Anglican Church in North America

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THE ARCHBISHOP AND PROVINCIAL OFFICERS OF THE ANGLICAN CHURCH IN NORTH AMERICA

BEFORE THE PROVINCIAL TRIBUNAL

IN THE MATTER OF THE RT. REV. STEWART RUCH III, Petitioner

SPECIAL APPEARANCE TO PRESENT MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO VACATE STAY ORDER; MOTION TO DISQUALIFY MEMBERS OF PROVINCIAL TRIBUNAL; OBJECTIONS TO FAILURE OF MEMBERS OF TRIBUNAL TO DISCLOSE EX PARTE COMMUNICATIONS AND TO RECUSE; AND OBJECTIONS TO VIOLATIONS OF ACNA CONSTITUTION AND CANONS AND OF THE PROVINCIAL TRIBUNAL'S RULES OF COURT (hereinafter referred to as *Motion to Dismiss and to Disqualify*)

TO THE MEMBERS OF THE PROVINCIAL TRIBUNAL:

The Archbishop, the Dean of the Province, the Dean of Provincial Affairs, and two of the Chancellors of the Anglican Church in North America hereby make this Special Appearance to object to the jurisdiction of, to move to dismiss, and to submit their Objections to multiple actions by the Provincial Tribunal and members of the Tribunal, including but not limited to the Tribunal's issuance of the ***Order of the Provincial Tribunal to Stay Proceedings of Any Board of Inquiry In The Matter of the Rt. Rev. Stewart Ruch III and Request to Archbishop to Communicate Such Order*** (hereinafter the "Stay Order").

Because this is a Special Appearance specifically for the purpose of contesting the assertion of jurisdiction over the subject matter, over the Archbishop, and over a canonical Board of Inquiry by the Provincial Tribunal (the "Tribunal"), this filing addresses only the issues of the jurisdiction and authority of the Tribunal, the recusal or disqualification of members of the Tribunal, certain violations of the ACNA Constitution and Canons and the Tribunal's Rules of Court by the Tribunal and some members, improper ex parte actions by the Tribunal, and improper ex parte communications by individual members of the Tribunal. This filing therefore has the same operation and same effect as a Rule 12(b)(6) Motion to Dismiss under the Federal Rules of Civil Procedure and satisfies any and all requirements under the Rules of Court for the filing of a responsive pleading. The Archbishop, Presenting Bishops, and Provincial Officers reserve all rights to file an Answer or other responsive pleading, as well as to take any and all other appropriate actions, should the Tribunal deny this *Motion to Dismiss and to Disqualify*.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a critical moment in the history of the Provincial Tribunal and of the ACNA. For the first time in the history of the Province, the Tribunal has convened and has taken any official actions. The Tribunal's actions will establish precedents that may be long-lasting and far-reaching. The integrity, reputation, and credibility of the Tribunal are at stake, not only in this proceeding but as the foundation for any future operations of the Tribunal. It is therefore absolutely essential that the Tribunal give careful, thorough, and correct attention to first principles of the ACNA Constitution and Canons and of proper judicial functioning and to the foundational precedents that the Tribunal's actions may establish.

The Tribunal's precipitous actions by issuing its Stay Order in response to the Request for Declarations submitted by Diocese of the Upper Midwest ("DUMW") Chancellor Charlie Philbrick on behalf of Bishop Stewart Ruch (hereinafter the "Ruch Request") jeopardize fundamental canonical, jurisprudential, and due process principles. If the Tribunal does not vacate its Stay Order and *correctly* address – and therefore dismiss – the Ruch Request, the Tribunal's first official actions in its history will create a serious – yet completely unnecessary and avoidable – constitutional crisis. The Tribunal's actions will present the Archbishop and other Provincial Officers with the untenable choice between either (a) acquiescing to erroneous interpretations of the ACNA Canons and Court Rules and violations by the Tribunal of due process, of the ACNA Canons, and of the Tribunal's Rules of Court that establish dangerous precedents or else (b) refusing to act in accordance with the Stay Order and thereby creating a canonical impasse and deepening the constitutional crisis that the Tribunal has already created.

The actions of the Tribunal and of specific members of the Tribunal that require vacating the Stay Order and dismissing the Ruch Request arise primarily in one or more of the following categories:

> Certain actions of the Tribunal *exceed the* ***jurisdiction*** *and/or* ***authority*** of the Tribunal under the ACNA Constitution and Canons and the Tribunal's own Rules of Court;
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> Certain actions of the Tribunal *compromise the* ***impartiality*** of the Tribunal and/or specific members of the Tribunal; and
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> Certain actions of the Tribunal *violate* ***due process*** *and* ***natural justice*** *and the Tribunal's own procedures* under the Canons and Rules of Court.
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> Unless these actions are reversed, the Tribunal's actions will cause serious harm to *the* ***integrity*** *of the Tribunal and to the canonical structure* of the ACNA.

First, the Tribunal has taken jurisdiction of and issued an order in response to a Request that the Tribunal does not have jurisdiction or authority over under the ACNA Constitution and Canons. The Stay Order lacks any analysis of subject matter jurisdiction or canonical authority beyond its passing reference to the Tribunal having jurisdiction under "Canon IV:5:3:1" because there is a "matter in dispute" without further analysis of the specific basis for jurisdiction and analysis of the same. In doing so, the Tribunal's failure to analyze subject matter jurisdiction as a threshold issue subverts the text and the structure of Title IV of the Canons. As explained below, the Tribunal's

assertion of jurisdiction cannot be sustained under any of the subparts of Canon IV:5:3:1, not even subclause (2)(a) regarding "matters in dispute," a legal term of art that the Stay Order treats as a blank check to intervene simply because a complainant asserts that there is a "matter in dispute." For the Tribunal to take its first official action without thoughtful analysis of its canonical jurisdiction and authority and of the specific grounds for any exercise of jurisdiction sets a dangerous precedent.

Second, the Tribunal has issued a "Stay Order" when neither the Canons nor the Rules of Court give the Tribunal any authority to order a "stay."[1] The Stay Order is devoid of any analysis of where the Tribunal's asserted power to issue a "stay" arises from. The Stay Order simply assumes that the Tribunal has such power. Further, to describe what the Stay Order commands as a "stay" is a category error. The Tribunal is not suspending its own order nor the order of an inferior court. The Stay Order is more accurately a temporary restraining order ("TRO") issued to other canonical branches of the ACNA's ecclesiastical governance. But there is no basis in the ACNA Constitution or Canons or in the Rules of Court for any such authority by the Tribunal. And the Stay Order fails even to consider the relevant standards that would apply to issuance of a TRO or preliminary injunction, let alone satisfy the heavy burden that is required to justify any such injunctive relief. It would be dangerous for the Tribunal to arrogate to itself such power in any event, but for the Tribunal simply to assume it possesses such authority without articulating a reasoned principled justification under the canons for such authority is even more dangerous.

Third, not only is the Tribunal acting where it does not have jurisdiction under the Canons and issuing a Stay Order that the Canons and the Rules of Court do not give it authority to issue, but its Stay Order purports to enjoin to other canonical officers, including the Archbishop of the ACNA, and other canonical bodies of the Province to stop carrying out their canonical duties.

Fourth, the Tribunal issued its Stay Order in ex parte proceedings based entirely upon the one-sided allegations of Bishop Ruch's Chancellor, without any notice to the Archbishop, let alone the opportunity to be heard by an impartial tribunal. There was no need and no legitimate basis for the Tribunal to take any action ex parte without notice to the very Archbishop to whom the Tribunal subsequently issued its Stay Order. Indeed, the Tribunal found no difficulty in communicating its Stay Order to the Archbishop via phone and email AFTER it had decided the matter. But neither the Tribunal nor Bishop Ruch as the movant saw any need or reason to give notice to the Archbishop BEFORE the Tribunal acted ex parte on the Ruch Request.

These ex parte actions of the Tribunal are in violation of the Tribunal's own Rules of Court. There is no provision whatsoever for any ex parte or expedited proceedings, either by canon or by court rule. ACNA Canon IV:5:7 has expressly directed all Provincial courts, including the Tribunal, that "No new rule of procedure shall be made while a matter is pending that would be affected by that rule." And these ex parte actions are violations of the "due process" and "natural justice" required

[1] The Canons clearly do not grant any authority to issue stay orders to Provincial Officers and canonical bodies. There is a distinct issue whether the Tribunal even has any authority to adopt Rules that grant itself the power to issue stay orders where the Canons do not grant such authority. But that issue need not be resolved here because the Rules of Court for the Tribunal provide absolutely no basis for – and indeed, make no reference whatsoever to – any sort of authority to order a stay.

of all courts of the Province under Canon IV:5:7. Under long-standing legal and canonical principles, the most fundamental requirements of natural justice and of due process include notice and the right to be heard by an impartial tribunal before the tribunal considers or takes action in any proceeding.

Fifth, the jurisdictional, canonical, and ethical violations by the Tribunal are substantially magnified by serious issues regarding the impartiality of members of the Tribunal. Our ultimate authority, the Word of God, clearly establishes that impartiality is required for justice, commanding that "You shall not be partial in judgment" (Deut. 1:17) and declaring that "Partiality in judging is not good." (Proverbs 24:23; see also, e.g., Leviticus 19:15, Romans 2:11). The right to a hearing before an impartial tribunal is one of the foundational elements of both "due process" and of "natural justice" and thus is an essential requirement for any Canon IV:5 court under ACNA Canon IV:5:7. Four of the seven members of the Tribunal who signed the Stay Order should have recused themselves from any consideration of the Ruch Request under fundamental principles of judicial impartiality. Although the Rules of Court do not address recusals, conflicts of interest, and disqualifications, there are well-established federal statutory standards governing recusal of judges. Under those federal standards, four members of the Tribunal should have disclosed to all members of the Tribunal specific facts that compel their recusal and have recused themselves from any involvement in any proceedings related to Bishop Ruch or the DUMW.

It cannot be forgotten that the failures of interested judges to recuse themselves have caused serious harm to faithful Anglicans during their years in The Episcopal Church and during property litigation in the secular courts. The Bishop Righter trial is one painful example where bishops failed to recuse themselves from an ecclesiastical court proceeding. *See* A. Hugo Blankingship, *Reflections on the Anglican Church in North American*, at p.24. The secular church property litigation involving the Diocese of South Carolina before the South Carolina Supreme Court is another. Under Canon IV:5:7 and as a simple matter of justice and integrity, members of any judicial body must recuse themselves in circumstances where their impartiality could reasonably be questioned.

Sixth, in addition to the ex parte actions of the Tribunal in receiving and acting on the Ruch Request and issuing the Stay Order without any notice to, let alone the opportunity to be heard by, the Archbishop, Presenting Bishops, and others, individual members of the Tribunal have engaged in ex parte communications with Bishop Ruch and members of his legal team regarding the Ruch Request and the issues coming before the Tribunal. Established canons of judicial ethics require that any and all such ex parte communications must be disclosed to everyone involved or implicated in the proceedings before the Tribunal.

If the Tribunal does not vacate its Stay Order and dismiss the Ruch Request for lack of jurisdiction, and the proceeding moves forward, the Archbishop and Provincial Officers would be entitled to seek discovery under Rule of Court (8), including discovery of all such ex parte communications. Therefore, we hereby provide a "litigation hold notice" to Bishop Ruch, Chancellor Philbrick and all "Advising Chancellors" and other legal and episcopal advisors to Bishop Ruch, and also to the members of the Tribunal itself, to preserve any and all evidence of such communications.

We also trust that the members of the Tribunal recognize that any ex parte communications between members of the Tribunal and an individual or legal advisor regarding a matter before the Tribunal would not come within the attorney-client privilege and therefore would likely be discoverable in any litigation in secular courts. The claim that an individual was acting in the role of a spiritual or legal advisor to Bishop Ruch and thus should be encompassed within whatever legal privileges may be available to Bishop Ruch is undermined, if not destroyed, by such an advisor serving as a member of the Provincial Tribunal considering the Ruch Request.

