STATE OF MAINE
SUPREME JUDICIAL COURT

NO. JUD-24-3

IN RE: CATHERINE R. CONNORS

BRIEF OF CATHERINE R. CONNORS,

James M. Bowie, Esq., Bar No. 185
Benjamin J. Wahrer, Esq., Bar No. 5628
Caitlin Ross Wahrer, Bar No. 5470

NORMAN, HANSON, & DETROY, LLC
220 Middle Street
P.O. Box 4600
Portland, ME 04112-4600
207-774-7000

jbowie@nhdlaw.com
bwahrer@nhdlaw.com
cwahrer@nhdlaw.com

Attorneys for Catherine R. Connors

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INTRODUCTION

The question presented is whether a judge engages in unethical, sanctionable conduct when she does not recuse herself in a matter where:

- the circumstances do not require recusal under Rule 2.11(A)(1)-(4) of the Code;
- no precedent provides that she needs to recuse under the circumstances presented;
- no participant in the matter moves to recuse the judge; and
- a judicial advisory committee indicates that the judge need not recuse.

Ultimately, the Committee's recommendation to the Panel is: "despite all that, we know it when we see it." Such an approach is not only unpredictable and unconstitutionally vague, but it reflects a fundamental misapprehension of both the applicable law and of how our adversarial system works.

For example, the Committee argues that a reasonable person would question Justice Connors's impartiality in a foreclosure case because, prior to becoming a judge, she represented "banking interests." CJC Br. 12, 25, 27, 29, 31. No authority stands for the proposition that lawyers who represented banks are thereafter recused as judges from hearing matters relating to banks. If this were the rule, then lawyers who represented consumers would also be recused

from cases involving "consumer interests." If not so evenly applied, then the appearance provision in the Code could become a tool for political retribution.

The Panel should reject the Committee's recommendation because the Committee's position is unworkable, lacks legal support, and is unfair to Justice Connors, whom the record reflects at all times sought to adhere to the applicable ethical rules. But more than that, the Committee's interpretation of the appearance standard is dangerous. It not only ignores the role of lawyers in our adversarial system but exacerbates the miseducation of the public as to that role.

Perhaps worst of all, the Committee appears to be arguing that a judge can be sanctioned based on how the judge votes on the merits of a matter. E.g. CJC Br. 20. That premise is frightening. It incents judges to vote based not on what they understand the law to be but based on fear of political retribution.

In sum, the record and applicable legal authority demonstrate that Justice Connors followed the law. The recommendation of the Committee does not.

STATEMENT OF THE FACTS

Prior to being appointed to the Maine Supreme Judicial Court, Justice Connors co-signed a brief on behalf of Bank of America in *Pushard v. Bank of America*, wherein Bank of America argued that a homeowner was not entitled to a declaratory judgment that the bank's note and mortgage were

unenforceable if the court had rejected the bank's first foreclosure action for failure to follow statutory notice requirements. *Pushard v. Bank of Am., N.A.,* 2017 ME 230, 175 A.3d 103; Agreed-Upon Record at p.7 (hereinafter R. 7). Later that year, she filed an amicus brief on behalf of the Maine Bankers Association and the National Mortgage Bankers Association in the matter of *Federal National Mortgage Association v. Deschaine*, which had six other amici. *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, 170 A.3d 230; R. 22. There, the Association argued that res judicata should not apply to bar a second foreclosure action when the initial action was dismissed with prejudice as a sanction. R. 271. The Law Court decided *Pushard* and then *Deschaine*, holding, respectively, that a homeowner was entitled to a declaratory judgment, and that res judicata applied to bar a subsequent foreclosure action. *Pushard*, 2017 ME 230, ¶ 36, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230.

In 2020, Justice Connors was confirmed as an Associate Justice for the Maine Supreme Judicial Court. *See* R. 37, 278. For two years, she recused from all foreclosure matters. R. 278. "Over time, [she] became more sensitive to the burden these recusals were imposing on [her] fellow Justices and [her] duty not to recuse unless required." R. 278.

In March 2022, the initial briefs were filed in *Finch v. U.S. Bank, N.A.*, 2024 ME 2, 307 A.3d 1049, and, consistent with Law Court protocol, the clerk's office

circulated an email listing the cases, parties, and attorneys, and asking if any Justices were recusing from the matters. R. 277. By May 31, 2022, the briefs had been filed in *J.P. Morgan Mortg. Acquisition Corp. v. Moulton,* 2024 ME 13, 314 A.3d 134. R. 277. In neither case had Justice Connors previously represented a party, nor was Pierce Atwood representing any party; there was likewise no motion for recusal filed. R. 277. Consistent with her current practice, Justice Connors recused from neither case. R. 277.

In June 2022, Justice Connors participated in the oral argument for the appeal in *Finch.* R. 277. In August 2022, the Law Court invited amicus briefs in *Moulton*, including on the issue of whether the Court should "reconsider and repudiate the language in [*Deschaine* and *Pushard*]." R. 154, 277.

At that point, it was known to the parties and to Complainant Tom Cox that Justice Connors had participated in the *Finch* oral argument and that both appeals were raising issues with *Deschaine's* and *Pushard's* language. R. 266-68.[1] Thereafter, the Maine Bankers Association filed an amicus brief in *Moulton*. R. 277.

[1] The Complaint appends a newspaper article from October 2022 where Attorney Cox is quoted as saying that "he thinks one of the justices on the case should recuse herself from participating in the decision because she represented a mortgage company in one of the 2017 cases and wrote a 'friend of the court' brief for the Maine Bankers Association in the other." R. 268.

Of the four parties, nine amici, and ten law firms involved in the *Finch* and *Moulton* appeals, none filed a motion for Justice Connors's recusal. R. 270, 277, 281-83, 324-29. Nor did Complainant Tom Cox file a motion as an amicus in *Finch* or *Moulton*, or file a complaint with the Committee, which would have permitted the Committee to address Justice Connors's participation in the appeals. Order Establishing the Committee on Judicial Conduct, § 6A, 2025 Me. Rules 06 (June 25, 2025) (herein after cited "M.R. Comm. Jud. Conduct")[2]; *see also* M.R. Comm. Jud. Conduct 6.

