vary wildly. When states adopt Federal rules, as with Rule 60, Federal precedent should be controlling. There has been very little direction from the SCOTUS on what constitutes Fraud Upon the Court.

The SCOV's interpretation excludes the "first five classes" of the rule, and focuses on the conduct rather than the effect on adjudication. Surely that cannot be an accurate interpretation or it effectively nullifies Rule 60(B)(6) entirely. One could not bring a Rule 60 case at all without some kind of evidence unavailable previously, for example. It is a self-defeating argument specifically excluded in the language of Rule 60(D) (*See Godin* below, where SCOV treats Fraud Upon the Court as a Rule 60(B)(6) motion, not 60(D)(3)).

> "*See Godin v. Godin*, 168 Vt. 514, 518, 725 A.2d 904 (1998) (noting that catch-all provision is available only when a ground justifying relief is not encompassed within any of the first five classes of the rule).
>
> As we recognized in Godin, the fraud-upon-the-court doctrine "has generally been reserved for only the most egregious misconduct evidencing . . . an unconscionable and calculated design to improperly influence the court.""

Montgomery v. Cheshire Handling, 186 Vt. 656, 987 A.2d 337 (2009)

Texas District Court also has a narrow view on the matter.

"Thus, only in "extraordinary circumstances"

> should a court find fraud upon the court. *Rozier, supra*, 573 F.2d at 1338 n.3. In *Rozier, supra*, 573 F.2d at 1338, the Fifth Circuit cited with approval *United States v. International Telephone & Telegraph Corp.*, 349 F. Supp. 22, 29 (D. Conn. 1972), aff'd without opinion, 410 U.S. 919 (1973), which stated that only egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in litigation will constitute a fraud upon the court. "Less egregious misconduct, such as non-disclosure [**134] to the court of facts allegedly pertinent to the matter before it will not ordinarily rise [*6] to the level of fraud on the court.""

Kerwit v. N.&H., No. CA-3-4282, 1978 U.S. Dist. LEXIS 14425, at *5-6 (N.D. Tex. 11/10/1978)

By contrast, S.D.N.Y. focuses on the ends, rather than the means.

> "fraud upon the court occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."

Braun v. Zhiguo Fu, No. 11cv04383 (CM) (DF), 2015 U.S. Dist. LEXIS 90652, at *46 (S.D.N.Y. 6/9/2015)

Mr. Dasler contends that the broad reach of Fraud Upon the Court is a deliberate construction

intended to catch cases like the one at bar where a party is able to manipulate the process to prevent it from functioning ordinarily. In the Dasler case, Ms. Dasler, through fraud, was able to deprive the court of the jurisdiction to preserve Mr. Dasler's rights even if she did not prevail in justifying the interference with his rights.

Mr. Dasler should not be deprived of recourse simply because Ms. Dasler found a loophole to exploit with relatively little effort, but still outside the bounds of what state precedent allowed the court to prevent.

The evidence of Ms. Dasler's fraud upon the court could not have been presented earlier due to the Constitutional Conflicts surrounding parallel litigation and evidence obtained after the hearing. Ms. Dasler, through influence over prosecution, was able to prevent the resolution of the criminal case earlier, while pushing the civil case to happen sooner. The resolution of the Family case prior to the criminal case was by her design and outside Mr. Dasler's control.

When it is clear that a party was able to prevent another party from having a full and fair opportunity to present a case and/or obtain a favorable judgement by subverting the machinery of the court itself, it should not be discretionary to provide relief.

IV. Opportunity to Be Heard

The constraints of an "opportunity to be heard" also vary. Specifically in the context of parallel civil and criminal litigation there is much ambiguity as to the legal standards. Mr. Dasler contends that when neither a stay, nor immunity is available and both

5th and 14th Amendment Rights are implicated there should be a heightened expectation of protection for the accused.

In the case at bar, not only was Mr. Dasler compelled to elect between 5th and 14th Amendment Rights (with no protection), but proving "no credible factual basis" (*Knutsen*, 2016 VT 2 and 2017 VT 62) to the allegations would not result in a restoration of his rights because the ex-parte change of status (to non-custodial parent) is a controlling factor regardless of the validity of the allegations (8/17/18 Order Pg.22).

The only apparent mechanism to provide relief is an opportunity to come back with a Rule 60 Motion to address an issue once the Constitutional Conflict is no longer present, and have an opportunity to present evidence that was previously excluded.

When a party is forced to choose waive one right to claim another it cannot truly be considered a "full and fair opportunity" to litigate. If there is no protection available, then a supplemental Rule 60 hearing is the next best thing, and provides the only opportunity to address the case without Constitutional Conflict.

Applying this logic, it allows the court to circle back narrowly in a supplemental hearing to consider what was unavailable at the time of the previous hearing and determine whether it would change the result and, if so, what equitable remedy may be available at time.

In the Dasler case specifically, the implications of the Hobson's choice (between 5th and 14th Amendment Rights when proving 'actual innocence' would still not restore his rights) reach beyond the criminal accusation. While Mr. Dasler pleads the 5th he is

also unable to present evidence of Ms. Dasler's life threatening mental health issues and history of violence without prejudice to his case (due to concerns of appearing to "blame the victim" while pleading the 5th).

While Mr. Dasler was obligated to prove Ms. Dasler was unfit/harmful to the child, he was also constrained in presenting exactly that form of evidence prior to the resolution of the criminal case. Surely this cannot be construed as a fair battle between the parties.

The consequences of the Hobson's choice reach far beyond just the defense of the criminal allegations and implicate not only Mr. Dasler's ability to defend himself, but also the child's right to a hearing in which both parents have an opportunity to present a case in her interest.

CONCLUSION

For the foregoing reasons the petitioner requests the Petition for Writ of Certiorari be granted.

1. Clarify that a showing of Clear and Convincing Evidence of harm is required to disturb parental rights.
2. Clarify that an accusation of abuse should be adjudicated at the same standard regardless of the identity of the moving party, and that such 'prosecution/investigation' should be directed by state agencies, not self-interested parties.

3. Clarify Fraud Upon the Court is a matter of cause and effect, not the level of misconduct. When a party successfully subverts the machinery of the court and/or prevents a party from having a fair opportunity to present a case Fraud Upon the Court is satisfied.

Clarify that when parallel Civil/Criminal litigation forces a Hobson's choice with no protection that a Rule 60 Motion is an appropriate post-judgement avenue to provide a Full and Fair Opportunity to litigate by allowing presentation of evidence previously excluded by Constitutional Conflict.

Respectfully submitted,

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AUGUST 2, 2021

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