THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. 2019-CP-42-03968

Tracy Jolly Pavlish, individually and as Personal Representative of the Estate of Beverly Dale Jolly, and Brenda Rice Jolly,…….....Respondents,

v.

Covil Corporation; Sentry Insurance A Mutual Company; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; United States Fidelity and Guaranty Company; and Zurich American Insurance Company a/k/a Zurich North America, Inc.,…….Defendants,

Of which

Zurich American Insurance Company a/k/a Zurich North America, Inc. is……..Petitioner

And

Peter D. Protopapas, as Receiver for Covil Corporation is …….Respondent.

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. 2019-CP-40-06956

Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto, and Donald Brian Hutto and Candace H. Youngblood, individually,.…….....Respondents,

v.

Covil Corporation; Sentry Insurance, a Mutual Company; Southern Insulation, Inc.; Starr Davis Company, Inc; Starr Davis Company of SC, Inc.; United States Fidelity and Guaranty Company; Zurich American Insurance Company; 3M Company; AECOM; Armstrong International, Inc.; Aurora Pump Company; BW/IP Inc.; Carboline Company; CBS Corporation; CGR Products, Inc.; Daniel International Corporation; Fisher Controls International LLC; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; The Goodyear Tire & Rubber Company; Grinnell, LLC; Hajoca Corporation; IMO Industries, Inc.; John Crane Inc.; Metropolitan Life Insurance Copmany; Spirax Sarco, Inc.; Trane U.S. Inc.; Uniroyal Holding Inc.; Velan Valve Corp.; Viking Pump, Inc.; Weir Vales & Controls USA, Inc..……...…….....….Defendants,

Of which

Zurich American Insurance Company a/k/a Zurich North America, Inc. is……..Petitioner

And

Peter D. Protopapas, as Receiver for Covil Corporation is …….Respondent.

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. 2020-CP-40-00265

Mildred Hagan and Jerry L. Hagan,…….…...Respondents,

v.

Armstrong International, Inc.; ABB Inc.; AECOM; Air & Liquid Systems Corporation; Anchor Darling Valve Company; A. O. Smith Corporation; Aurora Pump Company; BFK, Inc.; BorgWarner Morse TEC, LLC; BW/IP Inc.; Carboline Company; Carrier Corporation; CBS Corporation; Celanese Corporation; CNA Holdings LLC; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; Ecodyne Corporation; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; The Goodyear Tire & Rubber Company; The Gorman-Rupp Company; Goulds Pumps, Inc.; Great Barrier Insulation Co.; Great Barrier Insulation Co., Inc.; Greene, Tweed & Co, Inc.; Grinnell, LLC; Howden North America Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; ITT, LLC; John Crane, Inc.; Patterson Pump Company; Sentry Insurance, a Mutual Company; Southern Insulation, Inc.; Spirax Sarco, Inc.; Starr Davis Company, Inc.; Starr Davis Company of SC, Inc.; Sulzer Pumps (US), Inc.; Trane U.S. Inc.; United Conveyor Corporation; United States Fidelity and Guaranty Company; Uniroyal Holding Inc.; Velan Valve Corp.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; Yuba Heat Transfer, LLC; Zurich American Insurance Company; Zurn Industries, LLC; ……..……..Defendants,

Of which

Zurich American Insurance Company a/k/a
Zurich North America, Inc. is…….……..Petitioner

And

Peter D. Protopapas, as Receiver for Covil Corporation is ……Respondent.

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. 2020-CP-40-00585

Joseph Franklin Rampey…….…….....Respondent,

v.

Covil Corporation; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of SC, Inc.; United States Fidelity and Guaranty Company; Zurich American Insurance Company; AECOM; Anchor Darling Valve Company; Armstrong International, Inc.; Aurora Pump Company; Bahnson, Inc.; BW/IP Inc.; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; EMCOR Group, Inc.; Fisher Controls International, LLC; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; General Electric Company; The Goodyear Tire & Rubber Company; Grinnell, LLC; IMO Industries, Inc.; Ingersoll-Rand Company; ITT, LLC; J.L. Anderson Co., Inc.; Lehigh Hanson, Inc.; Metropolitan Life Insurance Company; R.T. Vanderbilt Holding Company, Inc.; Spirax Sarco, Inc.; Trane U.S. Inc.; United Conveyor Corporation; Unitherm, Inc.; Vanderbilt Minerals, LLC; Viking Pump, Inc……..……..……..Defendants,

Of which

Zurich American Insurance Company a/k/a
Zurich North America, Inc. is……..Petitioner

And

Peter D. Protopapas, as Receiver for Covil Corporation is ……Respondent.

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. 2020-CP-40-00952

James Joseph Reilly and Patricia P. Reilly,.……...Respondents,

v.

Covil Corporation; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of SC, Inc.; United States Fidelity and Guaranty Company; Zurich American Insurance Company; 4520 Corp., Inc.; ABB Inc.; Air & Liquid Systems Corporation; Anchor Darling Valve Company; AREMCO, Inc.; Armstrong International, Inc.; Aurora Pump Company; Carboline Company; Cleaver-Brooks, Inc.; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; The Dow Chemical Company; Durez Corporation; Ecodyne Corporation; Emerson Electric Co.; Fisher Controls International, LLC; Floweserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; The Goodyear Tire & Rubber Company; Gould Electronics, Inc.; Gould Pumps, Incorporated; Grinnell, LLC; Henry Pratt Company, LLC; IMO Industries, Inc.; Ingersoll-Rand Company; ITT, LLC; John Crane, Inc.; Metropolitan Life Insurance Company; Occidental Chemical Corporation; Schneider Electric USA, Inc.; Siemens Corporation; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Strategic Organizational Systems Enterprises, Inc.; Sulzer Pumps (US), Inc; Unitherm, Inc.; Velan Valve Corp.; ViacomCBS Inc.; Viking Pump, Inc.; Warren Pumps, LLC; Watts Water Technologies, Inc.; Weir Valves & Controls USA, Inc.; Zurn Industries, LLC…….……...…….Defendants,

Of which

Zurich American Insurance Company a/k/a
Zurich North America, Inc. is……..Petitioner

And

Peter D. Protopapas, as Receiver for Covil Corporation is ……Respondent.