Despite the lack of any motion for her recusal, eight days after the Maine Bankers Association filed its amicus brief, Justice Connors herself contacted the Judicial Branch's Advisory Committee on Judicial Ethics. R. 270-74.

While inviting the Advisory Committee on Judicial Ethics to contact her for any other information it needed, R. 274, Justice Connors pointed out:

(1) her involvement in *Deschaine* and *Pushard*, what those cases held, and what she had argued on behalf of her clients;

(2) her blanket recusal from all foreclosure matters for two years and her new practice of participating in foreclosure matters where

[2] The Supreme Judicial Court's June 2025 Order and related Rule amendments are cited for ease of access and reference. The amendments to both are in red and the text is otherwise that of the July 2021 versions, which were in effect during the underlying proceedings before the Committee.

Pierce Atwood did not represent any party and where she had not previously represented any party;

(3) the issues in *Finch* and her participation in the appeal thus far;

(4) the order for supplemental briefing and the call for amicus briefs that directly questioned whether *Deschaine* and *Pushard* should be overturned;

(5) and that the Maine Bankers Association had since filed an amicus brief in *Moulton*.

R. 271-72. She asked the Committee on Judicial Ethics: "should I recuse in *Moulton*? In *Finch* as well?" R. 272.

The Chair of the Advisory Committee responded to Justice Connors, stating: "The Judicial Ethics Committee has carefully reviewed your inquiry and we unanimously opine that you do not need to recuse yourself." R. 273. The Chair included an analysis of Rule 2.11 of the Maine Code of Judicial Conduct, stating that the pending cases were "totally separate from *Deschaine* and *Pushard*" and that the "[t]he sole justifications for recusal would be either that (i) the legal issues raised in these cases are ones in which Justice Connor[s] advocated a position representing a private client; or (ii) she previously represented an amicus in that same capacity in one of those earlier cases." R. 273. The Advisory Committee on Judicial Ethics found neither to be a reason for

recusal, noting that "[i]f the law were otherwise, presumably former prosecutors or defense counsel could not hear criminal cases or . . . a former civil rights lawyer could not hear such cases on the bench," and a contrary rule "could discourage the filing of amicus briefs, which would be a disservice both to the courts and to the public." R. 273.

On January 11, 2024, the Law Court issued its decision in *Finch*, where the majority of seven justices "overrule[d] *Pushard* to the extent that it holds that the acceleration of a note balance can occur without the lender having proved that it has complied with the statutory and contractual requirements to accelerate," and ending "Maine's outlier status as the only jurisdiction that endorses that outcome." *Finch*, 2024 ME 2, ¶¶ 49, 51, 307 A.3d 1049.

A week later—after Attorney Cox saw the decision—he filed a complaint with the State of Maine Committee on Judicial Conduct (hereinafter "the Committee"). R. 101. He alleged that Justice Connors's "representation of Bank of America in a decision reached in 2017 that has now been overruled in *Finch*, as well as her representation of the Maine Banker's Association in another 2017 case with an outcome now likely to be reversed by *Moulton*, should have compelled her to recuse herself from participation in the Court's deliberations in both *Finch* and *Moulton*." R. 102.

After the filing of Attorney Cox's Complaint and before Justice Connors's notice of the same, the Law Court issued a decision in *Moulton*, where the majority (comprised of five of the seven participating justices) applied *Finch's* holding to that matter. 2024 ME 13, ¶¶ 12-13, 314 A.3d 134.

In February 2024, the Committee reviewed Attorney Cox's complaint at its next meeting. R. 269; M.R. Comm. Jud. Conduct 1(B). Thereafter, the Committee sought a response from Justice Connors, who gave it by letter, enclosing her communications with the Committee on Judicial Ethics and confirming that there was no motion for her recusal filed in either matter. R. 269-74.

The Committee then held another meeting, at which it apparently reviewed a transcript of Justice Connors's January 2020 confirmation. *See* R. 275. In a second letter to Justice Connors, the Committee excerpted portions of the transcript and asked why she "actively participate[d] at the *Finch* oral argument before consulting with the Judicial Ethics Committee" and why she did not "choose . . . to err on the side of caution," "given that [her] extensive history of work on behalf of banks in foreclosure actions could, or would, give the appearance of impropriety." R. 276.

Justice Connors responded with the information recited above, *see* R. 277-79, and responded to the Committee's question regarding "whether [her]

remarks before the Judiciary Committee change the analysis" for recusal, R. 279, pointing out her intent to "communicate a commitment to adhere to the judicial rules of conduct regarding recusals," R. 280.

The Committee on Judicial Conduct then filed a Report to the Supreme Judicial Court Recommending Disciplinary Action for violation of Rule 2.11(A) for Justice Connors's failure to recuse herself in the *Finch* and *Moulton* appeals. R. 345, 351.

The Supreme Judicial Court remanded the matter to the Committee because (1) the Committee had not recommended what disciplinary action, if any, should be taken, and (2) the Report did not contain any findings of fact or conclusions of law reached by the Committee, both of which are required pursuant to the Order establishing the Committee and the Committee's own Rules. R. 541-42. Instead, the Report (much like the Committee's later Brief), largely recited Attorney Cox's allegations. *See* R. 345-47. Thereafter, the Committee filed an Amended Report making thirteen findings of fact, concluding that recusal had been required, and recommending a public reprimand. R. 547-50, 553.

STATEMENT OF THE ISSUES

I. **What is the law applicable to the Committee's allegation that Justice Connors violated Rule 2.11(A) of the Maine Code of Judicial Conduct?**

II. **Did Justice Connors violate Rule 2.11(A) of the Code?**

SUMMARY OF THE ARGUMENT

A reasonable observer who is aware of the facts and circumstances of Justice Connors's decision not to recuse would not question her impartiality. The reasonable person standard requires knowledge of the applicable law and the American legal system, and the reasonable person knows that Justice Connors's prior advocacy as an attorney is not imputed to her later decision making as a judge. Indeed, the Advisory Committee on Judicial Ethics—the closest analog to the reasonable person—unanimously opined that there was no basis for Justice Connors to recuse. The Committee bears the burden to prove that she violated the Code of Judicial Conduct, and it seeks to do so based on an identity of legal issues, but issue-based recusal is not required of judges, nor is it appropriate. In fact, no jurisdiction has ever held that prior representation relating to a legal issue disqualifies that judge from hearing cases involving those issues upon assuming the bench. This Panel should not be the first to find otherwise.