Seventh, if the Tribunal does not vacate its Stay Order, dismiss the Ruch Request for lack of jurisdiction, and properly recuse the implicated members of the Tribunal, the Tribunal will be setting very dangerous precedents for the ACNA and for future disciplinary proceedings. The principle of deciding like cases alike is also an element of due process and natural justice. By taking jurisdiction of the Ruch Request, the Tribunal invites any and all future bishops – and priests and deacons – who are the subject of a Presentment to file their own Requests for Declarations with the Tribunal, asking the Tribunal to address some purported deficiency in that Presentment.[2]

If it takes jurisdiction of the Ruch Request, the Tribunal will have no principled basis to decline to take jurisdiction of any other requests for declaration. By concluding that there is a "matter in dispute" in ex parte proceedings based entirely upon the requesting party's self-serving and factually inaccurate claims in Mr. Philbrick's filings, the Provincial Tribunal will have no principled basis to find that there is not a "matter in dispute" in any other requests for declarations by any other bishops who are presented. If the Tribunal is willing to interfere before a Board of Inquiry receives and investigates a Presentment against a bishop, the reasons to interfere with a Presentment by a diocese against a priest or deacon will be even more compelling. Once the Tribunal's assertion of jurisdiction based upon its erroneous understanding of the "matter in dispute" standard becomes publicly known, there will be nothing to prevent any bishop, priest, or deacon from invoking the Tribunal's jurisdiction in the same way, by asserting that there is a "matter in dispute."

Under Canon IV:5:4:1, the Provincial Tribunal appropriately is ***the last word*** on the Title IV disciplinary process. The Tribunal is properly the court of appeal to review a conviction of a bishop by the Court for the Trial of a Bishop. It is improper and anti-canonical for the Tribunal to also purport to be ***the first word*** on the Title IV disciplinary process and to insert itself before a Board of Inquiry and attempt to control the "whether, when, how, and what" of a Presentment coming before a Board of Inquiry that the Archbishop has selected and referred a Presentment to. By doing so, the Tribunal contravenes the architecture of Title IV and the Title IV disciplinary process. It inserts the Tribunal, which Canon IV:5 establishes as a ***judicial*** body, into the place of the Board of Inquiry, which Canon IV:4 establishes as a ***non-judicial investigative and evaluative body*** selected by the Archbishop.

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[2] Indeed, the Stay Order indicates that the Tribunal initially took jurisdiction of the Ruch Request based upon Mr. Philbrick's representations alone and before any copy of the Presentment was before it. As the Tribunal knows, there is no requirement under the canons for a Presentment to be served upon or disclosed to a bishop before it is served upon the Bishop by the Court for the Trial of a Bishop. See ACNA Canon IV:4:6 and Canon IV:5:2. Here, the Presentment was available to Bishop Ruch and his legal team because the Archbishop graciously provided it in response to Bishop Ruch's request.

It is both ironic and tragic that the Ruch Request and the Tribunal's Stay Order are eviscerating the very Title IV mechanisms that offer the only remaining hope of credibly exonerating Bishop Ruch, in whole or in part. Such credible exoneration can only occur if those mechanisms proceed under Title IV without further interference and reach their independent conclusions based upon credible evidence from third-party investigations.[3] At each stage, the ACNA process has focused upon having independent entities obtain and evaluate credible evidence to determine whether anything should proceed to the next stage in the disciplinary process. The Board of Inquiry may determine that the evidence does not provide sufficient "probable cause" or "reasonable grounds" to put Bishop Ruch to trial. Or the Court for the Trial of a Bishop may determine that the evidence is insufficient to support the charges.

But if the Provincial Tribunal inserts itself as ***the first word*** in this process and purports to determine what, if anything, may go before the Board of Inquiry, the credibility of the Tribunal itself and of the entire process will be severely undermined. That loss of credibility will be magnified exponentially if the ex parte proceedings that the Tribunal has already conducted, the non-recusals of members of the Tribunal with clear disqualifying roles and activities, and all ex parte communications between any member of the Tribunal and Bishop Ruch, Chancellor Philbrick, or other advisors to Bishop Ruch become publicly known. As a result of its own decisions, the Tribunal will have both a substantially expanded docket and substantially shrunken integrity and credibility.

Because the Provincial Tribunal does not have jurisdiction or authority under the ACNA Canons to entertain the proceeding that it has opened and has already purported to issue an Order in and does not have jurisdiction or authority under the ACNA Canons to "order" the Archbishop or any Board of Inquiry that he has appointed to take the actions that the Tribunal purports to order, the undersigned hereby make this Special Appearance to contest this erroneous assertion of jurisdiction and authority. Any appearance in this purported proceeding and all submissions and arguments made by or on behalf of the undersigned are subject to this Special Appearance and these objections to jurisdiction and do not in any way waive any objections to jurisdiction. The undersigned expressly reserve all rights to address the merits and to refute the many legal and factual errors and misrepresentations in the underlying Ruch Request should that become necessary, but it would be inappropriate to do so until all jurisdictional issues and all issues of recusal and disqualification have been fully resolved.

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[3] The Ruch Request forgets that, before Bishop Ruch and Chancellor Philbrick went on leaves of absence due to their involvement in the matters being independently investigated, Bishop Ruch promised DUMW and the public that there would be third-party investigations and that Bishop Ruch would publicly release the full Grand River Solutions ("GRS") report and not assert any privilege over it. To quote Bishop Ruch:

> First, the full report will be made public and will protect victim identities. Our intention in hiring GRS has always been transparency and we plan on a full public release of the report in keeping with that intent. We seek to walk in the light.
>
> Second, our agreement with the investigative firm is that the diocese will not assert any privilege over the report nor make any edits to it.
>
> Third, the scope of the investigation is diocesan-wide, and will include any shortcomings of the diocese.

https://midwestanglican.org/update-on-ongoing-investigation-of-abuse/

The undersigned who join in submitting this filing include:

- The Most Rev. Dr. Foley Beach, Archbishop of the Anglican Church in North America.
- The Most Rev. Dr. Ray Sutton, Provincial Dean of the ACNA and Presiding Bishop of the Reformed Episcopal Church.
- The Rt. Rev. John Guernsey, Dean of Provincial Affairs of the ACNA.
- Scott J. Ward, Esq., Chancellor of the ACNA, Chancellor of the Diocese of the Mid-Atlantic, and Chancellor of The Falls Church Anglican.
- Jeff Garrety, Esq., Vice Chancellor of the ACNA and Chancellor of the International Diocese.

In addition to the Provincial offices in which they serve, as noted above, the officers signing this Special Appearance include two of the four members of the Governance Task Force working group that drafted Title IV of the ACNA Canons in 2008-2009 (Bishop Guernsey and Chancellor Ward) and the primary author of the Rules of Court that have been adopted, with minimal revisions, by the Provincial Tribunal and the other Title IV:5 courts of the ACNA (Chancellor Garrety). Chancellor Ward was the recording secretary of the Title IV working group in 2009 and the primary custodian of the operative text of the entire ACNA Constitution and Canons throughout the 2009 Provincial Assembly at which they were ratified. These individuals have direct and immediate knowledge of the text, structure, history, drafting, and authorial intent of Title IV and the Rules of Court.

II. PROCEDURAL HISTORY

Neither the Archbishop, the Presenting Bishops, nor any of the Provincial Officers received notice of, nor were even aware of, the Ruch Request or any proceedings of the Provincial Tribunal prior to February 5, 2023. The following chronology is therefore drawn primarily from the Stay Order itself. But the timing of the Tribunal's actions demonstrate that the Tribunal has conducted ex parte proceedings without notice to the Archbishop or other Bishops and thus without any opportunity to be heard by an impartial tribunal prior to issuance of the Stay Order. These actions by the Tribunal are a clear violation of ACNA Canon IV:5:7, which applies only to the courts of the Province and requires that such courts, including the Tribunal, shall establish their own procedures that "shall be consistent with principles of fairness, due process and natural justice.…" A brief chronology will help demonstrate the impropriety and ex parte nature of the Tribunal's actions.

DATE		**ACTION**
Jan. 31, 2023		DUMW Chancellor Philbrick files with the Provincial Tribunal his ORIGINAL "Request for Declarations." This ORIGINAL Request for Declarations has never been served on or provided to the Archbishop or any of the Provincial Officers or, to our knowledge, any of the Presenting Bishops.

DATE		**ACTION**
Jan. 31, 2023		Chancellor Philbrick emails to Archbishop Beach an 11-page "Request for Investigation of Rumors" on behalf of Bishop Ruch, in response to the Archbishop's earlier request that Bishop Ruch identify in writing the specific "rumors" that he requested be investigated in his October 13, 2023 "Demand" pursuant to Canon IV:4:2 "made with the consent of The Right Reverend Eric Menees, Bishop of the Diocese of San Joaquin; The Right Reverend Julian Dobbs, Bishop of the Diocese of the Living Word, The Right Reverend Ryan Reed, Bishop of the Diocese of Fort Worth; and The Right Reverend Clark W.P. Lowenfield, Bishop of the Diocese of the Western Gulf Coast." At no point in any of these communications did Mr. Philbrick provide notice or otherwise indicate that there was any submission to or proceeding by the Provincial Tribunal at all, let alone one purporting to involve the Archbishop.
Jan. 31. 2023		Archbishop Beach emails to Bishop Ruch a copy of the signed Presentment of Bishop Ruch.
Feb. 1, 2023		Bishop Dobbs, acting as Presiding Officer of the Provincial Tribunal, contacts Archbishop Beach and ACNA Chief Operating Officer Bishop Alan Hawkins requesting contact information for each of the members of the Provincial Tribunal. At no point in any of these communications did Bishop Dobbs provide notice to or otherwise indicate that there was any submission to or proceeding by the Provincial Tribunal at all, let alone one purporting to involve the Archbishop.
Feb. 2, 2023		DUMW Chancellor Philbrick submits to the Provincial Tribunal a "Supplement" to his ORIGINAL Request for Declarations. This "Supplement" to the ORIGINAL Request for Declarations has never been served on or provided to the Archbishop or any of the Provincial Officers or, to our knowledge, any of the Presenting Bishops.
Feb. 4, 2023		Stay Order is signed by seven (7) members of the Provincial Tribunal.
Feb. 5, 2023		Bishop Dobbs contacts Archbishop Beach by telephone and subsequently emails to Archbishop Beach a copy of the Provincial Tribunal Stay Order. The email from Bishop Dobbs includes only the Stay Order. The underlying ORIGINAL Jan. 31 Request for Declarations and the Feb. 2 "Supplement" are not included and to date have never been served on or provided to the Archbishop or any of the Provincial Officers or, to our knowledge, any of the Presenting Bishops.
Feb. 15, 2023		Bishop Ruch and DUMW Chancellor Philbrick sign an "Amended Petition for Declarations" and submit it to the Provincial Tribunal. This AMENDED Petition indicates that the ORIGINAL Request did not comply with the Rules of Court.
Feb. 15, 2023		Bishop Dobbs signs a "Summons" for "the Petition for Declarations" issued by the Provincial Tribunal.

DATE		**ACTION**
March 23, 2023		As of March 23, 2023, the ORIGINAL Request for Declarations and the "Supplement" thereto have never been served on or provided to the Archbishop or any of the Provincial Officers. Therefore, the "leading pleading" upon which the Tribunal acted in issuing the Stay Order has never been served on the Archbishop, any of the Provincial Officers, or, to our knowledge, the Presenting Bishops, as required by Tribunal Rule of Court 3(c) and (d).

As this chronology demonstrates, the Archbishop was first made aware of the existence of any proceeding before the Provincial Tribunal whatsoever on the evening of Sunday, February 5, 2023, when he received an email and a telephone call from Bishop Julian Dobbs who said he was acting in the capacity of President Officer of the Provincial Tribunal. That email included as an attachment the 3-page PDF document titled ***Order of the Provincial Tribunal to Stay Proceedings of Any Board of Inquiry in the Matter of the Rt. Rev. Stewart Ruch III and Request to Archbishop to Communicate Such Order*** (the "Stay Order"). The email from Bishop Dobbs included only the Tribunal's Stay Order. The underlying ORIGINAL Feb. 1 Request for Declarations and the Feb. 2 "Supplement" were not included and to date have never been served on or provided to the Archbishop or any of the Provincial Officers. ACNA Chancellor Ward was CC-ed on that email.[4]

Bishop Dobbs had texted the Archbishop four days earlier, on Wednesday, January 31, 2023. In that text, Bishop Dobbs asked the Archbishop for the contact information for other members of the Provincial Tribunal. But in that January 31 text, Bishop Dobbs did not give any hint, let alone proper notice, that any members of the Tribunal had already received and were acting upon the ORIGINAL "Request for Declarations" from Bishop Stewart Ruch and his Chancellor Charlie Philbrick, Esq., or that they had also received from Mr. Philbrick a "Supplement" to that ORIGINAL "Request for Declarations."

The Archbishop has never been served with or otherwise received the January 31 ORIGINAL Request for Declarations or the February 2 "Supplement." This is crucial because this was the pleading the Tribunal acted upon in issuing its Stay Order.

III. ARGUMENT

(1) The Tribunal Has No Jurisdiction or Authority Under the ACNA Constitution and Canons (nor the Rules of Court) to Act On Bishop Ruch's "Request for Declarations" Regarding the Validity of a Presentment or the Operations of a Board of Inquiry.