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. 2020-CP-40-01163

Ronnie J. Jonas,…….…….....Respondent,

v.

Air & Liquid Systems Corporation; ABB Inc.; AECOM Energy & Construction, Inc.; Anchor Darling Valve Company; A. O. Smith Corporation; Armstrong International, Inc.; Aurora Pump Company; Bahnson, Inc.; BW/IP, Inc.; Carboline Company; Carrier Corporation; Carver Pump Company; CIRCOR Instrumentation Technologies, Inc.; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; Eaton Corporation; EMCOR Group, Inc.; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; The Gorman-Rupp Company; Gould Electronics, Inc.; Goulds Pumps, Inc.; Great Barrier Insulation Co., Inc.; Henry Pratt Company, LLC; Howden North America Inc.; I&M Industrials, Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; ITT, LLC; Morse TEC, LLC; The Nash Engineering Company; Occidental Chemical Corporation; Riley Power Inc.; Schneider Electric USA, Inc.; The Sherwin-Williams Company; Southern Insulation, Inc.; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Starr Davis Company, Inc.; Starr Davis Company of SC, Inc.; Trane U.S. Inc.; Uniroyal Holding Inc.; United Conveyor Corporation; United States Fidelity and Guaranty Company; United States Steel Corporation; Unitherm, Inc.; Velan Valve Corp.; VIAD Corp; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; York International Corporation; Yuba Heat Transfer, LLC; Zurich American Insurance Company; Zurn Industries, LLC; …….…….…….Defendants,

Of which

Zurich American Insurance Company a/k/a
Zurich North America, Inc. is……..Petitioner

And

Peter D. Protopapas, as Receiver for Covil Corporation is …….Respondent.

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. 2020-CP-40-01364

Nicholas Leon Murphy and
Doris Anne Murphy,.…….....Respondents,

v.

Covil Corporation; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of SC, Inc.; United States Fidelity and Guaranty Company; Zurich American Insurance Company; Duke Energy Corporation; Duke Energy Carolinas, LLC; ABB Inc.; Air & Liquid Systems Corporation; Anchor Darling Valve Company; Armstrong International, Inc.; Aurora Pump Company; BW/IP Inc.; Carboline Company; Carver Pump Company; Circor Instrumentation Technologies, Inc.; Consolidated Electrical Distributors, Inc.; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; Durez Corporation; Eaton Corporation; Fisher Controls International, LLC; Floweserve Corporation; Flowserve US Inc.; Foster Wheeler Energy Corporation; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Gardner Denver, Inc.; General Electric Company; The Goodyear Tire & Rubber Company; Gould Electronics, Inc.; Gould Pumps, Incorporated; Grinnell, LLC; Howden North America Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; ITT, LLC; Metropolitan Life Insurance Company; Morse TEC LLC; Occidental Chemical Corporation; Riley Power Inc; Schneider Electric USA, Inc.; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Trane U.S. Inc.; Uniroyal Holding, Inc.; Unitherm, Inc.; ViacomCBS Inc.; VIAD Corp.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; Weyerhaeuser Company; York International Corporation; Yuba Heat Transfer, LLC; Zurn Industries, LLC…….……...…….Defendants,

Of which

Zurich American Insurance Company a/k/a
Zurich North America, Inc. is……..Petitioner

And

Peter D. Protopapas, as Receiver for Covil Corporation is …….Respondent.

PETITION FOR WRIT OF MANDAMUS

Zurich American Insurance Company ("Zurich") respectfully petitions this Court in its original jurisdiction for a writ of mandamus directing the Honorable Jean Hoefer Toal to recuse herself from presiding in any capacity over the above-captioned actions. Zurich sets forth the grounds and bases for this petition below.

INTRODUCTION

Challenging the impartiality of a judge, and seeking immediate relief through a petition for a writ of mandamus, are not steps that Zurich takes lightly. But the unique circumstances of these cases call for that extraordinary relief in order to protect Zurich's right to a fair trial and to safeguard public confidence in the integrity of South Carolina's judicial system.

Plaintiffs in these wrongful-death asbestos suits have alleged that Zurich, along with other insurers of Defendant Covil Corporation ("Covil"), operated Covil as their supposed "alter ego" from the time the corporation dissolved in the early 1990s until Peter D. Protopapas was appointed Covil's Receiver in 2018. Based on this alter-ego theory, Plaintiffs contend that Zurich is responsible for all of Covil's alleged liability in these cases, without regard to insurance policy limits. Covil's Receiver has also brought a cross-claim against Zurich premised on the same alter-ego theory in two of the cases.

The record makes clear, however, that the judge assigned to preside over these cases, the Honorable Jean Hoefer Toal ("Chief Justice Toal"), made up her mind about the merits of this legally unprecedented alter-ego theory well before these suits were filed. Chief Justice Toal has repeatedly declared that Covil is the alter ego of its insurers in prior proceedings where the alter-ego question was not even at issue, where no briefing was submitted and no evidentiary hearing

was held on the alter-ego question, and where the insurers implicated by the alter-ego finding were not joined as parties. Despite this non-existent factual foundation, Chief Justice Toal on multiple occasions has purported to find that Zurich and other insurers "control[led] the affairs of Covil as their alter-ego." Ex. A, October 4, 2019 Hearing Transcript, *Charles T. Hopper and Rebecca Hopper v. Air & Liquid Sys. Corp., et al.*, Civil Action No. 2019-CP-40-0076, 95:21-96:1. And she has emphasized that this alter-ego finding is "the lens through which [she is] viewing" all future asbestos cases involving Covil. Indeed, in her order denying Zurich's recusal motions, Chief Justice Toal expressly acknowledges that, in prior proceedings, she has made a "finding that Zurich became the alter ego of Covil." Ex. K, p. 9. Although the order states that her finding has support in the record, the order does not provide any specific examples of evidentiary support from the record, and Chief Justice Toal has never identified any such record support in her previous rulings.

Confronted with these unsubstantiated statements purporting to resolve the alter-ego question, Zurich moved for Chief Justice Toal's recusal based on precedent from this Court establishing that "[a] judge's impartiality might reasonably be questioned"—and that recusal is therefore required—"when [her] factual findings are not supported by the record." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *see also Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993). Under that precedent, Chief Justice Toal was required to recuse herself from these cases because her prior alter-ego findings—rendered without evidence, briefing, or an opportunity for the insurers to be heard—were devoid of all factual support and, as a result, would lead a reasonable person to question her impartiality. Chief Justice Toal nevertheless denied the motions to recuse and made clear her intention to press forward with these cases.