ARGUMENT

I. The law that applies to necessary recusal under Rule 2.11(A) is clear, and we must keep it so.

A. Four specific circumstances set forth in Rule 2.11(A) require recusal.

Canon 2 of the Maine Code of Judicial Conduct requires a judge to "perform the duties of judicial office impartially, competently, and diligently." M. Code Jud. Conduct Canon 2. Rule 2.11 of the Maine Code of Judicial Conduct deals with recusal and disqualification and states that "[a] judge shall disqualify or recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." M. Code Jud. Conduct R. 2.11(A). The Rule lists four circumstances requiring recusal, *see id*. (A)(1)-(4), none of which are present in this case, and none of which the Committee relies upon in its Brief. *See generally* CJC Br.

B. The remaining provision in Rule 2.11 regarding appearance of impropriety is viewed through the lens of a reasonable person with an understanding of relevant legal principles including the role of an attorney as a zealous advocate.

A catchall provision in Rule 2.11 looks to whether "the judge's impartiality might reasonably be questioned." M. Code Jud. Conduct R. 2.11(A). The Code's Terminology section defines "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as

well as [the] maintenance of an open mind in considering issues that may come before the judge." M. Code Jud. Conduct Terminology, "*Impartiality*."

To determine whether a judge's impartiality might reasonably be questioned, judges must consider "the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances," *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000); *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 924 (2004) (same). The "reasonable person is a thoughtful observer rather than . . . a hypersensitive or unduly suspicious person." *In re Sherwin-Williams Co.*, 607 F.3d 474, 478 (7th Cir. 2010). They are familiar with the applicable legal standards and with the nature of our judicial system. *E.g,. Hoke Cnty. Bd. of Educ. v. State*, 896 S.E.2d 720, 721 (N.C. 2022) (the "motion [to disqualify because impartiality may reasonably be questioned] omits important factual *and legal* context that is relevant to the application of [the judicial rule] under these circumstances" (emphasis added)).

Put differently, in the context of Rule 2.11(A), "a reasonable person is able to appreciate the significance of the facts in light of relevant legal standards and judicial practice and can discern whether any appearance of impropriety is merely an illusion." *In re Sherwin-Williams Co.*, 607 F.3d at 478; *see also Cheney*, 541 U.S. at 924 (one cannot "facilely assume, *contrary to all precedent*, that in

such suits mere political damage . . . is ground for recusal" (emphasis in original)).

In short, the reasonable person knows the American system. "An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice." *In re McConnell*, 370 U.S. 230, 236 (1962). "[D]ue regard must be given to [an attorney's] right to act as a zealous advocate on his client's behalf." *State v. Campbell*, 497 A.2d 467, 472 (Me. 1985). A reasonable person does not presume the lawyer's arguments on behalf of a client to be the lawyer's opinion on the issue.

Further, a reasonable person understands that judges have practice histories that predate their judicial roles. *Obert v. Republic Western Ins. Co.*, 398 F.3d 138, 145 (1st Cir. 2005) ("Neither lawyers nor litigants are entitled to *tabula rasa* judges"). "Just as a jurist's prior career as a prosecutor is not understood to undermine their capacity to preside impartially in cases involving the State or defendants prosecuted by their office, it would be a disservice to the judiciary and to the people of [this state] to conclude that [a judge's] prior career as a[n] . . . attorney precludes [that judge] from acting impartially in cases involving [former practice] matters." *Hoke*, 382 N.C. at 697.

A reasonable person, then, is one who understands that judges are not required to recuse from cases involving legal issues they've advocated for or

against earlier in their career. It was their job to do so as attorneys in our adversarial system.

C. Rule 2.11(A) does not require issue-based recusal.

Our jurisprudence has foreclosed all circumstances requiring issue-based recusal except two: when a judge makes out-of-court, public comments on the pending matter expressing an opinion, *see, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 108 (D.C. Cir. 2001) (wherein "the Judge . . . had been giving secret interviews to select reporters before entering final judgment" expressing, among other things, "his distaste for the defense of technological integration—one of the central issues in the lawsuit"), and when a judge expresses that his viewpoint has prevented him from administering the law, *see, e.g.*, *United States v. Snyder*, 235 F.3d 42, 47 (1st Cir. 2000) (wherein the judge stated of the mandatory sentence that he refused to order: "And every time I think of Mr. Snyder having to serve 21 years, I almost get physically sick."). All other avenues to issue-based recusal are foreclosed.

Judges frequently hear cases involving legal issues they had litigated as advocates. *E.g. Hoke*, 896 S.E.2d at 722 (collecting cases). This must be permitted: otherwise, good lawyers would not be able to go on to make good judges. *New York Times Co. v. Comm'r of Revenue*, 693 N.E.2d 682, 689 (Mass.

1998) (noting that the premise is wrong and would often disqualify lawyers who previously represented agencies or were prosecutors or defense lawyers).

The same is true for appellate judges who are called to decide a legal question that they have previously ruled on: justices who author or join a dissent on an issue commonly go on to author or join a majority opinion overturning or distinguishing, to similar effect, the earlier case. For example, Justice Black authored the dissenting opinion in *Betts v. Brady*, 316 U.S. 455 (1942). Then, in *Gideon v. Wainwright*, the Supreme Court "requested both sides to discuss in their briefs and oral arguments the following: 'Should this Court's holding in *Betts v. Brady* be reconsidered?'" 372 U.S. 335, 338 (1963) (citation omitted). Justice Black then authored the majority opinion overturning the case he'd dissented from, writing that it had been wrongly decided. *Id.* at 345.

Indeed, there is no reasonable basis for recusal even when, unlike here, a judge has previously expressed an academic or personal view that is related to a case. *See Laird v. Tatum,* 409 U.S. 824, 835 (1972); *Schurz Communs. v. FCC*, 982 F.2d 1057, 1061 (7th Cir. 1992); (*Posner, J.*) ("[T]he affidavit repeated views about antitrust policy that I had stated in many different fora over a period of years, and the movants do not and could not argue that a judge should disqualify himself because he has views on a case.") (citation omitted); *see also Obert v. Republic W. Ins. Co.,* 190 F. Supp. 2d at 286 ("The judge's personal views on legal

or policy issues are not grounds for recusal unless the judge is unable to implement the law.").

