IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff/Appellee,* v. DYLANN STORM ROOF, *Defendant/Appellant.*	Case No. 17-3

APPELLANT'S MOTION FOR RECONSIDERATION OF RECUSAL AND FOR STAY OF THE MANDATE; EXHIBIT A

Appellant Dylann Roof, through undersigned counsel, hereby moves pursuant to Fed. R. App. P. 27(b) for reconsideration of this Court's prior recusal of the judges of the Fourth Circuit Court of Appeals from his appeal. He also moves, pursuant to Fed. R. App. P. 27 and 41, to stay this Court's mandate pending resolution of this motion and, should the motion be granted, through the pendency of any en banc proceedings. This motion is based on the attached Memorandum of Points and Authorities, the files and records of this case, and any further information this Court may request. Counsel for the government has been informed of the filing of this motion, and states that the government takes no position on it.

Respectfully submitted this 30th day of September, 2021.

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I. Introduction

This is an appeal from the district court's judgment convicting Dylann Roof of thirty-three felony counts related to the murder and attempted murder of parishioners of the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, and sentencing him to death. Roof filed his opening brief on January 28, 2020 (Dkt. 85), and briefing was completed on April 22, 2021 (Dkt. 159).

On May 11, 2021, before oral argument, this court issued a Notice stating that the judges of the Fourth Circuit had recused themselves from this appeal, and that a substitute panel of judges had been designated to hear and determine it in accordance with 28 U.S.C. § 291(a). (Dkt. 162.) The Notice did not state the basis for the recusal.

On August 25, 2021, the substitute panel issued a decision affirming Roof's convictions and death sentence. *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021). Roof subsequently petitioned for rehearing and rehearing en banc. (Dkt. 171.) Because the Fourth Circuit judges who would ordinarily consider the request for en banc rehearing had all recused themselves, however, Roof also filed a motion requesting that

the Fourth Circuit ask the Chief Justice of the United States to designate an en banc appellate panel pursuant to 28 U.S.C. § 291(a) or § 292(d) to consider his en banc rehearing petition, or alternatively for the Chief Judge of this Court to designate district judges from within the Fourth Circuit to constitute such a panel pursuant to 28 U.S.C. § 292(a). (Dkt. 172.)

After ordering the government to respond to Roof's petition for panel rehearing (Dkt. 174), and receiving that response (Dkt. 175), this Court denied panel rehearing on September 24, 2021 (Dkt. 176). On September 27, 2021, this Court, in an order issued at the direction of Chief Judge Gregory, denied Roof's petition for en banc rehearing and his motion for designation of a substitute en banc panel. (Dkt. 177.) The order explained that "[u]nder the wording of 28 U.S.C. § 46(c) and the Supreme Court's holding in *Moody v. Albemarle Paper Co.*, 417 U.S. 622 [(1974)], only judges of the Circuit who are in regular active service may make the determination to rehear a case en banc." *Id.* (quotation omitted). It concluded that "[d]esignation of a visiting judge for this purpose is 'an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit,'" and denied the petition for

rehearing en banc "due to the lack of a quorum for en banc review." *Id.* (quoting *Comer v. Murphy Oil*, 607 F.3d 1049, 1054 (5th Cir. 2010)).

II. This Court Should Reconsider Its Blanket Recusal Order for Purposes of Considering and Resolving Roof's Petition for Rehearing En Banc

Roof respectfully requests that this Court reconsider, and set aside, its blanket recusal for the purposes of considering whether to grant his petition for rehearing en banc and, should en banc review be granted, for hearing and determining the case en banc. Though the basis for this Court's recusal is not known to the parties, the considerations bearing on recusal from consideration of en banc rehearing—where the issue is ensuring uniformity of this Circuit's law—are fundamentally different and less restrictive than those bearing on recusal from consideration of the appeal's substance and merits. And where the consequence is denying Roof any forum for consideration of his en banc rehearing request, the Rule of Necessity requires that this Court withdraw its recusal so as not to disclaim its jurisdiction altogether. "A judge is as much obliged not to recuse himself when it is not called for as he is obligated to when it is." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2nd Cir. 1998).

