The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

94

Name: Matthew F. Stowe

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to rachel.harmon@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I was the elected District Attorney of Judicial District 24 (comprised of Benton, Carroll, Decatur, Hardin, and Henry counties) for eight years. I lost my primary election on May 3, 2022. I left office on September 1, 2022. The Honorable Judge John Everett Williams, my former boss and mentor, passed away shortly thereafter, thereby creating this vacancy. This month I will interview with some potential employers, but this vacancy is my primary focus.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

Year: 2011

BPR# 029994

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee: (#029994) (2011) (active)

Texas: (#24013583) (11/3/99) (inactive)

District of Columbia: (#482042) (6/9/2003) (active)

My Texas law license is currently inactive. I did not need it as District Attorney, and I needed to save money. I can reinstate it to active status, if necessary, by paying the requisite fees. My Tennessee, District of Columbia, 5th Circuit Court of Appeals, and U.S. Supreme Court bar licenses are all active and in good standing.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Board of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding

military service, which is covered by a separate question).

Information concerning my legal experience is contained in my response to Question 8. Information concerning my teaching experience can be found in my response to Question 12.

My wife and I started a small catering company during an extended period of unemployment from 2008-11. While my wife handles all the cooking, I assist her by moving heavy objects, greeting guests, and helping her clean up. The pandemic slowed business to a crawl, and it has yet to recover, but we still cater a few events each year. My wife and I once provided catering for this Council when it was interviewing candidates for the vacancy created by Judge Smith's resignation.

I worked as a certified personal trainer for several months in 1999.

In high school, I worked as a projectionist at the local movie theater for about two years.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I was unemployed for an extended period following the bankruptcy and dissolution of my then-newest employer, Howry Simon LLP, during the 2008-09 recession. Afterward, I moved back to Tennessee to join my extended family located in the Camden area. I moved into the house my grandfather built in 1943.

My wife and I started a small catering company during this time as discussed in my response to Question 5.

I was also a caregiver to several relatives with cancer and other age-related illnesses until they passed away. I treasure the time I got to spend with them. While I applied for many legal jobs during this time, I did not have much success. I often heard that I was overqualified for the position for which I was applying, and some employers even expressed concern that I might leave when something more suited to my experience level came along.

Fortunately, I met Judge John Everett Williams socially sometime during this period. At first, he was just an acquaintance, but as our friendship grew, I offered to come intern in his office *pro bono* and assist with opinion writing. I did so for the better part of a year, at which time there came to be a vacancy in his office, and he accepted me as his official law clerk sometime around late 2011.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I have not yet made the decision to start a new practice. In 2013-14, when I left Judge John Everett Williams' office, I worked as a solo practitioner for almost a year. During this time, I handled primarily criminal matters (60%) and unlawful employment actions (20%). I also assisted many folks whose claims for unemployment had been denied with navigating the complex administrative appellate process (20%). My services in this last area were always provided *pro bono*.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

GOVERNMENT SERVICE EXPERIENCE

DISTRICT ATTORNEY OF JUDICIAL DISTRICT 24, HUNTINGDON, TN. August 2014 — Present.

- Served as the elected Representative of the State of Tennessee in all felony and misdemeanor cases arising in Benton, Carroll, Decatur, Hardin, and Henry Counties.
- Supervised a staff of more than seventy people in three divisions.
- Led a Drug Task Force that made record seizures of fentanyl and many other deadly drugs.
- Served on the TNDAGC Executive Committee, Legislative Committee, and Technology Committee. Chairman of the Elder Abuse Committee. Second Look Commissioner.
- Successfully drafted and lobbied the legislature to pass a total overhaul of Tennessee's elder abuse laws, toughening punishments and modernizing the Code, *see* T.C.A. 39-15-501 *et seq*.
- Maintained a 100% conviction rate in homicides of all types in all counties throughout tenure.

DEPUTY SOLICITOR GENERAL OF TEXAS, AUSTIN, TX. February 2004 — June 2006.

- Represented the State and its officials in all civil appeals.
- Supervised a staff of more than twenty dedicated appellate attorneys and support staff.
- Planned and executed successful appellate litigation strategies in lawsuits challenging federal legislative redistricting, the State Capitol's display of the Ten Commandments, and the constitutionality of state public school financing and desegregation.
- Drafted more than 30 briefs filed before the United States Supreme Court and lower federal courts. Edited a similar number of briefs prepared by staff.
- Successfully argued three cases before the Fifth Circuit Court of Appeals. Argued numerous cases before Texas appellate courts.
- Served as lead counsel in a pair of $20 billion-dollar statewide Medicaid class action lawsuits.

LAW FIRM EXPERIENCE

HOWREY, LLP, HOUSTON, TX. *Of Counsel.* June 2008 — March 2009.

- Managed teams of scientific advisors and associates defending major oil and gas companies against a variety of patent infringement and other intellectual property claims.
- Served as lead counsel successfully defending Dril-Quip, Inc., in a multi-million-dollar patent infringement lawsuit concerning their design of subsea spool trees used in offshore drilling.

- Reviewed and edited petitions for certiorari and merits briefs filed in the United States Supreme Court. Prepared attorneys for oral argument before the USSC and Fifth Circuit COA.

PAUL HASTINGS LLP, WASHINGTON, DC. ***Of Counsel.*** **June 2006 — June 2008.**

- Managed teams of associates in successful defenses of major financial institutions against various employment and fraud claims — including a $6 billion dollar breach-of-partnership lawsuit brought against Capital One Financial and a $200 million mismanagement of financial assets lawsuit brought against Metropolitan West.
- Served as lead counsel representing the Humane Society in litigation concerning elephants.
- Drafted numerous briefs filed in the Federal Circuit, other Circuit Courts of Appeals, and the United States Supreme Court. Prepared attorneys for oral argument before the same courts.

PATTON BOGGS, LLP, WASHINGTON, DC. ***Associate.*** **November 1999 — February 2004.**

- Successfully worked with Benjamin Ginsberg, then-National Counsel for Bush for President, to ensure campaign compliance with all applicable federal and state laws.
- Advised elected officials and candidates for U.S. President and Congress on all aspects of compliance with federal election law. No clients found in violation of said laws during tenure.
- Drafted more than 30 trial and appellate briefs in cases including the 2000 Florida Recount and the Bipartisan Campaign Reform Act challenge. Achieved successful results for clients.
- Argued appeals and trial motions in redistricting and ballot access cases in numerous states. Examined and/or cross-examined numerous experts and lay witnesses.
- Served as lead defense counsel in Alabama's redistricting litigation. Won the case.

SUPREME COURT/APPELLATE CLERKSHIP EXPERIENCE

- **THE HONORABLE JUSTICE SANDRA DAY O'CONNOR, SUPREME COURT OF THE UNITED STATES, WASHINGTON, DC.** ***Law Clerk.*** **1997 — 98.**

- **THE HONORABLE JUDGE J. MICHAEL LUTTIG, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, WASHINGTON, DC.** ***Law Clerk.*** **1996 — 97.**

- **THE HONORABLE JUDGE JOHN EVERETT WILLIAMS, STATE OF TENNESSEE COURT OF CRIMINAL APPEALS, HUNTINGDON, TN. *Law Clerk.* 2011 — 2014.**

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

See above.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not yet had the pleasure of serving in any of these capacities.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

None.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

TEACHING EXPERIENCE

BETHEL UNIVERSITY, MACKENZIE, TN. ***Adjunct Professor.*** **2010 — 2014.**

- Instructed graduate students in business law, business ethics, and criminal justice.

CORNELL LAW SCHOOL, ITHACA, NY. ***Assistant Professor.*** **1999.**

- Instructed 100 students in criminal law; received highest evaluations for a first-time professor.

HARVARD LAW SCHOOL, CAMBRIDGE, MA. ***Teaching Fellow.*** **1995 — 96.**

- Facilitated Professor Jon Hansen's instruction of 250 first-year law students in tort law.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I have never previously applied for any judgeship or similar position. This vacancy is of special importance to me, and I felt called to apply.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

EDUCATION

HARVARD LAW SCHOOL, J.D. AWARDED IN 1996.

Honors:

- *magna cum laude* (top 5 in graduating class)
- *Harvard Law Review,* Primary Editor
- John M. Olin Fellowship in Law and Economics
- Williston Negotiation Competition — Winner 1994
- *Journal of Law and Public Policy*, Senior Editor

DARTMOUTH COLLEGE, B.A. IN ECONOMICS AND WITH HONORS IN GOVERNMENT AWARDED IN 1993.

Honors:

- *summa cum laude* (top 2% of graduating class)
- Presidential Scholar
- Phi Beta Kappa
- Student Assembly Representative

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 50

DOB: [redacted]1972

16. How long have you lived continuously in the State of Tennessee?

Fourteen years. My family goes back seven or eight generations in Benton County in West Tennessee, but my father was drafted into the Marines, honorably discharged, and then hired by the aptly named Mobil Oil Corporation. I followed my family during numerous moves across numerous states throughout this period. I returned home to my extended family in 2008 as described in my response to question 6 above.

17. How long have you lived continuously in the county where you are now living?

Fourteen years. I am still living in the house my grandfather built.

18. State the county in which you are registered to vote.

Benton

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I did not serve in the military.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

Prior to being elected District Attorney, I never received a bar complaint in any jurisdiction. During my eight-year tenure, I received two complaints – one in 2015 and one in 2017. The 2017 complaint was dismissed after the Board of Professional Responsibility received my response.

The 2015 complaint involved a dispute I had with a medical examiner in an upcoming murder trial who – having performed the autopsy – was a necessary witness if we wanted to secure a conviction. I had only been District Attorney for a few months at the time, and I had no prior experience in holding public office or interacting with the public generally.

The dispute started when the examiner informed one of my assistants of her plan to be on vacation during the week of the trial. The dispute occurred almost exclusively over email and became more heated over time, culminating with her decision to file a bar complaint. I hired an attorney at personal expense to defend myself, and the matter went before a three-member panel

in Jackson.

Although accused of witness tampering and other ethical charges, the panel rejected those claims, and in the end found me guilty of unprofessional conduct. The basis for those findings was some of the language I used in the emails. The panel was especially focused on an email I sent in which I stated that if she did not work with us to resolve this dispute, we would not bend over backwards to minimize her court time. Instead, I would simply serve her with a subpoena, and she could sit outside during the trial and wait her turn to testify, just like all the other witnesses. I also ended one of the last emails by saying, "If you blow this trial, I am going to hold you personally responsible," or words to that effect. While I intended that statement as mere puffery (like the kind commonly used in TV shows like *West Wing* and *Law & Order*), the panel considered my language an unnecessary threat. As a result, they recommended public censure.

At the time, this punishment struck me as disproportionate to the violation, as seemingly far more serious alleged violations, such as hiding exculpatory evidence, had been (and continue to be) resolved with a private letter of reprimand. However, I had already spent approximately $50,000 defending myself from the examiner's allegations, and I did not have the resources to appeal the case to the Tennessee Supreme Court. I made the difficult decision to let the public reprimand stand.

In hindsight, I very much regret some of the heated statements I made. I escalated a situation that should have been de-escalated. I did eventually apologize to the medical examiner for my behavior. I agree with the panel's conclusion that as the dispute progressed, I interacted with the medical examiner in ways that were increasingly less professional and counter-productive – and in ways that I never would today. Anger never makes a bad situation better. The whole experience taught me the importance of always keeping an even temper when dealing with frustrating circumstances or people. In the seven years since, I have developed the ability to stay calm in highly agitating situations, and I became a more successful District Attorney because of it.

A complete copy of my disciplinary history, as well as a certificate of good standing from the Board of Professional Responsibility, are attached to this application. I anticipate further questions on this issue should I be fortunate enough to move forward in this process, and I am prepared to answer those questions to the best of my ability.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Twice in my life I have gotten into monetary disputes with business entities that resulted in litigation in small claims court. One of these was in the District of Columbia when I got into a dispute with my condo association after they failed to credit me for several months of payments I had made. This matter involved approximately $3500 and was resolved by settlement, and I maintained no record of it after it was completed. I do not remember the year this matter arose, but it was more than ten years ago. I am sorry I cannot provide more information.

The second resulted from a dispute with my medical insurance company over coverage for a medical procedure. The doctor or hospital involved quickly turned the debt, which I believe was less than $5000, over to a collection agency that filed the suit. I eventually resolved this case by settlement and retained no records. I do not remember the year this matter occurred, but it was after I moved to Tennessee but before I was elected District Attorney, so sometime between 2008-14.