Because Chief Justice Toal's refusal to recuse herself threatens irreparable harm both to Zurich and to the public's confidence in South Carolina's judicial system, this Court should issue a writ of mandamus ordering Chief Justice Toal to recuse herself from these cases. All of the prerequisites to mandamus relief (a duty by a public official to discharge an act of a ministerial nature for which the petitioner possesses a legal right and no other legal remedy) are met here.

It is a well-established principle of South Carolina law that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," Rule 501, SCACR, Canon 3E(1), and an equally well-established principle of federal due process that a judge shall recuse herself when "the probability of actual bias . . . is too high to be constitutionally tolerable," *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (internal quotation marks omitted). This is a mandatory, ministerial duty to which Zurich has a legal right based on Chief Justice Toal's wholly unsupported statements and factual findings on the alter-ego issue—the central question underlying Plaintiffs' claims, as well as the Receiver's alter-ego-based cross-claims, against Zurich. Mandamus is the only possible remedy here because an interlocutory appeal is unavailable and an appeal following a final judgment would be inadequate to remedy the harm, both to Zurich and to public confidence in the judiciary, which would result from letting these cases proceed before a judge whose impartiality might reasonably be questioned. Absent a writ requiring Chief Justice Toal to recuse herself, Zurich will be deprived of its right to be heard before a decision-maker whose impartiality is not open to dispute, and the public will be led to doubt the fairness and integrity of the South Carolina judicial system.

STATEMENT OF THE CASES

Plaintiffs brought these lawsuits to recover for their own alleged bodily injury or for the wrongful death of their decedents, which Plaintiffs contend was caused by exposure to asbestos. *See, e.g.*, Ex. B, Pavlish Second Amended Complaint ¶¶ 1, 25 ("Second Amended Complaint").[1] Plaintiffs assert several tort claims against Covil, an insulation-supply company that ceased operations in 1991 and was subsequently dissolved, *id.* ¶ 36, as well as multiple other defendants. Plaintiffs allege that these defendants manufactured, supplied, installed, or used asbestos and asbestos-containing products to which Plaintiffs or their decedents were exposed during construction jobs in past decades. *Id.* ¶¶ 16, 18–20, 24–28.

Plaintiffs also sued three insurance companies, Zurich, United States Fidelity and Guaranty Company ("USF&G"), and Sentry Insurance a Mutual Company[2] (collectively, the "Insurers"), who had provided insurance to Covil at various points in time before its dissolution. *Id.* ¶¶ 17, 20–21. Even after Covil was dissolved, Zurich and the other Insurers remained contractually obligated to defend Covil and to indemnify the company for covered losses under the terms of their insurance policies, as long as Covil remained subject to suit. However, Plaintiffs allege that "Covil has become the alter ego of the [Insurers]" based on the Insurers' conduct in defending Covil in asbestos lawsuits between 1991, when the company ceased operations, and 2018, when Chief Justice Toal appointed Peter D. Protopapas Receiver for Covil. *Id.* ¶ 64. On behalf of Covil, the Receiver filed cross-claims against Zurich in the *Pavlish* and

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[1] The allegations in all of the captioned cases are essentially identical. Thus, Zurich is citing to only one of the pleadings as an example in order to save space and eliminate unnecessary repetition.

[2] Sentry was named as a defendant only in the *Pavlish*, *Hutto*, and *Hagan* cases. Sentry has since entered into a settlement agreement with the Receiver, and Plaintiffs have filed stipulations dismissing Sentry from *Pavlish, Hutto,* and *Hagan*.

Hutto cases. Among other claims, the Receiver alleges the same alter-ego claim as Plaintiffs. Ex. C, *Pavlish,* Cross Claim of Covil Corp. at 9–16 ("Cross Claim of Covil Corp.").[3]

In support of their alter-ego claims, Plaintiffs and the Receiver allege that the Insurers "managed Covil, making all determinations as to the use and disposition of Covil's assets." Second Amended Complaint ¶ 41; Cross Claim of Covil Corp. ¶ 12. They further contend that the Insurers exercised "exclusive, unilateral control of Covil by running Covil's affairs in all material aspects." Second Amended Complaint ¶ 44; Cross Claim of Covil Corp. ¶ 15. The Receiver also alleges that, prior to his appointment, "Covil was nothing more than a façade behind which the Primary Insurers stood and directed actions of its lawyers." Cross Claim of Covil Corp. ¶ 24.

Zurich has never before been sued on such a novel alter-ego theory by a South Carolina asbestos plaintiff or by a receiver. Nevertheless, Chief Justice Toal, who oversees all asbestos cases across the State, has purported to find in several hearings and written orders that Covil is the alter ego of Zurich and the other Insurers. She has done so even though the alter-ego issue was not actually presented in any of those cases, no evidentiary hearing was held and no briefs were submitted on the alter-ego issue, and no insurer was a party or was provided an opportunity to be heard on the issue.

For example, in a hearing in another asbestos tort case that had no alter-ego claim and in which the Insurers were not parties, Chief Justice Toal stated:

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[3] Since filing the cross-claims in the *Pavlish* and *Hutto* cases, the Receiver has been enjoined by the Honorable Bruce Howe Hendricks of the U.S. District Court for the District of South Carolina from seeking "judicial determinations in underlying state tort suits regarding insurance coverage issues arising from policies issued or allegedly issued to Covil by" Zurich and other insurers. *Covil Corp. v. Zurich Am. Ins. Co.*, Civil Action No. 7:18-3291-BHH, 2020 U.S. Dist. LEXIS 33140, at *43 (D.S.C. Feb. 27, 2020).

> The fault lies with those who control the affairs of Covil as their alter-ego for many years, and that wasn't even as much the lawyers for the defendant as it was the insurers. And I've already ruled about that to some extent, and so that's kind of the lens through which I'm viewing.