A. Recusal from en banc rehearing proceedings is fundamentally different from recusal from the merits

The disqualification statute, 28 U.S.C. § 455, clarifies the distinction between grounds that might warrant recusal from consideration of an en banc rehearing petition, on the one hand, and grounds that might warrant recusal from consideration of the merits on the other. Section 455 requires disqualification if the judge's "impartiality might reasonably be questioned," as well as for specific instances of "personal bias or prejudice concerning a party," "personal knowledge of disputed evidentiary facts," previous participation in the case, financial or other personal interest in the outcome, and relationship to parties. 28 U.S.C. § 455(a), (b)(1)-(5). At root, § 455 reflects the principle that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

What it means to have an "interest in the outcome" of en banc proceedings to secure uniformity of this Court's decisions—or address important legal questions—is a wholly different question from what it means to have an "interest in the outcome" of Roof's specific case. A decision to rehear a case en banc merely answers a "procedural

question," distinct from the merits. *Doe v. Fairfax Cty. School Bd.*, 10 F.4th 406, 406-07 (4th Cir. 2021) (Mem.) (Wynn, C.J., concurring in the denial of rehearing en banc). No relief is granted or denied. Even if en banc rehearing is granted, its focus is on conforming the Circuit's law to its own prior decisions and those of the United States Supreme Court. Fed. R. App. P. 35(a), (b). The application of § 455 to the determination of whether to rehear a case en banc, and the disposition of any such proceedings, thus calls for a new, separate inquiry from this Court's prior determination that § 455 required its judges' blanket recusal from the merits.

B. Roof's en banc rehearing petition is unrelated to the apparent basis for the Court's recusal decision

The distinction between merits review and en banc rehearing is particularly stark in this case, where the legal issues in Roof's en banc rehearing petition have no bearing on the apparent basis for this Court's recusal. While that reason is unknown to the parties, it appears to be that a current Judge of this Court, Julius Richardson, served as the lead prosecutor at Roof's 2016-2017 trial.

Assuming that is why this Court recused itself, Roof's en banc rehearing petition has no relation to that rationale. Unlike the merits

brief, the en banc petition solely addresses the panel's interpretation of controlling Fourth Circuit and Supreme Court law, specifically the reach of the Interstate Commerce Clause, the First Amendment, and the appropriate scope of victim-impact/victim-worth considerations in a capital sentencing proceeding. Ex. A (Petition for Rehearing and Rehearing En Banc). The Court does not need to pass on the propriety of Judge Richardson's conduct at trial to resolve these issues.

C. The Rule of Necessity warrants reconsideration of the recusal

The practical consequence of the recusal order—wholesale denial of en banc consideration in the direct appeal from a sentence of death—also requires that this Court set aside its recusal under the Rule of Necessity. That rule embodies the "well-settled principle at common law that . . . 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'" *United States v. Will*, 449 U.S. 200, 213 (1980). When disqualification threatens to deprive a litigant of any forum to have a legal question decided, the Court "ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not

given," *Cohens v. Virginia*, 19 U.S. 264, 404 (1821), and the judicial disqualification statute cannot be applied. *Will*, 449 U.S. at 213; *Comer*, 607 F.3d at 1062 (Dennis, C.J., dissenting) (citing *Cohens*).

The Rule of Necessity applies in cases where judicial recusals of multiple judges deprive the court of a quorum, and even if the court is not one of last resort. *Comer,* 607 F.3d at 1061-64 (Dennis, J., dissenting) (providing examples of cases in which the rule was invoked by intermediate appellate courts). It has been invoked when, as here, every judge, or all the judges of a particular Circuit, are disqualified. In *Will* itself, for instance, the Supreme Court held the Rule of Necessity precluded disqualification of Article III judges even though the lawsuit before them concerned judicial salaries, in which all Article III judges hold a direct interest. *Will*, 449 U.S. at 481-82. Similarly, in *Tapia–Ortiz v. Winter*, 185 F.3d 8, 10 (2nd Cir. 1999) (per curiam), the Second Circuit applied the rule where a litigant had sued every judge in the circuit.