I was a named defendant in several federal lawsuits filed by prisoners and/or defendants during my tenure as District Attorney. Most involved conduct that occurred before I took office, and I considered myself a nominal party. I was ably represented by the Attorney General's Office in each of these cases and had no meaningful participation in any of them. I do not remember any of the names of the parties involved or the exact nature of the plaintiffs' claims. I do not have any records concerning them. As far as I know, none of these lawsuits has resulted in a judgment for the plaintiffs.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Wo(men)'s Rape Assistance Program: Member of the Board of Directors. Appointed this year and presently serving.

Second Look Commission: Commissioner. Appointed in late 2020. Stepped down September 1, 2022, due to leaving elected office.

917 Society: Founder's Club member since 2021. Prior to that I assisted the organization as a volunteer for some years. I distributed pocket copies of the Constitution to local middle and high school students.

National Rifle Association: Lifelong membership with some lapses. Currently I am a member of the NRA Golden Eagles and nominated for the National Patriots Medal.

Tennessee Firearms Association: Member, 2015-22 (with some breaks when my membership lapsed). My attendance at meetings has been sporadic due to time constraints.

I am a member of the Eva Road Church of Christ, and I have been so since moving to Tennessee in 2008. I am also a frequent guest at the Flatwoods Baptist Church, where my mother and stepfather are members. I participate in all of the activities one would expect of someone attending either of those churches, subject to time constraints.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

During my tenure as District Attorney, I held many different positions within the District Attorney Generals' Conference (TNDAGC). I served on the governing body of our

organization, the Executive Committee, twice – once in 2014-15 and again in 2021-22.

I was initially Vice Chairman, and later became Chairman, of the TNDAGC's Elder Abuse Committee from 2016 until I left office. I served on the Conference's Technology Committee as a member from 2017-20. I served on the Family Abuse Committee for a year in 2020-21. At the request of the Conference, I also served as a Commissioner on the Second Look Commission from 2020 until I left office. Each of these positions was an appointment made by the then-presiding President of our Conference (each President serves a one-year term).

As Chairman or Vice-Chairman of the TNDAGC's Elder Abuse Committee, I drafted and successfully lobbied for passage of five important pieces of legislation designed to protect elderly and vulnerable adults. I owe a great deal to former General Lisa Zavogiannis for her leadership in this area, and I also wish to thank all of the Assistant District Attorneys who served on the Elder Abuse Committee for their assistance in completing this important task.

I was a member of the Tennessee Bar Association for some years after I moved to Tennessee in 2008. I never held a position in the organization and have not renewed my membership recently.

I was a member of the Texas Bar Association most of the time I worked in Texas. I never held a position in the organization.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

I received the highest-ranking student evaluations of any non-tenured professor at Cornell Law School during the time I taught there. This came as a surprise to me, as I taught the entire class using the Socratic method, which was unpopular with students at the time.

I also received a number of performance-based financial bonuses while working at private law firms, but I retain no records concerning these.

Otherwise, I have sought and received little in the way of awards or prizes for my professional work. I treasure those I have received, which I have already discussed in response to prior questions.

I do believe that a job well done is its own reward, and I also agree with Ronald Reagan when he said, "There is no limit to the amount of good you can do if you don't care who gets the credit."

30. List the citations of any legal articles or books you have published.

Matthew F. Stowe, *Note: "Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 Harvard L. Rev. 1765-82 (1996).

Matthew F. Stowe, *Recent Case: Criminal Defense – Legal Malpractice – Nevada Limits the Rights of Inmates to Sue Their Former Attorneys for Malpractice*, 108 Harvard L. Rev. 501-06 (1994).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

While I have significant teaching experience at the law school, business school, and collegiate levels, I have not taught any courses in the last five years due to time constraints. I have been a speaker at a one or two conferences for which CLE credit was given, usually speaking on the topic of elder and family abuse.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

District Attorney General, Judicial District 24: September 1, 2014, through September 1, 2022. This is an elected office.

Deputy Solicitor General of Texas: 2004-06. This is an appointed position. I was appointed by then-Attorney General Greg Abbott, who is now the Governor of Texas.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have submitted one brief as an exemplar from each of the jobs where appellate-related work was my primary focus. I picked these three briefs because: (1) they are relatively short and (2)

they mostly involve straightforward legal issues. In chronological order:

1. The amicus brief on the merits I submitted in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* on behalf of the Republican National Congressional Committee was originally drafted by me. It was moderately edited by Don McGahn II, then-General Counsel for the RNCC, and approved as written by Benjamin Ginsberg, then-partner of Patton Boggs LLP.

2. The amicus brief on the merits I submitted in *Barnes-Wallace, et al. v. Boy Scouts of America, et al.* on behalf of the State of Texas and six other States was originally drafted by me. It was lightly edited by another AAG. It was approved as written by then-General Abbott and then-Solicitor General R. Ted Cruz.

3. The brief in opposition to the petition for certiorari I submitted in *PT Pertamina v. Karaha Bodas Co., LLC* was originally drafted by me. It was reviewed by two associate attorneys (who also assisted in research) and approved as written by the managing partner. I have omitted the sizable appendices to this brief for convenience, as they do not reflect my writing.

More briefs I have authored are available online on Lexis and Westlaw simply by searching my name in the relevant briefs database. Prior to my election as District Attorney, it is my belief that every legal writing that bears my name was originally drafted by me.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I am seeking this position to continue the great legacy started by Judge Williams. I hope my appointment will minimize the impact of the great loss suffered by the CCA and the local community when he passed.

Having worked in his office, I am familiar with his legal reasoning and office operations. Judge Williams was always concerned that cases be decided after careful reflection but also that decisions be issued promptly. He always reported to me when he had his opinions all caught up, and he frequently bragged about the quick turnaround time of the CCA as a whole. I hope to continue this tradition.

I believe that both my personal and professional experiences make me well suited to the job. I have extensive experience in opinion writing. I have worked closely with many Judges. I believe I could hit the ground running.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I am committed to ensuring that people of all races, religions, and creeds receive equal justice.

Two examples:

While working as the Deputy Solicitor General of Texas, I confessed error in a criminal appeal to the Fifth Circuit that involved a prosecutor making a closing argument urging the jury to convict because the defendant was Hispanic, and statistics showed Hispanics were more likely to commit crimes in the future. This was not a popular decision, but it was what the law required.

While I was at Paul Hastings, LLP, I worked *pro bono* for the Humane Society for several years in a lawsuit against the Ringling Brothers and Barnum & Bailey Circus concerning the treatment of the elephants used in their performances. The litigation was still pending when I left the law firm, but the lawsuit eventually resulted in the circus' decision to cease using live elephants in their performances.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

The Court of Criminal Appeals -- comprised of twelve members -- is our State's intermediate appellate court for criminal matters. It conducts the first review of almost all criminal appellate claims in Tennessee. It covers the entire state and is divided into three grand divisions. This position is in the Western Grand Division, which covers approximately the western third of the state. Normally its judges review cases sitting in Jackson, although its judges may meet elsewhere and may review cases from other divisions as needed.

My selection would impact the court by adding my appellate expertise and diverse legal knowledge to that already impressive body. My goal, however, would be to continue the legal tradition of Judge John Everett Williams as faithfully as possible and to mitigate as much as possible the tremendous impact on the court caused by Judge William's passing.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

Judges must follow the Code of Judicial Conduct and cannot participate in some of the activities available to private citizens for fear of being conflicted out of cases involving the same subject matter. Before I participate in community organizations, I will check to make sure I am not doing anything to compromise the judiciary or to create the appearance of bias.

However, during my tenure as District Attorney, I worked hard to assist needy and abused persons and to support those in the recovery community. I did so by, *inter alia*, devoting time and money to organizations like the Hope Center, Second Harvest, and the Wo(men)'s Rape Assistance Program. I would like to continue to support the good work of these organizations as much as possible as a judge.

In the past, I have attended graduations at the Hope Center to show support for those recovering from addiction, and I have volunteered as a food packer at Second Harvest. I find great meaning in the work, and I hope to continue regardless of my position.

Judge Williams was also very active in the recovery community. He's the main reason most of the lawyers in Tennessee familiar with TLAP know that the program is "free, anonymous, and confidential." If they will let me, as Judge I would like to continue to raise awareness of this important program. If I can generate even half the excitement he did, we can do a lot of good.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

Judge Williams was like a father to me. I will miss our dinners together, trips out on the lake in his boat, and the magic shows he used to perform to the delight of children and adults alike. In all my travels, I have never met anyone who could fill his shoes. But I strongly believe that he would want me to at least apply for this job and try my best. He was planning to retire in two years, and had those plans worked out, I would have put his name at the top of my references. I am sorry for his family, friends, and the community at large that he did not live to reach his goal.

Judge Williams' father once served as District Attorney in my District. When I was in office, I worked hard each day to be a District Attorney of which he could be proud, knowing how much the office meant to him. While I sometimes fell short of that goal, overall, I had a more successful tenure because of him.

Personal relationship aside, I want the Counsel to know that while criminal law is my forte, I am well-rounded. I am a PADI-certified deep water and cave diver. I have been an ISSA certified personal trainer. I once worked a summer in college for the sanitation department as a "refuse collection engineer." I have many other skills and hobbies, including gardening, fishing, and bee-keeping.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

I disagreed strongly with the legal position taken by the client in one of the three briefs I submitted to you as writing samples. It is my hope that you cannot tell which one just by reading them. I argued my position to my supervisor and the client, but once they reached a final decision, I did my best to execute it.

I also disagreed strongly with one of the opinions I drafted for Judge John Everett Williams reversing a criminal conviction for what I viewed as a technicality. Again, I argued my position, but once a final decision was made, I did my job.

I am strongly opposed to judicial activism. If you see that I could follow instructions with which I disagreed as a private attorney and law clerk, then you know you can count on me to follow the actual law as a judge – even though I may disagree with it.

Activist judges who refuse to follow the law are a direct threat to our Republic. Since the time of the American revolution, we have trusted "[w]e the people" to govern themselves, and to do so by participating in elections and holding their elected representatives accountable at the ballot box. If I disagree with the substance of an otherwise constitutional law, you can count on me to uphold it and to try to address it the same way I did as a private citizen – by voting.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Mr. Walter Butler, former President of Bethel University: [redacted]
B. Honorable Senator John Stevens: [redacted]
C. Honorable Representative Kelly Keisling: [redacted]
D. Mr. Ken Baker, retired: [redacted]
E. Col. James Harding, decorated veteran: [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Tennessee Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 23, 2022,

Signature

When completed, return this application to Rachel Harmon at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

MATTHEW F. STOWE
Type or Print Name

Matthew F. Stowe
Signature

10-23-2022
Date

029994
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

TEXAS 24013583
DC 482042

No. 07-619

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

CHRISTOPHER F. DUGAN
Counsel of Record
MATTHEW F. STOWE
JAMES E. BERGER
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Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether an anti-suit injunction, upheld by the United States Court of Appeals for the Second Circuit using the most restrictive standard available, was justified under that approach.

2. Whether a litigant who obstructs the important public policies of prompt enforcement of international arbitration awards and finality of litigation may be enjoined from continuing to do so.

3. Whether a federal district court has continuing "ancillary" subject matter jurisdiction to protect and effectuate its own and other federal courts' judgments.

STATEMENT PURSUANT TO RULE 29.6

Respondent Karaha Bodas Company, L.L.C. certifies that its ultimate corporate parents are FPL Group, Inc., Caithness Energy, L.L.C., and P.T. Sumarah Dayasakti. Ten percent or more of the stock of Karaha Bodas Company, L.L.C. is indirectly owned by FPL Group, Inc., a publicly held company traded on the New York Stock Exchange.

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INTRODUCTION

Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed on November 8, 2007, by Petitioner PT Pertamina (Persero) (f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara) ("Pertamina"). For all the reasons that follow, KBC respectfully submits that the decision of the United States Court of Appeals for the Second Circuit was correct in all respects, that there are no compelling reasons justifying a grant of certiorari by this Court, and that the Petition should be denied in its entirety.

COUNTER-STATEMENT OF THE CASE

Pertamina's three prior attempts to bring this straightforward commercial dispute before this Court have all been rejected.[1] This fourth Petition for

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[1] *See Perusahaan Pertambangan Minyak Dan Gas Bumi Negara v. Karaha Bodas Co., L.L.C.*, 539 U.S. 904, 123 S. Ct. 2256, 156 L. Ed. 2d 113 (2003) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit); *PT Pertamina (Persero) v. Karaha Bodas Co., L.L.C.*, 543 U.S. 917, 125 S. Ct. 59, 160 L. Ed. 2d 202 (2004) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit); *PT Pertamina (Persero) v. Karaha Bodas Co., L.L.C.*, 127 S. Ct. 129, 166 L. Ed. 2d 35 (2006) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit). On February 14, 2007, this Court also denied Pertamina's emergency application requesting a stay of the disbursement injunction lifted

(continued...)

certiorari concerns Pertamina's improper attempt to use the courts of the Cayman Islands to nullify the arbitration award issued to KBC in 2000, as well as the final judgments of the United States District Court for the Southern District of Texas (the "Texas District Court") and the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") confirming the award, and the final judgments of the United States District Court for the Southern District of New York (the "New York District Court") and the United States Court of Appeals for the Second Circuit (the "Second Circuit") enforcing that award.

