NO. 08-0961

IN THE SUPREME COURT OF TEXAS

MARIA DEL CARMEN GUILBOT SERROS DE GONZALEZ, ET AL.,

Petitioners/Cross-Respondents,

vs.

MIGUEL ANGEL GONZALEZ GUILBOT ET AL.

Respondents/Cross-Petitioners.

PETITIONERS/CROSS-RESPONDENTS' POST-SUBMISSION BRIEF

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Petitioners/Cross-Respondents Maria del Carmen Guilbot Serros de Gonzalez *et al.* ("Plaintiffs") submit this post-submission brief to clarify arguments made by counsel, and address questions raised by the Court, at oral argument.

ARGUMENT

I. The court of appeals erred in concluding that Judge Herman's failure to refer Defendants' third recusal motion to yet another judge required reversal of the trial court's judgment.

The court of appeals' holding that "tertiary" means the third recusal motion filed "against the same judge," *Gonzalez Guilbot v. Estate of Gonzalez y Vallejo*, 267 S.W.3d 556, 562 (Tex. App.—Houston [14th Dist.] 2008, pet. granted), is wrong as a matter of law, rendering Civil Practice and Remedies Code Section 30.016 essentially toothless. *See* Pls.' Merits Br. 10-14; Pls.' Reply Br. 13-18.[1] The court's corollary determination that Judge Herman's failure to refer the motion filed against him required reversal of Judge Wood's subsequent final judgment is likewise erroneous for several reasons.

First, under the plain wording of Section 30.016(b), Judge Herman was *obligated* to rule on Defendants' motions to recuse Judges Burwell and Wood:

[1] At oral argument, Defendants' counsel argued that it makes sense for the Legislature to treat statutory probate court judges differently than district or statutory county court judges because there are comparatively fewer probate judges—18 versus the state's approximately 660 district and statutory county court judges. Counsel reasoned that if the Legislature did not narrow the definition of tertiary for recusal motions against probate judges, a party who moved to recuse every judge to which his case was assigned would "run out of statutory [probate] court judges" eventually, whereas that would not be a problem in county or district court, whose judges number in the hundreds. But this would mean that the Legislature knowingly permitted a resolutely trial-adverse party to file literally *hundreds* of recusal motions in district or statutory county court before Section 30.016(b) ever applied. *See* Pls.' Merits Br. 11-12.

> (b) A judge who declines recusal after a tertiary recusal motion is filed shall comply with the applicable rules of procedure for recusal and disqualification except that the judge *shall continue to*:
>
> (1) preside over the case;
>
> (2) sign orders in the case; and
>
> (3) move the case to a final disposition as though a tertiary recusal motion had not been filed.

TEX. CIV. PRAC. & REM. CODE ANN. § 30.016(b) (Vernon 2008) (emphasis added).

Next, although Section 30.016(b) also contains a separate and independent requirement that the tertiary judge refer the motion filed against him or her to the presiding judge or Chief Justice for assignment, *see id.* (requiring the tertiary judge to "comply with the applicable rules of procedure for recusal"), that requirement does not apply in this case for two reasons. First, under the exception to the referral rule recognized by most courts of appeals, Judge Herman had no obligation to refer the recusal motion filed against him because it was defective, failing to "state with particularity the alleged grounds for recusal." TEX. GOV'T CODE ANN. § 25.00255(b)(3) (Vernon Supp. 2009); *see* Pls.' Merits Br. 14-17; Pls.' Reply Br. 18-20.[2] While the

[2] *See also In re Marriage of Jordan*, 264 S.W.3d 850, 852-53 (Tex. App.—Waco 2008, no pet.); *Rammah v. Abdeljaber*, 235 S.W.3d 269, 274 (Tex. App.—Dallas 2007, no pet.); *Castano v. San Felipe Agric., Mfg., & Irrigation Co.*, No. 04-01-00822-CV, 2003 WL 288276, at *8 (Tex. App.—San Antonio Feb. 12, 2003, no pet.) (mem. op.); *Wailehua v. Hansen*, No. 06-99-00057-CV, 2000 WL 369346, at *3 (Tex. App.—Texarkana 2000, no pet.); *Stafford v. Stafford*, No. 07-09-0411-CV, 1998 WL 751185, at *1 (Tex. App.—Amarillo Oct. 28, 1998, no pet.); *McDuffie v. State*, 854 S.W.2d 195, 201 (Tex. App.—Beaumont 1993, pet. ref'd); *Williams v. Ingalsbe*, No. 11-92-227-CV, 1993 WL 13141709, at *1-2 (Tex. App.—Eastland Jan. 14, 1993, no writ); *Arnold v. State*, 778 S.W.2d 172, 180 (Tex. App.—Austin 1989), *aff'd on other grounds*, 853 S.W.2d 543 (Tex. Crim. App. 1993) (en banc) (all holding or stating that the referral rule does not apply to motions lacking particularity).

Any change to this majority rule should come through amendment of Texas Rule of Civil Procedure 18a and Texas Government Code Section 25.00255. *See* TEX. R. CIV. P. 18a(c) (proposed amendment, January 2010) (amending Rule 18a to clarify that the referral rule applies "even if the motion does not comply with section (a)").

motion vaguely suggests that Plaintiffs' trial counsel had *ex parte* communications with *someone* about the setting of the recusal hearings, the motion never alleges that those communications were actually with Judge Herman (as opposed to, say, with a deputy county clerk). *See* 1st CR 18-19. Defendants' equally obscure complaint about Judge Herman's alleged actions in prior cases likewise fails to meet the minimal standards of particularity. Defendants never explain in their motion why Judge Herman's intervention in another case involving other parties would affect his ability to participate in *this case*. *See id.* at 19-20. Indeed, Defendants do not even allege that any of their allegations are true, stating merely that they do "not want to agree or disagree with the serious allegations leveled against Judge Herman, and . . . would prefer not to have to inquire any further." *Id.* at 20.

