Case No. 80615

IN THE SUPREME COURT OF NEVADA

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation,

Appellant,

vs.

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada corporation,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Susan H. Johnson, District Judge
District Court Case No. A-16-744146-D

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

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INTRODUCTION

The Panorama Towers Condominium Unit Owners' Association (the "Association") retained a construction expert to assist after one of the exterior window assemblies failed and caused water damage to a unit and one of the two high-rise towers. After paying substantial funds to repair that failure less than six years after completion of the towers, the Association's expert determined the window failure was caused by a uniform defect in thousands of window assemblies for more than 600 units in both towers. Because the non-profit Association and its members could never bear the costs needed to repair thousands of defective window assemblies, the Association sued the construction professionals responsible for the faulty work.

Despite two published decisions analyzing and upholding AB 421's retroactivity provision, collectively by the entire Court, Respondents persist with their theory that the Association's claims are time-barred under the prior statute of repose. In September 2021, a panel of this Court rejected Respondents' contention that the new ten-year repose period cannot be applied retroactively for pending cases. *Dekker/Perich/Sabatini Ltd. v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 53, 495 P.3d 519 (2021). In November 2021, the en banc Court expressly adopted the *Dekker* decision and held that the district court abused its discretion by declining to retroactively apply the new ten-year statute of repose to the Association's pending

claims. *Panorama Towers Condo. Unit Owners' Ass'n v. Hallier*, 137 Nev. Adv. Op. 67, 498 P.3d 222 (2021).[1] Both decisions rejected Respondents' argument that the extended repose period offended due process. *Id.* at 225.

Respondents' Petition repeats the due process arguments and includes issues not previously briefed, each of which violates NRAP 40(c)(1). In addition, many of Respondents' contentions lack support (*e.g.*, narrow interpretation of AB 421, that the district court's judgment was immune to changes in the controlling law). Even considering these improper and unsupported arguments, Respondents fail to justify rehearing under the narrow scope of NRAP 40(c)(2).

REASONS THE PETITION SHOULD BE DENIED

I. Respondents Provide No Proper Basis for Rehearing.

NRAP 40(c)(2) permits rehearing in the rare circumstance when the Court "overlooked or misapprehended a material fact or has overlooked or misapplied controlling law." *City of N. Las Vegas v. 5th & Centennial*, 130 Nev. 619, 622, 331 P.3d 896, 898 (2014) (citing *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 608-609, 245 P.3d 1182, 1184 (2010)). "In petitions for rehearing, parties may not

[1] Justice Silver authored the panel decision in the *Dekker* matter and was joined by Justices Parraguire and Stiglich. The decision in this matter was signed by all six of the justices who participated, and Justice Silver recused. Between the two decisions, the entire Court has upheld AB 421 and applied it in the same way.

reargue matters they presented in their appellate briefs and during oral arguments, and no point may be raised for the first time." *Id.* (citing NRAP 40(c)(1)).

Here, neither Respondents nor their amici claim the en banc Court made any errors that justify rehearing. Instead, they reargue matters presented in prior briefs and raise new arguments. The reargued matters include the rejected arguments about (1) vested repose rights, (2) due process violations, (3) the district court's decision was final and cannot be disturbed by the Legislature, and (4) the *Byrne*, 136 Nev. 604, 475 P.3d 39 (2020), decision is dispositive in this case. *Compare* Pet. 10-15, 21-23 *with* A.B. 7-10. The arguments raised for the first time include the (1) retroactive repose period applying only to structures completed in the 10 years preceding AB 421's effective date, (2) erroneous possibility of limitless retroactivity, (3) purported legislative intent on AB 421's impact on existing cases, (4) unrelated *Byrne* decision, and (5) separation of powers. *Compare* Pet. 5-8, 11-12, 14-21 *with* A.B 3-5. After excluding these improper arguments, Respondents offer nothing for the Court to consider.

II. The Court Properly Applied the Express Retroactivity Period.

"When the Legislature intends retroactive application, it is capable of stating so clearly." Pet. 5 (citing *Salloum v. Boyd Gaming Corp.*, 137 Nev. Adv. Op. 56, 495 P.3d 513, 517 (2021)). The Nevada Legislature clearly stated its intent to apply

the new 10-year repose period retroactively. *See Panorama Towers*, 498 P.3d at 225; *Dekker*, 495 P.3d at 523; 2019 Nev. Stat. 2262, AB 421, § 11(4).