As a threshold matter, the Provincial Tribunal has no jurisdiction and no authority to entertain or act upon, let alone to do so ex parte and without notice, Bishop Ruch's "Request for Declarations" regarding the validity of a Presentment submitted for consideration by a Board of Inquiry appointed by the Archbishop. The Tribunal's actions to intervene at this stage of the Title IV

[4] A copy of this February 5, 2023 email from Bishop Dobbs and the attached PT Stay Order is attached hereto as Exhibit 1.

process are not authorized by the ACNA Canons. Taking jurisdiction of a presented Bishop's challenge to a Presentment usurps the canonical authority of the Board of Inquiry to "hear the accusations and such proof as the accusers may produce, and [to] determine whether, upon matters of law and fact, as presented to them, there are reasonable grounds to put the accused to trial." And the Tribunal's actions fundamentally alter the structure and design of Title IV disciplinary process. In other words, the Tribunal's actions are not authorized by but rather contravene the text, structure, and history of Title IV.

The first step for any court or tribunal considering a matter is to make certain that it has subject matter jurisdiction. That is particularly important where, as here, the Tribunal has a specific and narrowly defined jurisdiction. Although a tribunal might determine *sua sponte* that it does ***not*** have jurisdiction, it is improper for a tribunal to determine that it ***does*** have jurisdiction without having afforded an "Interested Party" (to use the Tribunal's term) to which it purports to issue a Stay Order an opportunity to explain why the tribunal has no jurisdiction over the subject matter (nor, as addressed below, over the entities to whom the Tribunal purports to issue its Stay Order).

The Provincial Tribunal's jurisdiction is set forth in and is limited by Constitution Article XI and Canon IV:5:4:1. Article XI of the Constitution provides in full:

> **ARTICLE XI: PROVINCIAL TRIBUNAL AND OTHER COURTS**
> 1. There shall be an ecclesiastical court of final decision to be known as the Provincial Tribunal consisting of seven members, both lay and clergy, who shall be appointed by the Provincial Council on such terms and conditions as determined by canon. The jurisdiction of the Provincial Tribunal shall be to determine matters in dispute arising from the Constitution and Canons of the Province and such other matters as may be authorized by canon.

ACNA Canon IV:5:4:1 defines the jurisdiction of the Provincial Tribunal. It provides in full:

> **Section 4 -** *Concerning the Provincial Tribunal*
> 1. There shall be a Provincial Tribunal as provided in the Constitution of the Church. The Provincial Tribunal shall serve: (1) as a court of review in the case of a conviction after trial of a Bishop, Presbyter, or Deacon; and (2) as a court of original jurisdiction: (a) to hear and decide matters in dispute arising from the Constitution and Canons of the Province, (b) to hear and decide disputes between Dioceses, (c) to hear and decide appeals by a bishop pursuant to Canons I.3.3(d) and III.8.7(d) and (d) to issue nonbinding advisory opinions on issues submitted by the College of Bishops, the Provincial Council, or the Provincial Assembly.

The jurisdiction, authority, and operations of the Provincial Tribunal are also governed and limited by ACNA Canon IV:5:7, which provides in full:

> **Section 7 -** *Concerning Procedures*
> The Provincial Tribunal, the Court for Trial of a Bishop, the Court of Extraordinary Jurisdiction, and the Trial Courts of the several Dioceses shall establish their own procedures, to include the appointment of a recorder of proceedings. Such procedures shall acknowledge the presumption of innocence of the accused, the

> right to representation by counsel, the right to confront and examine witnesses and shall be consistent with principles of fairness, due process and natural justice and shall require expeditious handling consistent with those principles. No new rule of procedure shall be made while a matter is pending that would be affected by that rule. In all courts of original jurisdiction, the standard of proof shall be by clear and convincing evidence. Unless a higher standard is required by diocesan Canon for a Diocesan Trial Court, the affirmative vote of not fewer than a majority of the members of a Court shall be required for any determination by that Court.

The requirement that all procedures of the Tribunal "shall be consistent with principles of fairness, due process and natural justice" is not generic or amorphous. These are well established legal terms of art recognized in both secular and ecclesiastical law in North America and in the United Kingdom. The meanings of those terms are quite clear and are well summarized as follows:

> The basis of procedural protection in the English system is the concept of natural justice. Natural justice is not, despite its name, a general natural law concept; the name is a term of art that denotes specific procedural rights in the English system. Natural justice includes two fundamental principles. The first, *audi alteram partem*, relates to the right to be heard; the second, *nemo debet esse judex in propria sua causa* or *nemo judex in re sua*, establishes the right to an unbiased tribunal.[5]

The meaning of "due process" is also well-established under U.S. law and imposes similar requirements. As the U.S. Supreme Court has repeatedly reinforced, due process requires, at a minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. *See, e.g.*, *Mullane v. Central Hanover Bank* (1950); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). In *Goldberg*, the Court emphasized that "an impartial decisionmaker is essential." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), *citing In re Murchison,* 349 U. S. 133 (1955); *Wong Yang Sung v. McGrath,* 339 U. S. 33, 45-46 (1950).

(1.1) The Tribunal's Actions Contravene the Text and Structure of Title IV.

The language of the Canon IV:5:4:1 is clear. The Tribunal's ***proper*** basis to exercise jurisdiction over the Title IV discipline process comes at the very conclusion of that process: "as a court of review in the case of a conviction after trial of a Bishop, Presbyter, or Deacon;" under clause (1). The Tribunal cannot make an "end-around" to intervene in the Title IV disciplinary process at an earlier stage in any Title IV proceeding because that would convert the Tribunal from "a court of review" to a participant in the Title IV process. That would result, in the event of an appeal after a conviction, in the Tribunal reviewing its own earlier decision. For a court to review on appeal its decisions when acting as a court of original jurisdiction would be a violation of the well-established natural justice principle of *nemo judex in causa sua potest* (no one can be a judge in his own case).

The Tribunal has jurisdiction only after a conviction in a trial court of a member of the clergy and only to act as a court of review reviewing the full record that was developed through the operations of the other canonical entities established by and/or authorized in Title IV: the Court for the Trial

[5] Frederick F. Schauer, *English Natural Justice and American Due Process: An Analytical Comparison*, 18 William & Mary L. Rev. 47, 48 (1976).

of a Bishop, the Board of Inquiry, and the Archbishop. See Canon IV:5:4:1(1); Canon IV:5:5; and Canon IV:5:6:1. That limited grant of authority also operates as a limitation of authority. And that limitation of authority is clear and intentional.

The Tribunal does not have jurisdiction or authority to act at any earlier point in the Title IV disciplinary process. For the Tribunal to purport to consider, let alone determine, whether a Presentment is flawed while that Presentment is being drafted, or is being considered by a Board of Inquiry, or is being litigated in the appropriate Court for the Trial of a Bishop or diocesan trial court would be to usurp the jurisdiction and authority of that other canonical actor. The Board of Inquiry must judge any Presentment coming before it as part of its canonical duty under Canon IV:4:4 to "investigate such rumors, reports, or charges, as the case may be," "to hear the accusations and such proof as the accusers may produce," and to "determine whether, upon matters of law and fact, as presented to them, there are reasonable grounds to put the accused to trial." The Board may determine that there are not reasonable grounds to put the accused to trial – whether based upon the facts before it following its investigation, the applicable law, or any apparent invalidity in the Presentment.[6]

But by entertaining the Ruch Request for Declarations, the Tribunal arrogates to itself the canonical authority, jurisdiction, and duties of the Board of Inquiry. The Tribunal may do so needlessly since the Board itself might conclude that a Presentment should not go any further. And the Tribunal will do so without the benefit of the fully developed factual record and legal analysis (particularly as to probable cause) that the Board of Inquiry may gather in carrying out its duties under Canon IV:4:4-6. All such actions by the Tribunal, just like its actions thus far in regard to the Ruch Request for Declarations, will be premature and without benefit of a proper factual record. That is in stark contrast to what Canon IV:5:6 requires for any review by the Tribunal on appeal. In addition, to the extent that the Tribunal, as it has done here, entertains any ex parte proceedings, the Tribunal will be without the benefit even of an opposing point of view. The Tribunal will fail to serve as a shining example of proper canonical interpretation and appropriate self-restraint and will instead become recognized as a partisan body that has undermined fairness.

The same is true for the subsequent stages in the process. Only if the Board of Inquiry determines that there is probable cause for the Presentment – or some but not all of the charges in the Presentment – to proceed to trial, the Court for the Trial of Bishop (or appropriate diocesan trial court for a Presbyter or Deacon) provides yet another level of fresh and independent review.

The Court for the Trial of a Bishop is the first moment in the case where the Canons envision anything resembling an adversarial process, let alone a judicial rather than investigative process. That is by design. Upon the Board of Inquiry determining there is "reasonable grounds" (Canon IV:4:4) or "probable cause" (Canon IV:4:6) to put the accused bishop to trial, the matter for the

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[6] Canon IV:4:4 provides in full:

> **Section 4 -** *Concerning the Process of Inquiry*
>
> The Board of Inquiry shall investigate such rumors, reports, or charges, as the case may be. In conducting the investigation, the Board shall hear the accusations and such proof as the accusers may produce, and shall determine whether, upon matters of law and fact, as presented to them, there are reasonable grounds to put the accused to trial.

first time moves from an investigative stage and process into a judicial stage and process, and from an executive body to a judicial body. Similarly, the Canons and Rules of Court require that the Presentment be served upon the named Bishop only when the Presentment is filed with the Court for the Trial of a Bishop. The Canons do NOT require service or even disclosure of the Presentment to the accused Bishop at any stage in the Title IV process before it reaches the Court for the Trial of a Bishop. Any sharing of the Presentment prior to that is entirely discretionary with the relevant actors: with the three bishops or ten non-bishops signing the Presentment or with the Archbishop or his designee or the full College receiving the Presentment.

Further, by intervening at any of these earlier stages, the Tribunal deprives itself of exactly what Title IV so clearly requires that the Tribunal have as the basis for any proper review of conviction on appeal: (1) an actual conviction by the trial court and (2) a fully developed factual record. Canon IV:5:6:1 is quite explicit: the basis for the Tribunal's review and actions – which can include overturning a conviction or ordering a new trial – is the record from the court below.[7]

(1.2) The Tribunal's Actions Contravene the Text of Canon IV:5:3 As There Is No "Matter In Dispute" Within the Meaning of Title IV.

The Tribunal's Stay Order asserts that "[t]his Court has original jurisdiction under Article XI of the Constitution and Canon IV.5.4.1 of the ACNA to hear and decide matters in dispute arising from the Constitution and Canons of the Province." But the Stay Order provides no analysis to support this assertion of jurisdiction. Its conclusion is erroneous both factually and legally.

One would expect that in the first action that the Tribunal has entertained and the first Order that the Tribunal purports to issue, the Tribunal would have given thorough and thoughtful analysis to whether it was proper for the Tribunal to exercise jurisdiction of the subject matter. The Tribunal is setting a foundational precedent that will have far-reaching implications for decades to come throughout the ACNA. Yet the Tribunal acted without any such analysis or explanation.

Principle 24: Due Judicial Process, of the *Principles of Canon Law Common to the Churches of the Anglican Communion* (2d Ed. 2022) states:

> 12. Church courts and tribunals must give their decisions, and the reasons for them, in writing, and both decisions and reasons must be based on fact and law.

Indeed, the principles of due process and natural justice that Canon IV:5:7 imposes upon the Tribunal also require no less.

The Stay Order clearly interprets the "matters in dispute" language of the Constitution and Canons extremely expansively. There are no limits whatsoever in the Stay Order. There is no discussion of the meanings of any of the canonical terms. There is no analysis in the Stay Order of what the

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[7] Canon IV:5:6:1 provides in full:

> The Provincial Tribunal shall hear the appeal based solely upon the record in the trial court. The parties may submit written briefs and may request oral argument. The Provincial Tribunal may reverse or affirm, in whole or in part, the appealed decision, or, if in its opinion justice shall require, may grant a new trial.

Tribunal believes are the boundaries of the "matters in dispute" language. There is no analysis of what is necessary, nor of what would not be sufficient, to satisfy that requirement. Indeed, the Tribunal determined that all requirements for its jurisdiction were satisfied based entirely upon the representations of *only one side* to the purported matter in dispute, that of Bishop Ruch and Mr. Philbrick, as the Tribunal issued its Stay Order entirely on that basis. The Tribunal provided no notice, let alone any opportunity to be heard, to the Archbishop or the Presenting Bishops (or to anyone other than Bishop Ruch and Mr. Philbrick). Rather, the Tribunal simply makes a declaratory statement that it has jurisdiction without providing any reasons.