On December 18, 2000, a Swiss Arbitral Tribunal issued its final decision awarding KBC $261,166,654.92 (the "Award"). Pertamina refused to pay the Award, forcing KBC to commence confirmation and enforcement proceedings in the United States and abroad.[2] On December 4, 2001, the Texas District

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(...continued)

the previous day by the U.S. Court of Appeals for the Second Circuit.

[2] Pertamina's Petition states repeatedly that the Texas District Court's Judgment on the Award was "paid." It is important to note that Pertamina never voluntarily "paid" the award or resulting judgments. To the contrary, those judgments were satisfied only by virtue of the New York District Court's orders mandating a third party garnishee – Bank of America, which handles Pertamina's oil and gas revenues – pay the judgment funds to KBC. These orders were preceded by years of contentious litigation and resistance by both Pertamina and the Indonesian Ministry of Finance.

Court confirmed the Award and entered judgment in favor of KBC (the "Texas Judgment"). On October 22, 2004, the New York District Court issued a final judgment turning over to KBC the full amount of the Texas Judgment. The Second Circuit summarily affirmed the New York District Court's October 2004 judgment in March 2006. On September 15, 2006, just days before this Court denied Pertamina's third petition for certiorari – a decision that would have resulted in the final distribution of the funds to KBC and that should have ended this litigation[3] – Pertamina brought an entirely new lawsuit against KBC in the Cayman Islands (the "Cayman Action"). The Cayman Action sought, on the basis of a belated and meritless claim for "fraud," (a) to "vitiate" the Award that the Texas District Court confirmed and that the New York District Court enforced, and (b) to enjoin KBC from using the Texas Judgment funds or distributing them to its stakeholders. The New York District Court properly viewed Pertamina's tactics as a direct threat to its jurisdiction and prior judgments (as well as to the finality of the Award and the Texas Judgment, which was registered in the New York District Court pursuant to 28 U.S.C. § 1963 at the outset of the enforcement proceedings). Consequently, on December 19, 2006, the New York District Court issued an order

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[3] The New York District Court's turnover order was stayed pending adjudication of all appeals, so that no funds were actually turned over to KBC until this Court had denied Pertamina's and the Indonesian Government's respective petitions for certiorari in October 2006.

enjoining Pertamina from prosecuting the Cayman Action and from commencing new litigation in order to frustrate KBC's use of the Award proceeds and trap KBC in perpetual litigation. Importantly, the order also expressly protected Pertamina's right to freely litigate its "fraud" defense in those courts that were already involved in this matter. That anti-suit injunction was upheld, with modifications, by the Second Circuit. The modified order of the Second Circuit was correct in enjoining Pertamina from continuing its perpetual litigation and should be left undisturbed.[4]

COUNTER-STATEMENT OF THE FACTS

Pertamina's intransigence has caused this straightforward case to take on a long and complicated procedural history. The anti-suit injunction on appeal represents the culmination of over nine years of

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[4] Recent events illustrate that Pertamina has no intention of discontinuing its campaign to "vitiate" the judgment against it. On November 6, 2007 – two days prior to filing this fourth petition for certiorari in this matter – Pertamina's chief executive officer, Ari Seomamo, stated that Pertamina *"will fight to the end, we will fight until the last drop of our blood."* *See* "Pertamina to Appeal Karaha Case in U.S. Court – Officials" Reuters, Nov. 6, 2007 (emphasis added) (Resp't App. 2a). This approach characterizes Pertamina's litigation conduct around the world, prolonging a straightforward commercial dispute into a nine-year procedural battle conducted in seven different countries. Courts around the world have uniformly condemned Pertamina's litigation misconduct. *See* Declaration of James E. Berger, Dec. 10, 2007 (Resp't App. 4a) (quoting myriad judicial rebukes).

arbitration and litigation in the United States and six other nations.

I. THE PRIOR PROCEEDINGS

A. The Project and the Arbitration

In 1994, KBC agreed with Pertamina to develop the Karaha Bodas geothermal energy project (the "Project") in West Java, Indonesia. On January 10, 1998, the President of Indonesia issued a decree that effectively terminated the Project. The Project's premature termination caused KBC to suffer substantial losses, and KBC accordingly initiated arbitration seeking damages of over $600 million for its lost investment and lost profits. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F. Supp. 2d 283, 285 (S.D.N.Y. 2006), *aff'd as modified by* 500 F.3d 111 (2d Cir. 2007). One of the most closely-contested issues during the arbitration was the size of the geothermal resource that KBC sought to develop. Pertamina argued that the geothermal yield of the Project was much lower than KBC claimed, and Pertamina cross-examined KBC's witnesses and questioned the geothermal analyses KBC had prepared. Most notably, Pertamina expressly alleged that the principal documents prepared by KBC describing the size of the geothermal resource were "sham[s]."[5] The Arbitral Tribunal considered and

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[5] Pertamina claims in its Petition that it "did not assert [in the Texas District Court proceedings] (because it did not then have

(continued...)

rejected Pertamina's fraud allegations,[6] but agreed that the size of the resource may have been overestimated. *See Karaha Bodas Co.*, 500 F.3d at 113-14. Thus, while the Tribunal found that KBC's geothermal projections were genuine, it nonetheless ruled largely in Pertamina's favor on the issue of the size of the resources and reduced the amount of KBC's lost profits recovery by $350 million. *See id.* On December 18, 2000, the Arbitral Tribunal issued its final decision awarding KBC $261.1 million. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 284.

B. The Confirmation and Annulment Proceedings

Pertamina has at all times adamantly refused to pay the Award, forcing KBC to commence confirmation and

(...continued)

proof) that KBC's Notices had fraudulently misrepresented the extent of geothermal resource that KBC had confirmed." Petr. Brief at 6. That claim is demonstrably false. By its own admission, Pertamina had the documents it now touts as "proof" of KBC's alleged fraud at the time it moved in the Texas District Court for relief from the Texas Judgment under Fed.R.Civ.P. 60(b).

[6] The Second Circuit expressly found that Pertamina's fraud allegations were litigated before the Arbitral Tribunal and taken into consideration in determining the amount of the Award. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 113-14 (2d Cir. 2007) ("The Swiss arbitral tribunal rejected Pertamina's allegations 'about the genuineness' of the information provided by KBC in support of its claims, but acknowledged the possibility that KBC's projections may have been 'overestimate[s].'")

enforcement proceedings in the United States, Hong Kong, Singapore, and Canada. The courts of each of those nations have confirmed the Award. In the United States, the Texas District Court confirmed the Award and entered judgment on December 4, 2001. The Texas Judgment was affirmed by the Fifth Circuit, whose order affirming the Texas Judgment this Court declined to review.[7] In addition to vigorously opposing KBC's attempts to confirm the Award, Pertamina commenced annulment actions in the courts of Switzerland and Indonesia. Following the Swiss Supreme Court's dismissal of Pertamina's first annulment petition, Pertamina commenced a second annulment action in the courts of Indonesia, which was ultimately dismissed.[8]

In response to Pertamina's Indonesian annulment action, KBC sought and was granted an anti-suit injunction by the Texas District Court to prevent Pertamina from prosecuting the annulment action.[9] On June 18, 2003, the Fifth Circuit vacated the Texas District Court's injunction on the ground that notions of international comity overrode any potential burdens

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[7] *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936 (S.D. Tex. 2001), *aff 'd*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004).

[8] *See Karaha Bodas Co.*, 500 F.3d at 114-15.

[9] In March 2004, the Indonesian Supreme Court vacated the Indonesian trial court's order annulling the Award. *See Karaha Bodas Co.*, 500 F.3d at 115.

arising from the Indonesian litigation. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357, 375-76 (5th Cir. 2003). Despite finding that "Pertamina is likely in the wrong here, and that Indonesia's injunction and annulment may violate comity and the spirit of the [New York] Convention much more than would the district court's injunction," the Fifth Circuit held that because the Indonesian annulment action posed no threat to the Texas District Court's Judgment, international comity weighed in favor of allowing Pertamina to prosecute its Indonesian action.[10] *Id.* at 373. Despite finding in Pertamina's favor, the Fifth Circuit's decision was harshly critical of Pertamina, stating: "Although it is always possible for Pertamina to pursue enforcement . . . in third countries, it seems extremely unlikely that any country would countenance

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[10] While Pertamina alleges a circuit split arising in this same case based on the fact that the Fifth Circuit reversed the Texas District Court's earlier anti-suit injunction, the circumstances of that injunction are legally and factually distinct from those presently on appeal. The Fifth Circuit's decision expressly found that the Indonesian Court's annulment of the Award posed no threat to the Texas Judgment because U.S. courts had the discretionary authority to "ignore" the Indonesian decision and allow KBC to recover the Award. In contrast, the Cayman Action poses an unmistakable threat to the New York District Court's (and the Texas District Court's) jurisdiction because it seeks a Mareva injunction and damages in the precise amount of the Award, essentially annulling that award by restraining KBC's use of the very funds that the New York District Court ordered turned over to KBC to satisfy the Award.

such a claim, given Pertamina's dubious behavior throughout this process." *Id.* at 369. The Fifth Circuit further explained that Pertamina's pursuit of the Swiss annulment proceeding, its initial urging to the Texas District Court that Switzerland was the forum of primary jurisdiction, and its later abandonment of that position following the Swiss Supreme Court's dismissal of its annulment action were "*sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive.*" *Id.* at 369 n.50 (emphasis added).

C. The Execution Proceedings

On February 22, 2002, KBC registered the Texas Judgment in the New York District Court pursuant to 28 U.S.C. § 1963.[11] On several occasions during the four years of execution proceedings that followed, the New York District Court found that Pertamina's litigation conduct was animated by a strategy of delay.[12] There

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[11] *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 77 (2d Cir. 2002), *cert. denied*, 539 U.S. 904 (2003).

[12] In a decision issued April 30, 2007, the New York District Court sanctioned Pertamina $500,000 for its bad-faith litigation conduct, finding that a Pertamina witness lied under oath in a deposition in an effort to frustrate the New York District Court from accurately ruling on the ownership of funds in New York bank accounts. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. Civ. 21-MC-00098 (TPG), 2007 WL 1284903, at *6 (S.D.N.Y. April 30, 2007). The New York District Court invited KBC to make a further motion for sanctions covering Pertamina's misconduct that occurred after December 2004, when the original sanctions motion was filed. *See* Excerpt of

(continued...)

was never any doubt about Pertamina's intent: Pertamina's Finance Director, Alfred Rohimone, expressly stated in 2003 (when it was clear that payment of the Texas Judgment was likely unavoidable) that "what Pertamina is doing now is actually buying time. The objective is that KBC will be willing to negotiate so that the . . . claim can be reduced."[13]

II. THE CAYMAN ISLANDS LITIGATION AND THE ANTI-SUIT INJUNCTION

A. The Cayman Action

On September 15, 2006 – just two weeks before this Court denied Pertamina's third petition for certiorari[14] – Pertamina filed a lawsuit against KBC in the Cayman Islands (the "Cayman Action"). Pertamina's pleadings in the Cayman Action sought to "vitiate" the Award as a result of purportedly "newly discovered" documents that Pertamina alleged were evidence that KBC fraudulently overstated the size of the geothermal

(...continued)

Transcript of S.D.N.Y. Proceedings, Sept. 26, 2006, (Resp't App. 73a) ("[W]hat I am really looking for are lies, and there were some of those. And if that is repeated in this exercise there will be sanctions.") KBC filed an additional sanctions motion against Pertamina, but it has been stayed pending the outcome of this certiorari petition.

[13] *Karaha Bodas Co.*, 465 F. Supp. 2d at 289.