If the Rule of Necessity requires judges to exercise their jurisdiction and hear cases even despite the types of direct financial or personal interests in *Will* and *Winter*, surely it requires this Court to do

the same here, where no personal interest of any judge is impacted by whether or not en banc rehearing is granted, or the disposition of any such proceedings.[1] This Court has determined that "only judges of the Circuit who are in regular active service may make the determination to rehear a case en banc" and that "[d]esignation of a visiting judge" for that purpose is "inappropriate." (Dkt. 177) (quotations omitted). But without such designation, no judges exist to consider Roof's en banc rehearing petition at all—depriving Roof of a critical level of appellate review at which litigants ordinarily raise intracircuit conflicts on issues of law. Because intracircuit conflicts are not a basis for certiorari in the Supreme Court, Sup. Ct. R. 10, precluding Roof from en banc consideration would deprive him of all opportunity to argue this basis for the opinion's modification. And it would do so in a case with a most serious consequence—the death penalty—at stake. This Court should reconsider its recusal to avoid depriving Roof of that opportunity.

[1] Judge Richardson, of course, has a personal disqualifying interest and should remain recused.

III. This Court Should Stay the Mandate Pending the Resolution of this Motion and any En Banc Proceedings

This Court denied Roof's petition for en banc rehearing on September 27, 2021. In the ordinary course, the mandate would issue seven days from that date, on October 4, 2021.

Under Federal Rule of Appellate Procedure 41(d), however, the Court may stay the mandate upon a showing of substantial questions and good cause for a stay. This standard requires questions that are "not frivolous or filed merely for delay." Fourth Cir. L.R. 41. Those requirements are satisfied here.

First, Roof's en banc rehearing petition is far from frivolous, because it points out that the panel opinion decides a federal question of widespread importance that the Supreme Court has not yet addressed, and that has so far been addressed by only one other federal court of appeals: whether the Interstate Commerce Clause confers federal jurisdiction over an intrastate criminal offense based solely on the defendant's *pre-offense* uses of interstate channels and instrumentalities like highways, telephones, or the Internet.[2] The

[2] This question is distinct from that of whether the Commerce Clause permits federal jurisdiction when the statutorily-defined offense *is* the use of interstate channels or instrumentalities for a defined

religious obstruction statute under which Roof was convicted, 18 U.S.C. § 247, defines a purely intrastate offense, obstruction of religion, and requires *that* offense—not pre-offense conduct—to be "in" interstate commerce. 18 U.S.C. § 247(a)(2), (b). The only other Circuit decision to address whether pre-offense conduct can support Commerce Clause jurisdiction over such an intrastate offense, *United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005) (en banc), generated forceful dissents from judges who distinguished § 247 from statutes in which Congress expressly regulates the use of interstate channels and instrumentalities by making the use itself the offense. *Id.* at 1243 (Tjoflat, C.J., dissenting) ("When Congress seeks to rely on interstate travel as a basis for exercising its authority under the Commerce Clause, it knows how to do so," and it did not do so in Section 247); *id.* at 1257 (Hill, C.J.,

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harmful purpose. *Compare* 18 U.S.C. § 247(a)(2) with statutes in cases cited at Docket no. 175 (Opposition of the United States to Petition for Panel Rehearing) at 11 (citing *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014) (addressing 18 U.S.C. § 1201(a)(2), penalizing *"us[ing] . . . any* [interstate] *instrumentality"* to commit or "further[]" kidnapping) (emphasis added); *United States v. Campbell*, 783 F. App'x 311 (4th Cir. 2019) (same); *United States v. Mandel*, 647 F.3d 710 (7th Cir. 2011) (addressing 18 U.S.C. § 1958(a), criminalizing "us[ing]" interstate facilities to further murder-for-hire); *United States v. Marek*, 238 F.3d 310 (5th Cir. 2001) (en banc) (same.))

dissenting) (criticizing the majority's approach for "collapsing the three *Lopez* categories of permissible regulation of commerce into one, all-purpose category that permits regulation of even purely local *non-economic* activities—such as violent crime—if someone or something associated with the activity moves in the channels or utilizes the instrumentalities of interstate commerce prior to the activity").