The Tribunal ignores the fact that the term "matter in dispute" is a legal term of art with a recognized legal meaning. The term has been in use since before the founding of the United States. The term "matter in dispute" is defined in Black's Law Dictionary as follows:

> The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined. *Lee v. Watson*, 1 Wall. 339, 17 L. Ed. 557; *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L.Ed. 985.

"Matter in dispute" is largely synonymous with the term "matter in controversy" which is recognized as a synonym and is similarly defined by Ballentine's Law Dictionary as:

> The subject of the litigation; the matter for which suit is brought and upon which the trial of the action proceeds. *Lee v Watson* (US), 1 Wall 337, 17 L Ed 557. The claim presented on the record of a case in court to the legal consideration of the court, ordinarily the amount demanded by the plaintiff's pleading.

The term "matter in dispute" appears fifteen times in the Judiciary Act of 1789, the foundational law that structured and established procedures for the entire Article III federal court system. *See, e.g., Judiciary Act of 1789*, ch. 20, § 12, 1 Stat. 73, 84. It is used there in a similar way to refer to the specific issue for which a suit has been brought and the issue joined in the existing proceedings of another court. The Judiciary Act of 1789 used the term to give the Supreme Court appellate jurisdiction to review final judgments or decrees of the federal circuit courts on writ of error if "the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs." *See id.*; Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 Duke L.J. 263, 326 (Nov. 2007).

The relevant definitions and the widespread use in specific cases of the term "matter in dispute" make clear that a "matter in dispute" only exists when the issue has been joined between parties in an existing lawsuit. Under the Judiciary Act of 1789, one party could not invoke the jurisdiction of the Supreme Court simply by asserting that the party had a disagreement with someone else about a matter with legal or even constitutional significance. It was necessary to show that the matter in dispute was one where issue had been joined between litigants in an existing proceeding. Joinder requires both parties.[8]

[8] See, e.g., https://thelawdictionary.org/joinder/

In the same way, the fact that Bishop Ruch and Mr. Philbrick may disagree with or "dispute" some aspect of the Presentment or any of the related proceedings involving the Board of Inquiry does not constitute a "matter in dispute" within the meaning of Title IV. There is no proceeding in which issue has been joined or where any such disagreement is "the subject of the litigation" or "the matter for which suit is brought and upon which the trial of the action proceeds." Bishop Ruch is not a party to the Presentment nor to the proceedings of the Board of Inquiry that will consider and investigate the Presentment. Indeed, under ACNA Canon IV:4:6 there is no requirement that Bishop Ruch even know the Presentment exists unless and until "in the judgment of two-thirds of the Board of Inquiry there is probable cause to present the accused Bishop for trial for violation of Canon 2 of this Title, [and the Board] make[s] a public declaration to that effect."

Indeed, there is an inherent, unresolvable, and deeply concerning contradiction in the Tribunal's asserting in the Stay Order that there is a "matter in dispute" within the meaning of Article XI and Canon IV:5:4:1(2)(a) sufficient to give it jurisdiction over the Ruch Request for Declarations, and yet at the same time the Tribunal's failing to give any notice, let alone the opportunity to be heard by an impartial tribunal, to the Archbishop. The Tribunal on the one hand points to the alleged "dispute" as a basis for asserting jurisdiction and yet on the other hand does not find that "dispute" sufficient even to give notice to anyone before proceeding in secret to issue a Stay Order to the Archbishop and the Board of Inquiry.[9]

The language of Constitution Article XI and of Canon IV:5:4:1(2)(a) regarding "matters in dispute" does not create a blank check for the Provincial Tribunal to intervene in canonical processes of other canonical officers and bodies simply because someone, or even the Tribunal itself, asserts that there is a dispute. The disagreement must be presented either by that issue having been joined between adverse parties in a contested proceeding or by agreement of **both** sides that there is a matter in dispute that they wish to request the Tribunal to resolve. Otherwise, there is no defensible limiting principle for what "matters in dispute" over which the Tribunal will and will not assert jurisdiction. The Tribunal's ruling will usurp unto itself the rights and duties of other canonical bodies and officers to interpret and apply the Constitution and Canons in the course of carrying out their canonical responsibilities.

(2) The Provincial Tribunal Has No Authority Under the ACNA Canons (nor the PT Rules) to Issue Its "Stay Order."

The Tribunal has purported to issue a Stay Order when neither the Canons nor the Rules of Court give the Tribunal any authority to order a stay.[10] The Stay Order is devoid of any analysis or even articulation of where the asserted power to issue a stay to other canonical officials comes from, again violating the Principle 24(12), Due Judicial Process, of *The Principles of Canon Law* requiring courts to provide their reasoning for their decision in writing. The Stay Order simply

[9] As we address below, there is no basis in the Constitution, Canons, or Rules for any ex parte proceedings.

[10] The Canons clearly do not grant any authority to issue stay orders to Provincial Officers and canonical bodies. There is a distinct issue whether the Tribunal can adopt Rules that grant itself the power to issue stay orders where the Canons do not. But that issue need not be resolved here because the Court Rules make no reference whatsoever to a stay.

assumes without any analysis that the Tribunal has such power. It would be dangerous for the Tribunal to arrogate to itself such authority, but it is even more dangerous to do so without articulating a reasoned justification. The Tribunal's assertion of jurisdiction and of the authority to issue the Stay Order is problematic and unjustifiable for multiple independent but complementary reasons.

First, and most important, for the reasons discussed above, the Tribunal does not have subject matter jurisdiction over the Ruch Request and does not have authority over the purported parties that it purports to order to stay. A responsible court normally engages in a thorough analysis of the basis for any assertion of jurisdiction over the subject matter of the action and over any party to be enjoined. Indeed, it is not unusual for a court to dismiss a request for TRO or preliminary injunction simply for lack of jurisdiction on either basis. That is exactly what the Tribunal should have done here, yet the Stay Order devotes only a single sentence to the issue of either aspect of jurisdiction.

Second, the power to issue a stay should not be assumed, implied, or arrogated. It should be established by legislation (such as the Canons) or by properly adopted court rules of procedure. Thus, the federal All Writs Act, enacted as part of the Judiciary Act of 1789,[11] authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2018). Similarly, Federal Rule of Civil Procedure 62 provides procedures that govern a stay of proceedings to enforce a judgment.

Third, there is no provision and no basis whatsoever in the ACNA Constitution and Canons nor in the Tribunal's own Rules of Court for the Provincial Tribunal to issue an injunction of any kind. And, as ACNA Canon IV:5:7 has consistently provided since 2009, "No new rule of procedure shall be made while a matter is pending that would be affected by that rule." To call the Tribunal's Stay Order "extra canonical" would be a serious understatement. The Tribunal's actions are *ultra vires* – beyond its lawful authority. The Tribunal's issuance of an injunction, in the form of the Stay Order, is not "filling in the gaps" in existing canonical authority, nor taking actions that are preparatory to and lead up to its existing canonical authority. It is arrogating to the Tribunal authority that the Constitution, Canons, and Rules of Court do not grant.[12]

Fourth, even if there were both jurisdiction and authority to issue a stay (which there is not), the Tribunal's "Stay Order" is a misnomer or category error. A stay is normally issued only by an appellate court or the trial court itself to delay a judgment or order entered by that specific trial court from going into effect. In essence, the court is staying its own proceedings or the proceedings of the court below that it is reviewing. The Supreme Court has explained the primary difference between a stay and an injunction. An injunction is a judicial process or mandate operating *in*

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[11] *See* All Writs Act, ch. 231, §§ 234, 261–62, 36 Stat. 1156, 1156, 1162 (1911) (codified as amended at 28 U.S.C. § 1651 (2018)); Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651 (2018).

[12] Mr. Philbrick or the Tribunal may assert that the canonical language permitting the Tribunal "to hear and decide matters in dispute arising from the Constitution and Canons of the Province" also implicitly grants the Tribunal authority to issue any injunctions or other orders that it believes are appropriate in support of its decisions. That would be an unsupportable and dangerous error. The power to enjoin should never be assumed or implied. It should be grounded upon an express grant of authority.

personam; the order is directed at someone and governs that party's conduct. This is so whether the injunction is preliminary or final; in both contexts, the order is directed at someone, and governs that party's conduct. *Nken v. Holder*, 556 U.S. 418, 428 (2009).

> By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability. *See* Black's [Law Dictionary], at 1413 (6th ed. 1990) (defining "stay" as "a suspension of the case or some designated proceedings within it"). *Id*.

Here, the Stay Order purports to enjoin the Archbishop – the chief executive officer of the Province – and a canonical investigative body, the Board of Inquiry, from acting. The Tribunal may call it a "stay" but in reality the Stay Order is an attempt to enjoin the ongoing operations of a different branch of the ecclesiastical governance of the ACNA, specifically, the Archbishop and a Board of Inquiry appointed pursuant to the Canons, from carrying out their canonical duties.

Moreover, the "Stay Order" was issued by the Tribunal in an ex parte proceeding, without prior notice to the Archbishop and Provincial Officers, let alone any opportunity to be heard before an impartial tribunal as required under ACNA Canon IV:5:7 and the principles of due process and natural justice. Thus, the Stay Order is best analogized to an ex parte temporary restraining order ("TRO"). Yet there is no provision in the Canons or Rules of Court for such a TRO. And the Tribunal engaged in absolutely none of the analysis required for issuance of a TRO before issuing its ex parte Stay Order.

Fifth, either a stay or a TRO should only be granted upon a clear showing by the applicant seeking such extraordinary relief. A stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian R. Co.* v. *United States*, 272 U.S. 658, 672 (1926). The party seeking a stay must make a strong showing on four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
(2) whether the applicant will be irreparably injured absent a stay;
(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
(4) where the public interest lies.

Hilton v. *Braunskill*, 481 U.S. 770, 776 (1987). There is substantial overlap between these and the factors governing preliminary injunctions, *see, e.g.*, *Winter* v. *NRDC, Inc.*, 555 U.S. 7, 24 (2008); not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined. Nken v. Holder, 556 U.S. 418, 434 (2009).

There is no indication in the Stay Order that Bishop Ruch even attempted to address this test, let alone satisfy the "heavy burden" that a moving party must carry. And there is no indication in the Stay Order that the Tribunal considered any one of these required factors, let alone all four. The burden is on the movant to satisfy all four factors before the respondent has any duty or even reason to respond and before the court has any foundation to act. We therefore reserve all rights to respond

in full should that become necessary, while trusting that the Tribunal will act correctly and dismiss the Ruch Request for lack of jurisdiction.

Sixth, issuance of a TRO or any other preliminary injunctive relief– but particularly an injunction purporting to halt executive branch bodies in the exercise of their canonical duties – requires that the party requesting such relief not only carry a heavy substantive burden of persuasion, but also satisfy all appropriate procedural requirements. In the U.S. federal courts, the granting of preliminary injunctive relief in any form is governed for by Federal Rule of Civil Procedure 65, *Injunctions and Restraining Orders*, which provides clear procedural requirements.

FRCP 65(a)(1) clearly states that a "court may issue a preliminary injunction only on notice to the adverse party." No notice was given to the Archbishop or Presenting Bishops here at any time prior to Bishop Dobbs calling the Archbishop and then immediately emailing to the Archbishop the Stay Order. Such ex parte actions are improper as discussed below. The ex parte actions also demonstrate that the Stay Order cannot be a preliminary injunction but rather is closer to a TRO.

FRCP 65(b) imposes important procedural requirements for a TRO on both the movant and the court. Subsection (1) narrowly constrains any basis for issuance of such an Order (whether termed a TRO or a "Stay Order") as follows:

> (b) TEMPORARY RESTRAINING ORDER.
>
> (1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
>
> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

We cannot comment on whether any such affidavit was submitted to the Tribunal by Mr. Philbrick because as of the filing of this *Motion to Dismiss and to Disqualify*, neither Bishop Ruch, Mr. Philbrick, nor the Provincial Tribunal itself has ever served or in any way provided any copies of the ORIGINAL Request for Declarations that Mr. Philbrick submitted on January 31, nor of the February 2 "Supplement," even though those two submissions provide the sole and entire basis for the Tribunal's issuance of its Stay Order. We can state that the allegations in the AMENDED Petition for Declarations (which the Stay Order acknowledges did not exist until February 15, 2023) are full of factual errors and misrepresentations and do not allege "that immediate and irreparable injury, loss, or damage will result to the movant" without a TRO or "Stay" in place.