[14] *See PT Pertamina (Persero)*, 127 S. Ct. at 129, 166 L. Ed. 2d at 35.

resource of the Project.[15] In its Cayman Action, Pertamina sought, *inter alia*, (a) an injunction prohibiting KBC from prosecuting any actions to enforce the Award (including the then-ongoing litigation in the New York District Court), (b) "damages" equal to any sums received by KBC pursuant to the Award, and (c) a worldwide "Mareva" injunction freezing all of KBC's assets up to the amount of the Award, plus interest.[16]

Despite the fact that the Cayman Action sought damages in the exact amount of the Award, and despite its express demand to "vitiate" the Award, Pertamina has refused to acknowledge that its Cayman Action was an attempt to annul the Award. Instead, Pertamina contends that the Cayman Action is a separate and independent action, not one for annulment. *See Karaha Bodas Co.*, 500 F.3d at 122; *Karaha Bodas Co.*, 465 F. Supp. 2d at 290. To counter the obvious issues regarding the timing of its "fraud" claim, Pertamina has claimed repeatedly that the documents underlying the Cayman Action were "recently discovered." *See Karaha Bodas Co.*, 500 F.3d at 117. That claim is false. Pertamina admits that it received these documents in November 2002, but alleges that it never reviewed the documents until

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[15] As discussed *supra* in footnote 6, this is precisely the same issue that was litigated and decided during the arbitration.

[16] *See Karaha Bodas Co.*, 500 F.3d at 117; *Karaha Bodas Co.*, 465 F. Supp. 2d at 289.

August 2005. *See id.* The New York District Court considered the claim that these were "newly discovered" documents to be dubious indeed, stating that "the idea that this is newly discovered evidence is so suspect that I just affirmatively say it is simply probably not true . . . I think the probabilities are very, very strong that this is a flat misrepresentation."[17]

B. Pertamina's Concealment of the Cayman Action from the New York District Court

At a hearing on August 25, 2006, before the New York District Court regarding KBC's sanctions motion, KBC expressed concern that Pertamina was planning to initiate further litigation to hinder KBC's ability to receive the proceeds of the Texas Judgment. As a result, Judge Griesa asked Pertamina's counsel:

> [W]hat about that? Is there any intention to have further litigation, or can we end it? If the Supreme Court denies cert., will the money simply be paid to KBC or not?
>
> . . .

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[17] Sept. 26 Tr. S.D.N.Y. (Resp't App. 83a). Given Pertamina's acknowledgement that it has already spent over $20 million in legal fees in connection with its attempt to avoid paying the Award, it is simply not credible that these documents would have gone unreviewed for that long.

> The question is, and I have absolutely good reason for asking such a question in view of the record here, I want to know, assuming the Supreme Court denies cert., I want to know if Pertamina will now agree to the payment of the judgment, which would mean the release of the funds which are now held to secure that judgment, immediate release.
>
> . . .
>
> *[B]ecause even the possibility of further useless litigation is something that I want to be warned of*, and I want to know if it's in the offing, in view of this long record which you are aware of.

Excerpt of Transcript of S.D.N.Y. Proceedings, Aug. 25, 2006, (emphasis added) (Resp't App. 87a-89a). Pertamina's counsel claimed in response that he could not answer the question. *See id.* (Resp't App. 87a-88a). In a letter sent on August 28, 2006, Pertamina further evaded the New York District Court's questions, stating that "in the event that the Supreme Court denies the pending petitions, and assuming that the Court issues a turnover order with respect to the restrained funds appropriate in form and amount, Pertamina will not object before this Court to the

payment of the judgment."[18] Pertamina – which has never denied that it was planning the Cayman Action at the time – did not disclose the Cayman Action when it submitted its letter. Judge Griesa found that "of course, Pertamina knew. It deliberately concealed its plan from this Court and deliberately failed to have its attorney disclose that plan in the August 28 letter. No other conclusion is possible."[19] *Karaha Bodas Co.*, 465 F. Supp. 2d at 298. Given the subsequent filing of the Cayman Action, Judge Griesa properly found that Pertamina's letter constituted a "subterfuge" aimed at "deliberately conceal[ing]" its plan from the New York District Court. *See id.* at 298, 300.[20]

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[18] *See* Letter to Judge Griesa from Henry Weisburg, Aug. 28, 2006 (Resp't App. 91a).

[19] That was not the first time that Pertamina lied to the New York District Court about the Texas Judgment. On April 19, 2004, in response to KBC's demand that Pertamina produce a deposition witness, Pertamina's former counsel wrote to the New York District Court stating that Pertamina "commits to pay the Texas Judgment in the event that its forthcoming writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful." Letter from M. Slater to Judge Griesa, Apr. 19, 2004 (Resp't App. 93a). Based on this "promise," Pertamina asked the New York District Court to stay any further enforcement proceedings. When the Supreme Court later denied Pertamina's petition for certiorari, Pertamina reneged on its promise to pay. *See* Excerpt of Transcript of S.D.N.Y. Proceedings, Oct. 5, 2004 (Resp't App. 97a) ("Your Honor . . . I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter . . .").

[20] In hearing before the Second Circuit on May 21, 2007, Judge Cabranes questioned Pertamina's counsel regarding the deliberate concealment:

(continued...)

C. The Anti-Suit Injunction

On September 21, 2006, KBC filed a motion for an injunction preventing Pertamina from prosecuting the Cayman Action.[21] The New York District Court

(...continued)

> JUDGE CABRANES: *Why would anyone use this curious locution before this Court if it wasn't to try to be evasive with respect to something that would transpire later? . . .* I mean wouldn't the normally English language statement that if you intended to simply acquiesce to the district court's judgment and let the funds pass free and clear to KBC, you would have said something roughly like that. *You wouldn't have seized upon this clever locution "not object before this Court the payment of the judgment."*
>
> MR. SINGER: I don't know, Your Honor.
>
> JUDGE CABRANES: *. . . It certainly looks curious at a minimum, perhaps even apparent that Pertamina is trying to evade the jurisdiction of the district court and to effectively to be free to move this dispute to yet another forum.*

Excerpt of Unofficial Transcript of Second Circuit Proceedings, May 21, 2007 (emphasis added) (Resp't App. 105a-106a).

[21] KBC has no doubt that it would ultimately be successful in the Cayman Action, just as it was successful in Hong Kong on precisely the same "fraud" issues. *See* discussion *infra* at 17. However, the full relitigation of these issues would be extremely

(continued...)

conducted a hearing on the issue on September 26, 2006, and immediately issued a partial injunction barring Pertamina from taking any action in the Cayman Islands challenging the New York District Court's jurisdiction or seeking to encumber any funds that would be turned over by it. *See* Sept. 26 Tr. (Resp't App. 76a). On October 6, 2006, after this Court denied Pertamina's third petition for certiorari,[22] the New York District Court ordered the turnover[23] of approximately $260 million, the remaining unpaid amount of the Texas Judgment. On December 8, 2006, the New York District Court issued an opinion granting a full anti-suit injunction against Pertamina. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 283. After finding that the "main objective of Pertamina is to have the Cayman Islands court reach out to the United States and frustrate the consummation of the long and difficult litigation in the United States," the decision enjoined Pertamina from seeking, through affirmative

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(...continued)

costly and time consuming. After prevailing in every tribunal around the world, KBC should not be forced to participate in perpetual litigation.

[22] *PT Pertamina (Persero)*, 127 S. Ct. at 129, 166 L. Ed. 2d at 35.

[23] Pertamina claims in its Petition that it "promptly complied" with the turnover orders. Petr. Brief at 10. That claim is utterly false: For almost eight years, Pertamina has refused to pay a single penny of the Award. Because of that recalcitrance, the turnover orders were directed not at Pertamina, but at the bank in New York that had frozen Pertamina's funds. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 291.

litigation in the Cayman Islands or elsewhere, to restrain KBC's use of the Texas Judgment proceeds or to attempt to recoup those proceeds through affirmative litigation. *Id.* at 298-99. The Second Circuit upheld that decision, with modifications, clarifying that Pertamina's actions warranted an anti-suit injunction under the strict standard imposed by the *China Trade* test. It is this decision that Pertamina now appeals.[24]

D. The Hong Kong Action

Pertamina's "fraud" claim – the same claim that the Arbitral Tribunal decided in 2000 and that Pertamina sought to relitigate in the Cayman Action – was decisively rejected by the Court of Appeal in Hong Kong. The court there conducted a three-day hearing carefully considering the voluminous evidence and affidavits that the parties submitted. In a decision

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[24] On October 11, 2007, the Cayman Court issued an order dismissing Pertamina's claim, stating:

> I am satisfied that in all the circumstances the description by the New York Court of Pertamina's proceedings before this Court as *"an abusive litigation tactic" is entirely justified.* It is clear that the proceedings amount in the circumstances to an attempt to use this Court for a collateral purpose, [namely] an attempt to further delay and avoid the enforcement of the arbitral award made almost 7 years ago. *In my view that was improper and unreasonable [and as] such an abuse of this Court.*

Decision, Cause No. 386 of 2006, Grand Court of the Cayman Islands (Oct. 11, 2007) (emphasis added) (Resp't App. 113a).

issued October 9, 2007, the Hong Kong Court of Appeals found Pertamina's claim to be "*singularly lacking in merit.*"[25] In rejecting the fraud claims, the Hong Kong Court found that Pertamina had not even made out a *prima facie* case for fraud, let alone demonstrated a reasonable prospect of success on the merits:

> *[T]his plea did not achieve the level of a "prima facie case", much less the standard of a "reasonable prospect of success."*
>
> . . .
>
> I do not think Pertamina comes anywhere near to establishing that the new evidence would have an important influence on the outcome of the arbitration. *Further, I do not think they show any fraud practiced by KBC at the court below or for that matter, at the arbitration proceedings.*

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[25] Excerpts of Decision, Civil Appeal no. 121/2003, High Court of the Hong Kong Special Administrative Region Court of Appeal (Oct. 9, 2007), at ¶142 (emphasis added) (Resp't App. 119a).

Id. (Resp't App. 117a, 121a, ¶¶ 134, 154) (emphasis added). Despite losing yet again, in yet another forum, Pertamina filed this Petition for certiorari a month later, seeking to overturn the decision of the Second Circuit so that it can litigate its hopeless "fraud" allegations for a third time in the Cayman Action. If this injunction is lifted, Pertamina will no doubt seek to engage in perpetual litigation, fighting "to the last drop of [its] blood."

REASONS FOR DENYING THE PETITION

Pertamina's certiorari Petition should be denied because none of the three circuit splits it alleges is ripe for review by this Court on the facts of this case. The only deep split alleged in Pertamina's Petition – that the Courts of Appeals differ over the standards for granting international anti-suit injunctions – is not implicated by the facts of this case because the lower court applied the standard most favorable to Pertamina and still found that an anti-suit injunction was warranted. Pertamina attempts to avoid this result by re-characterizing a well-known and longstanding two-way split in the lower courts as a three-way split instead, with the Second Circuit test purportedly occupying the middle ground, but this position finds no support in the numerous appellate decisions that address the issue.

The remaining splits alleged by Pertamina implicate at most one other lower court opinion apiece. Properly read, there is no actual conflict posed by either of these two pairs of opinions, as the facts of the cases differed dramatically in important respects. Moreover, even if the conflicts Pertamina alleges were genuine, the lower courts should be given additional time to sort out these issues, so that additional decisions from the Courts of Appeals can provide this Court with the benefit of additional reasoning on the issues involved before they are permanently settled.

Finally, the decision below as it stands serves important public policy interests regarding the swift

enforcement of arbitration awards and the finality of litigation. Pertamina has vexatiously delayed this straightforward commercial dispute for almost a decade, attempting to use the specter of endless litigation to leverage a "settlement" in a case that was resolved on the merits in 2000. A grant of certiorari by this Court on any issue would serve primarily as a validation of these delaying tactics, which have been criticized by courts around the world.

III. THE SECOND CIRCUIT APPLIED THE STRICTEST STANDARD IN GRANTING AN ANTI-SUIT INJUNCTION UNDER THESE UNIQUE CIRCUMSTANCES, AND CONSEQUENTLY PERTAMINA IS NOT ENTITLED TO RELIEF REGARDLESS OF THE STANDARD USED TO GRANT SUCH INJUNCTIONS.

Although it is generally correct that there is a longstanding split among the Courts of Appeals over the standard for issuing a foreign anti-suit injunction, that split is not implicated by the decision below. The Second Circuit is among those courts that apply the most restrictive test, and consequently Pertamina would not be entitled to relief regardless of which test this Court might adopt as a nationwide rule. Pertamina has attempted to avoid this result by re-casting the well-known and longstanding two-way split over the standards for granting international anti-suit injunctions into a three-way split instead. Then, Pertamina attempts to place the Second Circuit among

its newly-invented "middle group" in order to make it appear that a decision in favor of the most restrictive test would allow Pertamina to return to the Second Circuit in an attempt to obtain relief under a more restrictive anti-suit injunction standard. Pertamina's re-casting of the split finds no support in the decisions of the Courts of Appeals, which have consistently noted the existence of a two-way split and have placed the Second Circuit firmly on the most restrictive side. Consequently, this case is not a proper vehicle for this Court to use to settle the split over anti-suit injunction standards.