Second, Defendants have waived any argument that Section 30.016(b) required Judge Herman to refer the motion against him at some particular time in the case. Indeed, Defendants have never, even to this day, raised that argument at any stage of this case. In response to Plaintiffs' reliance on Section 30.016 in the court of appeals, Defendants argued that Judge Herman should have referred the motion to recuse him *and declined to take further action* because the motion to recuse him did not meet the definition of tertiary in Section 30.016(a). *See* Defs.' Ct. App. Reply Br. 6 ¶ 5; Defs.' Resp. to Pet. Rev. 3-7; Defs.' Resp. to Pls.' Merits Br. 11-15. Defendants also reurged their trial-court theory that their appeal to the Fifth Circuit of Judge Rosenthal's remand order prevented *any* state court judge from taking *any* action until the Fifth Circuit had completed its review. *See* Defs.' Ct. App. Reply Br. 8 ¶ 8 ("Until the 5th Circuit decides

either to remand with instructions to the district court to then remand to the state court, or to retain, the case is still in the federal system.").[3] At no point in this long process have Defendants ever argued that Section 30.016(b) required Judge Herman to refer the motion against him *even if* it were a tertiary motion under the statute. It would simply be too late for Defendants to make that point now.

Third, even if the Court determines that Judge Herman did have a statutory obligation to refer the motion filed against him even before he ruled on the pending motions, and that Defendants have somehow preserved that point or that it ought to be made by the Court for their benefit, Defendants' misconduct, gamesmanship, and strategic errors compel the conclusion that Judge Herman's failure to refer the motion was harmless. This Court has explained that a trial court's ruling on the *merits* of a recusal motion is waivable, reviewable for abuse of discretion, and ultimately subject to a harmless-error analysis. Thus, in contrast to the erroneous denial of a motion to disqualify a trial judge,

> the erroneous denial of a recusal motion does not void or nullify the presiding judge's subsequent acts. While a judgment rendered in such circumstances may be reversed *on appeal*, it is not fundamental error and can be waived if not raised by proper motion.

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[3] *See also* Benchbook Tab 8, 1st CR 34, 37-41; *id.* at 41 ("Thus, as the case [is] now in the United States Court of Appeals for the 5th Circuit, jurisdiction has not re-vested in the State Court as a matter of law, and no State Court has jurisdiction to hear this case until the 5th Circuit issued its mandate . . . ."); *id.* ("Accordingly, until such time [as] the 5th Circuit issues its mandate deciding whether to remand to the district Court with directions to remand to this Court; or to keep the case in federal Court, the State Court lacks jurisdiction to continue in this case and until such time [as] the jurisdictional question is finally resolved, the recusal issues are not waived but 'go live' once the 5th Circuit decides the appeal.").

In re Union Pac. Res. Co., 969 S.W.2d 427, 428 (Tex. 1998) (emphasis added). "Recognizing this distinction," *id.*, Texas Rule of Civil Procedure 18a(f) expressly provides that the denial of a recusal motion "may be reviewed for abuse of discretion on appeal from the final judgment." TEX. R. CIV. P. 18a(f). Moreover, at least one court of appeals, informed by U.S. Supreme Court case law, has held that even if a trial court abuses its discretion in denying a motion to recuse, a reviewing court should "apply a harmless error analysis and examine: (1) the risk of injustice to the parties in the particular case; (2) the risk that denial of relief will produce injustice in other cases; and (3) the risk of undermining the public's confidence in the judicial process." *Mosley v. State*, 141 S.W.3d 816, 838 (Tex. App.—Texarkana 2004, pet. ref'd) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)); *see also In re Union Pac. Res. Co.*, 969 S.W.2d at 428 ("If the appellate court determines that the judge presiding over the recusal hearing abused his or her discretion in denying the motion and the trial judge should have been recused, the appellate court can reverse the trial court's judgment and remand for a new trial before a different judge. *This procedure is no different than the correction of any trial court error through the normal appellate process*." (emphasis added)).

Yet even though a trial court's ruling on the merits of a recusal motion is reviewed under a deferential standard and treated like any other trial court error, several courts of appeals have concluded that a trial court's initial failure to refer a recusal motion in accordance with Rule 18a(c) or Government Code Section 25.00255(f) automatically renders a subsequently rendered judgment *void*, i.e., "absolutely null" from

its inception. BLACK'S LAW DICTIONARY 921 (9th ed. 2009).[4] Like the court of appeals in this case, these courts typically point to the mandatory nature of the referral rule and then make the leap in logic that its violation—unlike other errors—requires the undoing of all subsequent trial court action. *See, e.g.*, *Gonzalez Guilbot*, 267 S.W.3d at 561 ("Because Judge Herman did not have the power to rule on his own recusal motion, all subsequent orders he entered are void. . . . Because Judge Herman's order denying the motion to recuse Judge Wood is void, a recusal motion was still pending against Judge Wood when he entered the final judgment, rendering the judgment void as well."). As far as Plaintiffs can tell, no court has articulated any policy reason for treating a referral-rule violation differently than the erroneous denial of a recusal motion on its merits.