D. The ultimate result in a case is not relevant, nor appropriate, for the judge to consider in deciding whether to recuse.

The outcome of a case does not, and cannot, determine whether a judge should recuse based on the appearance of impartiality. If the precise outcome of a case were to affect the recusal analysis, that would force judges to do precisely what they must not: prejudge the matter; and particularly, risks decisions not based on the law but on a fear of retribution. *Matter of Benoit*, 523 A.2d 1381, 1383 (Me. 1987) (finding a violation when a judge created "the appearance that he is prejudging any aspect of an issue that has not been finally decided").

Litigants are not permitted to wait for the outcome to decide whether to move to recuse. "A party who has a reasonable basis for moving to disqualify a judge may not delay in the hope of first obtaining a favorable ruling and then complain only if the result is unfavorable. Not only is such a tactic unfair, but it may evidence a belief that the judge is not in fact biased." *In re Michael M.*, 2000 ME 204, ¶ 13, 761 A.2d 865 (quoting *Madsen v. Prudential Fed. Sav. & Loan Ass'n,* 767 P.2d 538, 542 (Utah 1988)); *In re Kaitlyn P.,* 2011 ME 19, ¶¶ 8–9, 12 A.3d 50 (citation omitted) ("The rationale for this rule is obvious: A party should

have no incentive to 'roll the dice' for a favorable decision and then, if the decision is unfavorable, raise grounds for recusal of which [he] or [his] counsel had actual knowledge prior to the decision being made."). The Law Court looks unfavorably on litigants who appear to raise recusal issues strategically. *In re Michael M.*, 2000 ME 204, ¶ 13, 761 A.2d 865 ("The timing of Matthew's recusal motion raises the concern that his purpose was to collaterally attack the judgment and that he did not hold a genuine belief that the judge's impartiality could be questioned.")

This is so outside of Maine as well. *See, e.g.*, *Schurz Commc'ns, Inc.,* 982 F.2d at 1060, *amended* (Dec. 8, 1992) (*Posner, J.*) ("Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them."); *United States v. York,* 888 F.2d 1050, 1055 (5th Cir. 1989)) (prohibiting "knowing concealment of an ethical issue for strategic purposes").

This is especially so for outcomes that are politically unpopular. "[A]ttacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligns one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment." Paul J. De Muniz, *Politicizing State*

Judicial Elections: A Threat to Judicial Independence, 38 Willamette L. Rev. 367, 387 (2002). "What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government." *Id.*

The Advisory Notes to the Code recognize the importance of considering the timing of the claim of bias: "A claim of bias or a motion to recuse asserted only after an adverse ruling should be examined with caution, particularly if the basis for any objection was known, or could with reasonable diligence have been known, prior to the hearing leading to the questioned judicial action." M. Code Jud. Conduct R. 2.11 advisory notes to 2015 amend. This is so for good reasons:

> First, a prompt application [to recuse] affords the . . . judge an opportunity to assess the merits of the application before taking further steps that may be inappropriate for the judge to take. Second, [it] avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters.

M. Code Jud. Conduct R. 2.11 advisory notes to 2015 amend. (citation omitted).

E. Judges owe a duty not to needlessly recuse.

The Maine Code of Judicial Conduct requires a judge to hear and decide matters except when required to recuse. M. Code Jud. Conduct R. 2.7. The Advisory Notes to Rule 2.11 carve out a section on "The Obligation Not to Recuse Except When Necessary." M. Code Jud. Conduct R. 2.11 advisory notes to 2015 amend. Therein, judges are cautioned that "a judge who disqualifies himself or herself for no reason other than an unfounded and meritless claim of partiality, has abused the judge's discretion." *Id*. (citation omitted).

Rule 2.11's Notes further cite the rule under federal precedent that "a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." *Sensley v. Albritton*, 385 F.3d 591, 598–99 (5th Cir. 2004) (quoting *Laird,* 409 U.S. at 837). Maine has endorsed this rule for its own jurists, stating in *Michael M.*: "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." 2000 ME 204, ¶ 14, 761 A.2d 865 (quotation marks omitted); M. Code Jud. Conduct R. 2.11 advisory notes to 2015 amend.

Besides the ethical obligation not to engage in unnecessary recusals, as a practical matter, such recusals result in an inappropriate transfer of the workload amongst other members of the judiciary. *See Maier v. Orr,* 758 F.2d 1578, 1583 (Fed. Cir. 1985) (rejecting a late motion to recuse from an appellate

panel noting that acceptance of the basis cited for recusal would "result in an unconscionable transfer of workload to the remaining active judges of this court, and would result in an inappropriate fixed assignment of judges to panels on the basis of subject matter." *Id.* (citing the Federal Circuit Court's Handbook ¶ 20).

F. Recusal under the appearance provision of 2.11(A) is an inherently discretionary decision.

"Recusal 'is a matter within the broad discretion of [a] trial court.'" M. Code Jud. Conduct R. 2.11 advisory notes to 2015 amend. (quoting *State v. Atwood*, 2010 ME 12, ¶ 20, 988 A.2d 981; *Johnson v. Amica Mut. Ins. Co.*, 1999 ME 106, 733 A.2d 977). The Code even permits parties to waive disqualification or recusal under 2.11(A) that is not based on actual bias or prejudice. M. Code Jud. Conduct R. 2.11(C).

Following a complaint, the Committee's Rules contemplate consideration of the jurist's point of view *See* M.R. Comm. Jud. Conduct 1(B) (iii). In deciding a complaint of judicial misconduct involving the alleged violation of Canon 2(A) and a judge's creation of "the appearance that he is prejudging any aspect of an issue that has not been finally decided," the Supreme Judicial Court examined the judge's thought process in deciding whether there had been a violation and

the appropriateness of a sanction. *Matter of Benoit*, 523 A.2d 1381, 1383-84 (Me. 1987).

G. The law on 2.11(A)'s appearance provision must be clear to avoid unpredictability, unconstitutional vagueness, and arbitrary or partisan application.