Respondents ask the Court to rewrite the statute and alter the Legislature's express provision by "cabin[ing] the retroactivity period" to 10 years before the statute's effective date. Pet. 6-8. *See Doe Dancer I v. La Fuente Inc.*, 137 Nev. Adv. Op. 3, 481 P.3d 860, 872 (2021) ("It is not [a court's] power to enlarge or improve or change the law. A court has only the 'right and the duty…to interpret the [legislative] document' not 'to rewrite the words.'"). Respondents' arguments fail for other reasons.

First, Respondents provide no support for their contention that the Court interpreted the statute too broadly. Pet. 6. The Court need not consider unsupported arguments. *Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010).

Second, the statute's plain language does not show any legislative intent to limit the retroactivity period. Respondents contort the Legislature's clear language well beyond the limits of common sense. Pet. 6-7. Had the Legislature intended to "cabin" the retroactivity in any way, it would have clearly stated so. *See Salloum*, 495 P.3d at 517. Paradoxically, Respondents acknowledge the Legislature's power to revive reposed claims, which undermines their other arguments. *Compare* Pet. 7 ("would revive claims . . . that had expired") *with* Pet. 9-26.

Third, Respondents' claim that the opinion allows "limitless retroactivity" is unsupported and grossly misconstrues this Court's decisions. Pet. 7-8. Respondents and their amici admit that a legislature can retroactively lengthen a repose period. They both assert AB 421 applies retroactively from its effective date but take issue with the retroactive application of the ten-year period to the claims in this action and the *Dekker* action—both of which ***were pending at the time the statute took effect***. Indeed, this Court held that "[b]ecause AB 421's statute of repose was retroactive, the Legislature intended it to apply to construction defect actions ***pending*** as of October 1, 2019." *Panorama Towers*, 498 P.3d at 225 (emphasis added); *see also Dekker*, 495 P.3d at 523 (noting retroactive effect because case pending at time statute went into effect).

III. The Judgment was Not Immune from a Change in Controlling Law.

While a district court judgment is final for purposes of appeal, enforceability, and preclusion, the courts must apply a change in the controlling law at any time before completion of the appellate process. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995); *Axel Johnson Inc. v. Arthur Anderson & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) (citing *U.S. v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801)); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) (collecting cases). This Court and the *Dekker* court recognized this longstanding rule

of law. *Panorama Towers*, 498 P.3d at 225; *Dekker*, 495 P.3d at 523. A district court's certification under NRCP 54(b) does not change this fact, which moots Respondents' argument. Pet. 9-12.

Without this rule, one of the "basic grounds" for relief under NRCP 59(e)—a change in the controlling law—would serve no purpose. *AA Primo Builders, LLC*, 126 Nev. at 582, 245 P.3d at 1193; AOB at 20–21 (collecting cases).[2] The *AA Primo* court held the district court abused its discretion by not applying the controlling law in place at the time it ruled on the NRCP 59(e) motion. *Id.* at 589, 245 P.3d at 1197. Applying the current law to this pending case, which the binding law has always required, does not re-open any final judgment, offend due process, or violate any other rule of law.

IV. The Grace Period Has No Impact on the Court's Decision or Rehearing.

Respondents contend the *Byrne* court's decision—another change in the law after entry of the district court's judgment—should control. Pet. 12-15. But the *Byrne* decision does not control (or even relate to) the Court's decision in this case[3] because it interprets AB 125 (2015)—the statute that AB 421 replaced. Because the

[2] *See also Bryant v. New Jersey Dept. of Transp.*, 998 F.Supp. 438 (D.N.J. 1998) (granting FRCP 59(e) relief for change in controlling law and collecting cases); *Quinones-Ruiz v. U.S.*, 873 F.Supp. 359 (S.D. Cal. 1995) (same).

[3] The Court footnoted *Byrne* in the fact section of its decision. *Panorama Towers*, 498 P.3d at 224, n. 4.