The standard used by the Second Circuit was first established more than twenty years ago and has consistently been recognized as the most restrictive standard. The Second Circuit's *China Trade* test for issuing an anti-suit injunction has two threshold requirements: "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined." *China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987). If these two threshold requirements are satisfied, courts may consider other relevant factors in deciding whether to grant the injunction. *Paramedics Electromedicina Comercial, Ltda, v. GE Medical Sys. Info. Tech., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004). Of these, two factors have "greater significance" than the others: "namely, whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum." *Karaha Bodas Co.*, 500 F.3d at 126 (citing *China Trade*,

837 F.2d at 36). The Second Circuit properly weighed these factors when it upheld the anti-suit injunction issued by the New York District Court.

As courts across the nation have observed, the *China Trade* test places the Second Circuit firmly among the most conservative circuits in terms of the test it applies in determining whether and when anti-suit injunctions may issue. The Second Circuit originally adopted this extremely restrictive test precisely because it recognized and placed a high value on concerns over the damage such injunctions can do to international relations. *See Paramedics*, 369 F.3d at 652 ("[P]rinciples of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'") (quoting *China Trade*, 837 F.2d at 36). The decision by the Second Circuit in this case is completely in accord with the important principles of comity it espoused.

The Courts of Appeals have repeatedly and recently recognized the existence of a two-way split over the standards for issuing anti-suit injunctions, and placed the Second Circuit on the conservative side of this binary split. As the First Circuit explained as recently as 2004, "[t]wo basic views have emerged. For ease in reference, we shall call the more permissive of these views the liberal approach and the more restrictive of them the conservative approach." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) (citing Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1049-51

(1985)). The First Circuit went on to observe that the Fifth and Ninth Circuits have adopted a liberal approach, with the Seventh Circuit expressing support for this approach in dicta. *See id.* at 17. Under the liberal approach, courts give international comity some consideration, but tend to define comity interests narrowly and give comity concerns modest weight. *See id.* In practice, an international anti-suit injunction may issue in these more permissive circuits "whenever there is a duplication of parties and issues and the court determines that the prosecution of simultaneous proceedings would frustrate speedy and efficient determination of the case." *Id.* (citing *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996), *cert. denied*, 519 U.S. 821 (1996); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982)).

Rejecting this approach, the First Circuit expressly placed itself within the "conservative" camp, which "[f]our courts of appeals have espoused." *Id.* "Under this approach, the critical questions anent the issuance of an international antisuit injunction are whether the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy." *Id.* (citing *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products*, 310 F.3d 118, 127 (3d Cir. 2002); *China Trade*, 837 F.2d at 36). The First Circuit explained that the conservative approach used by the Second, Third, Sixth, and D.C. Circuits imposes a presumption against international anti-suit injunctions, "is more respectful of principles of international

comity," and recognizes that issuing an anti-suit injunction is a step that should be taken only with the utmost care and restraint. *Quaak* at 18. Nowhere in its opinion does the First Circuit note any tension with its decision and earlier decisions of the Third, Sixth, and Eighth Circuits, as Pertamina alleges exists. *See* Petr. Brief at 31. There is no language suggesting, as Pertamina does, that the First Circuit was imposing a different test than those circuits, *see* Petr. Brief at 32-34, a test that would permit consideration of various "equitable factors" in situations where the Third, Sixth, and Eighth Circuits would not.

Nor does Pertamina's characterization of a three-way split find support in earlier circuit decisions. In 2001, the Third Circuit also characterized the foreign anti-suit injunction split as binary. "The federal Courts of Appeals have not established a uniform rule for determining when injunctions on foreign litigation are justified. Two standards, it appears, have developed." *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). Just as the First Circuit would do a few years later, the Third Circuit described the Fifth, Seventh, and Ninth Circuits as generally applying the "liberal" standard, and explained that "the Second, Sixth, and District of Columbia Circuits use a more restrictive approach." *Id.* Again, the Third Circuit specifically cited the Second Circuit's decision in *China Trade* in support of its assertion, noting that these courts "approve enjoining foreign parallel proceedings only to protect jurisdiction or an important public policy. Vexatiousness and inconvenience to the parties carry

far less weight." *Id.* at 161. Consequently, while Pertamina asserts that the Third Circuit would not consider vexatiousness and inconvenience to the parties at all (labeling these factors "other equitable considerations"), *see* Petr. Brief at 33-34, the Third Circuit implied just the opposite when it decided that "[o]ur Court is among those that resort to the more restrictive standard." *Gen. Elec.*, 270 F.3d at 161. Pertamina's contention that some circuits would refuse to consider other equitable factors at all appears to be the result of purposefully misreading selected dicta from various opinions.

Indeed, the Second Circuit's *China Trade* test has been consistently placed on the conservative side of the binary circuit split going back at least fifteen years. The Sixth Circuit, in a decision joining the conservative courts, observed the existing split in 1992 as involving on one side "[t]he Ninth and Fifth Circuits [that] hold that a duplication of the parties and issues, alone, is generally sufficient to justify the issuance of an international injunction" and on the other "the Second and DC Circuits [that] have held the standard for granting a foreign anti-suit injunction is whether the injunction is necessary to protect the forum court's jurisdiction or to prevent evasion of the forum court's important public policies." *Gau Shan Co. Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992). Again, the Sixth Circuit specifically cited the Second Circuit's *China Trade* decision in support of the conservative position it adopted. *See id.* Numerous courts in between *Gau Shan* and *Quaak* have also

characterized the split as binary and placed the Second Circuit on the most restrictive side. *See, e.g., Stonington Partners,* 310 F. 3d at 126-27; *Kaepa,* 76 F.3d at 627 n.12; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-32 (7th Cir. 1993). If, as Pertamina asserts, there is a third side to the split between courts that will consider other equitable factors and those that will not, it is curious that none of these courts has noticed and commented on it.

This Court should accept the lower courts' uniform characterization of this split as a binary one, and recognize, as each circuit has, that the Second Circuit's test embraces the most conservative standard. Because the Second Circuit issued an anti-suit injunction against Pertamina using the most restrictive standard, which was the most favorable to Pertamina, Pertamina would not be entitled to any relief even if this Court granted certiorari and ruled in its favor on the choice of standards. Consequently, the existing split among the Courts of Appeals on anti-suit injunction standards is simply not implicated by the facts of this case, and the Petition should be denied for that reason alone.

IV. ANY GRANT OF CERTIORARI IN THIS CASE WOULD THWART IMPORTANT PUBLIC POLICY AND EQUITABLE CONSIDERATIONS BY VALIDATING PERTAMINA'S HIGHLY QUESTIONABLE DELAYING TACTICS IN THIS CASE, WHICH HAVE BEEN THE SOURCE OF CONSTERNATION TO COURTS AROUND THE WORLD.

Leaving the decision below intact serves important public policy considerations that would be undermined by any grant of certiorari by this Court, even if this Court ultimately affirmed the opinion below or otherwise ruled in favor of KBC. Pertamina's attempt to pursue the Cayman Action violated the public policies of: (1) the finality of litigation, (2) respect for arbitration clauses, (3) respect for arbitral awards, especially in the international arena, and (4) the discouragement of forum shopping and vexatious conduct. The injunction was intended to stop Pertamina from engaging in perpetual litigation around the world to thwart an arbitration award that it should have paid almost a decade ago. Any action by this Court vacating the injunction or calling its validity into question even temporarily would effectively validate Pertamina's delaying tactics and encourage other parties to engage in similarly dubious legal behavior.

A. Federal policy favors finality of litigation.

Federal law embodies a strong policy favoring finality of litigation. *See Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 996 (2d Cir. 1981) ("[S]trong policies favoring finality in litigation and conservation of judicial resources lead an appellate court to disregard contentions that a party has not asserted at trial or has failed to raise on appeal."). Pertamina's commencement of the Cayman Action on the eve of this Court's final ruling – and its concealment of that intention from the New York District Court – demonstrate an obvious contempt for this fundamental policy. Pertamina waited until more than eight years of arbitration and litigation in this case had transpired before bringing its Cayman Action. As the New York District Court expressly found,[26] if Pertamina actually believed it had been "defrauded" by KBC, it could have raised its claim much earlier by interposing it, at a minimum, in either the New York District Court or the Texas District Court proceedings.[27] Rather than utilize these options,

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[26] *Karaha Bodas Co.*, 465 F. Supp. 2d at 297.

[27] Pertamina seemingly misunderstands the New York District Court's discussion of Pertamina's missed opportunity to address its claims through Rule 60(b). It is correct that Rule 60(b) is not, in and of itself, a public policy. However, it is a rule that *embodies* important national policies, seeking to reconcile "a tension between two goals: (1) that of ensuring that the court's judgment reflect[s] an appropriate adjudication of the rights and obligations of the parties, and (2) *that of finally terminating the litigation in order to provide the parties with certainty as to the nature and extent of their rights and obligations as adjudicated.*" *In re*

(continued...)

Pertamina chose instead to withhold and delay its claim until the last possible minute, going so far as to actively conceal and misrepresent its intentions to the New York District Court. Given the overwhelming evidence of Pertamina's intent to delay and the ample opportunities it had to assert its fraud claim previously, there can be little doubt that Pertamina's litigation conduct was inimical to the strong federal policy favoring finality in litigation, and that the anti-suit injunction was necessary to properly vindicate that policy.

B. Federal policy favors enforcement of arbitration clauses.

"Federal policy strongly favors enforcement of arbitration agreements." *See Paramedics*, 369 F.3d at 653 (citing 9 U.S.C. § 2; *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). The claim in the Cayman Action that KBC defrauded Pertamina during the performance of the underlying contract (the "direct fraud" claim) is, by the plain terms of the arbitration agreement between Pertamina and KBC, subject to mandatory arbitration. *See Karaha Bodas Co.*, 364 F.3d 274, 282 (5th Cir. 2004). Instead of abiding by its agreement to arbitrate, Pertamina ignored it altogether when it commenced the Cayman Islands action. The anti-suit injunction was

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(...continued)

Frigitemp Corp., 781 F.2d 324, 326-27 (2d Cir. 1986) (emphasis added).

consequently necessary to effectuate the important federal policy in favor of the enforcement of arbitration agreements.

C. Federal policy demands that arbitration awards be enforced swiftly and efficiently.

Leaving the anti-suit injunction undisturbed is also justified by the strong public policy favoring respect for arbitration awards. *See, e.g., B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006) ("When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken."). This Court has commented frequently on the desirability of encouraging the use of arbitration as a means of dispute resolution in cases both national and international. More than twenty years ago this Court explained "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Solar Chrystler-Plymouth Inc.*, 473 U.S. 614, 626-27 (1985).

Instead, in today's world this Court has commented that effective international arbitration is:

> [An] almost indispensable precondition to achievement of the orderliness and

> predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). This Court has further explained the danger that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* at 516-17. This Court has even gone so far as to criticize lower courts for issuing stays that interfere with the rapid enforcement of arbitral awards, explaining that they "frustrate[] the [federal] statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23.

Disturbing the decision below would contravene this important and oft-repeated guidance from this Court, and would send the wrong message to lower courts and parties tempted to resist arbitration. The Award in this case was issued seven years ago, yet duplicative litigation in several jurisdictions continues. As the Second Circuit observed in upholding the injunction:

> We have noted "the strong public policy in favor of international arbitration," and the need for proceedings under the New York Convention "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *These important objectives would be undermined were we to permit Pertamina to proceed with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced.*

Karaha Bodas Co., 500 F.3d at 126 (citations omitted and emphasis added). This Court now has the opportunity to send the proper message regarding the desirability of swift and effective international arbitration by denying Pertamina's latest certiorari Petition.

D. Federal law does not countenance forum shopping or other vexatious conduct.

Finally, continuance of the anti-suit injunction is consistent with the strong federal policies prohibiting forum shopping. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (interpreting rule to avoid resultant forum shopping); *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007) (explaining that "equitable considerations such as deterring forum shopping favor the [anti-suit] injunction"). Pertamina raised its fraud

allegations before the Arbitral Tribunal, which took those allegations into consideration when issuing its Award in 2000. Pertamina's subsequent arguments concerning the propriety of the Award have been rejected by courts in every country to consider them, including the courts of Indonesia. Although Pertamina could have raised its fraud allegations in most of these previous fora, it chose instead to file its claim alleging fraud in the Cayman Islands, a jurisdiction whose courts were unfamiliar with both the dispute and Pertamina's prior litigation tactics.