The Due Process Clause of the Constitution of the United States and the Constitution of the State of Maine guard against the enactment of laws so vague that "set[] guidelines which would force men of general intelligence to guess at [their] meaning, leaving them without assurance that their behavior complies with legal requirements and forcing courts to be uncertain in their interpretation of the law." *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247, 253 (Me. 1974); *see also* U.S. Const. Amend. 14; Me. Const. Art. 1, § 6–A. Unconstitutionally vague laws permit "arbitrary and discriminatory enforcement" and "inhibit the exercise of" those "basic First Amendment freedoms." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

Canons or rules in codes of judicial conduct may be held to be unconstitutionally vague when they "would tend to lead judges to severely restrict their conduct, lest they be accused of failing to 'uphold the integrity and independence of the judiciary.'" *Spargo v. New York State Comm'n on Jud.*

Conduct, 244 F. Supp. 2d 72, 91 (N.D.N.Y.), *vacated on other grounds*, 351 F.3d 65, 73 (2d Cir. 2003)).

The law on Rule 2.11(A)'s appearance provision cannot be interpreted to lend it unconstitutionally vague effect. Special care must be taken when the question of recusal is not presented in a pending case but, rather, after the fact, in a complaint for judicial misconduct, because it invites arbitrary, unpredictable, and partisan application of the law.

"One form of political attack on judges that special interest groups currently use is an outcome-determinative evaluation that focuses solely on the results of judicial decisions, rather than the decision-making process and the application of law to facts." Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 Willamette L. Rev. 367, 387 (2002) (and citing examples). "Outcome-determinative criticism is corrosive to judicial independence because it implies that a judge should always reach a particular outcome regardless of the law," and "suggests that judges are free to ignore the law in favor of the perceived will of the majority." *Id.* at 388.

H. The Committee bears the burden of persuasion before the Panel, and the Panel owes no deference to the Committee's recommendation.

This Panel, on behalf of the Supreme Judicial Court, has "exclusive original jurisdiction" over "matters of judicial discipline." *In re Nadeau*, 2016 ME 116, ¶ 3, 144 A.3d 1161 (quotation marks omitted).

"The Committee bears the burden of proving the allegations contained in its report." *Id*. ¶ 5; *see also* M. Code Jud. Conduct R. 8(C). The burden must be met with "a preponderance of the evidence." *Matter of Cox*, 553 A.2d 1255, 1255 (Me. 1989).

Upon review of the agreed-upon record,[3] the Panel will "determine, on a de novo basis, whether [a jurist] violated the Code." *In re Nadeau*, 2016 ME 116, ¶ 5, 144 A.3d 1161. The Panel will "give no deference to the Committee's report." *Id.*

II. Justice Connors did not violate Rule 2.11(A) of the Maine Code of Judicial Conduct.

Applying the governing legal principles noted above, Justice Connors did not violate the Code of Judicial Conduct. The Committee seeks to prove that

[3] The Supreme Judicial Court makes its de novo decision "[b]ased on the findings rendered by the Hearing Justice sitting as a referee," *In re Nadeau*, 2016 ME 116, ¶ 5, 144 A.3d 1161, and in this case, pursuant to Hearing Officer Justice Murphy's July 15, 2025, Procedural Order, the parties filed a Joint Statement of Facts and stipulated that those facts and the Record were sufficient to decide the matter. (Joint Statement of Facts "JSF" ¶ 30.)

Justice Connors violated Rule 2.11(A).[4] In its attempt, the Committee repeatedly misinterprets the law or fails to cite it altogether.

A. Justice Connors was not required to recuse from *Finch* or *Moulton* because they involved the same legal issues as *Pushard* and *Dechaine*.

The Committee's argument, succinctly stated, is that, "[g]iven that the Law Court in *Finch* was to decide whether the *Pushard* case (which Attorney Connors previously lost on appeal) should be reversed, it is unthinkable that Justice Connors' impartiality not be reasonably questioned." CJC Br. 27. This argument is entirely predicated on the concept that a reasonable basis for recusal is an identity of legal issues in a prior case, contrary to the basic tenets of the role of an attorney in our adversarial system. Despite the Committee bearing the burden of proof, it cannot cite a single case supporting this unprecedented argument. This is because the law is squarely against it. *E.g. Hoke.*, 896 S.E.2d at 722; *New York Times Co.*, 693 N.E.2d at 689; *Liteky v. United States*, 510 U.S. 540, 554-56 (1994); *Schurz Communs.*, 982 F.2d at 1061; *Laird*, 409 U.S. at 826.

[4] At one point in its Brief, the Committee alleges that Justice Connors violated "Canon 2, Rule 2.11(A) *and the questions raised by the legislators at the Confirmation Hearing about necessary recusals*." CJC Br. 32 (emphasis added). This isn't the charge before the Panel, nor does the Committee attempt to demonstrate how it could be. And, in its Statement of the Issues, the Committee asks whether Justice Connors violated Rule 2.11(A) "and/or other provisions of the Maine Code of Judicial Conduct," CJC Br. 21, but it makes no effort to develop any other alleged violation of the Code.

B. There is no other basis for Justice Connors's recusal.

The record is uncontroverted that Justice Connors had not previously represented any party in the *Finch* or *Moulton* appeals, nor was Pierce Atwood presently representing any party. And it is settled law that a jurist's prior representation of an amicus curiae "is not the equivalent of representing a 'litigant' in an appeal." *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 127, 130 (Nev. 1997); *see also Hoke*, 896 S.E.2d at 722 (collecting cases).[5]

With the law squarely against it on issue-based recusal, the Committee for the first time now references Justice Connors's "ongoing financial interest in Pierce Atwood," that firm's "Affiliate Membership in the Maine Bankers Association," and "the fact that the Maine Bankers Association would benefit from an overturning of *Pushard* and *Deschaine*." CJC Br. 37-38. The Committee makes these intimations without attempting to prove that Justice Connors "kn[ew] that [she] . . . [i]s a person who has more than a de minimis interest that could be substantially effected by the proceeding," M. Code Jud. Conduct R. 2.11(A)(2)(c), nor could it do so.