Court must apply the law in place at this time—the retroactive ten-year repose period—the *Byrne* decision, AB 125, and the grace period have no application. Respondents' request to apply old law—AB 125—to time-bar the Association's claims violates decades of binding precedent. And their request to apply the subsequent (and now outdated) *Byrne* decision but not the subsequent controlling statute and retroactive repose period is beyond the pale.

V. Retroactive Application of the Statute of Repose is Constitutional.

Respondents base their new and recycled constitutional arguments on two faulty premises: (1) that the district court's NRCP 54(b)-certified judgment is immune to a change in the controlling law, and (2) that the Legislature's clear, express retroactivity language is capable of multiple interpretations, one of which raises serious constitutional concerns. Pet. 15. The Court already debunked the first false premise. *See supra*, Section III. This court and the *Dekker* court, after considering the parties' constitutional arguments, resolved the second false premise by holding the Legislature clearly and explicitly provided that the ten-year repose period apply retroactively. *Panorama Towers*, 498 P.3d at 225; AOB 23; *Dekker*, 495 P.3d at 523; *Dekker* Writ 15-20. Thus, Respondents' constitutional complaints do not support rehearing.

A. The Opinion Does Not Violate the Separation of Powers.

Like the rest of their constitutional arguments, Respondents base their separation-of-powers argument on the erroneous view that the district court's NRCP 54(b)-certified judgment is immune to a change in the controlling law. This Court, the *Dekker* court, and the overwhelming weight of authority—including the Supreme Court of the United States—have held all judgments remain subject to changes in the law until the appellate process concludes. *See supra*, Section III.

1. The Opinion Does Not Implicate the Separation of Powers.

Respondents rely on the inapposite case of *Berkson v. LePome*, which held a legislature may not authorize a plaintiff to refile an action that was already dismissed and affirmed by the appellate courts. 126 Nev. at 501, 245 P.3 at 566. The *Berkson* rule has no application here because this case remains pending on appeal.

Respondents' reliance on non-binding authority fares no better. In *State v. Bodyke*, the Ohio court held the legislature could not reclassify a sex offender who took a plea deal eight years before the statute's enactment. 126 Ohio St.3d 266, 280, 933 N.E.2d 753, 767 (2010). In *Ex parte Jenkins*, the Alabama court held the legislature could not reopen a paternity order that became final approximately eight years before the statute's enactment. 723 So.2d 649, 660 (Ala. 1998). And in *Commonwealth v. Sutley*, the Pennsylvania court held the legislature could not resentence criminals because it "interfere[d] with the final judgments of the

judiciary." 474 Pa. 256, 260, 378 A.2d 780, 782 (1977). Here, the district court's NRCP 54(b)-certified judgment remains on appeal and subject to changes in the controlling law, which eliminates any basis to consider these non-binding cases.

2. The Court Correctly Applied AB 421—the Controlling Law at the Time of its Decision (and the District Court's Decision).

Respondents concede that changes in the controlling law should apply to the Association's claims, Pet. 7, but ask the Court to either apply outdated law (*Byrne*) or contort the current law to their favor. This Court considered and rejected these arguments when it adopted the *Dekker* court's well-reasoned application of the Legislature's clear, express intent to retroactively apply the ten-year repose period to this pending case. The Court's decision is grounded in decades of precedent and based on one of the "basic grounds" for NRCP 59(e) relief. *Panorama Towers*, 498 P.3d at 224-25. Respondents' claim that the Court's decision will encourage claimants to prolong litigation is confusing because Respondents waited years to raise their repose defense and have delayed the litigation by another three years via this appeal. AOB 9-12.

B. Revival of a Claim Through Retroactive Application of an Extended Repose Period Complies with Due Process.

Respondents' recycled and already-rejected due process arguments hinge on the same faulty premise that the district court's NRCP 54(b)-certified judgment became immune to changes in the law before the appellate process concluded.

1. The 2019 Legislative Process Provided Due Process.

In addition to the due process arguments this Court already considered, "the legislative process provided all the process that [Respondents were] due." *A&I LLC Series 3 v. Federal Nat. Mort. Ass'n*, 134 Nev. 903, 422 P.3d 706 (Nev. 2018) (unpublished) (citing *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1153-55 (D. Nev. 2015) (holding "when the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law.").[4] The 2019 Legislature heard testimony in favor of and in opposition to AB 421.[5] Respondents cannot complain to this Court about due process when they had the opportunity to participate in the normal legislative process that resulted in AB 421.