For all of these reasons, the Tribunal's issuance of the Stay Order is improper and contravenes the Constitution, Canons, and Rules of Court. The Tribunal should vacate the Stay Order immediately.

(3) The Provincial Tribunal Has No Jurisdiction or Authority Under the ACNA Constitution and Canons or the PT Rules to Enjoin the Archbishop and a Board of Inquiry from Carrying Out Their Canonical Responsibilities

For all of the reasons explained above, the Tribunal has no lawful authority under the Constitution and Canons or its own Rules of Court to issue a TRO or even a stay at all. Such authority must be properly grounded, not simply assumed and exerted. But the Tribunal has even less basis to purport to enjoin other canonical officers and bodies from carrying out their canonical duties. The Stay Order attempts to enjoin the Archbishop, who is the chief executive officer of the Province, and a canonical investigative body, the Board of Inquiry, from acting. The closest analogy would be a court enjoining the President and Department of Justice from acting. All of the reasons set forth in Section (2) above apply with equal or greater force to this independent but parallel issue.

Further, the Stay Order is an attempt to enjoin the ongoing operations of a different branch of the ecclesiastical governance of the ACNA, specifically, the Archbishop and a Board of Inquiry appointed pursuant to the Canons, from carrying out their canonical duties. Such an injunction raises not only serious canonical issues but also serious separation of powers issues.

(4) The Tribunal Has Conducted Ex Parte Proceedings That Contravene Due Process, Natural Justice, the ACNA Constitution and Canons, and the Tribunal's Own Rules.

As set forth in detail in the Procedural History above, the Stay Order clearly states that the Provincial Tribunal received and began acting on the ORIGINAL Request for Declarations and the "Supplement" thereto shortly after Mr. Philbrick submitted them on January 31, 2023, and February 1, 2023, respectively.

On exactly those same dates, Mr. Philbrick was communicating via email with Archbishop Beach about receiving a copy of the Presentment. And on February 1, 2023, Bishop Dobbs, in his capacity as Presiding Officer of the Tribunal, was communicating with both Archbishop Beach and with ACNA Chief Operating Officer Bishop Alan Hawkins about contact information for the members of the Provincial Tribunal.

At any time between January 31 and February 5, 2023, Mr. Philbrick could have sent via email to Archbishop Beach the ORIGINAL Request for Declarations and the "Supplement." Indeed, less than two weeks later, on February 14, 2023, Mr. Philbrick contacted the Archbishop and the Presenting Bishops via email to ask that they accept service via email of what turned out to be the AMENDED Petition for Declarations.

At any time between January 31 and February 5, 2023, Bishop Dobbs could have informed the Archbishop that the Tribunal had received – and was convening to act upon – Mr. Philbrick's ORIGINAL Request for Declarations and "Supplement." Yet neither Bishop Dobbs nor any other member of the Tribunal provided any indication, let alone actual notice, let alone copies of the ORIGINAL Request for Declarations that the Tribunal had received from Mr. Philbrick and was then acting upon.

The Provincial Tribunal issued its Stay Order based ***entirely and solely*** on Mr. Philbrick's January 31, 2023 ORIGINAL Request for Declarations and February 1, 2023 "Supplement" thereto. The Tribunal issued the Stay Order on February 4, 2023, and Bishop Dobbs emailed it to the Archbishop on February 5, 2023. Yet as of March 23, 2023, the January 31, 2023 ORIGINAL Request for Declarations and the February 1, 2023 Supplement have never been served upon or sent to the Archbishop or any of the Provincial Officers nor, to the best of our knowledge, to any of the Presenting Bishops.[13] Thus, the Provincial Tribunal has issued its Stay Order to the Archbishop based entirely upon submissions that it never provided the Archbishop, giving neither notice of, nor any copies of, nor any opportunity to be heard in response to such submissions.

There was no need and no legitimate basis for the Tribunal to take **any** action ex parte without notice to the Archbishop to whom the Tribunal subsequently issued its Stay Order. Indeed, the Tribunal found no difficulty in communicating its Stay Order to the Archbishop via phone and email within a day ***after*** the Tribunal had considered the ORIGINAL Ruch Request. But neither the Tribunal nor Bishop Ruch and Mr. Philbrick as the movants gave any notice to the Archbishop ***before*** the Tribunal acted ex parte on the ORIGINAL Ruch Request and the "Supplement."

These ex parte actions of the Tribunal are in violation of the Tribunal's own Rules of Court. There is absolutely **no provision whatsoever** in the Rules of Court for any ex parte or expedited proceedings. The Rules also require prompt service of any and all pleadings upon the purported "Responding Party(ies)." The most relevant Rule of the Provincial Tribunal is Rule (3)(b) and (c), which requires that a Summons[14] "signed by the … presiding officer of the Court" and a copy of the "Petition, Complaint, or other leading pleading" must be served on all "Responding Party(ies)" either "by hand-delivery or Certified Mail with a Return Receipt."[15] And of course ACNA Canon IV:5:7 expressly directs all Provincial courts, including the Tribunal, that "No new rule of procedure shall be made while a matter is pending that would be affected by that rule."

Further, all these ex parte actions by the Tribunal and Mr. Philbrick not only contravene the Canons and Rules of Court, they are serious violations of the "due process" and "natural justice" expressly required of all Provincial courts, including the Provincial Tribunal, by Canon IV:5:7. Under long-standing legal and canonical principles, the most fundamental requirements of natural justice and of due process include notice and the right to be heard by an impartial tribunal before the tribunal takes action in any proceeding. As discussed above, under both secular and ecclesiastical law, "natural justice" includes "two fundamental principles. The first, *audi alteram partem* (listen to

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[13] This also means that the "leading pleading" that was filed in this proceeding – the ORIGINAL Request for Declarations submitted to the Tribunal on January 31, 2023, has never been served upon the Archbishop nor upon any of the Presenting Bishops, as is required by PT Rule of Court 3(c) and (d). Mr. Philbrick's Affidavit of Service filed with the Tribunal addresses only the AMENDED Petition for Declarations, not the ORIGINAL Request for Declarations. This is yet another failure to follow the Tribunal's own Rules.

[14] To date, the Archbishop has not received a properly served Summons. The Summons was not hand-delivered nor served by certified mail, as required by the Rules, but rather taped to the door of the Provincial office. It did not include the ORIGINAL Request for Declarations nor even the AMENDED Petition for Declarations. Notably, the Summons was not taped in an envelope, but was openly displayed to the public on the door.

[15] *See* Rule 3 of the Provincial Tribunal's Rules of Court.

the other side), relates to the right to be heard; the second, *nemo debet esse judex in propria sua causa* (no one can be a judge in his own case) or *nemo judex in re sua* (no one is a judge in his own case), establishes the right to an unbiased tribunal."[16] Similarly, "due process" requires, at a bare minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. *See, e.g.*, *Mullane v. Central Hanover Bank* (1950); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Both principles are consistent with Scripture as expressed in Proverbs 18:17, "The one who states his case first seems right, until the other comes and examines him." The Tribunal provided ***none*** of these essential elements before issuing its Stay Order.

It is significant that the Stay Order repeats the assertions by Mr. Philbrick and Bishop Ruch that the Presentment and "the investigative process leading up to the Articles of Presentment [have not] satisfied the requirements of fairness, due process and natural justice provided in Canon IV.5.7." Stay Order at pp.1-2. But in quoting this text, the Stay Order and the Request for Declarations (whether ORIGINAL or AMENDED) both alike ignore the *actual* text and structure of Title IV. Canon IV:5 applies ***only*** to the Provincial courts identified in Canon IV:5:1, including the Tribunal. The quoted Canon IV:5:7 begins by referring specifically to "**The Provincial Tribunal**, the Court for Trial of a Bishop, the Court of Extraordinary Jurisdiction, and the Trial Courts of the several Dioceses…." (emphasis added) There is no reference in Canon IV:5:7 to the Archbishop, nor to a Board of Inquiry, nor to a Presentment, nor to the signers of a Presentment.

Put bluntly, Canon IV:5:7 by its very terms does not apply to a Presentment, a Board of Inquiry, or the Archbishop. That is not an error or an accident, it is part of the architectural design of Title IV. Indeed, that is consistent with Principle 24, Due **Judicial** Process, of *The Principles of Canon Law*. Any investigation of allegations of misconduct, any preparation and submission of a Presentment, and any consideration and investigation of a Presentment by a Board of Inquiry **are not judicial acts** and **are not conducted by judicial bodies**, that is, by courts. All such actions are **investigative acts** conducted by investigative, evaluative, and charging entities – entities that intentionally are ***not*** courts. Canon IV:4:4 and IV:4:6 are very clear that the Board of Inquiry is canonically charged with ***investigating*** the matters raised by a Presentment. Title IV entrusts the Board of Inquiry with determining whether there are any deficiencies with a Presentment or the supporting evidence and, if so, what should be done either to remedy the deficiencies or to determine that there are not "reasonable grounds" or "probable clause" to present the accused Bishop for trial. Tribunals must strictly comply with all requirements of due process and natural justice because they are judicial bodies, that is, courts. But to require the same "Due **Judicial** Process" at every stage of the process of investigating and deciding whether charges against a bishop should go to trial would eviscerate the investigative process. That is one reason (of many) that Title IV does not require that a bishop be given notice of a Presentment unless and until it is served upon him by the Court for Trial of a Bishop after the Board of Inquiry determines that there is probable cause or reasonable grounds for it to proceed to trial.

Bishop Ruch and Mr. Philbrick are seeking to turn the investigative, Presentment, and Board of Inquiry processes under Title IV into a "trial before the trial." The Ruch Request – and the January 31, 2023 ORIGINAL Request and February 1, 2023 "Supplement" that the Archbishop and others

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[16] *See, e.g.*, Frederick F. Schauer, *English Natural Justice and American Due Process: An Analytical Comparison*, 18 William & Mary L. Rev. 47, 48 (1976) (summarizing sources).

have never seen – seek to substitute the Provincial Tribunal for the Board of Inquiry in making all of these determinations in the first instance, ***before*** the Presentment even reaches the Board of Inquiry. That contravenes the text, the structure, and the purposes of Title IV. The Provincial Tribunal must not become complicit in re-writing Title IV to suit Mr. Philbrick's purposes. The Ruch Request and the Stay Order pose a far greater threat to Title IV than does any action by the investigators, the Presentment, the Board of Inquiry, the Archbishop, or anyone.

Indeed, the Stay Order criticizes as deficient **the Presentment as provided by Mr. Philbrick** as part of his February 1, 2023 Supplement. The Stay Order states:

> Moreover, the presentment has contained within it references to two investigative reports, the "Husch Blackwell report" (page 5 of the presentment) and the "Telios Law report" (page 6 of the presentment). Neither of these two reports are appended nor included with the presentment, and only one of which, the "Husch Blackwell report," has ever been made public. As such, the presentment is itself by its own language not a complete document.

This criticism ignores the fact that Bishop Ruch has no right under the Constitution and Canons to be notified of, let alone to receive, any Presentment until the Board of Inquiry determines that it should proceed to trial. And it ignores the fact that the Archbishop only provided to Bishop Ruch, as a pastoral act of grace, the Presentment alone, not the supporting evidence. Of course, there would be no such confusion by the Tribunal if it were reviewing this situation pursuant to its appellate jurisdiction to review following a conviction by the Court for the Trial of a Bishop and based upon a full record as developed before that court. Because the Tribunal is improperly attempting to expand its jurisdiction beyond what Title IV envisions, the potential for misunderstandings and errors increases substantially.

Unlike Mr. Philbrick's misapplied criticism that due process has been violated in an investigative stage, Principle 24(10) of Due **Judicial** Process states, "In disciplinary and other cases **in church courts or tribunals**, the procedure is at all times to be fair and just, and is **to protect rights of the parties to notice of proceedings**, to adequate time for preparation of defence, to a presumption of innocence, **to be heard within a reasonable time**, to question evidence, to representation and to appeal in appropriate cases on a matter of fact or law." (emphasis added) This Tribunal has failed at protecting the due process rights of the Archbishop, Provincial Officers, and Presenting Bishops by not providing notice and not giving the opportunity to be heard **before this Tribunal issued its Stay Order**. The Tribunal could only do so by participating in ex parte action in violation of the Canons and its own Rules.

(5) Four Members of the Tribunal Should Have Recused from Any Involvement in Proceedings Relating to Bishop Ruch or the Diocese of the Midwest and the Archbishop and Provincial Officers Hereby Move to Disqualify Them.