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[5] "[I]f judges and justices could be automatically disqualified due to actions on the part of amici curiae, parties could manipulate the composition of the Court . . . [by] solicit[ing] an amicus brief by a certain entity or individual in an attempt to disqualify a specific judge or justice," or the court would "initiate a practice of declining to accept amicus briefs, which would deprive the Court of a valuable resource for its decision-making." *Brackin v. Trimmier Law Firm*, 897 So. 2d 207, 233 n.4 (Ala. 2004).

In its Amended Report, the Committee did not make any findings of fact regarding Justice Connors having a financial interest in the outcome of the *Finch* or *Moulton* appeals, *see* R. 547-550, and there are no agreed-upon facts to that effect. *See* JSF ¶¶ 1-30. The sole piece of information regarding Justice Connors's financial interest in Pierce Atwood is her candid admission that she "retain[s] a financial interest (albeit very small) in the firm," which she shared while explaining why she continues to recuse from appeals where Pierce Atwood represents a party. R. 278.

The Committee had before it the limited information it now seeks to argue stands for more than it does. Complainant Attorney Tom Cox appended to his Complaint a print-out of a list maintained by the Maine Bankers Association listing Pierce Atwood as a "Current Affiliate Member" of that Association. R. 226, 229. There is no evidence in the record that Pierce Atwood, due to this "affiliate membership," would be financially benefitted by a decision favorable to the Maine Bankers Association, nor how such a financial benefit would be so substantial as to benefit Justice Connors. There is likewise no evidence of Justice Connors's knowledge at the time of her decision not to recuse that she had "more than a de minimis interest that could be substantially effected by the proceedings." M. Code Jud. Conduct R. 2.11(A)(2)(c) (requiring such knowledge).

The Committee could have sought more information but did not, and it made no findings regarding this interest, nor did it populate the record with any other evidence regarding the same. Instead, the Committee hopes the specter of financial impropriety will sway the Panel, and if not the Panel, the public.

C. A reasonable observer would not question Justice Connors's impartiality.

a. The reasonable person standard does not change with public opinion of the courts.

The Committee cites "our society['s] . . . increasing distrust and lack of respect for people and institutions, including the judiciary." CJC Br. 43. Unfortunately, it is the Committee's manner of arguing its case that has undoubtedly contributed to that "increasing distrust." The Committee posits that it is reasonable to presume that a judge will base her rulings on partisan, views, and, further, that such views are to be found based on the "interests" of the types of clients for whom the judge previously advocated as an attorney. This argument is both contrary to the law and our adversarial system of justice and dangerous to the public's view of the judiciary.

Still, to the extent the public has been so influenced by the Committee's inaccurate view, that does not affect the reasonable person standard. The Committee does not cite any authority for the proposition that the reasonable person standard grows more stringent or lax depending upon the changing

status of public faith in the judiciary. That is because "a reasonable person is a thoughtful observer rather than . . . a hypersensitive or unduly suspicious person." *In re Sherwin-Williams Co*., 607 F.3d at 478 (citation omitted).

Judges cannot make recusal decisions based on political winds: "The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults." *Cheney,* 541 U.S. at 928. Instead, "[a] reasonable observer must assume that judges are ordinarily capable of setting aside their own interests and adhering to their sworn duties to 'faithfully and impartially discharge and perform all the duties' incumbent upon them." *Armenian Assembly of Am., Inc. v., Cefesjian*, 783 F. Supp. 2d 78, 91 (D.D.C. 2011); *see also Bond v. Bond,* 127 Me. 117, 141 A. 833, 836 (1928) ("'Our government is a 'government of laws and not of men.' In addition to their legal learning, judges are presumably selected because of their ability to lay aside personal prejudices and to hold the scales of justice evenly. The presumption is that they will do so.").

b. Justice Connors's recusal decision cannot be impacted by what journalists have written or newspapers have reported.

Without citation to any legal authority, the Committee argues that Justice Connors "should have at least reexamined the application of this standard to

her situation" "[w]hen the *Porland Press Herald* published an article in its morning edition of the October 31, 2022, paper, before the oral argument that day in Moulton," and "err[ed] on the side of recusal." CJC Br. 38.

Justice Scalia faced a similar argument in the timely motion for his recusal in *Cheney*. There, the movants argued: "Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned." *Cheney*, 541 U.S. at 923. In denying the motion, Justice Scalia wrote: "The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it." *Id.*

Judges are not to be swayed by public opinion. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 Willamette L.Rev. 367, 387 (2002). ("Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions . . . . Judges should not have 'political constituencies.' Rather, a judge's fidelity must be to enforcement of the rule of law regardless of perceived popular will."). Indeed, otherwise, "elements of the press [would have] a veto over participation of" certain Justices, which result would be "intolerable." *Cheney*, 541 U.S. at 927. "To expect judges to take

account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do." *Id.*

The same is true for the Committee's attempt to use, as evidence to meet its burden of proof before this Panel, its statement that "various members of the legislature and public expressed their surprise and dismay with Justice Connors in the media." CJC Br. 31; *see also* CJC Br. 32 ("The public outcry concerning her actual participation in the appeals proves that a reasonable person not only could, but would, question her impartiality under the circumstances.")

"The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney*, 541 U.S. at 914; *see also In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) (recusal analysis cannot focus on whether the judge's failure to recuse was a "subject of unfavorable comment in the media" because that would give litigants or third partes "a negative veto over the assignment of judges"); M.R. Comm. Jud. Conduct R. 2(F) ("Evidence shall be admitted if it is of a kind upon which reasonable persons are accustomed to rely in the conduct of serious affairs.").

Again, the implications of the Committee's reasoning are alarming.

c. Justice Connors's confirmation hearing does not affect the reasonable-person analysis.

The Committee argues that the questions put to Justice Connors in her January 2020 confirmation hearing require her recusal from cases years later. CJC Br. 27-28. It states that the questions "demonstrate[] that reasonable people were concerned about her ability to be impartial given her past representation of banks," and that the questions demonstrate that "reasonable people would continue to be concerned about those issues." CJC Br. 28.

Putting aside the lapse of time between the questions about recusal and the decision not to recuse, the more important difference is this: the questions were hypothetical and were asked without context, and Justice Connors's decision was made in two real cases with real context she could analyze.