Ex. A, October 4, 2019 Hearing Transcript, *Charles T. Hopper and Rebecca Hopper v. Air &Liquid Sys. Corp., et al.*, Civil Action No. 2019-CP-40-0076, 95:21-96:1; *see also* Ex. E, September 13, 2019 Hearing Transcript, *Roxanne Falls, et al. v. CBS Corp., et al.*, Civil Action No. 2015-CP-46-02155, 15:15-18 ("And we have been through a 30-year fiction that Covil was driving these cases, when in fact it turns out that that was not the case. And I am not going to operate on that basis anymore.").

Similarly, in a written order in another asbestos tort case—where, again, there was no alter-ego claim at issue and the Insurers were not parties—Chief Justice Toal wrote that "[i]t is important to note that Covil does not and has not existed since 1993. It has been nothing more than a shell operated, controlled and abused by its insurers and those who purport to be attorneys for Covil." Ex. F, Order Granting Plaintiff's Motion for a New Trial Pursuant to Rule 60(b)(2) & 60(b)(3), *Jerry Howard Crawford, et al. v. Celanese Corp., et al.*, Civil Action No. 2017-CP-42-04429, p. 6 (Nov. 25, 2019); *see also* Ex. G, Order Denying Covil's Motion to Lift Entry of Default, *Denver D. Taylor, et al. v. Covil Corp., et al.*, Civil Action No. 2018-CP-40-04940, p. 6 (Mar. 20, 2019) ("Covil ceased to exist in 1993. Since that time, the Covil entity has apparently been nothing more than a façade behind which the insurers stand and direct the actions of its lawyers."); Ex. H, Order, *Charles T. Hopper and Rebecca Hopper v. Air & Liquid Systems Corp., et al.*, Civil Action No. 2019-CP-40-0076, p. 4 (Sept. 19, 2019) (same). Chief Justice Toal identified no record support for any of these supposed findings.

Most recently, in January 2020, Chief Justice Toal issued an Order for Rule to Show Cause Hearing against the Insurers in five separate asbestos tort cases. Without citing any record evidence, Chief Justice Toal wrote that "it became clear to this Court that certain of Covil's primary insurers (USF&G, Zurich, and Sentry) were operating an otherwise defunct Covil for purposes of managing Covil's asbestos litigation and had been doing so for over two decades without any apparent involvement from the insured—Covil Corporation." Ex. I, Order for Rule Show Cause Hearing at 3. Chief Justice Toal further stated that the Insurers failed "even to disclose to this Court their scheme to operate Covil as an undisclosed alter ego of these insurance companies." *Id.* Like the prior alter-ego findings made by Chief Justice Toal, these statements were made without an evidentiary hearing or briefing on the alter-ego issue, in proceedings to which Zurich and the other Insurers were not parties, and without providing the Insurers an opportunity to be heard on the alter-ego issue.[4]

Based on Chief Justice Toal's repeated, factually unsupported statements and findings relating to the very alter-ego issue in dispute in these actions, Zurich filed Motions for Recusal. *See*, Ex. J., *Murphy*, Motion for Recusal. Chief Justice Toal denied the motions in identical orders on May 6, 2020, reasoning that "[t]he law requires recusal only where a judge's bias

[4] Chief Justice Toal reversed course on her alter-ego finding as to Sentry in an April 10, 2020 order approving Sentry's settlement with the Receiver. In that order, Chief Justice Toal expressly found that Covil *never* became Sentry's alter ego. *See* Ex. D, Order Granting Joint Motions to Establish Covil Qualified Settlement Fund and to Approve Settlements Between the Receiver for Covil and (1) Hartford, (2) TIG, and (3) Sentry and to Keep Continuing Jurisdiction Over This Qualified Settlement Fund at 21 ("At no time did Sentry exercise any control over Covil Corporation beyond its contractual right to control the defense of those Covil asbestos bodily injury suits implicating or alleging exposures that may have fallen under a Sentry insurance policy. Therefore, Covil never became Sentry's alter ego."). Chief Justice Toal offered no explanation for the stark inconsistency between this finding of fact and her earlier findings about a supposed alter-ego relationship between Sentry and Covil, including her finding to that effect just three months earlier in the Order for Rule to Show Cause Hearing. The only thing that had changed in the interim was that Sentry chose to settle with the Receiver, whereas Zurich and USF&G did not.

stems from an extrajudicial source" and that her prior statements and findings on the alter-ego issue do not constitute an extrajudicial source. Ex. K, Order Denying Zurich's Motion for the Recusal of Chief Justice Jean H. Toal at 3.

SUMMARY OF ARGUMENT

A petition for a writ of mandamus is the proper mechanism for challenging a judge's refusal to recuse. Although this Court has not addressed whether a writ of mandamus is available in these circumstances, the overwhelming weight of authority from federal and state courts across the country recognizes the right of a party to petition for a writ of mandamus when a judge refuses to recuse herself. This Court should follow those cases because a post-judgment appeal is an inadequate mechanism for challenging an erroneous denial of a motion to recuse, which inflicts immediate, irreparable harm on both the party that moved to recuse and on the integrity of the judicial system. Only the availability of a petition for a writ of mandamus can avert those serious, irremediable consequences.

All of the prerequisites to the issuance of a writ of mandamus are met here. First, a judge has a duty to recuse herself under South Carolina law when her impartiality might reasonably be questioned, Rule 501, SCACR, Canon 3B(5), and under federal due process when "the probability of actual bias . . . is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (internal quotation marks omitted).

Second, that duty is mandatory and thus ministerial within the meaning of this Court's case law. *See Edwards v. State*, 383 S.C. 82, 96, 678 S.E.2d 412, 420 (2009).

Third, Zurich has a clear right to Chief Justice Toal's recusal because this Court has held that "[a] judge's impartiality might reasonably be questioned when [her] factual findings are not supported by the record." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). In

prior proceedings, Chief Justice Toal has repeatedly made unsupported statements and findings that Covil is the alter ego of Zurich and the other Insurers—without holding an evidentiary hearing, receiving briefing, or affording the Insurers (who were not parties to those proceedings) an opportunity to be heard on the alter-ego issue. Those factually unsubstantiated and procedurally irregular findings call into question Chief Justice Toal's impartiality and create an unacceptable risk of actual bias. Chief Justice Toal therefore has an obligation to recuse herself in order to safeguard Zurich's fundamental right under South Carolina law and federal due process to a "fair trial in a fair tribunal." *Caperton*, 556 U.S. at 876 (internal quotation marks omitted).