Whether *pre-offense* uses of interstate channels and instrumentalities confer federal jurisdiction over a crime that consists purely of intrastate conduct is a critically important question affecting states' criminal law policymaking, law enforcement, and resource allocation decisions, because it bears on the extent of states' exclusive authority to define and penalize crime within their borders. *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 841-44 (4th Cir. 1999). Indeed, state prosecutors expressed the view that their prosecution efforts were hindered by Roof's concurrent federal prosecution in this case. (Dkt. 86 (Materials Subject to Judicial Notice) at JN-28-35, JN-42-52.) This important question of law provides a sound basis for en banc rehearing. Fed. R. App. P. 35(a).

Second, the panel opinion conflicts with the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)—which prohibit limitless federal intrusion into states' police power over local crime—as well as with *Jones v. United States*, 529 U.S. 848 (2000), *Cleveland v. United States*, 531 U.S. 12 (2000), and *Bond v. United States*, 572 U.S. 844 (2014), which require courts to construe statutes' jurisdictional elements against such severe federal intrusion absent a clear expression of Congressional intent to the contrary. Section 247's jurisdictional element is far from clear enough to justify federal jurisdiction over any local offense preceded by uses of interstate instrumentalities or channels, because it explicitly requires the "*offense*"—not pre-offense conduct—to be "in" interstate commerce. 18 U.S.C. § 247(b). Though Congress intended that language to broaden the law's jurisdictional element by deleting prior "duplicative" language, (Opinion 114 n.46 (citing H.R. Rep. No. 104-621 at 2-3 (1996)), Congress's ultimate choice to require the "offense" to be in interstate commerce does not dispense with the need for channel- or instrumentality-usage *during* the offense. Certainly, it does not clearly

indicate Congressional intent to expand jurisdiction to any religious obstruction offense preceded by a defendant's driving on highways within a state, making telephone calls, or searching or posting on the Internet, as the panel opinion potentially permits.

The panel opinion conflicts with Circuit and Supreme Court law still further by approving argument for a death sentence based on victims' particular or exceptional worth relative to other hypothetical victims, in violation of *Humphries v. Ozmint*, 397 F.3d 206 (4th Cir. 2005) (en banc), and *Payne v. Tennessee*, 501 U.S. 808 (1991). (*See* Dkt. 171 at 12-15.) The opinion's conflicts with Circuit and Supreme Court decisions provide a strong basis for en banc rehearing. Fed. R. App. P. 35(a).

Third, interests of judicial economy favor staying the mandate. Roof is filing a request in the Supreme Court for designation of an en banc panel to consider his petition for rehearing en banc under 28 U.S.C. § 291. If the mandate is not stayed, and the Supreme Court appoints a substitute panel, Roof will be required to file a motion to recall the mandate to permit the substitute panel to consider his petition. If the mandate is stayed, no further motion will be necessary.

Undersigned counsel certify that this motion is not filed for purposes of delay, but for the reasons stated in this motion.

IV. Conclusion

For the foregoing reasons, Roof requests that this Court reconsider its prior blanket recusal from his appeal, and stay the mandate pending resolution of this motion and any en banc proceedings.

Respectfully submitted this 30th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

1. This Motion For Reconsideration of Recusal and For Stay of the Mandate has been prepared using Microsoft Word 365, Century Schoolbook font, 14-point proportional type size.

2. This Motion complies with Federal Rule of Appellate Procedure 27, and Fourth Circuit Local Rule 27(d)(2) because, including the Notice of Motion and Memorandum of Points and Authorities but exclusive of the table of contents, table of authorities, and certificate of service, this brief contains no more than 2,881 words.

I understand that a material misrepresentation can result in this Court's striking the petition and imposing sanctions. If the Court so requests, I will provide a copy of the word or line print-out.

Date: September 30, 2021

/s/ Margaret A. Farrand
Margaret A. Farrand

CERTIFICATE OF SERVICE

This is to certify that the foregoing Appellant's Motion For Reconsideration of Recusal and For Stay of the Mandate; Exhibit A was filed electronically via CM/ECF, which automatically sends a notice of such filing to all registered counsel of record, and that a hard copy of the same was sent via overnight courier to:

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