That said, the facts considered in a recusal decision are as they were, not as they might be misreported or misunderstood, *Cheney*, 541 U.S. at 914, 924, and so, if the Panel looks to the confirmation hearing, it must look at the actual questions put to Justice Connors and her actual answers.

Justice Connors's statement that she would "defer on the side of recusal" was following the broadest possible question about her "thoughts on recusal" and "the appearance of conflict," which must be held to its legal meaning. Regarding foreclosure appeals, the question was: "have you had a lot of those

cases?" And Justice Connors answered: "I think I've appeared -- I've appeared on a number of foreclosure appeals on behalf of banks, not -- and a couple of amici briefs. So I'd probably be recused from -- well, certainly from those particular clients, those particular banks. And I'd have to go back and look at the cases, but I think we're talking about significant recusals." The question went to her actual prior representations, and she answered as to those clients, that she would need to look at the cases, and that she expected "significant recusals" as to "those particular clients, those particular banks." There is no suggestion whatsoever in the record that any of Justice Connors prior bank clients were involved in either *Moulton* or *Finch.*

Tellingly, the Committee does not cite a single case where such a promise at confirmation (or any statement at confirmation) created an appearance of impartiality that later required recusal in a specific case.

d. The Advisory Committee on Judicial Ethics is the reasonable person.

If we are to find a real-life example of the reasonable person, the Advisory Committee on Judicial Ethics is it.

The Advisory Committee on Judicial Ethics is maintained by the State of Maine Judicial Branch and is comprised of three justices of the Superior Court or judges from the District Court; one Family Law Magistrate; one judge of the

Probate Court; one licensed attorney; and one member of the public. Charter on Adv. Comm. on Jud. Ethics, I(A). The Advisory Committee on Judicial Ethics "carefully reviewed [Justice Connors's] inquiry and [it] unanimously opine[d] that [Justice Connors did] not need to recuse [herself]." R. 273.

The Committee appears to suggest that Justice Connors attempted to secret away the real question when she asked the Advisory Committee on Judicial Ethics for advice. *See* CJC Br. 19, 30, 36-37. What the record shows, instead, is that she pointed the Advisory Committee on Judicial Ethics to the most direct possible conflict she could see, while inviting contact if the Advisory Committee on Judicial Ethics needed more information. R. 271-272, 274. In response, the unanimous Advisory Committee on Judicial Ethics opined that there was no appearance of impropriety based on the issues presented in *Finch* and *Moulton* and their connection to the issues in *Deschaine* and *Pushard*, nor in Justice Connors's prior representation of an amici. R. 273. (The Committee misstates the basis for the opinion of the Committee on Judicial Ethics in its Brief. *See* CJC Br. at 19.)

The Committee also states, inaccurately, that Justice Connors "focused upon section 2.11(A)(4) of the Rule which addresses when the judge has 'served as a lawyer in the matter in controversy.'" CJC Br. 36. There is no citation to subsection (A)(4) of the rule in Justice Connors's communications, nor in the

Advisory Committee on Judicial Ethics's response. R. 271-274. Indeed, she asked the Advisory Committee if she should recuse in *Finch*, and the Maine Bankers Association had not filed an amicus brief in that case. R. 272. And in addition to its answer as to the amicus question, the Advisory Committee on Judicial Ethics specifically opined about issue-based recusal, R. 273, which is the crux of the Committee on Judicial Conduct's case.

D. Justice Connors appropriately exercised her judicial discretion in determining that her recusal was not necessary.

Despite the vast body of law disfavoring the strategic wielding of complaints, the Committee seeks to second-guess—to the extreme of a sanction—Justice Connors's decision not to sua sponte recuse from the *Finch* and *Moulton* appeals. And the Committee argues, when it serves the Committee's point,[6] that Justice Connors's own decision making on the matter is irrelevant. *See* CJC Br. 23.

a. A delayed complaint risks disturbing the finality of judgments.

Under the Committee's amorphous view of what constitutes appearance of impropriety, the natural strategy of anyone unhappy with a judicial decision

[6] The Committee nevertheless argues that her subjective thoughts are "important to understand" for the time period before she sought the opinion of the Committee on Judicial Ethics, CJC Br. 28, and that "Justice Connors knew she was casting the deciding vote that would make a 4-3 decision in *Finch*," CJC Br. 30 n.5, and that the opinion of the Advisory Committee on Judicial Ethics was unreliable because "the Advisory Committee did not know of her past thought process." (CJC Br. 31).

will be to attack the judge's ethics based on appearance. After succeeding in such an ethical attack, the complainant will next launch a collateral attack on the underlying decision as void. *See Blaisdell v. Inhabitants of Town of York*, 110 Me. 500, 87 A. 361, 367 (1913) ("[W]hen a statute provides that in a certain case or under certain specified conditions a judge shall not sit or shall not act, any judgment rendered by such judge in such a case is coram non judice and utterly void."). This is a true *"heads-I-win-tails-you-lose"* strategy. Schurz Commc'ns, Inc., 982 F.2d at 1060, *amended* (Dec. 8, 1992) (*Posner, J.*) (emphasis added). Under the Committee's approach, a complainant unhappy with a decision can ignore rules of judgment finality by impugning the judge's ethics at any time, even after the judge is no longer there to defend herself.

b. Justice Connors made a decision, and her reasoning is relevant to the Panel's inquiry.

For the Committee to argue the irrelevance of Justice Connors's thought process is to ignore the reality of the matter. This Panel must determine whether the Committee has met its burden to prove that Justice Connors violated Rule 2.11(A) and that her violation is sufficiently serious to warrant a public sanction. Her thought process is relevant to these inquiries. *See, e.g.*, M.R. Comm. Jud. Conduct 1(B)(iii); *Matter of Benoit*, 523 A.2d at 1383; *Microsoft Corp.*, 530 U.S. at 1302.

c. Justice Connors did not abuse her judicial discretion in deciding not to recuse.

Justice Connors did not abuse her judicial discretion when she decided not to recuse from *Finch* or *Moulton*. The record demonstrates that she sought advice from the Advisory Committee on Judicial Ethics. When it unanimously opined that she need not recuse, she weighed the lack of a necessity for recusal against the duty not to recuse, and, appropriately, she did not sua sponte recuse.

i. Justice Connors owed a duty not to unnecessarily recuse.