Finally, a post-judgment appeal would not be an adequate alternative to a writ of mandamus because it could not fully remedy the injury to Zurich from being required to defend itself before a judge whose impartiality is open to debate. A delayed appeal also could not repair the damage to the public's confidence in the judiciary from permitting Chief Justice Toal to serve as the presiding judge in these cases.

STANDARD OF REVIEW

A party seeking a writ of mandamus must establish: (1) a duty by the person against whom the writ is sought to perform the act, (2) the ministerial nature of the act, (3) the petitioning party's specific legal right to have the act performed, and (4) a lack of any other legal remedy. *Porter v. Jedziniak*, 334 S.C. 16, 18, 512 S.E.2d 497, 498 (1999). The issuance of a writ of mandamus is addressed to the sound discretion of this Court. *Linton v. Gaillard*, 203 S.C. 19, 25 S.E.2d 896, 898 (1943). In considering a motion to recuse, a court "must accept as true the factual allegations of [the] motion." *Shaw v. State*, 276 S.C. 190, 192, 277 S.E.2d 140, 141 (1981).

ARGUMENT

I. A Writ Of Mandamus Is An Appropriate Mechanism For Challenging A Judge's Failure To Recuse.

This Court has held that a "denial of a motion for disqualification of a judge is an interlocutory order" that is not immediately appealable, *Townsend v. Townsend*, 232 S.C. 309, 312, 474 S.E.2d 424, 427 (1996), but it has not addressed whether a refusal to recuse can be challenged through a writ of mandamus. *See Rogers v. Wilkins*, 275 S.C. 28, 29, 267 S.E.2d 86, 87 (1980) (noting direct appeal was unavailable and that the appellant had not sought "relief by way of petition for writ of mandamus"). Numerous federal and state courts, however, have held that mandamus is available to challenge a judge's decision not to recuse. This Court should follow those decisions in order to ensure that parties have a meaningful mechanism for challenging a judge's refusal to recuse.

Multiple federal courts of appeals have held that a petition for a writ of mandamus can be used to challenge a judge's decision not to recuse. Indeed, "every circuit to have addressed" the "propriety of seeking the recusal of a judicial officer by petition for a writ of mandamus" has "found it proper." *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (citing cases from eight circuits that have expressly endorsed the availability of mandamus); *see also, e.g.*, *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987) ("A district judge's refusal to disqualify himself can be reviewed in this circuit by way of a petition for a writ of mandamus.").

Numerous state courts agree that mandamus is available where a judge fails to recuse. *See, e.g.*, *In re Blake*, 912 So. 2d 907, 918 (Miss. 2005) (granting writ of mandamus to require the recusal of a trial judge from seven cases because a "reasonable person [would] question whether the judge would have a personal bias or prejudice"); *Ex parte Crawford*, 686 So. 2d 196, 198 (Ala. 1996) (explaining that a refusal to recuse can be raised in a petition for a writ of

mandamus); *Payne v. Lee*, 222 Minn. 269, 278, 24 N.W.2d 259, 265 (Minn. 1946) (mandamus is an "expeditious and suitable remedy" for determining whether a judge should be disqualified for bias); *Florida v. Sarasota Cty.*, 118 Fla. 629, 635, 159 So. 797, 799 (Fla. 1935) (disqualification motion "should have been directly tested by mandamus"); *cf. Idaho v. Blume*, 113 Idaho 224, 226, 743 P.2d 92, 94 (Idaho Ct. App. 1987) ("A litigant is not required to await final judgment before challenging a trial judge's refusal to be disqualified. Rather, he may seek immediate relief by means of a writ of prohibition.").[5]

These federal and state courts have concluded that mandamus is appropriate when a judge improperly refuses to recuse because the aggrieved party has "no other way . . . to obtain effective relief." *Cobell*, 334 F.3d at 1139. As these courts have recognized, immediate relief protects "public confidence" in the integrity of the judicial process. *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) (internal quotation marks omitted). A case involving a failure to recuse is therefore "distinguishable" from one involving an error of law that "may be fully addressed and remedied on appeal" because "public confidence in the courts requires that such a question be disposed of at the earliest possible opportunity." *Id.* (alterations and internal quotation marks omitted). That confidence is "irreparably dampened once a case is allowed to proceed before a

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[5] There are many other state-court cases that authorize the use of mandamus to challenge a judge's decision not to recuse. *See, e.g.*, *State v. Pena*, 345 Or. 198, 205 n.1, 191 P.3d 659, 663 n.1 (Or. 2008); *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 254-55, 112 P.3d 1063, 1066 (Nev. 2005); *Clark v. Bd. of Educ. of Indep. Sch. Dist. No. 89*, 2001 OK 56, ¶ 9, 32 P.3d 851, 855 (Okla. 2001); *Anderson v. United States*, 754 A.2d 920, 922 n.4 (D.C. 2000); *Klinck v. Dist. Court of the Eighteenth Judicial Dist.*, 876 P.2d 1270, 1271 (Colo. 1994); *Bus. & Prof'l People v. Barnich*, 244 Ill. App. 3d 291, 297, 614 N.E.2d 341, 345 (Ill. Ct. App. 1993); *In re Antonio*, 612 A.2d 650, 652-53 (R.I. 1992); *Judicial Inquiry Comm'n v. McGraw*, 171 W. Va. 441, 443-44, 299 S.E.2d 872, 874-75 (W. Va. 1983); *State ex rel. Ballard v. Jefferson Circuit Court*, 225 Ind. 174, 175, 73 N.E.2d 489, 490 (Ind. 1947); *State ex rel. Locke v. Sandler*, 156 Fla. 136, 23 So. 2d 276 (Fla. 1945); *Musser v. Third Judicial Dist. Court*, 106 Utah 373, 377, 148 P.2d 802, 804 (Utah 1944) (per curiam); *State v. Livaudais*, 161 La. 882, 888, 109 So. 536, 538 (La. 1926).

judge who appears to be tainted." *In re al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015) (internal quotation marks omitted); *see also In re Int'l Bus. Machines Corp.*, 618 F.2d 923, 926–27 (2d Cir. 1980) ("A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits.").