Subject to and without waiving the Special Appearance and all objections to the jurisdiction and authority of the Tribunal, the Archbishop and Provincial Officers also object to the failures of four members of the Tribunal to recuse themselves, and therefore hereby file this *Motion to Disqualify*

these four members from serving in any capacity in this proceeding should the Tribunal continue to assert its jurisdiction over this subject matter and over the Archbishop and the Board of Inquiry.

(5.1) The Tribunal Should Follow Federal Standards for Recusal or Disqualification.

Neither the ACNA Constitution and Canons nor the Rules of Court for the Provincial Tribunal provide specific standards for recusal, but Canon IV:5:7 and the principles of natural justice, due process and fairness, as well as the Scriptures, require that recusal may be necessary to protect the impartiality of a court. The governing standards for recusal of a federal judge are well-established and are set forth in 28 U.S.C. §455 and in 28 U.S.C. §144. Section 455 is directly relevant to the current situation. Just as the Tribunal and other courts are to be guided by the Federal Rules of Evidence for evidentiary matters, *see, e.g.*, Rule 11(h), the recusal question here should be guided and governed by these well-established federal statutory law principles.

The first statute, 28 U.S.C. § 455, is directly relevant to the current situation. Subsections (a) and (b) are quoted in full below:

> **§ 455. Disqualification of justice, judge, or magistrate [magistrate judge]**
> **(a)** Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> **(b)** He shall also disqualify himself in the following circumstances:
> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> **(2)** Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> **(3)** Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> **(4)** He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> **(5)** He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> **(i)** Is a party to the proceeding, or an officer, director, or trustee of a party;
> **(ii)** Is acting as a lawyer in the proceeding;
> **(iii)** Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> **(iv)** Is to the judge's knowledge likely to be a material witness in the proceeding.

This federal statute provides several independent grounds for recusal or disqualification of a judge that are clearly applicable here.[17]

First, subsection (a) requires recusal whenever the judge's *impartiality might reasonably be questioned*. The question is not whether the judge in fact is biased. The law sets the bar much lower: whether the judge's "impartiality might reasonably be questioned."

Second, subsection (b)(1) requires recusal where the judge has either (a) a personal bias or prejudice concerning a party or (b) personal knowledge of disputed evidentiary facts regarding the proceeding.

Third, subsection (b)(2) requires recusal where the judge or a lawyer colleague "in private practice … served as lawyer in the matter in controversy." Note that this service as lawyer is in the "matter in controversy" and is **not** limited to the specific **proceeding** that will come before the court. This subsection assumes that because the lawyer is now a judge, the lawyer is no longer continuing to engage in the practice of law (note the past tense: "served as lawyer") and thus that the disqualifying involvement was in the past. The urgency of recusal is only heightened if the judge's service as lawyer is in the present or recent.

Fourth, subsection (b)(2) also requires recusal where the judge (or a lawyer with whom he was previously associated) "has been a material witness concerning [the matter in controversy]."

Fifth, subsection (b)(3) requires recusal where the judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy…." Because the present matter in controversy involves service on a church court rather than a secular court, the relevant employment would be any employment by the ecclesial entity involved in the controversy. Recusal is triggered by having participated as counsel, as an adviser, or as a material witness. Recusal is also triggered by having expressed an opinion concerning the merits of the particular case in controversy.

Sixth, subsection (b)(4) requires recusal based upon a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.[18]

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[17] Note that these recusal requirements apply specifically to a judge. They do not apply to those who have been participating in, overseeing, or managing the investigative and evaluative processes.

[18] A second federal statute is also relevant. 28 U.S.C. §144 provides an additional angle on recusal and disqualification based upon the bias or prejudice of a judge. It states:

> **§ 144. Bias or prejudice of judge**
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

These legal principles do not characterize such outside involvements as unlawful, immoral, or wrong. Rather, the principles recognize that such involvements ***disqualify*** the judge from serving in the proceeding. Under subsection (a), the focus is on whether anyone might ***reasonably question*** the judge's impartiality on any basis. Actual bias or partiality is not necessary. Subsection (b) then goes further to identify specific factors that require recusal in addition to the general principle in subsection (a). Both prongs of the statute, and all of the specific factors, help reinforce the recognized principles of natural justice that "establishes the right to an unbiased tribunal" and of due process that "an impartial decisionmaker is essential."[19] "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[20] "Our system of law has always endeavored to prevent even the probability of unfairness."[21]

When applied to this proceeding, these statutory legal principles require the recusal or disqualification of four members of the Tribunal who signed the Stay Order.

(5.2) Bishops Lowenfield and Dobbs Should Recuse Themselves or Be Disqualified.

Two members of the Tribunal, Bishop Lowenfield and Bishop Dobbs, should be recused for any of three separate reasons (at least). First, both have consented to and support Bishop Ruch's "Request for Investigation of Rumors" submitted by Bishop Ruch invoking ACNA Canon IV:4:2.[22] Bishop Ruch and Mr. Philbrick represented such consent in the original one-page Request for Investigation and in the subsequent expanded 12-page Request. That Request overlaps substantially with the same topics, issues, and evidence involved in the Presentment. By signing that Request, the Bishops have given their consent that Bishop Ruch has "reason to believe that there are in circulation rumors, reports, or allegations affecting his personal or official character…." Both Bishops have thus both gone on record in support of Bishop Ruch's and Mr. Philbrick's positions in this controversy. Having previously taken positions with regard to allegations against Bishop Ruch by signing Bishop Ruch's request that the Archbishop appoint a

> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[19] *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), *citing In re Murchison,* 349 U. S. 133 (1955); *Wong Yang Sung v. McGrath,* 339 U. S. 33, 45-46 (1950).

[20] *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 876 (2009); *accord William Jefferson & Co. v. Bd. of Ass'mt*, 695 F.3d 960, 963-64 (9th Cir. 2012).

[21] *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (citations omitted).

[22] ACNA Canon IV:4:2 provides in full:

> **Section 2 -** *Concerning Response to Rumors*
>
> Whenever a Bishop shall have reason to believe that there are in circulation rumors, reports, or allegations affecting his personal or official character, he may, with the consent of two other members of the College of Bishops, demand in writing of the Archbishop, the Archbishop's delegate, or the College of Bishops, that investigation of such rumors, reports and allegations be made.

Board of Inquiry to investigate rumors identified by Bishop Ruch, it would be improper for either Bishop to sit on the Tribunal and to consider any matter relating to the issues and events that are raised or implicated by the Rumor Request.

Second, each Bishop has served at some point since July 2021 as an "episcopal visitor" to Bishop Ruch, providing spiritual and pastoral support to him related to his leave of absence and his return to the DUMW as a result of the actions and investigations in question.

And third, Bishop Lowenfield has been identified by Bishop Ruch's Lay Canon to the Ordinary as one of the "bishops who function as his advocates" on behalf of Bishop Ruch in interactions with the Archbishop and the Province.

Both bishops have the freedom to serve Bishop Ruch in any or all of those ways and such service may be admirable. But such voluntary service to Bishop Ruch disqualifies them from serving on any tribunal that would consider any request by Bishop Ruch or any aspects of what the Request for Investigation covers. Their involvement in any one of these areas provides more than sufficient basis to reasonably question their impartiality as a member of the Tribunal in this proceeding (or in any proceeding related to or involving Bishop Ruch, Chancellor Philbrick, or the DUMW). Thus, recusal/disqualification is necessary under subsection (a) of 28 U.S.C. §455.

Further, as a result of serving in those roles, the bishops have knowledge of the issues that the Tribunal is being asked to rule on that comes from outside the Title IV judicial process. It is even possible that they may also be percipient witnesses to some of the factual issues that the Ruch Request seeks to have the Tribunal consider. Their service in any of these ways thus also requires recusal or disqualification under subsections (b)(1) and (b)(3) and possibly other subsections.

(5.3) Attorney Raymond Dague Should Recuse Himself or Be Disqualified.

Another member of the Tribunal, attorney Raymond Dague, has identified himself to the third-party investigators and to the Provincial Chancellors as legal counsel of record to at least two priests in the DUMW – Father William Beasley and Father Keith Hartsell – and also as legal counsel to the Greenhouse Movement in response to the investigations overseen by the ACNA at the request of the Bishop's Council of DUMW and Bishop Ruch. Father Beasley, Father Hartsell, and the Greenhouse Movement were each addressed in the Husch Blackwell investigative report and the Husch Blackwell report was referenced in Mr. Philbrick's January 31 Rumor Request and in this Tribunal's Stay Order. Accusations against Mr. Dague's clients are included in the Presentment as facts relevant to the charges against Bishop Ruch.

First, such representation provides more than sufficient basis to reasonably question Mr. Dague's impartiality as a member of the Tribunal in this proceeding (or any proceeding related to such investigations). Second, as an independent reason, Mr. Dague "in private practice [has] served as lawyer in the matter in controversy" and therefore recusal or disqualification is required under subsection (b)(2). Third, as an additional independent matter, Mr. Dague's engagement as counsel may also trigger subsection (b)(3) since he has been engaged as counsel and as an adviser and likely has "expressed an opinion concerning the merits of the particular case in controversy…."

(5.4) Canon Phil Ashey Should Recuse Himself or Be Disqualified.

Another member of the Tribunal, Canon Phil Ashey, has been engaged by the DUMW in several different capacities. Perhaps most significantly, on December 1, 2022, Bishop Ruch described to the DUMW Canon Ashey's involvement as follows:

> I am so grateful that our Bishop's Council initiated a review of our Constitution and Canons last year. They engaged the expertise of a trusted canon lawyer, Canon Phil Ashey, and his associates at the American Anglican Council. Since my return, I have assembled a task force including former Acting Chancellor Todd Johnson, supervisory Bishop Martyn Minns, and Canon Brenda Dumper. This task force is working closely with Canon Ashey, his associates, and the Bishop's Council.[23]

Given this ongoing engagement and close working relationship with Bishop Ruch and the DUMW, Canon Ashey's impartiality may reasonably be questioned under subsection (a) of §455. In addition, it would be important to evaluate whether, in the course of such engagements and interactions, there is any personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding (subsection (b)(1)), there was any participation as an adviser concerning the proceeding or expression of an opinion concerning the merits of the particular case in controversy that is now before the Tribunal (subsection (b)(3), and/ or there is a financial interest in the subject matter or in the outcome of the proceeding (subsection (b)(4)). Canon Ashey likely will know best all the points of engagement with the DUMW, with Bishop Ruch, with Chancellor Philbrick, and with other members of Bishop Ruch's legal team and other advisors, such as (but not limited to) "Advising Chancellors" Alec Smith and Jim Sweeney and any bishops functioning as advocates.

Of course, under the principles of due process and natural justice required of courts by Canon IV:5:7 and under relevant recusal standards such as 28 U.S.C. §455 and §144, all such compensation and all such contacts should be voluntarily and fully disclosed to all members of the Tribunal and to all those involved in this proceeding. That will make it possible to accurately identify any additional grounds upon which recusal is required or appropriate. But simply on the face of the known engagements and interactions, Canon Ashey's impartiality may reasonably be questioned and recusal is therefore necessary and appropriate.

(5.5) Full Disclosures and Recusals Are Essential to Protect the Impartiality, Integrity, and Credibility of the Provincial Tribunal and Other ACNA Courts.

Under 28 U.S.C. §455, judges should be quick to recognize any reasonable basis to question their impartiality and to voluntarily recuse themselves. That is important to protect the impartiality, the integrity, and the credibility of the Provincial Tribunal as the court of last resort in the ACNA. One good test to consider is whether, if all of the relevant information were known to the full ACNA and to the watching world, would most observers question the impartiality or be confident in the impartiality of the member of the Tribunal. Because the Tribunal's decisions and all submissions filed with the Tribunal should ultimately be available to the public, all of the information in Mr. Philbrick's ORIGINAL Request for Declarations, the "Supplement," and the AMENDED Petition for Declarations and in this *Motion to Dismiss and to Disqualify* filed by the Archbishop and

[23] https://midwestanglican.org/advent-greetings-and-an-update-to-our-constitution-canons/

Provincial Officers will presumably be made public at some point in the near future. Of course, the parties also have the right to release the filings publicly as well. There is no indication in the Stay Order that any of those filings were made "under seal."

As important as Canon IV:5:7 and the principles of natural justice and due process are, there is an even deeper duty here. Our ultimate authority, the Word of God, clearly establishes that impartiality is required for justice, commanding, "You shall not be partial in judgment" (Deut. 1:17) and declaring, "Partiality in judging is not good." (Proverbs 24:23; see also, e.g., Leviticus 19:15, Romans 2:11).