This disparity in Texas recusal law makes no sense—the failure to refer a potentially meritless recusal motion should not result in automatic reversal of a final

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[4] *See Hudson v. Tex. Children's Hosp.*, 177 S.W.3d 232, 236-37 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that judge's failure to refer recusal motion rendered subsequent orders, including final judgment, void); *Fagin v. Duke-Keller Outdoor Adver., Inc.*, No. 04-97-01020-CV, 1999 WL 552825, at *1 (Tex. App.—San Antonio July 30, 1999, no pet.) (judge's failure to refer recusal motion voided turnover order); *In re Hesser*, No. 05-00-00769-CV, 2000 WL 694742, at *1-2 (Tex. App.—Dallas May 31, 2000, no pet.) (judge's failure to refer recusal motion voided subsequent order granting motion for new trial); *Bourgeois v. Collier*, 959 S.W.2d 241, 246 (Tex. App.—Dallas 1997, no writ) (vacating findings of fact and conclusions of law due to violation of referral rule); *Brosseau v. Ranzau*, 911 S.W.2d 890, 893 (Tex. App.—Beaumont 1995, no writ) (orders dissolving receivership, extending temporary restraining order, and granting temporary injunction all void due to referral-rule violation); *Leon County v. Grayson*, No. 10-03-101-CV, 2003 WL 21780961, at *2 (Tex. App.—Waco July 30, 2003, no pet.) (writ of mandamus issued after violation of referral rule was void); *In re Rio Grande Valley Gas Co.*, 987 S.W.2d 167, 179 (Tex. App.—Corpus Christi 1999, no pet.) (transfer orders issued in violation of referral rule held void); *cf. In re M.E.H.*, No. 2-02-376-CV, 2004 WL 1471092, at *2 (Tex. App.—Fort Worth July 1, 2004, no pet.) (holding judge's order dismissing lawsuit for want of prosecution while recusal motion was still pending was void).

But see De Leon v. Aguilar, 127 S.W.3d 1, 6 (Tex. Crim. App. 2004) ("[A] trial judge's failure to comply with Rule 18a can be harmless where the record demonstrates that the trial judge was not biased."); 47 TEX. JUR. 3D *Judges* § 109 (2010) ("Either a trial judge's failure to . . . recuse himself or herself upon a proper motion or refer the motion to another judge or a deciding judge's denial of a motion to recuse may be harmless error." (citing *Mosley*)).

judgment when the outright denial of a decidedly meritorious recusal motion does not. The Court should clarify the effect of a judge's failure to follow the referral rule and hold that, like the erroneous denial of a recusal motion, a trial court's initial failure to refer a recusal motion is subject to harmless-error review on appeal.

Furthermore, regardless of what kind of harm analysis the Court employs, any error by Judge Herman is clearly harmless here. Judge Herman's failure to refer the recusal motion filed against him cannot "probably"—or even possibly—have "caused the rendition of an improper judgment," TEX. R. APP. P. 44.1(a)(1), because Defendants (i) intentionally passed on their opportunity to participate in the trial on the merits;[5] (ii) failed to appeal Judge Wood's death-penalty-sanctions order, which prohibits them from refuting Plaintiffs' underlying claims;[6] and (iii) failed to appeal Judge Herman's denial of the motion to recuse filed against him, thus implicitly conceding its lack of merit.

The analysis is essentially the same under the federal test applied by the Sixth Court of Appeals in *Mosley*. In particular, Defendants' failure to appeal the denial of their motion to recuse Judge Herman precludes any risk that Judge Herman's initial declination to refer that motion would result in any injustice to Defendants or future litigants, or that the public's confidence in the judicial process would be undermined by this Court's reversing the court of appeals' judgment and affirming the trial court's judgment for Plaintiffs on harmless-error grounds. *See Mosley*, 141 S.W.3d at 838 (applying three-factor test set forth in *Liljeberg*, 486 U.S. at 864). Indeed, rewarding

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[5] *See* 1 (of 26) RR 22-23.

[6] *See* Benchbook Tab 2, 17 CR 4015.

Defendants' gamesmanship with another bite at the apple would pose a much greater risk to the public's confidence in the judicial process than would a disposition favorable to Plaintiffs.[7]

[7] If the Court determines (i) that Judge Herman had a statutory duty to refer the recusal motion filed against him, (ii) that Defendants have preserved error on this point, and (iii) either that harmless-error principles do not apply or that Judge Herman's error was harmful, then the most pragmatic and efficient disposition would be for the Court to abate this case while Judge Spencer considers and rules on the motion to recuse Judge Herman. As Defendants stress in their briefing, after the court of appeals issued its decision in this case, Judge Herman *did* refer the motion to recuse filed against him to Chief Justice Jefferson for assignment, and Chief Justice Jefferson then directed the Honorable Polly Jackson Spencer to hear the motion. *See* Defs.' Resp. Br. 6-7; Defs.' Pet. Rev. App. B-F. At the urging of *both* parties, Judge Spencer agreed not to schedule a hearing until the proceedings in this Court had been completed. *See id.* App. E-F. But as Defendants concede, her appointment remains in effect to this day. *See* Defs.' Resp. Br. 7 ("Judge Jackson Spencer's October 17, 2008 assignment continues to be in effect . . . .").