These courts have also expressed concern that a post-judgment appeal would be inadequate in the recusal setting "because it is too difficult to detect all of the ways that bias can influence a proceeding." *al-Nashiri*, 791 F.3d at 79; *see also Pac. & Sw. Annual Conf. of the United Methodist Church v. Superior Court*, 82 Cal. App. 3d 72, 79, 147 Cal. Rptr. 44, 48 (Ct. App. 1978) ("The issue of jural bias, if left unresolved, may infect the entire subsequent proceedings with fatal error. The issue must be promptly resolved."). In addition, issuance of a writ of mandamus ensures that judges do not adjudicate cases that they lack the statutory and constitutional authority to hear. *See, e.g.*, *In re Sch. Asbestos Litig.*, 977 F.2d 764, 778 (3d Cir. 1992) ("Interlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear . . . ."); *Payne*, 222 Minn. at 277, 24 N.W.2d at 265 (noting that the writ "lies to prevent any inferior court from exceeding its legitimate power and authority" by "exercis[ing] [its] jurisdiction in violation of the constitution").

Like these numerous other federal and state courts, this Court should protect litigants' right to an impartial adjudication, as well as public confidence in the judicial system, by holding that mandamus is available to challenge a judge's decision not to recuse.

II. A Writ Of Mandamus Is Warranted Directing Chief Justice Toal To Recuse Herself.

All four prerequisites to a writ of mandamus are satisfied here. First, when a judge's impartiality might reasonably be questioned or there is a constitutionally unacceptable risk of actual bias, the judge has a duty to recuse herself from the proceedings. Second, this duty to recuse is mandatory and thus ministerial. Third, Zurich has a legal right to Chief Justice Toal's recusal because her impartiality might reasonably be questioned, and there is an unacceptable risk of actual bias, based on her factually unsupported and procedurally irregular findings on the alter-ego issue at the heart of Plaintiffs' and the Receiver's claims against Zurich. And fourth, Zurich has no legal remedy other than a writ of mandamus to vindicate its right to a trial before a judge whose impartiality is not open to dispute.

A. Judges Have A Duty To Recuse Where Their Impartiality Might Reasonably Be Questioned.

South Carolina law is clear that judges are required to recuse themselves "where questions of impartiality or impropriety are raised." *State v. Cheatham*, 349 S.C. 101, 111, 561 S.E.2d 618, 623 (Ct. App. 2002). This obligation is codified in Canon 3 of South Carolina's Code of Judicial Conduct, which states that "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in performance of judicial duties, by words or conduct manifest bias or prejudice." Rule 501, SCACR, Canon 3B(5). Under Canon 3E(1), a "judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," including but not limited to circumstances where "the judge has a personal bias or prejudice concerning a party" or "personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* Canon 3E(1). The commentary to Canon 3(E) makes clear that "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply." *Id.* cmt. This Court has repeatedly held that "[a] judge's impartiality might reasonably be questioned when his [or her]

factual findings are not supported by the record." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *see also Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993). "In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice." *Id.* (cited cases omitted).

In addition to these state-law protections, the Due Process Clause of the Fourteenth Amendment provides a minimum constitutional standard governing judicial disqualification. "'[A] fair trial in a fair tribunal is a basic requirement of due process,'" *Caperton*, 556 U.S. at 876 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), which "guarantees 'an absence of actual bias on the part of a judge," *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (quoting *Murchison*, 349 U.S. at 136). To that end, the United States Constitution mandates recusal when "'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). As a result, "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Id.* at 886 (quoting *Murchison*, 349 U.S. at 136); *see also Williams*, 136 S. Ct. at 1909 ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.").

Because judges have a duty to recuse in appropriate circumstances under South Carolina law and the United States Constitution, the first element of the mandamus standard is met.

B. A Judge's Duty To Recuse Is Mandatory And Ministerial.

A judge's duty to recuse where her impartiality might reasonably be questioned, or where there is a constitutionally intolerable risk of actual bias, is mandatory and therefore ministerial.

A "duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 308, 811 S.E.2d 758, 766 (2018). In other words, if a "definite duty" arises under "conditions specified" by statute, that duty is ministerial. *Edwards v. State*, 383 S.C. 82, 96, 678 S.E.2d 412, 420 (2009). In contrast, a duty is not ministerial when it "requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Richland Cty.*, 422 S.C. at 308, 811 S.E.2d at 766.

This Court has explained that the "use of mandatory language is unambiguous" where the duty is specified using terms such as "must" and "shall." *Richland Cty.*, 422 S.C. at 309, 811 S.E.2d at 767 ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." (internal quotation marks omitted)). This is true even when a public official otherwise possesses broad discretionary powers. *Id.* at 308–09, 811 S.E.2d at 767.

Applying these standards, it is clear that a judge's duty to recuse herself under South Carolina law is mandatory, and thus ministerial, where her impartiality might reasonably be questioned. Canon 3 of the Code of Judicial Conduct is framed in unambiguously mandatory terms because it states that a judge "*shall* perform judicial duties without bias or prejudice" and that a judge "*shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Rule 501, SCACR, Canon 3B(5), 3E(1) (emphases added). The recusal obligations imposed by federal due process are equally mandatory. *See Caperton*, 556 U.S. at 872 ("Under our precedents there are objective standards that *require* recusal when the probability of actual bias . . . is too high to be constitutionally tolerable." (emphasis added)).

These "absolute, certain, and imperative" duties to recuse under "conditions specified" by South Carolina law and the United States Constitution satisfy the second element of the mandamus standard. *Richland Cty.*, 422 S.C. at 308, 811 S.E.2d at 766.

C. Zurich Has a Legal Right to Chief Justice Toal's Recusal.

Zurich has a legal right to Chief Justice Toal's recusal because her prior, factually unsubstantiated statements and supposed findings on the alter-ego issue at the core of the claims against Zurich create a reasonable basis for questioning her impartiality and an unacceptable risk of actual bias.

This Court has repeatedly held that "[a] judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." *Patel*, 359 S.C. at 524, 599 S.E.2d at 118; *see also Ellis*, 315 S.C. at 285, 433 S.E.2d at 857 (same); *Mallet v. Mallet*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) (determining whether recusal was warranted by analyzing whether "the trial judge's findings [were] so unsupported by the record as to manifest" bias).