Being scrupulous about recusals and disqualifications is also essential because failures by judges to properly recuse themselves have caused serious harm to faithful Anglicans during their years in The Episcopal Church and during property litigation in the secular courts when leaving TEC. The secular church property litigation involving the Diocese of South Carolina before the South Carolina Supreme Court is one painful example.[24] The Bishop Righter trial is another painful example where bishops failed to recuse themselves from an ecclesiastical court proceeding. As ACNA Chancellor Emeritus Hugo Blankingship explained in his account of that trial:

> It developed that four of the members of the trial court had conducted the same ordinations for which Bishop Righter was being tried. We drafted and filed a motion to have the four disqualified and a pretrial hearing was scheduled for Hartford, Connecticut. I was surprised to find the hearing room packed with spectators, mostly supporters of Bishop Righter, and members of the press. I was struck by the continuing interest of the press, including international reporters, in the proceedings. The Motion to Disqualify was argued, and the trial court adjourned for a very long time. When they returned, the President announced that the Court had carefully considered the recusal matter and had concluded that they felt they represented a good cross-section of the bishops of the Church and that a new panel of judges would not be very different. Thus, not only did the four not recuse themselves, but the remaining five did not require them to stand down. It was not very difficult to see where the case was headed.[25]

If the members of the ACNA are to be able to trust the courts of the Province, it is essential that the members of those courts be completely open about possible grounds for recusal and voluntarily recuse themselves at any point that their impartiality could reasonably be questioned. And it is imperative that other members of those tribunals not lightly dismiss such concerns as the other bishops on the Righter trial court did, but rather hold both themselves and their colleagues accountable to appropriately high standards of impartiality and integrity.

Accordingly, subject to and without waiving the Special Appearance and all objections to the jurisdiction and authority of the Tribunal, the Archbishop and Provincial Officers also object to the failures of these four members of the Tribunal to recuse themselves, and therefore hereby submit this *Motion to Disqualify* these four members from serving in any capacity in this

[24] *See, e.g.*, https://americananglican.org/lawsuits-lossesa-mediation-psalm-37/

[25] *See* A. Hugo Blankingship, *Reflections on the Anglican Church in North American, at p.24.*

proceeding should the Tribunal continue to assert its jurisdiction over this subject matter and over the Archbishop and the Board of Inquiry.

(6) Members of the Provincial Tribunal Have Violated Judicial Impartiality by Engaging In and by Failing to Disclose Private Communications (Ex Parte Communications) with Bishop Ruch and Members of His Legal Team About Issues Coming Before the Tribunal.

Canon IV:5:7 requires that the courts of the Province, beginning with "The Provincial Tribunal" shall establish procedures that "shall be consistent with principles of fairness, due process and natural justice…." As discussed in depth above, the principles of fairness, due process, and substantial justice each require that the Tribunal and all members of the Tribunal be impartial and unbiased. One important element of protecting the impartiality of any court is the avoidance of ex parte communications between any member of the tribunal and any of the parties, their lawyers, or others acting on their behalf.

Ex parte proceedings and communications are defined as follows:

> A judicial proceeding or order is ex parte "when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." As a rule of fairness, it includes any communication of information that a judge or attorney knows or should know would be of interest to adversary counsel. An otherwise proper communication becomes a prohibited ex parte communication when matters relevant to a proceeding circulate among or are discussed with fewer than all the parties who are legally entitled to be present or notified of the communication and entitled to have an opportunity to respond, impeach, contradict or explain. Cited examples of ex parte communications occur when a party's motion or correspondence submitted to a court is not served on all other parties or when a judge obtains information about a case without making it available to all the parties.[26]

Ex parte communications destroy the impartiality of a judge even when well-intentioned:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. Even if a judge has correctly decided a case, judicial

[26] Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Hous. L. Rev. 1343, 1354 (Winter 2000).

> exposure to ex parte communications creates the appearance of impropriety, which undermines public confidence in the judicial system.[27]

Due to these dangerous and destructive effects of ex parte communications, canons of judicial ethics set forth clear prohibitions and limitations on such ex parte communications and generally require full disclosure to the full tribunal and to all parties to any proceeding of the full extent of any ex parte communications that may have occurred, even if inadvertent. A leading example is the *ABA Model Code of Judicial Conduct*, which devotes an entire Rule to prohibiting ex parte communications with only a few specified exceptions, quoted below in full (bold added):[28]

> **Rule 2.9: Ex Parte Communications**
>
> **(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or <u>impending</u> matter,* except as follows:**
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, **which does not address substantive matters**, is permitted, provided:
>
> **(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and**
>
> **(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.**
>
> (2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.
>
> (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
>
> (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
>
> (5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

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[27] *Id*. at 1356.

[28] Similar prohibitions and exceptions are addressed in Canon 3(A)(4) of the Code of Conduct for United States Judges. *See* https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#d.

> **(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.**
>
> **(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.**
>
> (D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecommunications/

This Rule and other canons of judicial ethics speak directly to the judge and impose upon the judge ethical duties (1) to avoid all ex parte communications and (2) should any ex parte communications ever occur, to promptly disclose not just the occurrence but the substance of all such communications to all parties. Full disclosure is an ethical duty of the judge precisely because it is the judge, not the party who was excluded from the ex parte communication, who knows that such a communication occurred, and it is the judge's ethical and legal (and, for a church tribunal, spiritual) duty to protect the impartiality of the tribunal. (Any attorney who has participated in the ex parte communications may also have an ethical duty under legal ethics rules or based upon the attorney's status as an officer of the court to disclose any ex parte communications. Such duty is in addition to the judge's duties and does not in any way lessen the judge's ethical duties.) And although full disclosure by the judge to all members of the tribunal and all parties to the proceeding is where the proper remedies for ex parte communications begin, that is not where those remedies end. "Judges are expected to recuse themselves if they even give the impression of partiality through ex parte communications." Kathleen Kerr, *Ex Parte Communications in a Time of Terror*, 18 Geo. J. Legal Ethics 551, 553 (Spring 2005).

In this proceeding, there is concerning evidence that such ex parte communications have occurred and may have facilitated Bishop Ruch's and Chancellor Philbrick's filing of their Requests for Declarations (both the original and the amended versions).

First, there was no notice given to the Archbishop or any of the Presenting Bishops that there even was any proceeding underway or even any submission by Bishop Ruch and Mr. Philbrick until the Stay Order was emailed to the Archbishop by Bishop Dobbs on the evening of Sunday, February 5, 2023. Consequently, ALL communications between any member of the Tribunal and Bishop Ruch, Mr. Philbrick, and any other advisors (legal or otherwise) to the same during that time are by definition ex parte communication and must be disclosed to all members of the Tribunal and to all parties to the proceeding.[29]

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[29] Further, as of the filing of this *Motion to Dismiss and to Disqualify*, the ORIGINAL Request for Declarations and the "Supplement" thereto have never been served on or provided to the Archbishop or, to the best of our knowledge, any of the Presenting Bishops in the form in which they were submitted to the Tribunal. Unless and until that is properly remedied, even those submissions may be ex parte

Second, as set forth in Section 5 above, several members of the Tribunal have been engaged in various capacities with Bishop Ruch and/or his legal and other advisors. All contacts referred to in Sections 5.2, 5.3, and 5.4 above would be good starting points (but not ending points) for evaluating possible ex parte communications that might have occurred. There may also be other points at which such ex parte communications could have occurred, such as a meeting of the College of Bishops, a meeting of the governing board of a ministry or other organization, a conference or retreat or training, a mission trip, a social gathering, or similar occasions or events.[30]

Third, the prohibition on ex parte communications does not come into play only after a proceeding has been formally filed. As the very first paragraph of Rule 2.9 provides, the prohibition applies from the first moment that such a matter is even "impending." Impending means "occurring or likely to occur soon; upcoming" and synonyms include approaching, coming, forthcoming, or brewing.[31] Thus, from the first moment that a member of the Tribunal was aware that any challenge to the Presentment **or the underlying investigations** was being considered, the Tribunal member must act in accordance with the strong prohibition on ex parte communications and any ex parte communications that occurred from that moment forward must be fully disclosed.

Fourth, the presence of other persons does not alter the character of a communication as ex parte. For example, if a member of the Tribunal facilitated a connection between Bishop Ruch or Mr. Philbrick and another person, any communications about the subject matter of the Ruch Request for Investigations (in any form), the Presentment it attacks, or the underlying matters raised by those documents would also be ex parte communications that must be disclosed.

To say all this is not to make any accusations. As discussed above, ex parte communications may be well-intentioned, innocent, or inadvertent. A judge may think he or she is advancing the progress of a proceeding or even serving a broader cause of "justice" or "due process." But good intentions are irrelevant to whether it is an ex parte communication and must be disclosed.

Judges must be scrupulous to fulfill their ethical, legal, and spiritual duties, including both avoiding ex parte communications and properly disclosing them whenever they occur. Honest disclosure is the best course. Indeed, dishonesty about or concealment of such ex parte communications itself could be a violation of ACNA Canon IV:2.

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communications. Unlike documents filed in secular court systems such as the federal court's PACER system, such documents are not publicly accessible records.

[30] That is one reason the Archbishop's plea to the College not to discuss pending Title IV matters in "hallway" and other private conversations at College of Bishop's meetings was prudent and was even protective of the members of the Provincial Tribunal and other ACNA Title IV courts. Being aware of risks that such conversations pose, particularly, and in some ways uniquely, for members of any Title IV court, is one way that the Archbishop has labored to protect the integrity of the various pending Title IV processes.

[31] *See, e.g.*, https://www.merriam-webster.com/dictionary/impending and https://www.merriam-webster.com/thesaurus/impending

(7) The Provincial Tribunal Must Not Act in Secret.

Thus far, the Tribunal has acted in secret. No notice was provided to the Archbishop nor to the Presenting Bishops until ***after*** the Tribunal had issued its Stay Order asserting jurisdiction. Bishop Ruch's January 31 ORIGINAL Request for Declarations and February 1 "Supplement" – the sole documents that served as the basis for the Tribunal's Stay Order – have never been served on or even provided to the Archbishop, Presenting Bishops, and Provincial Officers. At this time, to our knowledge, only the Tribunal and Bishop Ruch's legal team even have a copy of those two ORIGINAL documents – unless they have provided copies to persons other than the Archbishop and Presenting Bishops. The Archbishop and Presenting Bishops have no way to compare what was filed with the AMENDED Petition which was ultimately sent to them weeks later.

It is noteworthy that DUMW Chancellor Philbrick sought to effectuate services of his AMENDED Petition for Declarations via group email to the Archbishop and Presenting Bishops AFTER the Tribunal had issued its Stay Order. It is noteworthy that Bishop Dobbs in his capacity as Presiding Officer of the Tribunal sent the Stay Order to the Archbishop by email and contacted the Archbishop by phone AFTER the Tribunal had met, acted, and issued the Stay Order. It defies logic to suggest that neither Chancellor Philbrick nor Bishop Dobbs could have given notice to the Archbishop and the Presenting Bishops at the time of the initial submission by Mr. Philbrick rather than only after the Tribunal issued its Stay Order.

If the Stay Order is vacated, the appropriate recusals occur, and the Ruch Request dismissed in full with prejudice for lack of jurisdiction, then the actions that the Tribunal has taken will have little or no precedential effect. There is more of a principled basis for a court to decide not to make public a vacated ruling that has no precedential effect.

But if the Tribunal continues on its present course, then not only its Stay Order but all of the underlying briefing, including this *Motion to Dismiss and Disqualify*, will need to be made public. That is more imperative when the Tribunal asserts as the sole basis for its jurisdiction that it believes it must resolve a "matter in dispute" under the Constitution and Canons of the ACNA. And that is even more imperative due to the serious concerns about jurisdiction, authority, ex parte proceedings, recusals, ex parte communications, and impartiality that exist.

The Tribunal may assert that it is acting in secret due to concerns about possible damage to the reputation of the Bishop making the Request, or perhaps others. But such an assertion misses the point of the Title IV disciplinary structure. Title IV establishes a body that is designed to meet ***confidentially*** to evaluate allegations against a bishop and the evidence in support thereof. ***That body is a Board of Inquiry***. Canon IV:4 clearly establishes that a Board of Inquiry is an investigative and evaluative body. The Board is designed to deal with charges, allegations, and evidence about a bishop in an *appropriately* confidential manner. The confidentiality that Title IV provides for the Board of Inquiry's operations – but ***not*** those of the Provincial Tribunal – is designed to appropriately protect the accused and the accusers and witnesses who may have provided evidence in support of the Presentment or in the Board's investigation of the charges.

(8) Unless the Stay Order Is Vacated and Bishop Ruch's Requests Dismissed on Jurisdictional Grounds, the Actions of the Tribunal Will Create Dangerous Precedents for the Tribunal and for the ACNA.