Accordingly, if the Court views Judge Herman's initial failure to refer the recusal motion filed against him as reversible error, then, in the interest of efficiency and judicial economy, the Court should abate this case now so Judge Spencer can decide the motion to recuse Judge Herman, while retaining jurisdiction over the case to issue a final opinion after the motion to recuse is decided. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003) (where plaintiffs filed a motion to disqualify King Ranch's attorney after King Ranch had filed petition for review but before petition had been granted, explaining that Court had abated appeal and remanded so trial court could rule on motion to disqualify and issue findings of fact and conclusions of law and that Court lifted abatement order once motion was denied by trial court); *Sun Exploration & Prod. Co. v. Jackson*, 783 S.W.2d 202, 208 (Tex. 1998) (Gonzalez, J., concurring) ("Another avenue available to appellate courts is to abate the appeal while a hearing is conducted on recusal. The judge assigned to hear the recusal motion will decide whether the trial judge was biased or prejudiced within the meaning of Tex. R. Civ. P. 18b(2)."); *Ross v. State*, 947 S.W.2d 672, 673 (Tex. App.—Texarkana 1997, no writ) ("Before ruling on other issues in the case, in the interest of time and expense to all concerned, we find it necessary to abate the appeal and order the trial court to refer this motion to the presiding judge . . . for the assignment of another judge to hear the motion to recuse."); *Sanchez v. State*, 927 S.W.2d 195, 198 (Tex. App.—El Paso 1996, no writ) ("Where an appellate court finds that the trial court erred in failing to have a hearing on a motion to recuse, the proper remedy is to abate the appeal and order the administrative judge of the judicial region to hear, or assign another judge to hear, a recusal motion.").

If Judge Spencer were to grant Defendants' motion, then Judge Wood's final judgment would be vacated without regard to anything in the court of appeals' opinion and without need for any further action by this Court. If she were to deny the motion, then this Court could proceed to resolve the issues raised in this cause.

II. Under the circumstances of this case, the court of appeals correctly held that jurisdiction revested in the probate court when the remand order was filed there.

Notwithstanding its clear error on the recusal issue, the court of appeals properly held that jurisdiction did revest in the state court prior to trial because *Quaestor*'s "mailing" language cannot be taken to its literal extreme. This Court should likewise reject Defendants' hypertechnical readings of Section 1447(c) and *Quaestor*.

A. The Court need not revisit *Quaestor* because Defendants have failed to request a remand.

As an initial matter, even if Defendants were correct that jurisdiction only reverts to the state court after remand if and when the federal district clerk mails a certified copy of the remand order, Defendants still would not be entitled to a new trial because they have never requested one. This Court has declined to remand for a new trial where a party failed to request such relief. *See Stevens v. Nat'l Educ. Ctrs., Inc.*, 11 S.W.3d 185, 186 (Tex. 2000) (per curiam) (assuming that trial court's submission of broad-form jury question on damages was harmful error but nevertheless declining to grant petitioner a new trial because petitioner "specifically requested that [the] Court not remand for a new trial and prayed only for rendition" and thus "did not request appropriate relief"); *Tex. Prudential Ins. Co. v. Dillard*, 307 S.W.2d 242, 252 (Tex. 1957) (declining to remand for further development of the record where "the respondent's otherwise rather elaborate brief contain[ed] no request for a remand"). Several courts of appeals have followed suit, echoing the "established . . . proposition that relief that has not been prayed [for] cannot be granted." *West End API, Ltd. v. Rothpletz*, 732 S.W.2d

371, 374 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) ("What can be better established than the proposition that relief that has not been prayed cannot be granted? Owners have given no indication anywhere in their briefs that they desire a new trial of the adverse possession claim. They only ask that we render judgment in their favor. . . . [W]e must limit Owners to the relief prayed." (citing *Tex. Prudential Ins. Co.*, 307 S.W.2d at 252)).[8]

Defendants do not ask this Court to affirm the court of appeals' judgment ordering remand or to render any other judgment that would result in a remand for a new trial. Defendants ask this Court only to "vacate the judgment of the 14th Court of Appeals, and dismiss the underlying case for lack of jurisdiction." Defs.' Merits Br. 29; *see* Defs.' Reply Br. 15; Defs.' Pet. Rev. 15; Defs.' Reply in Supp. of Pet. Rev. 8. Defendants' consistent position has been that the probate court lacks jurisdiction to retry Plaintiffs' claims because the hand-delivery of the remand order "destroyed jurisdiction in both [federal and state] courts," Defs.' Merits Br. 16, thereby propelling this case into perpetual judicial limbo. *See id.* at 17 ("[N]either the trial court nor the federal court has jurisdiction over this case, *nor can either be re-vested with jurisdiction in the future*." (emphasis added)).

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[8] *See also Jay Petroleum, L.L.C. v. EOG Res., Inc.*, ---S.W.3d---, No. 01-08-00541-CV, 2009 WL 1270251, at *3 (Tex. App.—Houston [1st Dist.] May 7, 2009, pet. denied) ("A court cannot grant relief that a party fails to request. If an appellant requests reversal and rendition of judgment, an appellate court will not reverse and remand."); *Molina v. Moore*, 33 S.W.3d 323, 327 (Tex. App.—Amarillo 2000, no pet.) ("Should we determine, in considering appellant's issue on this appeal, that the record contains error warranting reversal and that remand for a new trial would be the appropriate remedy, we are not authorized to remand for a new trial because appellant has requested this court only to reverse and render judgment in her favor."); *Hampton v. State Farm Mut. Auto. Ins. Co.*, 778 S.W.2d 476, 480 (Tex. App.—Corpus Christi 1989, no writ) (on motion for rehearing) (denying appellant's request for prejudgment interest because "appellant did not complain about interest or pray for prejudgment interest and penalties before [the court's] opinion was handed down" and citing the rule that "[r]elief that has not been prayed for on appeal cannot be granted").