In prior cases, Chief Justice Toal has repeatedly made factually unsubstantiated statements and purported findings that Covil is the alter ego of Zurich and the other Insurers, which is the central issue underlying the claims that Plaintiffs and the Receiver are asserting against Zurich in these cases.[6] Chief Justice Toal has done so even though the alter-ego issue

[6] In fact, Chief Justice Toal has now made that same finding **in these very cases**. The order denying the recusal motions repeats the finding that Zurich "became the alter ego of Covil." Ex. K, p. 9. Chief Justice Toal restated that conclusion, even though the alter-ego question is the primary issue involved in these cases. In so doing, Chief Justice Toal has effectively made a merits ruling on the central issue, despite the fact that preliminary motions to dismiss have not even been decided and no discovery has taken place. Chief Justice Toal's repetition of that unsubstantiated alter-ego finding underscores why it is fundamentally unjust for Chief Justice Toal to preside over these cases.

was not presented in any of those prior cases, there was no evidentiary hearing or briefing on the issue, and the non-party Insurers had no opportunity to be heard on the issue.[7]

For example, Chief Justice Toal declared during hearings in prior cases that the "lens through which [she is] viewing" the asbestos tort cases filed against Covil is that the Insurers "control the affairs of Covil as their alter ego," Ex. A, October 4, 2019 Hearing Transcript, and that she is "not going to operate on th[e] basis" of what she called "a 30-year fiction that Covil was driving these cases, when in fact it turns out that that was not the case," Ex. D, September 13, 2019 Hearing Transcript.

Chief Justice Toal has also asserted in multiple written orders that Covil is the supposed alter ego of the Insurers. In one of those orders, Chief Justice Toal stated that "Covil ceased to exist in 1993" and "[s]ince that time, the Covil entity has apparently been nothing more than a façade behind which the insurers stand and direct the actions of its lawyers." Ex. G, Order Denying Covil's Motion to Lift Entry of Default at 6.[8] Chief Justice Toal offered no citation to the record to support that assertion. And in an order in another case, Chief Justice Toal similarly stated, "Covil does not and has not existed since 1993" and "has been nothing more than a shell operated, controlled and abused by its insurers and those who purport to be attorneys for Covil." Ex. F, Order Granting Plaintiff's Motion for a New Trial Pursuant to Rule 60(b)(2) & 60(b)(3) at 6. Again, Chief Justice Toal made this statement without citation to any evidence in the record.

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[7] According to Chief Justice Toal, "Zurich's argument that it is a nonparty is no basis for recusal" because "the South Carolina Rules of Alternative Dispute Resolution mandate[d]" Zurich's "attendance at mediation" in the asbestos cases filed against Covil. Ex. K, Order Denying Zurich's Motion for the Recusal of Chief Justice Jean H. Toal at 10. But mandatory participation in mediation—which occurs off-the-record and without judicial participation—is no substitute for Zurich's constitutionally guaranteed right to be heard through the submission of legal briefs and the development of a factual record before the judge herself.

[8] The Receiver's allegations here parrot this language. *See* Cross Claim of Covil Corp. ¶ 24 ("Covil was nothing more than a façade behind which the Primary Insurers stood and directed actions of its lawyers.").

Most recently, in an order issued in five separate cases to which Zurich was not a party, Chief Justice Toal purported to find that the Insurers "were operating an otherwise defunct Covil for the purposes of managing Covil's asbestos litigation and had been doing so for over two decades without any apparent involvement from the insured." Ex. I, Order for Rule to Show Cause Hearing at 3. According to Chief Justice Toal, the Insurers undertook a "scheme to operate Covil as an undisclosed alter ego of these insurance companies." *Id.* As with her other statements on the alter-ego issue, Chief Justice Toal did not support these assertions with citations to the record, conduct an evidentiary hearing on the alter-ego issue, or receive briefing on the question.

Nor was there an evidentiary basis for any of Chief Justice Toal's prior statements and findings that Covil was supposedly the alter ego of Zurich and the other Insurers and that the Insurers somehow concealed Covil's defunct status. In South Carolina, "[a]n alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby." *Colleton Co. Taxpayers Ass'n v. Sch. Dist.*, 371 S.C. 224, 237, 638 S.E.2d 687, 692 (2006). Chief Justice Toal has never cited to any record evidence showing either one of those elements can be established as to Zurich.[9]

For example, there is no support for Chief Justice Toal's statement that "we have been through a 30-year fiction that Covil was driving these cases." Ex. E, September 13, 2019

[9] According to Chief Justice Toal, her "finding that Zurich became the alter ego of Covil is based on the record" because "[t]hrough the litigation in this Court, this Court learned that [Zurich] made a series of decisions that should have been decided by Covil." Ex. K, Order Denying Zurich's Motion for the Recusal of Chief Justice Jean H. Toal at 8. Even if that finding were accurate—which it is not given that Covil was defunct and had no agents or employees capable of making decisions on its behalf—the finding still would not support Chief Justice Toal's alter-ego determinations because it does not establish that Zurich exercised total domination and control over Covil or that inequitable consequences resulted from Zurich's conduct.

Hearing Transcript. Counsel for Covil consistently reiterated during asbestos cases over the years that Covil was out of business and had no employees, officers, or agents. In one such instance, Covil objected to a 30(b)(6) deposition on the express grounds that Covil was out of business. *See* Ex. L, January 24, 2018 Hearing Transcript, *Timothy W. Howe, as Personal Representative of the Estate of Wayne Ervin Howe, et al. v. Air & Liquid Sys. Corp., et al.*, Civil Action No. 2015-CP-46-3456, 63:11-13, 66:1-9 ("I suspect you know, Covil has been out of business, defunct since 1991.").

Additionally, Covil's written discovery responses have repeatedly disclosed that Covil went out of business in 1991 and that it has no employees, agents, or officers. For example, Covil's responses to the plaintiffs' interrogatories and requests for production in another case stated, "Covil was dissolved as an entity in 1993 and is no longer an active company. Covil has no active employees, agents or officers. As a result, it is difficult if not impossible for counsel for Covil to retrieve or reconstruct the information requested in these Interrogatories." Ex. M, Covil's Responses to Plaintiffs' Standard Interrogatories and Request for Production of Documents to All Defendants, *Roxanne Falls, et al. v. CBS Corp., et al.*, Civil Action No. 2015-CP-46-02155. These were standard discovery responses used by counsel for Covil in asbestos cases.