The Cayman Action was indisputably vexatious. After almost a decade of arbitration and litigation, Pertamina waited until two weeks before the funds were likely to be paid to KBC to bring a new action that sought, on its face, to strip the New York District Court of enforcement jurisdiction and enjoin KBC from using the Texas Judgment proceeds. Because Pertamina had been in possession of the documents that allegedly support its fraud claim[28] for at least four years when it filed the Cayman Action, this delay is inexcusable and impossible to consider as good faith litigation conduct. As the New York District Court noted, Pertamina had time to raise these "fraud" allegations before the Texas District Court in a "direct and straightforward" manner; instead, they chose to

[28] As noted *supra* at 17, the Hong Kong Court of Appeals carefully considered and soundly rejected Pertamina's fraud allegations.

make these allegations in a forum that has "virtually no significance" to the dispute.[29]

V. FEDERAL COURTS HAVE CONTINUING JURISDICTION TO PROTECT AND EFFECTUATE THEIR JUDGMENTS.

Federal courts maintain continuing jurisdiction to protect their final judgments, even after satisfaction. This Court has long held that federal courts have the power and duty to ensure that litigants retain "the substantial fruits of a judgment rendered in their favor," and that federal courts have jurisdiction to protect a judgment "no matter how or when [a party] may attempt to evade it or escape its effect[.]" *Dietzsch v. Huidekoper*, 103 U.S. 494, 497 (1880); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure and preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."); *see also* 28 U.S.C. § 1367(a) (codifying doctrine of ancillary jurisdiction by providing that federal courts have jurisdiction over "all other claims that are so related to the claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III"); All Writs Act, 28 U.S.C. § 1651(a) (providing that federal courts "may issue all writs necessary or appropriate in

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[29] *Karaha Bodas Co.*, 465 F. Supp. 2d at 297-98.

aid of their respective jurisdictions and agreeable to the usages and principles of law").

Pertamina has argued that the Second Circuit's opinion supporting these propositions is contrary to the decision reached by the Eighth Circuit in *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft,* 491 F.3d 355 (8th Cir. 2007). The instant Petition does not pose a good opportunity for this Court to review any putative shallow split in circuit authority because the facts of the two cases differ so dramatically, rendering it difficult if not impossible to accurately gauge whether a meaningful split yet exists between the circuits. The Eighth Circuit in *Goss,* while occasionally using more expansive dicta, carefully limited its holding to the unusual facts of that case. Moreover, its decision was based on various factors including (1) the direct threat posed to international bilateral relations by an injunction and (2) concerns regarding the constitutional balance of powers, neither of which is present in this case.

More specifically, the *Goss* case involved a judgment issued under the Antidumping Act of 1916, which Congress prospectively repealed as a result of a dispute before the World Trade Organization ("WTO"). *See id.* at 356-359. As the repeal was prospective, it did not affect the *Goss* judgment. *See id.* at 358. Because Japan considered that prospectivity to be contrary to the United States' obligations under the WTO agreements, it enacted a Special Measures Law, a

clawback statute that specifically allows Japanese entities to recover judgments awarded under the 1916 Act. *See id.* This was not a broad statute; in fact, the Special Measures Law affected only one judgment: the *Goss* decision. *See id.* at 366 ("[T]he only lawsuit possible under the Special Measures Law can be brought against Goss alone."). Given the direct and pointed conflict between the U.S. and Japanese legislatures regarding the validity of the *Goss* judgment, the *Goss* anti-suit injunction "would be deeply offensive to the Japanese government." *Goss v. Tokyo Kikai Seisakuscho, Ltd.*, 435 F. Supp. 2d. 919, 929 (N.D. Iowa 2006), *vacated*, 491 F.3d 355 (8th Cir. 2007).

It is clear that the instant case does not involve such a direct international conflict between two nations. The Eighth Circuit recognized the unique circumstances of the *Goss* case and expressly limited its opinion, finding that while the anti-suit injunction could not be maintained under those circumstances, "we reach no categorical conclusion regarding the propriety of the issuance of an anti-suit injunction in all cases involving the preservation of a judgment." *Goss*, 491 F.3d at 368 n.9. Moreover, the *Goss* Court did not cite to a single case that held that subject matter jurisdiction terminates when the judgment is paid. Instead, it cited *Peacock v. Thomas*, 516 U.S. 349 (1996), which stands only for the inverse proposition that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment." *Goss*, 491 F.3d at 365 (emphasis in original). As noted by the *Goss* Court, this

Court explained in *Peacock* the importance of the maintenance of jurisdiction after issuance of the judgment: "Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Peacock*, 516 U.S. at 356 (internal quotations omitted). Consequently, the rule, unchanged by the unique facts of the *Goss* case, is that federal courts maintain jurisdiction to protect a final judgment even after satisfaction. There is simply no circuit split on this issue implicated by the facts of this case.

CONCLUSION

For all the foregoing reasons, Pertamina's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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NOTE

"COMMON SENSE" LEGISLATION: THE BIRTH OF NEOCLASSICAL TORT REFORM

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"COMMON SENSE" LEGISLATION: THE BIRTH OF NEOCLASSICAL TORT REFORM

Recent federal and state tort reform resembles a political juggernaut crushing virtually all obstacles in its path. Notorious tort cases have attracted public scorn,[1] creating a political atmosphere receptive to reform proposals. The Republican Party has attempted to capitalize on this atmosphere at the state level and, since the 1994 elections, at the federal level as well. Its success in the states has been considerable.[2] Republican success at the federal level, however, has been more limited. Although "Common Sense" legal reform bills flew through the House of Representatives, the Senate amended the bills, which now face the threat of a Presidential veto.[3] The disagreement between the two chambers of Congress and the President belies the apparently strong popular consensus over the content of tort reform.

This Note explores the nature and source of this consensus. Tort law commentators have conducted the war over the nature and desirability of tort reform largely in economic terms.[4] Positivists such as Richard Posner contend that existing law is largely efficient,[5] while normativists such as Steven Shavell argue that changes would make the law more efficient.[6] Tort law scholars generally share a strong faith that their arguments will influence the national debate on tort

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[1] National attention has recently focused on cases "such as the $2.7 million award to a woman injured by hot McDonald's coffee, or the $1 million award to a psychic who claimed a CAT scan robbed her of her ESP." Elsa F. Kramer, *Tort Reform: Does It Make "Common Sense" for Indiana?*, RES GESTAE, Feb. 1995, at 8, 8.

[2] In March 1995, when Illinois enacted the Civil Justice Reform Act, which limits recovery for noneconomic damages and eliminates joint and several liability, it joined more than thirty states that have enacted tort reform legislation since the mid-1980s. *See* Stephen J. O'Neil, *A New Day: The Civil Justice Reform Amendments of 1995*, CBA REC., May 1995, at 18. In the last 10 years, 33 states have abolished or modified rules on joint and several liability, and 30 states have reformed laws on punitive damages. *See id.*

[3] The most comprehensive of the federal tort reform proposals, the Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. (1995), passed the House, an amended version passed the Senate, but the bill still awaits conference between the two Houses to resolve the differences. *See* 141 CONG. REC. S17,674 (daily ed. Nov. 28, 1995) (statement of Sen. Pressler). A more limited proposal, which focuses primarily on products liability, recently passed the Senate, but President Clinton has threatened to veto the bill so long as it contains caps on punitive damages. *See Senate Votes to Limit Punitive Damage Awards*, ST. LOUIS POST-DISPATCH, Mar. 22, 1996, at 1A. Critics have accused the President of playing election-year politics and threatening to veto the bill in order to gain the support of trial lawyers, who oppose such damage caps. *See id.*

[4] One commentator argues that there have been "no articles of importance within the last five years written about modern tort law that have not addressed . . . functional economic analysis." George L. Priest, *The Inevitability of Tort Reform*, 26 VAL. U. L. REV. 701, 704–05 (1992).

[5] *See, e.g.*, William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 535 (1985).

[6] *See, e.g.*, Steven A. Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 23–25 (1981).

reform. One prominent law and economics scholar, George Priest, concludes that the force of his school's scholarship has made tort reform inevitable.[7]

This Note argues that these scholars have overestimated the influence of legal scholarship on tort reform. Despite groundbreaking academic analyses of joint liability, punitive damages, and other aspects of the tort system, the 1995 "Common Sense" federal tort reforms embody essentially the changes urged by legal scholars more than twenty years ago. While academics no longer call for the wholesale eradication of noneconomic damages or joint and several liability, legislators do. Rather than speculate about the impetus behind current federal tort reforms, this Note attempts to show that both federal and state tort reform would benefit from incorporating the insights of modern legal scholars.

Part I of this Note considers the genesis of the first tort reform efforts and describes the "progressive" and "classical" schools of traditional tort reform scholarship. Part II describes the recent history of tort reform, focusing on "Common Sense" tort reform legislation at the federal level. Part III describes the "modernist" tort reform movement in recent legal scholarship. This Note then argues that modernist insights could improve "Common Sense" tort reform.

I. THE ERA OF CLASSICAL TORT REFORM

The idea of fundamental reform of the civil justice system has roots in the Progressive Era of legal scholarship, which followed World War I.[8] Reform-minded commentators in the Progressive Era criticized the tort system for inadequately compensating plaintiffs and advocated a more insurance-minded alternative, such as workers' compensation or a no-fault regime.[9] Because "through the first half of the twentieth century, the tort system tended to protect the interests of defendants,"[10] progressive tort reformers sought to enable plaintiffs to prevail more easily.[11] Progressive reformists' hallmark concern for plaintiff compensation dominated tort reform ideas until the late 1960s

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[7] *See* Priest, *supra* note 4, at 705–07. One hopes that these scholars are at least partially correct about the impact of legal scholarship on legislation passed by Congress. The alternatives to scholarship-driven legislation are often less savory: if legislation is not shaped powerfully by scholarship, special interest groups, factions, the media, or big business may fill the void.

[8] *See generally* Lawrence M. Friedman & Jack Ladinski, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 69–79 (1967) (discussing the development of worker's compensation at the height of the Progressive Era).

[9] *See* Robert L. Rabin, *The Politics of Tort Reform*, 26 VAL. U. L. REV. 709, 710–11 (1992).

[10] Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 651 (1990). Before the Progressive Era, the legal regime afforded strong protection to tortfeasors, and the "general principle of our law [was] that loss from accident must lie where it falls." OLIVER W. HOLMES, JR., THE COMMON LAW 94 (Sheldon M. Novick ed., Dover Publications 1991) (1881).

[11] *See* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 695–703, 706–12 (1993).

and led to important developments, such as the growth of strict liability at the state level.[12]

Subsequently, progressive tort reform fell into disfavor. Some scholars have suggested that this decline was the result of three separate torts crises.[13] The first crisis occurred in the medical industry in the late 1960s, when health care providers steeply increased premiums, ostensibly because of an increase in negligence claims brought by patients.[14] The second came in the late 1970s, when rising liability premiums led to manufacturer concern.[15] Lastly, a general tort crisis erupted in the 1980s when insurance companies responded to continued financial losses by cancelling or refusing to re-issue policies held by high-risk policyholders.[16] Common law torts attracted the lion's share of the blame for the situation, and the public began to associate lawsuits with hindering commerce.[17]

Academia mirrored big business's discontent with the perceived excesses of tort law. Most notably, the progressive idea that tort law should focus on plaintiff compensation fell into disfavor,[18] as did notions that tort law should serve corrective justice.[19] Instead, law and economics commentators argued that the primary, if not sole, function of tort law was to deter undesirable behavior.[20] If a tort liability rule would not deter potential tortfeasors from engaging in risky activities, these commentators argued for its repeal.

"Classical" tort reform, as defined in this Note, sees itself as an effort to correct the excesses of Progressive Era reform.[21] Classical tort reformers call for the elimination of legal rules that are particularly expensive for defendants. In areas in which liability is perceived as levying a "tort tax," such as products liability and medical malpractice, classical reformers suggest increasing scienter requirements or re-

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12 *See id.* at 706–12.

13 *See* Page, *supra* note 10, at 649–50.

14 *See id.* at 649.

15 *See* James A. Henderson, *Products Liability Law: The Need for Statutory Reform*, 56 N.C. L. REV. 623, 624 (1978).

16 *See, e.g.*, U.S. ATTORNEY GEN. POLICY WORKING GROUP, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6–15 (1986).