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[4] In effect, Respondents take issue with the enactment of AB 421, specifically the retroactivity provision. A party cannot complain to the courts about the results of a properly conducted legislative process. *Skylights LLC*, 112 F.Supp.3d at 1153-55. "[I]t is well established that the legislature can adjust the benefits and burdens of our economic lives as long as it does not behave in an arbitrary and irrational way." *Fields v. Legacy Health Sys.,* 413 F.3d 943, 956 (9th Cir. 2005).

[5] *See* https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6799/Exhibits (listing testimony and statements in support of and in opposition to AB 421).

2. *The Legislature's Revival of Claims Does Not Violate Due Process.*

This Court and the *Dekker* court adopted the majority approach[6] and rejected the idea that Respondents had a vested right to never be sued as soon as the retroactively replaced six-year repose period expired. *Panorama Towers*, 498 P.3d at 225; *Dekker*, 495 P.3d at 524; ARB 5-15.

The *Dekker* decision, on which this Court relied, correctly applied the rational basis test to uphold the 2019 Legislature's retroactive lengthening of the repose period for unfiled and pending claims. *Dekker*, 495 P.3d at 524-25. The *Dekker* court devoted an entire section to the rational basis test and found (1) "[t]he Legislature explicitly provided that the ten-year repose period applies retroactively[;]" (2) the retroactively lengthened repose period "was intended to relieve prejudice to Nevada landowners who were unaware of property damage that did not manifest within the

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[6] *See, e.g.*, *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1 (1976); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co*., 467 U.S. 717 (1984) (relying on *Usery*, 428 U.S. 1); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (citing *Pension Benefit*, 467 U.S. at 730); *Shadburne-Vinton v. Dalkon Shield Claimants Tr*., 60 F.3d 1071, 1077 (4th Cir. 1995), *cert denied,* 516 U.S. 1184 (1996) (holding analysis used in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid when analyzing constitutionality of retroactive legislation and rational basis test applies to statutes of limitation and repose); *Underwood Cotton Co., Inc. v. Hyundai Merchant Marine, Inc*., 288 F.3d 405, 408, n.7 (2002) (citing *Shadburne*, 60 F.3d at 1074–77); *Campanelli v. Allstate Life Ins. Co*., 322 F.3d 1086, 1100 (9th Cir. 2003) (holding retrospective economic legislation subject to rational basis review); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001) (holding statutes of repose and limitation treated same and subject to rational basis review).

six-year repose period[;]" (3) "[a]pplying the statute retroactively . . . comports with AB 421's express language and legislative intent[;]" and (4) "[T]he Legislature extended the repose period to reflect the timeframe in which these types of defects most often materialize and thus, more fairly allow the pursuit of claims based on such defects." *Dekker*, 495 P.3d at 523, 525.

Respondents cannot meet their heavy burden to show the Legislature's decision was arbitrary or irrational. *See Peck v. Zipf*, 133 Nev. 890, 896, 407 P.3d 775, 780 (2017) (holding "if any rational basis exists, or can be hypothesized, then the statute is constitutional"). Respondents merely argue that "[r]etroactivity is particularly irrational in light of the constitutional requirements that a grace period accompany any retroactive truncation of a statute of limitation on a claim that has accrued" citing to the case, *Alsenz v. Twin Lakes Village., Inc.*, 108 Nev. 1117, 843 P.2d 834 (1992). Pet. 25. *Alsenz* addresses the **shortening** of the statute of repose, "cut[ting] off a claimant's right to file suit for a cause of action which ha[d] accrued." 108 Nev. at 1132, 843 P.2d at 838. The *Alsenz* court held that **retroactively precluding** the right to sue without a grace period to file claims is unconstitutional. *See id*. The *Dekker* court considered *Alsenz* and correctly found it inapplicable to the **retroactive lengthening** of the statute of repose. *Dekker*, 495P.3d at 524.