Defendants obviously do not want a new trial—and for good reason. They do not want another fact-finder to hear that they "destroyed evidence" and produced "forged and counterfeited . . . stock certificates" in discovery in order to prove ownership of the family businesses at issue in this case and those businesses' assets. Benchbook Tab 2, 17 CR 4016-19. Indeed, Defendants' elaborate efforts to avoid trial the first time—coupled with their cross-petitioning for review on the *Quaestor* issue rather than raising that issue as a responsive cross-point to Plaintiffs' petition[9]—prove that a trial is the last thing Defendants want. Because Defendants "did not request appropriate relief" for the error they allege, *Stevens*, 11 S.W.3d at 186, the Court need not re-examine the *Quaestor* issue at all.

B. The Court should not elevate its *Quaestor* dictum into a blanket holding on the meaning of a federal statute.

If the Court does choose to address Defendants' "mailing" argument, then the court of appeals properly rejected it for several reasons.

First, the language of Section 1447(c) is ambiguous:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be *remanded*. . . . A certified copy of the order of remand *shall be mailed* by the clerk to the clerk of the State court. The State court may *thereupon* proceed with such case.

[9] *Cf. Dean v. Lafayette Place (Section One) Council of Co-owners, Inc.*, 999 S.W.2d 814, 818 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("If an appellee is satisfied with the relief granted by the trial court, but merely wants to present additional, independent grounds for affirming the trial court's judgment, no notice of appeal is required. The independent grounds for affirmance can be raised in a cross-point as long as the appellee is not requesting greater relief than that awarded by the trial court."). *Compare* TEX. R. APP. P. 53.1 ("A party who seeks to alter the court of appeals' judgment must file a petition for review."), *with* TEX. R. APP. P. 53.3(c)(2) (listing, among other requirements for a response to a petition for review, "a statement of the issues presented" if "the respondent is asserting independent grounds for affirmance of the court of appeals' judgment").

28 U.S.C. § 1447(c) (emphasis added). As Justice Hecht noted at oral argument, it is unclear whether the "thereupon" in this section modifies "remanded" or "mailed." Defendants' main argument that the plain language of Section 1447(c) makes jurisdiction turn on mailing is therefore wrong.

A court should not "shun common sense in resolving ambiguities." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 555 (1982). Here, "[l]ogic . . . indicates that it should be the action of the court . . . rather than the action of a clerk . . . that should determine the vesting of jurisdiction." *Van Ryan v. Korean Air Lines*, 640 F. Supp. 284, 285 (C.D. Cal. 1985) (Rymer, J.); *see Health for Life Brands, Inc. v. Powley*, 57 P.3d 726, 730 (Ariz. Ct. App. 2002) ("An issue as important as whether a state court may proceed with a case should be determined by the action of a federal court . . . rather than the ministerial act of a clerk mailing a copy of the order."); *cf.* TEX. R. CIV. P. 329b; TEX. R. APP. P. 26.1 (time to file post-judgment motions and notice of appeal runs from date order is signed by judge rather than date order entered by trial court clerk).

And there is ample case law that Congress's use of the phrase "shall be mailed" does not necessarily mean that the state court is without power to proceed unless and until the federal clerk places the remand order in the mail. As the United States Supreme Court has recognized, "'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action." *Richbourg Motor Co. v. United States*, 281 U.S. 528, 534 (1930).[10]

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[10] *See also United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18 (1990) ("Many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not

Chief Justice Hughes's opinion for the Court in *Fleisher Engineering & Construction Co. v. United States*, 311 U.S. 15 (1940), is instructive. That case involved a federal statute giving subcontractors the right to sue a general contractor on a payment bond if the subcontractor first gave written notice to the contractor. *Id.* at 17 n.1. The statute specified that the "notice shall be served by mailing the same by registered mail." *Id.* The subcontractor in *Fleisher* sent notice by regular mail, but it was undisputed that the general contractor actually received it. *Id.* at 18. The Supreme Court held that the statute had been substantially complied with, explaining:

> We think that the purpose of the provision as to manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required notice within the specified time frame had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. . . . [W]e think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown.

Id. at 19.

The Court's reasoning in *Fleisher* applies equally to the mailing requirement of Section 1447(c). The likely purpose of that requirement is to document the order's being sent to, and received by, the state court. But where, as here, it is

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limit their power or render its exercise in disregard of the requisitions ineffectual." (quoting *French v. Edwards*, 80 U.S. 506, 511 (1871))); *French*, 80 U.S. at 511 ("Regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected" are "not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.").

undisputed that the state court actually received the order, then the mailing requirement becomes irrelevant.

At oral argument, Justice Wainwright suggested that the issue of when a state court reacquires jurisdiction post-remand might be controlled by state, rather than federal, law. But since the state court reacquires jurisdiction the moment the federal court loses it,[11] and Congress is empowered to determine the scope and parameters of federal-court jurisdiction, the timing of the jurisdictional transfer must be an issue of federal law. *See Spanair S.A. v. McDonnell Douglas Corp.*, 90 Cal. Rptr. 3d 864, 866 (Cal. Ct. App. 2009) ("when a state court reassumes jurisdiction over a matter that has been removed to federal court and then remanded" is "an issue of federal law"); *Blazer Elec. Supply Co. v. Bertrand*, 952 P.2d 857, 858 (Colo. Ct. App. 1998) ("[I]nterpretation of the federal removal statutes determines when a state court reassumes jurisdiction following the remand of a case which had originally been removed from state court to federal court.").