17 Some scholars suggest, however, that tort law was merely the scapegoat used to cover up a crisis caused by insurers' bad business decisions. Insurance companies overextended themselves by relying on high interest rate investments during the 1970s, these scholars contend, and when these rates fell in 1984, the industry was forced to raise premiums in response. *See* Brenda Trollin, *Controlling Liability Insurance Costs*, 11 STATE LEGIS. REP., May 1986, at 1, 1, *reprinted in* NATIONAL CONFERENCE OF STATE LEGISLATURES, RESOLVING THE LIABILITY INSURANCE CRISIS (1986).

18 *See, e.g.*, STEVEN A. SHAVELL, AN ECONOMIC ANALYSIS OF ACCIDENT LAW 231 (1987).

19 *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093–98 (1972).

20 *See, e.g.*, SHAVELL, *supra* note 18, at 298.

21 *See* Page, *supra* note 10, at 654.

pealing liability altogether.[22] Classical reformers wish to lower or abolish noneconomic and punitive damages,[23] and to abolish joint and several liability.[24] Critics could dub classical reform "baby-with-the-bathwater" reform, because it is not aimed at *reforming* common law rules, but at *repealing* them either in whole or in part.[25] Critics claim that such classical reform "is fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system."[26]

Classical tort reform legislation reflected the crises that spawned it. In the 1970s, in response to the first tort crisis, at least "forty-three states and two territories legislatively modified one or more significant aspects of [their] common law" to limit the potential malpractice liability of health care providers.[27] The second wave of classical tort reforms sought to eliminate pro-plaintiff common law rules across the board, rather than for particular sectors and industries.[28] The most widely adopted tort reforms eliminated joint and several liability and imposed caps on noneconomic damages,[29] especially punitive damages.[30] Several states reestablished sovereign immunity doctrines.[31] Others allowed defendants to pay damage awards periodically, rather than in a lump sum.[32] Some states directly penalized plaintiffs that brought "frivolous" lawsuits,[33] and others mandated alternative forms of dispute resolution.[34] By 1991 nearly all fifty states had enacted some form of tort reform.[35]

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[22] PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 4, 11 (1988).

[23] *See id.* at 79–80.

[24] *See id.* at 115–16, 121–22.

[25] Classical tort reform also differs from progressive reform in that it focuses on the legislative, rather than the judicial arena. *See* Page, *supra* note 10, at 654–55. Indeed, prior to 1970, "legislatures rarely initiated major changes in tort law." Nancy L. Manzer, Note, *Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 633 (1988).

[26] Page, *supra* note 10, at 654.

[27] Peter A. Bell, *Legislative Intrusions into the Common Law of Medical Malpractice*, 35 SYRACUSE L. REV. 939, 943 (1984).

[28] *See* Manzer, *supra* note 25, at 633.

[29] *See id.* at 633–34.

[30] *See, e.g.*, COLO. REV. STAT. §§ 13-21-102, -102.5 (1989); MINN. STAT. ANN. § 549.191 (West 1988 & Supp. 1995).

[31] *See, e.g.*, OKLA. STAT. ANN. tit. 51, § 155 (West 1988 & Supp. 1996) (immunizing state from liability for failure to provide police or fire protection).

[32] *See, e.g.*, MICH. COMP. LAWS ANN. § 600.6309 (West 1987) (allowing for automatic periodic payments when judgments exceed a fixed amount).

[33] These fee-shifting provisions allowed the judge to award fees only to the defendant in cases in which a suit was brought in bad faith or in order to harass the defendant. *See, e.g.*, FLA. STAT. ANN. § 57.105 (West 1994 & Supp. 1996); HAW. REV. STAT. § 607-14.5 (1988).

[34] *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.4951–4969 (West 1987).

[35] *See* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 859–62 (2d ed. 1992) (describing state tort reform proposals from 1986 to 1991).

II. THE "COMMON SENSE" TORT REFORMS

When the Republican Party gained control of both houses of Congress in 1994, the momentum of tort reform shifted from the state to the federal level. Legal reform was a critical component of the Contract with America, the House Republicans' 1994 platform.[36] Tenet Nine of the Contract with America called for a variety of tort reforms including, inter alia, the institution of punitive damage limitations, reformation of the products liability laws, and adoption of the British rule of attorney fee-shifting.[37] In the first one hundred days after the new Congress was seated, the Republicans attempted to live up to their contract by introducing four Common Sense reform bills designed to reform the legal system: the Common Sense Product Liability Reform Act,[38] the Common Sense Product Liability Reform Act of 1995,[39] the Common Sense Legal Reforms Act of 1995,[40] and the Common Sense Legal Standards Reform Act of 1995,[41] collectively referred to as the "Common Sense reform bills."

Broadly speaking, the reforms these bills propose fall into one of two categories. First, many of the bills contain provisions designed to limit or eliminate the liability of defendants in certain areas. For example, several bills would allow a plaintiff to recover punitive damages only if the plaintiff could show clear and convincing evidence that the harm was a result of conduct evincing conscious indifference to safety ("actual malice").[42] Almost all of the bills would cap punitive damages at some level, typically at the greater of $250,000 or three times the plaintiff's economic injury.[43] The bills would eliminate either joint or several liability of multiple defendants.[44] If a product liability plaintiff misused the allegedly defective product, the Common Sense bills generally would reduce the liability of the manufacturer by

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[36] *See* Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 700 (1995).

[37] *See* Kramer, *supra* note 1, at 8.

[38] H.R. 917, 104th Cong., 1st Sess. (1995). The bill was sponsored by Representative Michael Oxley of Ohio and introduced in the House on February 13, 1995. House Bill 917 has been reported in the House, but no action has been taken on it since March 1, 1995. *See* 141 CONG. REC. H2486 (daily ed. Mar. 1, 1995).

[39] H.R. 955, 104th Cong., 1st Sess. (1995). The bill was introduced on February 15, 1995, by Illinois Representative Henry Hyde. On the same day, House Bill 955 was referred to the House Judiciary Committee, where it has remained to date. *See* 141 CONG. REC. H1849 (daily ed. Feb. 15, 1995).

[40] H.R. 10, 104th Cong., 1st Session (1995). The bill was introduced by Representative Henry Hyde on March 22, 1995. House Bill 10 had an impressive 150 co-sponsors when it was initially introduced. House Bill 956 now encompasses the majority of Title I of House Bill 10.

[41] H.R. 956, 104th Cong., 1st Sess. (1995). The bill was introduced by Representative Henry Hyde on February 15, 1995. *See* 141 CONG. REC. H1849.

[42] H.R. 956 § 2(a); H.R. 955 § 8(A), (C); H.R. 917 § 6(c)(1).

[43] *See* H.R. 956 § 201(b); H.R. 10 §(C), (D); H.R. 955 § 8(B); H.R. 917 § 6(c)(2).

[44] *See* H.R. 956 § 109; H.R. 10 §(C), (D); *see also* H.R. 955 § 6 (eliminating such liability for damages generally); H.R. 917 § 5(c) (eliminating liability for noneconomic damages only).

a proportion equal to the percentage of the harm caused by the misuse.[45] Some of the bills would set federal liability standards.[46]

Second, all of the tort reform bills share a desire to deter frivolous litigation. Some of the bills would allow sanctions to be directly imposed on plaintiffs that file frivolous suits.[47] Others would adopt the British fee-shifting rule and routinely award fees to the prevailing party.[48]

III. The Failures of Neoclassical Tort Reform

The Common Sense tort reform bills are best understood as "neoclassical." The bills share the major elements of the classical tort reform movement: a strong pro-defendant leaning, the goal of eliminating pro-plaintiff common law rules, and in many cases, the desire to award special protections to particular sectors of the economy. Yet in some ways, the Common Sense reforms have advanced beyond their classical ancestors: they urge less radical reform and show more sympathy for plaintiffs' rights.[49]

Although the neoclassical reforms embodied in the Common Sense reform bills represent a moderate improvement over their classical pre-

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[45] *See* H.R. 956 § 107; H.R. 917 § 4.

[46] *See* H.R. 10 § 103. The bills contain other miscellaneous provisions limiting defendants' liability. Some would provide manufacturers with a complete defense if the accident was more than 50% attributable to the plaintiff's use of alcohol or drugs. *See* H.R. 956 § 105; H.R. 955 § 5; H.R. 917 § 7(a). Others would create a two-year statute of limitations for most products liability actions, *see* H.R. 917 § 8(a), and bar most claims not filed within fifteen years of the delivery of a "capital good" to its first purchaser, *see* H.R. 956 § 109; H.R. 955 § 7; H.R. 917 § 8(b).

[47] *See* H.R. 10 §§ 202, 204 (addressing frivolous securities litigation); H.R. 917 § 12.

[48] *See* H.R. 10 § 101 (proposing the adoption of the English rule in federal civil diversity litigation).

The goals of reducing defendant liability and deterring frivolous litigation have been somewhat controversial in both chambers of Congress. For example, the Common Sense Legal Standards Reform Act of 1995 (House Resolution 956) was amended several times in the House before going to the Senate, where it was again amended numerous times. Amendments added in the Senate include the Snowe amendment to limit the amount of punitive damages that may be recovered in a health care liability action. *See* 141 CONG. REC. S5940 (daily ed. May 2, 1995).

Moreover, a number of other amendments relating to the punitive damages provision were proposed but rejected by the House, including the Furse amendment, which would have stricken the clear and convincing burden of proof requirement, *see* 141 CONG. REC. H2940 (daily ed. Mar. 9, 1995), the Hoke amendment, which would have required that 75% of punitive damage awards in civil cases exceeding $250,000 be forfeited to the treasury of the state in which the action was brought, *see* 141 CONG. REC. H2951 (daily ed. Mar. 9, 1995), and a motion to raise the cap on punitive damages to $1 million, *see* 141 CONG. REC. H3026 (daily ed. Mar. 10, 1995). The two Houses have had considerable difficulty in reconciling the differing versions of the bill. *See* 141 CONG. REC. S17,674 (daily ed. Mar. 9, 1995).

[49] This section of the Note analyzes the Common Sense tort reform efforts at reducing defendant liability and frivolous lawsuits. *See supra* pp. 1769–70. In discussing reforms that reduce defendants' liability, this Note will focus solely on the proposals to cap punitive damages and eliminate joint and several liability, because these proposals are considered most important by commentators, *see, e.g.*, Manzer, *supra* note 25, at 628, and at least the former has become an important point of contention between the President and Congress, *see supra* note 3.

cursors, the bills nonetheless fail to take into account many recent advances in law and economics tort scholarship. The newest wave of academic reformers — modernist tort scholars — recognize that, although many of the pro-plaintiff common law rules adopted in the Progressive Era have defects, these rules serve important insurance and deterrence functions. Modernist tort scholars advocate modifying but retaining the existing rules to serve the goals of tort law better. To clarify the difference between neoclassical and modernist reform, the following sections explore both classical critiques of the tort system and modernist responses. The Common Sense tort reform bills suffer from serious defects that Congress could rectify by shifting from a neoclassical to a modernist approach to tort reform.

A. Punitive Damages

The practice of awarding punitive damages for torts has ancient origins.[50] Whatever the rationale in ancient times, punitive damages have been justified throughout American history on punishment and deterrence grounds.[51] Pre-classical tort doctrine held that it was just and right to impose punitive damages to "punish" guilty tortfeasors[52] and that punitive damages would teach the defendant a lesson, so that the tort would not be repeated in the future.[53]

However, the traditional justifications for punitive damages came under rigorous attack in the years following the tort crises. First, for different (and even opposing) reasons, commentators argued that punitive damages either would not result in optimal deterrence or would not deter at all.[54] Some classical reformers argued that punitive damages could not be used to create optimal deterrence because tort law serves a variety of disparate and often conflicting goals.[55] Different classical reformers maintained that punitive damages would lead to overdeterrence, because manufacturers act overly cautiously in the face of uncertain levels of liability.[56] Second, critics charged that punitive

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[50] Precursors to punitive damages existed in the Code of Hammurabi as early as 2000 B.C. *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984).

[51] *See id.* at 1126.

[52] *See* JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 2.02, at 4–5 (1995).

[53] *See id.* § 2.06, at 13–14.

[54] Some commentators argue that, because the majority of jurisdictions allow manufacturers to insure against punitive damage claims, punitive damages no longer serve a significant deterrent purpose. *See, e.g.*, Sales & Cole, *supra* note 50, at 1163. This view seems to overlook the possibility that insurers may (1) require manufacturers to take certain precautions in order to qualify for coverage, (2) raise premiums of manufacturers who are hit with punitive damage claims, or (3) deny coverage to manufacturers who are repetitively held liable for punitive damages.

[55] *See* Bruce Chapman & Michael Trebilcock, *Punitive Damages: In Search of a Rationale*, 40 ALA. L. REV. 741, 742–43 (1992).