The Committee argues that Justice Connors was "[i]ncorrect" when she concluded that, based on Rule 2.7, she "should not recuse except when the Code really required disqualification." In support of its argument, it cites a single case: *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001), which it argues stands for the proposition that "[e]ven if the question is a close one, the balance tips in favor of recusal" (CJC Br. 33). To the extent that decision is relevant, it supports Justice Connors's decision. First, in the instant matter, when no one had moved Justice Connors to recuse, and when the seven members of the Advisory Committee on Judicial Ethics had unanimously opined that she need not, there was no close question. Further, there was no "close question" in *Boston Children's*, given that the First Circuit granted the petitioners' writ of mandamus and noted that such relief "requires a case not merely close to the line, but

clearly over it." *Id.* at 167 (judge had given a press interview speaking favorably of *other* plaintiffs' cases and stating that the present matter was "more complex"). Finally, that case dealt with a timely motion for a trial judge to recuse herself and the Court of Appeals expressly indicated it was not suggesting that the judge acted unethically. *In re Boston's Children First*, 244 F.3d at 168; *see also id*. at 165 (stating that its decision did not "suggest that the trial judge abdicated any of her ethical responsibilities).

The Committee also argues, without supporting legal citation, that the duty not to unnecessarily recuse that comes from Rules 2.7 and 2.11 only applies to recusal decisions to judges in trial courts, not courts of appeal. (CJC Br. 33). This is simply inaccurate. As the Supreme Court's own policy stated at the time of Justice Scalia's decision on a motion for his recusal in *Cheney*: "Even one unnecessary recusal impairs the functioning of the Court." *Cheney*, 541 U.S. at 916 (quoting the Supreme Court's 1993 Statement of Recusal Policy). As Justice Connors herself stated in her second response to the Committee, her first two years of recusals from all foreclosure appeals—in addition to other recusals—imposed a burden on her colleagues. R. 278.

The Committee argues that Chief Justice Stanfill's recusal in *Finch* demonstrates that the Law Court could function without Justice Connors on the panel. The Committee also states that former Chief Justice Saufley "would

recuse in banking related cases because her husband worked in the mortgage industry." There is no explanation for Chief Justice Stanfill's recusal in the record, and former Chief Justice Sauffley's recusal policy based on her personal relationship is unlike the issue-based recusal advocated by the Committee. These Justices' reasons for recusing are not at issue in this matter and do not impact the analysis of whether Justice Connors violated Rule 2.11(A) by not recusing, and that such violation was so serious as to require public sanction.

Again, the implications of the Committee's reasoning is alarming. Multiple Justices with blanket recusal policies, if unnecessary under the Code, would unfairly divide the labor of the Court with regards to certain case types. *See* *Maier*, 758 F.2d at 1583.

ii. Justice Connors was required *not* to consider the outcome in making her recusal decision.

The Committee argues, without legal support, that how Justice Connors ruled in these matters controls the recusal analysis. *See, e.g.*, CJC Br. 28-30. As noted above, Justice Connors was required **not** to weigh that factor. The later unpopularity of an opinion—be it with a single complainant or a segment of the public—cannot determine whether an ethical violation occurred at the time of the judge's recusal decision. Otherwise, judicial independence corrodes, *De Muniz,* 38 Willamette L. Rev. at 387, the Code may be "arbitrar[ily] and

discriminator[ily] enforce[d]," *Grayned,* 408 U.S. at 108, and judges facing no motion to recuse will still have "no assurance that their behavior complies with legal requirements," *Shapiro Bros. Shoe Co.*, 320 A.2d at 253, even if they have an advisory opinion to the contrary.

CONCLUSION

Justice Connors appropriately evaluated her duties under the Rules of Judicial Condict when she decided that she need not recuse under Rule 2.11 and instead adhered to her duty not to unnecessarily recuse.

No jurisdiction has ever held that prior representation relating to a legal issue disqualifies that judge from hearing cases involving those issues upon assuming the bench. Moreover, Justice Connors sought advice from the Advisory Committee on Judicial Ethics to confirm her analysis and followed that advice. The Committee has failed to prove any violation of the Code of Judicial Conduct, and the report and complaint should be dismissed.

If this Panel determines that the Committee has carried its burden to prove that Justice Connors violated Rule 2.11(A), and that such violation is sufficiently serious to warrant a sanction, Justice Connors asks that the Panel issue a detailed opinion regarding its analysis so that she and other jurists may know, with confidence, when recusal is mandated due to a judge's prior work

as a private attorney making arguments regarding a legal issue that presents itself for decision in a subsequent case.

The parties are in agreement on this: the Panel's opinion will inform the recusal decisions of jurists throughout the State.

Dated at Portland, Maine this 26th day of September 2025.

/s/ James M. Bowie
James M. Bowie, Esq., Bar No. 185
Benjamin J. Wahrer, Esq., Bar No. 5628
Caitlin Ross Wahrer, Esq., Bar No. 5470
jbowie@nhdlaw.com
bwahrer@nhdlaw.com
cwahrer@nhdlaw.com

Attorneys for Catherine Connors

NORMAN, HANSON, & DETROY, LLC
220 Middle Street
P.O. Box 4600
Portland, ME 04112-4600
207-774-7000

CERTIFICATE OF SERVICE

I hereby certify that I have made due service of the foregoing Brief of Catherine Connors by mailing two (2) copies of same by U.S. Postal Service, postage prepaid and one copy via email, this date upon:

John A. McArdle, III
cjc@mebaroverseers.org
Maine Committee on Judicial Conduct
P.O. Box 127
Augusta, ME 04332

Dated at Portland, Maine, this 26th day of September 2025

/s/ James M. Bowie
James M. Bowie, Esq., Bar No. 185
Benjamin J. Wahrer, Esq., Bar No. 5628
Caitlin Ross Wahrer, Esq., Bar No. 5470
jbowie@nhdlaw.com
bwahrer@nhdlaw.com
cwahrer@nhdlaw.com

Attorneys for Catherine Connors

NORMAN, HANSON, & DETROY, LLC
220 Middle Street
P.O. Box 4600
Portland, ME 04112-4600
207-774-7000