Nonetheless, Texas courts have also interpreted statutory language like "shall" to be merely directory when such an interpretation is warranted by the context of the statutory language and common sense. *See Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976) ("Although the word 'shall' is generally construed to be mandatory, it may be and is frequently held to be directory. . . . Provisions which do

[11] *See Quaestor Invs., Inc. v. State of Chiapas*, 997 S.W.2d 226, 228 (Tex. 1999) (per curiam) ("Remanding a case to state court terminates the jurisdiction of a federal district court over that case. There is no requirement that the state court take any action (*e.g.*, entering the order in the state court docket) to reassert jurisdiction." (citations omitted)).

not go to the essence of the act to be performed, but which are for the purpose of promoting the proper, orderly, and prompt conduct of business, are not ordinarily regarded as mandatory."); *Gardner v. Cleveland*, 35 Tex. 74, 76 (1871) (noting that statute "point[ing] out the mode in which depositions may be transmitted by mail to the clerk of the court in which they are to be used[] is a directory statute" and that "substantial compliance with the directions of the statute is all that is required where there is nothing to raise a presumption of fraud"); *Butler v. Taylor*, 981 S.W.2d 742, 743-44 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (reversing summary judgment for defendant where statute required that plaintiff send 60 days' notice of medical malpractice claim to defendant by certified mail but plaintiff sent notice by Express Mail and reasoning that primary purpose of statute was fulfilled because defendant acknowledged receiving notice of claim 60 days before suit was filed).

Second, as explained by the court of appeals and in Plaintiffs' response brief, *Quaestor* dealt with an issue different from the one presented here, and the Court's "mailing" language was dictum not necessary to its decision. *See* Pls.' Resp. Br. 6-10; *Gonzalez Guilbot*, 267 S.W.3d at 560. The parties' briefs to this Court confirm that the main issue in *Quaestor* was whether the filing requirement of Texas Rule of Civil Procedure 237a applies when a case is removed and remanded following a no-answer default, as the court of appeals in that case apparently held in an unpublished order.[12]

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[12] *See* Brief of Appellee, 1999 WL 33744098 at *11, *Quaestor Inv., Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (No. 98-0835); State of Chiapas's Brief on the Merits, 1999 WL 33744099, at *3 & n.1, 10-12, *Quaestor Inv., Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (No. 98-0835); Reply to State of Chiapas's Brief on the Merits, 1999 WL 33744100, at *2-3, *Quaestor Inv., Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (No. 98-0835).

Because the remand order in *Quaestor* had in fact been mailed, neither party suggested that mailing was a jurisdictional prerequisite or opined whether any other method of transmittal could suffice to transfer jurisdiction back to state court. Only Respondent State of Chiapas even mentioned the circuit conflict on the jurisdictional-transfer issue, and only in a footnote. *See* State of Chiapas's Brief on the Merits, 1999 WL 3374099, at *8 n.3.

Third, none of the cases cited in Defendants' merits brief supports their argument that Section 1447(c) makes mailing an absolute jurisdictional requirement. *See* Defs.' Merits Br. 20. The issue in most of these cases was whether the federal district court had jurisdiction to reconsider its remand order even after the order was mailed to state court[13] or between the time of entry and mailing.[14] Many use the term "mail" interchangeably with other terms like "certify,"[15] "enter,"[16] "notify,"[17] "sent,"[18] and

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[13] *See Hunt v. Acromed Corp.*, 961 F.2d 1079, 1080-82 (3d Cir. 1992); *Seedman v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 837 F.2d 413, 414 (9th Cir. 1988); *FDIC v. Santiago Plaza*, 598 F.2d 634, 635-36 (1st Cir. 1979); *In re La Providencia Dev. Corp.*, 406 F.2d 251, 252 (1st Cir. 1969).

[14] *See Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225-26 (3d Cir. 1995); *Hubbard v. Combustion Eng'g, Inc.*, 794 F. Supp. 221, 222 (E.D. Mich. 1992); *Cook v. J.C. Penney Co.*, 558 F. Supp. 78, 79 (N.D. Iowa 1983).

[15] *See Seedman*, 837 F.2d at 414 ("Once a district court *certifies* a remand order to state court it is divested of jurisdiction and can take no further action on the case." (emphasis added)).

[16] *See Browning v. Navarro*, 743 F.2d 1069, 1078-79 (5th Cir. 1984) ("It is axiomatic that *remanding* a case to state court terminates the jurisdiction of a federal bankruptcy or district court over that case. Even a federal court, persuaded that it has issued an erroneous remand order, cannot vacate the order once *entered*. The federal court is completely divested of jurisdiction once it *mails* a certified copy of the order to the clerk of the state court. '[O]nce a district court has decided to remand a case and has so *notified* the state court, the district judge is without power to take any further action.'" (internal citations omitted) (emphasis added) (quoting *Santiago Plaza*, 598 F.2d at 636)).

[17] *See Browning*, 743 F.2d at 1078-79; *State v. Lehman*, 278 N.W.2d 610, 615 (Neb. 1979) ("On May 2, 1978, a copy of an order remanding the case back to the state trial court . . . was *filed* in [state court]. If the jurisdiction of the state court had ever been suspended, it was certainly free to proceed after the above filing." (emphasis added)).

"file."[19] None squarely considers whether an alternate method of transmittal suffices to transfer jurisdiction back to state court.