The record is thus abundantly clear that Chief Justice Toal has repeatedly made statements and purported "factual findings" on the alter-ego issue that "are not supported by the record," *Roche v. Young Bros., Inc.*, 332 S.C. 75, 85, 504 S.E.2d 311, 316 (1998), and that she has done so without even attempting to develop a factual record or providing Zurich and the

other Insurers an opportunity to be heard on that issue.[10] In light of these factually unsupported and procedurally deficient findings, Chief Justice Toal's "impartiality might reasonably be questioned," *id.*, and there is a "probability of actual bias . . . [that] is too high to be constitutionally tolerable," *Caperton*, 556 U.S. at 872 (internal quotation marks omitted).

In her Order denying Zurich's Motions for Recusal, Chief Justice Toal reasoned that she was not required to recuse herself because Zurich supposedly failed to "cite any 'extrajudicial source' that is the basis for this Court's alleged bias or prejudice." Ex. K, Order Denying Zurich's Motion for the Recusal of Chief Justice (Ret.) Jean H. Toal at 4. Chief Justice Toal's reliance on the "extrajudicial source" doctrine, which provides that the basis for recusal must originate from "a source outside the judicial proceeding at hand," *Liteky v. United States*, 510 U.S. 540, 545 (1994), is misplaced. That doctrine is no barrier to recusal on the basis of a judge's factually unsupported findings in a prior case because "earlier judicial proceedings conducted by the same judge" *are* "extrajudicial sources." *Id.*; *see also id.* (explaining that *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) "(the only opinion of ours to recite the doctrine) clearly meant by 'extrajudicial source' a source outside the judicial proceeding at hand—which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge"). In any event, this Court has not applied the "extrajudicial source" doctrine in either of the cases in which it has determined that recusal is required where "factual findings are

[10] The absence of evidentiary support for Chief Justice Toal's alter-ego findings is underscored by her abrupt about-face in her order approving Sentry's settlement with the Receiver, where—despite repeatedly finding in the past that Covil was the alter ego of Sentry—she found that "Covil *never* became Sentry's alter ego." Ex. D, Order Granting Joint Motions to Establish Covil Qualified Settlement Fund and to Approve Settlements Between the Receiver for Covil and (1) Hartford, (2) TIG, and (3) Sentry and to Keep Continuing Jurisdiction Over This Qualified Settlement Fund at 21 (emphasis added). Chief Justice Toal did not even acknowledge in the settlement order that she had repeatedly made the exact opposite finding regarding the relationship between Sentry and Covil—let alone provide a reasoned explanation for her sudden change of heart.

not supported by the record," *Patel*, 359 S.C. at 524, 599 S.E.2d at 118; *see also Ellis*, 315 S.C. at 285, 433 S.E.2d at 857, and the U.S. Supreme Court itself has made clear that the "extrajudicial source" doctrine is merely a "factor" to be considered in making a recusal determination and that "the absence of an extrajudicial source" does not "necessarily preclude[ ] bias." *Id.* at 554.

Zurich therefore has a legal right to Chief Justice Toal's recusal under both South Carolina law and federal due process.

D. Zurich Has No Other Legal Remedy.

Finally, Zurich has no other legal remedy for securing Chief Justice Toal's recusal before irreparable harm is inflicted on both Zurich and South Carolina's judicial system.

The denial of a motion for recusal is not immediately appealable. *Townsend*, 323 S.C. at 312, 474 S.E.2d at 427. Thus, without issuance of a writ, Zurich will not be able to challenge the denial of its motion to recuse until these cases have moved forward before Chief Justice Toal and culminated in final judgments. As multiple courts have recognized, however, a post-judgment appeal is a manifestly inadequate remedy for the erroneous denial of a motion to recuse. *See, e.g.*, *Cobell*, 334 F.3d at 1139 ("The ordinary route to relief from an adverse interlocutory order is to appeal from the final judgment. When the relief sought is recusal of a disqualified judicial officer, however, the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable."); *see also Berger v. United States*, 255 U.S. 22, 36 (1921) ("The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious.").

As these courts have explained, post-judgment review is simply inadequate in the recusal setting because "it is too difficult to detect all of the ways that bias can influence a proceeding"

and because post-judgment review "fails to restore public confidence in the integrity of the judicial process." *In re Mohammad*, 866 F.3d 473, 475 (D.C. Cir. 2017) (internal quotation marks omitted); *see also Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 (3d Cir. 1993) ("While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separate harm to public confidence that [recusal] is designed to prevent.").

Those considerations apply with full force here, where, in the absence of mandamus relief, Zurich will be required to defend itself in front of a judge who has repeatedly made factually unsubstantiated statements and supposed findings about the alter-ego issue that rests at the heart of the claims against Zurich. A post-judgment appeal would provide Zurich with inadequate relief for the irreparable injury of being required to defend itself before an adjudicator whose impartiality is open to question and would create an intolerable risk of permanent damage to the public's faith in the independence and integrity of South Carolina's judicial system. Those irremediable harms cannot be undone by a post-judgment appellate decision directing Chief Justice Toal to recuse herself from a proceeding over which she never should have presided in the first place.

Accordingly, all four of the relevant elements point decisively in favor of issuing a writ of mandamus directing Chief Justice Toal to recuse herself from these cases.

CONCLUSION

As this Court has emphasized, "when mandamus is warranted, 'the judiciary cannot properly shrink from its duty.'" *Edwards*, 383 S.C. at 97, 678 S.E.2d at 420 (quoting *Blalock v. Johnston*, 180 S.C. 40, 43, 185 S.E. 51, 52 (1936)). In these cases, well-settled principles of South Carolina law and federal due process make clear that the Court's duty is to issue a writ of mandamus directing Chief Justice Toal's recusal in order to avert the irreparable harm to both

Zurich and the South Carolina judicial system that would necessarily result from permitting these cases to proceed before a judge whose impartiality is subject to reasonable dispute.

Respectfully submitted,

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