Should the Tribunal proceed on its current path and exercise jurisdiction over Bishop Ruch's Request (in any form), the Tribunal will set deeply dangerous precedents for the Tribunal, for interpretation of the Constitution and Canons, for the separation of powers, and for the life of the Province. It is sadly clear that in issuing its Stay Order the Tribunal gave inadequate thought (if it gave any thought at all) to the principle of stare decisis, that like cases should be decided alike, and therefore to the far-reaching consequences of the *principles* embodied in its decision that would be implied in future cases. The following highlights just a few of the many dangerous precedents the Tribunal has now created.

The Tribunal's actions establish an expansive and effectively unlimited standard for the Tribunal's assertion of jurisdiction. The Tribunal determined here that there was a "matter in dispute" sufficient to establish its original jurisdiction under Constitution Article XI and Canon IV:5:4:1(2)(a) and to allow it to issue a Stay Order:

* based entirely upon the representations of a single party in a proceeding without opposition, or even any presentation of any alternative perspective;
* without any notice to the parties whom the Stay Order purports to bind, nor any opportunity to be heard in opposition; and
* prior to any effort by the Tribunal or the Petitioner to serve Summons or any pleadings on the parties whom the Stay Order purports to bind;

Having done so in this proceeding, the Tribunal invites other litigants to invoke its jurisdiction and seek its aid on the same grounds. The Tribunal will be unable to decline on jurisdictional grounds such unilateral petitions or requests by a single party, but rather will have to consider and resolve them on the merits.

The Tribunal's interpretation of "matters in dispute" vastly expands its original jurisdiction and invites additional litigation. Having set such a low bar to determine that there is a "matter in dispute" in this instance, the Tribunal will have little principled basis to reject any future pleading for lack of jurisdiction on the grounds that there is no "matter in dispute" under the Constitution and Canons. Any difference of opinion as to the interpretation of a canonical provision will be sufficient for a single person with differing opinion to invoke the Tribunal's jurisdiction.

The Tribunal has set a precedent that will result in multiple invocations of its jurisdiction throughout the entire Title IV disciplinary process. Having asserted jurisdiction solely based upon Bishop Ruch's disagreement with the Presentment as signed by three Bishops for submission to the Board of Inquiry, the Tribunal invites – and places no principled limits on – similar invocations of its original jurisdiction at any other point in the Title IV process. The same reasoning would allow Bishop Ruch – or any other Bishop under Presentment now or in the future – to assert that there is a "matter in dispute" about the Constitution or Canons at some other stage of the process and invoke the Tribunal's original jurisdiction yet again. After all, if it was not premature or unripe for the Tribunal to interfere with a Presentment before it reached a Board of Inquiry, what keeps it from interfering in the deliberations of that Board of Inquiry, or with the determination of the

Board of Inquiry that "there is probable cause to present the accused Bishop for trial for violation of Canon 2"? The accused Bishop, Priest, or Deacon subject named in the Presentment would seek two bites at the same apple – ask the Tribunal to invalidate the Presentment and, if the Tribunal does not, only then proceed to the Board of Inquiry. What the Tribunal has justified here as an invocation of its *original* jurisdiction based upon a "matter in dispute" in practice will turn out to operate as a form of *interlocutory appeal* throughout the entire Title IV process.

The Tribunal's Stay Order and interpretation of "matters in dispute" will alter the entire Title IV discipline process both at a Provincial level and also within Dioceses. The Tribunal has issued its Stay Order purporting to order the Archbishop and a Board of Inquiry to stop the entire Title IV disciplinary process and has exercised jurisdiction here based solely upon allegations that there is a deficiency in a Presentment signed by three Bishops. Once that precedent becomes known, any Bishop who is the subject of a Presentment would be foolish not to ask the Tribunal to consider any deficiency that he can assert in any Presentment against him. Further, any Priest or Deacon who is the subject of a Presentment within a diocese under Canon IV:3 would be foolish not to ask the Tribunal to consider any deficiency that he or she can assert in that Presentment. There is no principled reason that the Tribunal would take jurisdiction of such a petition from a Bishop but reject a similar petition from a Priest or Deacon.

Further, such clergy facing discipline will have incentives to press to get any information about and any documents relating to possible charges as soon as possible so that they can identify a purported deficiency sufficient to invoke the Tribunal's jurisdiction in an ex parte filing seeking a stay. Whatever concerns anyone may have about the speediness of existing disciplinary processes, the precedent this Tribunal is considering setting would only further delay disciplinary processes, if not gut them entirely.

Practically, the Tribunal and its Members will find themselves doing little else but reviewing and litigating any disagreement an individual may find with a decision or process remotely related to the constitution or canons as well as most every Presentment brought against a Bishop, Priest, or Deacon within the Province.

The Tribunal's reliance upon its conclusory assertion of jurisdiction without supporting legal analysis sets poor precedents for ACNA courts, chancellors, dioceses, and others. It is significant that the Tribunal in its Stay Order asserted its jurisdiction under IV:5:4:1(2)(a) in a single sentence without any analysis whatsoever. Normally one would expect that the first official actions by a Tribunal whose duties include interpreting the Constitution and Canons of the Province would give meaningful attention to issues of jurisdiction, judicial review, interpretive principles and practices, and the meaning of constitutional and canonical language. There is nothing like that in the Stay Order. There is no analysis of the Tribunal's jurisdiction. There is no analysis of the phrase "matters in dispute" or even the recognition that it is a legal term of art. There is no consideration of the structure of Title IV or the operations of the disciplinary process. Thus, the Tribunal's approach here establishes deficient, disappointing, and dangerous practices and precedents for the Tribunal and other courts and legal officers throughout the ACNA.

The Tribunal's actions ignore and contravene the Tribunal's own Rules of Court and send a message that such Rules will be followed on a selective basis. The Tribunal's actions thus far in

this proceeding contravene the Canons and its own Rules of Court in multiple ways, including (but not limited to) the following:

- The Canons and Rules do not provide for the Tribunal to conduct any ex parte proceedings.
- The Canons and Rules do not provide for the Tribunal to issue any form of preliminary injunctive relief, let alone on an expedited basis.
- The Canons and Rules require that after a "Petition, Complaint, or other leading pleading" is filed it must be served upon the named opposing party so that the opposing party can respond before the Tribunal takes any actions.

The Tribunal's actions undermine the allocation of canonical offices and duties and the separation of powers established by the Constitution and Canons. The Tribunal's Stay Order assumes, without analysis, that it has authority to issue a "Stay Order" – more accurately recognized as an injunction or TRO – to the Archbishop of the ACNA and to a canonical body, a Board of Inquiry, that the canons place under the authority of the Archbishop to select and put into operation. Such an assertion raises serious issues of separation of powers. It unbalances the balance of authority as allocated by the Canons.

The Tribunal's actions assert the Tribunal's control over the entire Title IV disciplinary process from beginning to end. We do not dispute that the Tribunal has jurisdiction of any *appeals* from the Court for the Trial of a Bishop after a conviction in that Court. That is what IV:5:4:1(1) calls for and consistent with the architecture of Title IV. But the Stay Order asserts the Tribunal's purported power to intervene at the very beginning of the Title IV disciplinary process to determine whether a Presentment is valid or has deficiencies – and therefore what will be done in response to any such purported invalidity or deficiencies. Having justified intervening at the beginning of the process, before a Presentment reaches a Board of Inquiry, the Tribunal has no principled basis not to intervene at other stages of the process. If the Tribunal is allowed to rule at each step of the way through the disciplinary process, it will destroy trust in the entire system. The Tribunal will become, both in reality and in perception, judge, jury, and executioner – or, more specifically, Drafter (or Editor) of Presentments, Board of Inquiry, and Archbishop.

By inserting itself at the beginning of the Title IV disciplinary process, the Tribunal undermines its proper canonical role as the final court of appeal at the conclusion of the process. By becoming involved before the disciplinary process has been completed, the Tribunal puts itself in the position of later reviewing and ruling as a court of appeal at the end of the process decisions that the Tribunal made as a court of original jurisdiction at the beginning of the same process. That will raise serious issues of bias and undermine the impartiality of the process. The principle that "no one can be a judge in his own case" also means that the same judge or court cannot review their own decisions on appeal. That is why Supreme Court Justices recuse themselves from any consideration of cases they decided while serving on a lower court.

The Tribunal's actions undermine the architecture and balance of the Title IV process. Title IV provides for two stages of the disciplinary process – an investigative, evaluative, and charging stage and then, should charges move forward out of that stage, a judicial phase. The investigative phase does not involve courts. The judicial stage is committed entirely to the courts. The Tribunal's Stay Order and its willingness to exercise jurisdiction over Bishop Ruch's Requests to review the

Presentment insert the Tribunal into the investigative stage – and at the very beginning. That invades the canonical spheres of responsibility of other bodies established by the Canons.

The Tribunal's actions interfere with the Archbishop's authority and duties under Title IV to oversee the disciplinary process until it reaches the Title IV courts. Title IV provides for the Archbishop to be the primary recipient of Presentments (which he may delegate to another officer), along with the College of Bishops, to select a Board of Inquiry, and to "refer the matter to it." Title IV thus envisions that the Archbishop receives and oversees the Presentment, not the Provincial Tribunal. If there are concerns about a Presentment or the process, under the Canons the correct approach would be to direct and entrust them to the Archbishop or, if he determines appropriate, to the Board of Inquiry he has selected. By interfering in this process, the Tribunal interferes with the Archbishop's carrying out of his canonical responsibilities and inserts itself into processes that the Canons entrust to other canonical officers.

The Tribunal's actions will destroy confidence in the ACNA's disciplinary process among members of the Province and the watching world. If the Tribunal continues on its present course, it will destroy confidence in the ability of the ACNA to discipline its own Bishops and other clergy under its own Canons. The Tribunal's actions send a clear message to the clergy and laity of the ACNA: if you have concerns about any ACNA Bishop, do not present them to the ACNA for investigation. Either proceed to get ten laity and clergy to file their own Presentment – but be prepared for the Bishop to quickly ask the Provincial Tribunal to declare that Presentment invalid or deficient. Or simply pursue your allegations and concerns by other means outside the ACNA. Such means may involve increased use of media and social media options. Such means may include civil litigation wherever a claim of abuse, misconduct, or negligence might withstand a motion to dismiss or a request for sanctions under Rule 11. The ACNA will have reduced credibility in such proceedings because the Tribunal will have already interfered with the existing Title IV processes. And the plaintiffs in such a suit will likely be very interested in issuing subpoenas to and taking the depositions of anyone where it can show improper contacts between an accused bishop and a supposedly impartial decision-making body, such as the Tribunal.

(9) The Archbishop and Provincial Officers Request Oral Argument.

The Archbishop and Provincial Officers respectfully submit that the relevant authorities and analysis in this *Motion to Dismiss and to Disqualify* are more than sufficient for the Provincial Tribunal to dismiss Bishop Ruch's Request for Declarations (in all of its forms, both seen and unseen) in its entirety. But in the event the Tribunal decides that it will not dismiss the Request, the Archbishop and Provincial Officers request oral argument. The damage that the Tribunal's actions will inflict upon the text and structure of Title IV, upon the entire Title IV process, upon the Province, and upon the Tribunal's standing and reputation as an impartial court of limited jurisdiction will be substantial. The Archbishop and Provincial Officers deeply desire to see the Tribunal correct its earlier errors.

IV. CONCLUSION

The Archbishop, two of the Provincial Deans, and the Chancellors hereby respectfully request that the Provincial Tribunal take all of the following actions:

(1) Issue an Order vacating in its entirety the Stay Order dated February 4, 2023;

(2) Have every member of the Tribunal disclose, to all other members of the Tribunal and to all parties to the proceeding, ***all*** ex parte communications under the standards discussed in Section 6 of this Motion to Dismiss and Disqualify;

(3) Recuse from any consideration of any matters related to Bishop Ruch or the Diocese of the Upper Midwest any members of the Tribunal whose impartiality may reasonably be questioned or who would be expected to recuse under any of the standards set forth in 28 U.S.C. §455; and

(4) Enter an Order dismissing with prejudice for lack of jurisdiction all forms and variations of Bishop Ruch's Request for Declarations, including but not limited to the January 31, 2023 ORIGINAL Request for Declarations, the February 1, 2023 "Supplement" thereto, and the February 15, 2023 AMENDED Petition for Declarations.

We continue in prayer for this matter, for the Provincial Tribunal and its members, and for all who are affected by these issues.

Respectfully submitted,

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Archbishop and Primate
Anglican Church in North America

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The Most Rev. Dr. Ray R. Sutton
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