Fourth, when presented the opportunity to invalidate state-court action because of technical noncompliance with Section 1447(c), most courts have refused to do so. *Compare Johnson v. Estelle*, 625 F.2d 75, 78 (5th Cir. 1980) (per curiam) (refusing to grant habeas-corpus relief where defendant was tried and sentenced in state court before remand order was entered and mailed because order had been announced in open court with all parties present); *Health for Life Brands, Inc.*, 57 P.3d at 730-32 (refusing to overturn final judgment rendered after remand where remand order was entered but never mailed); *First State Bank v. Leffelman*, 521 N.E.2d 195, 197-98 (Ill. Ct. App. 1988) (rejecting argument that trial court lacked jurisdiction to enter judgment of foreclosure and sale because certified copy of remand order was never mailed); *City of Orange City v. Lot 10*, No. 98-1389, 2002 WL 100674, at *2 (Iowa Ct. App. Jan. 28, 2002) ("reject[ing] [appellant's] contention that the district court lacked jurisdiction when it [entered judgment against appellant] prior to having received a *certified* copy of the remand order from the Federal District Court"); *Citizens Bank & Trust Co. v. Carr*, 583 So. 2d 864, 866 (La. Ct. App. 1991) (rejecting appellant's argument that state court

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[18] *See McCandless*, 50 F.3d at 225 ("The general rule is that a district court loses jurisdiction over a case once it has completed the remand by *sending* a certified copy of the remand order to the state court." (emphasis added)); *Hubbard v. Combustion Eng'g, Inc.*, 794 F. Supp. 221, 222 (E.D. Mich. 1992) (holding that court had jurisdiction to reconsider remand order where order "had not [yet] been *sent* to the clerk of the state court" (emphasis added)).

[19] *See Hubbard*, 794 F. Supp. at 222 (stating that "a district court retains jurisdiction to reconsider a remand order where a certified copy of the order has not yet been *mailed* to clerk of the state court" while also citing cases using the terms "certification," "filed," and "sent" (emphasis added)); *Lehman*, 278 N.W.2d at 615 ("[I]t should be noted that after the State court is *notified* of the remand, it resumes jurisdiction . . . ." (internal quotation marks omitted) (emphasis added)).

lacked jurisdiction to render judgment of eviction against her, reasoning that "it was not error for the trial court to base its finding of reinstated jurisdiction on a true copy of the remand order provided by counsel instead of a remand order mailed by the federal court clerk"); *and State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 889 P.2d 204, 206-07 (N.M. Ct. App. 1993) (refusing to invalidate state-court action in two-and-one-half-year period between entry and mailing of remand order, where order was filed in state court by plaintiff's counsel), *with State ex rel. Nixon v. Moore*, 108 S.W.3d 813, 820-21 (Mo. Ct. App. 2003) (reversing summary judgment for State against *pro se* inmate for State's cost of incarcerating inmate) (discussed *infra*).

These courts have reasoned that "substance must control [over] form," *Johnson*, 625 F.2d at 78; that interpreting Section 1447(c) to make jurisdiction turn on the court's entering the remand order "prevents a case from floundering in some sort of legal limbo while awaiting the ministerial task of mailing a copy of the . . . order" and "furthers the intent of Congress that any doubts about the existence of removal jurisdiction in the federal courts should be resolved in favor of remand and state court jurisdiction," *Health for Life Brands, Inc.*, 57 P.3d at 731; and that to hold otherwise "would arbitrarily give one side a second opportunity to argue its case based on a clerical error, would disregard principles of comity, and would waste judicial resources," *id.* (internal citations omitted).[20]

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[20] *See also* FED. R. CIV. P. 1 (instructing courts to "construe[] and administer[]" the federal rules "to secure the just, speedy, and inexpensive determination of every action and proceeding"); *Balestriere Lanza PLLC v. Silver Point Capital, LP*, No. 08 Civ. 4731, 2008 WL 2557454, at *2 (S.D.N.Y. June 26, 2008) ("Though [Rule 1] does not, strictly speaking, govern the interpretation of § 1447(c), it should be the touchstone not only of judicial action, but of behavior of members of the bar as well.").

The lone case Plaintiffs have found actually vacating a post-remand judgment, *State ex rel. Nixon v. Moore*, 108 S.W.3d 813 (Mo. Ct. App. 2003), involved truly egregious facts. After a prison inmate, Moore, won a judgment of $9,800 against the State of Missouri for failing to provide necessary medical care, the State brought its own statutory action against Moore in state court to recover the cost of incarcerating him. *Id.* at 814. Moore removed the case to federal court *in forma pauperis* in October 2001. *Id.* at 815. The federal district court entered a remand order in February 2002, but it was not mailed until April 2002, after Moore had filed, and the federal court had denied, two motions for reconsideration. *Id.*

But the State never ceased litigating the merits of its reimbursement claim in state court. The State filed a motion for summary judgment in November 2001, while the federal court indisputably had jurisdiction over the case. *Id.* In March 2002, a few weeks before remand order was mailed and received, the state trial court held a hearing on the summary-judgment motion—which Moore did not attend—and then proceeded to enter a judgment for the State awarding it 90% of Moore's assets (including Moore's $9,800 judgment for inadequate medical care). *Id.*

The court of appeals reversed, basing its decision not only on Section 1447(c)'s "mailing" language but also on Moore's clear reliance on that language. *See id.* at 818 ("Moore never took any action that could be construed as acquiescence in state court jurisdiction until after the mailing" of the remand order."); *id.* (noting that Moore "rel[ied] on the language of § 1447(c) [by] continu[ing] to file motions in federal court" between the time of entry and mailing and "did not acknowledge the jurisdiction of the

state court until . . . immediately after the certified copy of the remand order was mailed to the state court"); *id.* at 20 (noting that "Moore believed he was protected from any state court action until the mailing of the certified copy of the order of remand").