Respondents offer no valid basis to revisit the *Dekker* court's rational basis analysis on rehearing. *See supra*, Section I. Instead, Respondents ask for this Court

to re-do the *Dekker* analysis based on non-binding cases. Despite the minority of courts on which Respondents rely, the fact remains that legislatures across the country have revived expired claims and extended claim-filing deadlines.[7] The majority of courts have upheld these statutes in the face of due process challenges.[8]

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[7] *See, e.g.*, KRS § 413.249(7) (2021) (reviving time-barred claims); Cal. Civ. Proc. Code § 340.1(q), (r) (2020) (same); W.V. Code §55-2-15(c) (2020) (same); H.B. 2466, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (same); GEN. LAWS 1956, § 9-1-51(a)(3) (2019) (same); HRS § 657-1.8(b) (2018) (same); 7 G.C.A. § 11301.1(b) (2016) (same); Ga. Code Ann. § 9-3-33.1(d)(1) (2015) (same); 18 Del.C. § 6856 (2010) (same); 10 Del.C. § 8145(b) (2009) (same); Cal. Civ. Proc. Code § 340.1(c) (2003) (same); M.S.A. § 541.073(2) (2013) (same); MCA § 27-2-216(4) (2019) (same); N.Y. C.P.L.R. 214-g (2020) (same); *see also* C.G.S.A. § 52-577d (2019) (extending statute of limitations); 12 V.S.A. § 522(d) (2019) (same); D.C. Code § 12-301(11) (2019) (same); M.C.L.A. § 600.5851b(1)(a), (3) (2018) (same); M.G.L.A. 260 § 4C (2014) (same); O.R.S. § 12.117 (2010) (same); C.G.S.A. § 52-577d (2002) (same); N.J.S.A. 2A:14-2a(a)(1) (2019) (same).

[8] *See e.g.*, *Shadburne-Vinton*,60 F.3d at 1077 (holding statute revived claim—eliminating statute of repose—constitutional); *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119, 121 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (holding revival of time-barred claims via retroactive amendment of statute of repose constitutional); *U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc.*, 749 N.W.2d 98, 104 (Minn. Ct. App. 2008) (reviving claims after statute eliminated statute of repose); *see also B.B. v. Zermeno*, 2022 WL 462407, at *5 (D.Guam Feb. 15, 2022) (rejected constitutional challenge to revived claims); *Giuffre v. Andrew*, 2022 WL 118645, *18-20 & n.107 (S.D.N.Y. Jan. 12, 2022) (rejecting due process challenge to claim revival because repeatedly rejected by state and federal courts); *Doe v. Ariz. Bd. of Regents*, 2021 WL 2561534, *2-4 (Ariz.Super. June 8, 2021) (holding statute revived time-barred claims); *Harvey v. Merchan*, 860 S.E.2d 561, 574-76 (Ga. 2021) (same); *Doe v. Silverman*, 401 P.3d 793, 794-96 (Or.Ct.App. 2017) (same); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 516-18 (Conn. 2015) (same); *Sliney v. Previte*, 41 N.E.3d 732, 736-42 (Mass. 2015) (same); *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259-60 (Del. 2011) (same); *Deutsch v. Masonic Homes of Cal., Inc.*, 80

Respondents' belief that they have a vested right to not be sued based on the prior statute of repose is a theory premised on a "completely defunct" rationale. *Shadburne*, 60 F.3d at 1076 (quoting *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119, 122 (D.C. Cir. 1989), cert. denied, 494 U.D. 1003, 110 S. Ct. 1296 (1990)). Under the correct rationale, as applied by the *Dekker* court, this Court properly applied AB 421 to revive the Association's pending claims.

CONCLUSION

In violation of NRAP 40(c)(2), the Petition raises numerous new points and revisits due process issues argued and considered by this Court. Despite these violations, Respondents failed to show how this Court (or the *Dekker* court) misapplied AB 421. The Legislature explicitly and unambiguously enacted a retroactively longer statute of repose with a rational basis. AB 421 did not violate any constitutional requirements, and the Court properly applied this current controlling law to the Association's pending claims. Based on the foregoing, the Court should deny the Petition for Rehearing.

Cal.Rptr.3d 368, 378-80 (Cal.Ct.App. 2008) (same); *Cosgriffe v. Cosgriffe*, 864 P.2d 776, 778-80 (Mont. 1993) (same).

DATED: March 28, 2022

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Time New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,509 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: March 28, 2022

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CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2022, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing "Response to Petition for Rehearing" with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

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