Here, by contrast, Defendants clearly did not rely on Section 1447(c)'s mailing language (or this Court's *Quaestor* opinion) because *they* were the first party to reinitiate litigation in probate court after the failed removal. Immediately following the remand hearing, knowing that Judge Rosenthal's remand order was being hand-delivered to the probate court for filing but before it even arrived, Defendants invoked the jurisdiction of the state court by moving to recuse Judge Wood. Defs.' Pet. Rev. Reply App. A at 35-36 (transcript of remand hearing); 1st CR 7; 28 CR 6774; *cf. State ex rel. Village of Los Ranchos de Albuquerque*, 889 P.2d at 207 ("[I]t appears particularly unseemly for Plaintiffs first to have filed the remand order to induce the state district court to grant a temporary restraining order and then to attack the state court's jurisdiction after the preliminary injunction is reversed on appeal.").

Fifth, the literal application of *Quaestor* would erect an awkward jurisdictional demarcation line. If jurisdiction can only be transferred by the federal clerk's mailing a remand order, there will be times when the state court lacks jurisdiction but may not know it. In particular, since Rule 237a requires a plaintiff to file a copy of the remand order in state court to trigger the defendant's time for filing an answer, remand orders might frequently be filed in state court before they are actually mailed by the federal court clerk. *See* TEX. R. CIV. P. 237a ("When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a

certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.").

Additionally, neither the state-court docket sheet nor the file itself is likely to reflect whether the order was filed by a party or received through the mail from the federal-court clerk, much less the date of mailing if the order *is* received from the federal-court clerk. Indeed, in *Quaestor* itself, the parties themselves disagreed on the date of mailing and receipt, and the State of Chiapas objected to any appellate consideration of the federal-court docket sheet on that issue because it was outside the state appellate court record. *See* State of Chiapas's Brief on the Merits, 1999 WL 33744099, at *9.

In sum, Plaintiffs' filing of the federal court's remand order in the probate court substantially complied with 28 U.S.C. § 1447(c), and accepting Defendants' invitation to broadly hold that jurisdiction revests in state court *only* upon mailing would defy established principles of jurisprudence and common sense alike. By contrast, the reasons for this Court to repudiate its dictum in *Quaestor* are numerous and strong. If the Court chooses to reach Defendants' remand argument, it should hold that, on the facts of this case, the probate court reacquired jurisdiction when the remand order was filed there.

III. The interests of justice would not be served by a remand.

Finally, if the Court concludes for some reason that the court of appeals' judgment must be reversed, it should render a judgment for Plaintiffs in accordance with the trial court's judgment. Even if Defendants had prayed for a remand under any theory,

see supra Part II.A., the Court should not remand this case for a new trial in the interest of justice. *See* TEX. R. APP. P. 60.3.

The Court has "broad discretion to remand for a new trial in the interest of justice," *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993), and has typically done so where it "clarifie[s] the law," *Amarillo Oil Co. v. Energy Agri-Prods., Inc.*, 794 S.W.2d 20, 28 (Tex. 1990), or "overrule[s] existing precedents on which the losing party relied at trial." *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992). Yet even if this Court clarifies its statement in *Quaestor* about jurisdiction revesting upon mailing of the remand order, the interests of justice would not be served by a remand here because Defendants did everything possible to keep this case from going to trial the first time. Their (i) falsification of key evidence, (ii) groundless removal petition, (iii) frivolous appeal of Judge Rosenthal's remand order to the Fifth Circuit, (iv) barrage of recusal motions, and (v) utter refusal to participate in the recusal hearing or trial on the merits reflect a conscious contempt for the judicial system that should not be rewarded with relief that they have not sought and apparently do not want.

This is simply not a case where Defendants "presented [their] case in reliance on controlling precedent," *Boyles*, 855 S.W.2d at 603; were somehow prevented from fully developing their factual or legal theories at trial;[21] or where rendition would lead "to a result deemed by the court to be unjust." Robert W. Calvert, *" . . . In the*

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[21] *Cf. Hagen v. Hagen*, 282 S.W.3d 899, 908 (Tex. 2009) (declining to remand for further litigation of issues relating to interpretation of a 1976 divorce decree where wife "did not appeal from the 1976 decree" and there was "no indication she did not then have full opportunity to present her legal and equitable positions, present her proof, and request the decree she wanted the trial court to enter").

Interest of Justice.”, 4 ST. MARY’S L.J. 291, 291 (1972). Rather, this is a case where Defendants have repeatedly thumbed their nose at the judicial system and wasted multiple courts’ time and resources in a concerted effort to avoid facing their day in court. Far from serving the interests of justice, giving these Defendants a new trial would be an open invitation to litigants to scorn our court system and game it to their advantage.

CONCLUSION & PRAYER

For these reasons and those given in Plaintiffs’ merits briefing, Plaintiffs respectfully urge the Court to reverse the court of appeals’ judgment and render judgment for Plaintiffs in accordance with the trial court’s judgment. Alternatively, if the Court determines that Judge Herman had an obligation to refer the motion to recuse filed against him and that his failure to do so was reversible error, then Plaintiffs ask the Court to abate this case until Judge Spencer has ruled on the motion to recuse, while retaining jurisdiction to issue an opinion and render judgment after that motion is decided.

Respectfully submitted,

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Certificate of Service

I certify that on March 9, 2010, a true and correct copy of Petitioners/Cross-Respondents' Post-Submission Brief was served by certified mail on the following counsel of record:

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