[56] *See, e.g.*, Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 988 (1989).

damages lead to excessive litigation and windfall gains for plaintiffs, encouraging plaintiffs to pursue litigation by making settlement more likely as defendants seek to avoid the increased costs and uncertainty of trial.[57] Third, punitive damages were blamed for reducing the availability and increasing the cost of insurance.[58] Finally, many blamed punitive damages for producing unjustifiable awards and forcing otherwise viable industries out of business.[59]

One of the most scathing critiques of punitive damages arose from law and economics scholars, who argued that, to reach the socially efficient level of deterrence, each tortfeasor must be held liable for a dollar amount exactly equal to the social harm caused by the tort — the total economic and noneconomic damages suffered by all potential plaintiffs.[60] If each potential plaintiff brings suit and receives an amount equal to the actual economic damages he or she has suffered, efficient deterrence will be obtained. On the other hand, adding punitive damages on top of actual damages will result in tortfeasors taking a supra-optimal level of care — overdeterrence — unless an insufficient number of plaintiffs bring suit or the tortfeasor escapes detection.[61] In addition to making inefficiently high investments in care, tortfeasors who manufacture products will also pass on at least some of the costs of punitive damages to consumers in the form of higher prices.[62] From these observations, it follows that neither the *wealth* of a corporation nor the egregiousness of corporate behavior *should* affect the level of punitive damages,[63] because relying on these factors divorces the level of punitive damages from the amount of harm caused by the tort; only if punitive damages equal social harm will optimal deterrence result. In short, "[s]imple economic models of tort law

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[57] *See* Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 448 (1988); David Rosenberg & Steven A. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3–6 (1985).

[58] *See* TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 66–69 (1986).

[59] *See* Dickinson R. Debevoise, *A Trial Judge's View of Tort Reform*, 25 SETON HALL L. REV. 853, 855–57 (1994) (noting anecdotal evidence that HMOs suffer large punitive damage awards).

[60] *See, e.g.*, A. Mitchell Polinsky & Steven A. Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239, 240 (1993).

[61] *See* William M. Landes & Richard R. Posner, *New Light on Punitive Damages*, REGISTER, Oct. 1986, at 33.

[62] If liability is routinely imposed for damage actually caused, the price of the product will rise to include an efficient "risk premium" that reflects the expected accident costs of the product's use. Adding liability for punitive damages will result in the inclusion of an additional (inefficient) price premium that reflects the expected cost of punitive damages. *See generally* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 94–104 (2d ed. 1989) (discussing how legal liability leads to product price premiums).

[63] Note that the Common Sense reforms do not address this critique, because they raise the scienter requirement for punitive damages to a recklessness standard. *See supra* p. 1769.

demonstrate that ordinary compensatory damages are sufficient to induce the injurer to take the socially efficient level of care."[64]

The response of neoclassical reformers to these critiques of the punitive damage system is to urge its emasculation. By setting damage caps and raising plaintiffs' burden of proof with respect to damages, neoclassical reformers seek to minimize the use of punitive damages in the tort system. But capping punitive damages is a nonsensical response to many of the concerns that led to the tort crisis. Modernist law and economics scholars have developed better, less drastic solutions to the alleged punitive damages problem.

First, modern scholars question the assumption that, as an empirical matter, excessive punitive damages are a problematic facet of the tort system. A study by the RAND Institute for Civil Justice shows that the frequency and magnitude of punitive damage awards changed little in the period from 1962 to 1987.[65] The General Accounting Office examined data from five states in the years from 1983 to 1985 and concluded that punitive damage awards were neither frequent nor excessively large.[66] A comprehensive study by legal scholars that analyzed 25,627 civil jury verdicts in eleven states found that plaintiffs received punitive damages in only 4.9% of these verdicts[67] and that, even when punitive damages were awarded, "the amount was generally modest."[68] A fourth study, which looked at 355 punitive damage awards, further supports the finding that "[m]edian punitive damage awards . . . are quite modest."[69] Although earlier studies did show slightly greater use of punitive damages,[70] the lion's share of the empirical evidence no longer supports the claim that runaway punitive damages are widespread, and may point in the opposite direction.

Even if punitive damage awards are sufficiently large or frequent to warrant legal concern, damage caps are an ineffective answer to the classical charges. For example, the cap proposed by the Common

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64 Darryl Biggar, *A Model of Punitive Damages in Tort*, 15 INT'L REV. L. & ECON. 1, 1 (1995).

65 *See* WILLIAM M. LANDES & RICHARD R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 15 (1987).

66 *See* U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMM. ON COMMERCE, CONSUMER PROTECTION, AND COMPETITIVENESS, COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, PRODUCT LIABILITY, VERDICTS AND CASE RESOLUTION IN FIVE STATES, GAO/HRD-88-89, at 2 (Sept. 1989).

67 *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 28–31 (1990).

68 *Id.* at 43.

69 Michael Rustad, *In Defense of Punitive Damage Awards in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 45 (1992).

70 The Rand Corporation studied two counties in California and found that, in one county, the average punitive damage award jumped 1500% percent between 1980 and 1984. *See* AMERICAN TORT REFORM ASS'N, PUNITIVE DAMAGES UPDATE, RELEVANT STUDIES ON TORT REFORM/PUNITIVE DAMAGES (Apr. 12, 1989). But a study with such a small sample size cannot overshadow the numerous larger studies revealing contradictory results.

Sense legislation — the greater of $250,000 or three times a plaintiff's economic damages — would not prevent runaway damage awards from forcing viable companies out of business; small businesses — perhaps the backbone of American industry — would still buckle under the weight of quarter-of-a-million-dollar damage verdicts. Furthermore, even with the damage cap, even large corporations would still face insolvency in cases in which the plaintiff's economic damages are high, such as environmental disaster or mass toxic tort suits.[71] To the extent that punitive damages currently correct for the tort system's inability to hold all tortfeasors accountable, a cap may result in underdeterrence.

Common Sense tort reform would benefit from abandoning the classical goal of curtailing punitive damages and instead focusing on improving the current punitive damage system with the help of the insights of modernist legal scholars. For example, recent scholarship suggests that requiring civil plaintiffs to forfeit punitive damage awards to a third party would curtail the negative incentive effects of punitive damages.[72] Plaintiffs will be less interested in bringing punitive damage claims if they do not benefit from them.[73] Forfeiture would solve the problem of plaintiffs bringing meritless suits and receiving a windfall to which they are not entitled.[74] Because plaintiffs would have no incentive to pursue punitive damage awards, these damages would be sought by state-appointed attorneys in separate proceedings.[75] The state could pursue those claims only when punitive damages would have a beneficial effect. The state could base its decision to seek punitive damages on factors such as the likelihood that the tortfeasor would evade detection, thus allowing punitive damages to serve a beneficial deterrent purpose.

A second beneficial modernist reform proposal is to adopt structured guidelines for punitive damage awards. When the federal gov-

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[71] *See generally* Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 87 (1992) ("Capping punitive awards at a specific monetary level is an inefficient way to deter harmful misconduct, because each defendant's economic situation is different.").

[72] *See, e.g.*, *id.* at 90–92. Most scholars suggest that the state would receive the plaintiff's forfeited award. Nonetheless, nothing requires that the state be the recipient of the forfeited funds, and state-received punitive damage awards may be subject to constitutional scrutiny under the Excessive Fines Clause. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989). A superior alternative has been adopted by states that "give money to such things as health plans, rehabilitation services, [and] insurance assistance programs." James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1139–40 (1992).

[73] *See* Breslo, *supra* note 72, at 1140.

[74] Under a forfeiture plan, plaintiffs will still have an advantage in bargaining, because defendants will have an incentive to settle to avoid possible state-sought punitive damages. *See id.* at 1158–66. However, this advantage will be weaker than under the current system, because plaintiffs will not be able to control the state decision whether to pursue a punitive claim.

[75] *See* E. Jeffrey Grube, *Punitive Damages, A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 856 (1993); Breslo, *supra* note 72, at 1148–49.

ernment was concerned with ensuring consistency in punishment in the criminal justice system, it adopted the Federal Sentencing Guidelines.[76] One scholar suggests that a similar system be imposed in the tort context to ensure consistency in punitive damage awards.[77] To create a uniform system of guidelines, Congress would examine certain types of torts and decide how often defendants escape detection, plaintiffs fail to bring suit, or the tort causes harm not covered by compensatory damages. Congress would then establish a range of punitive damages — perhaps based on a multiplier of the plaintiff's actual harm — that a jury could impose. Punitive damage guidelines set in this way would alleviate both the problem of juries awarding excessive verdicts when the defendant has deep pockets, and the problem of potential tort defendants overinvesting in preventative measures in the face of uncertain liability. Punitive damage guidelines are also superior to damage caps because they are narrowly tailored to the social harm caused by particular torts; the guidelines are related to the defendant's conduct in a way that reflects the deterrence purposes of punitive damages — ensuring that tortfeasors are liable for the entire amount of social harm caused by the tort.

Tort reform that incorporated the modernist insights would not simply cap punitive damages at a set level, but rather establish guidelines to govern the use of punitive damages and require that these damages be forfeited to the state. The Common Sense reform bills' reliance on the old mantle of a straightforward cap reflects the modernist school's failure to influence the national debate.

B. Joint and Several Liability

The doctrine of joint and several liability originated in British common law and was initially applied in cases in which multiple tortfeasors committed a "shared tort" by breaching a common duty or injuring a plaintiff in concert.[78] The doctrine was adopted in America through a complex and convoluted process that stretched the doctrine far beyond its British origins.[79] Today, joint and several liability allows a plaintiff to sue a single defendant and recover full damages for harm caused by multiple tortfeasors. The Progressive Era tort reformers championed joint and several liability because it spread losses

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[76] *See* ANDREW VON HIRSCH, THE SENTENCING COMMISSION AND ITS GUIDELINES 3–5 (1987).

[77] *See* Jonathan Kagan, Comment, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform*, 40 UCLA L. REV. 753, 783–85 (1993).

[78] *See* W. PAGE KEETON, PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 351 (5th ed. 1984).

[79] For a more detailed summary of the development of joint and several liability doctrine, see John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 194–98 (1986).

among defendants rather than plaintiffs[80] and ensured that plaintiffs received full compensation for their injuries.[81] The arguments of the progressive reformers were successful; as recently as 1973, "joint and several liability was universally applied in every state."[82]

As the tort crises waxed, scholarly scrutiny of joint and several liability increased. Classical tort reformers called "joint and several liability the 'deep-pocket theory' because it encourages plaintiffs to seek out defendants of minimal culpability but maximum financial ability and add them to the suit to bankroll the expected judgment."[83] Classical reformers stressed that it was normatively unfair to hold a single defendant fully liable when that defendant was only remotely involved in causing the harm.[84] Other scholars argued that joint and several liability had malevolent effects on the insurance industry.[85] They claimed that, for insurance to function properly, insurers must be able to predict potential liability accurately ex ante.[86] Because joint and several liability reduced the insurer's ability to predict a policyholder's tort liability exposure reliably, insurance costs rose.[87]

Most modernist tort scholarship views joint and several liability more favorably. Even during the age of classical tort reform, many scholars praised joint and several liability as encouraging settlement.[88] They argued that in cases in which all trial outcomes were identical, the plaintiff would settle with some defendants for less than their pro rata share, because as long as one defendant remains, the plaintiff can sue the remaining defendant for the rest of the uncompensated damages.[89] Despite this conventional wisdom, more recent modernist writers argue that the effect of joint and several liability on settlement

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80 *See* James J. Scheske, *The Reform of Joint and Several Liability Theory*, 54 J. AIR L. & COM. 627, 631 (1988).

81 *See, e.g.*, American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 904–05 (Cal. 1978).

82 Paul Bargren, Comment, *Joint and Several Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453, 471.

83 *Id.* at 456.

84 *See, e.g.*, Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1133 (1989) (complaining that shifting losses to a joint tortfeasor treats the tortfeasor as a "whipping boy").

85 *See, e.g.*, Scheske, *supra* note 80, at 650.

86 *See* Basil L. Bradley, *Why Tort Reform Was Needed in Washington*, 22 GONZ. L. REV. 3, 12 (1986).

87 *See* Richard K. Willard, *Troubling Trends in Our Civil Justice System and the Need for Tort Reform*, 34 FED. B. NEWS & J. 116, 118 (1987).

88 *See, e.g.*, Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 358 (1980).

89 Suppose a plaintiff suffers a $1000 harm that was jointly caused by two defendants and has a 50% chance of winning at trial against either defendant. In the absence of several liability, each defendant will settle for up to $250 (half of their share of the expected joint loss at trial). But with joint and several liability, if one defendant settles for $250, the remaining defendant faces a 50% chance of paying the remaining $750, and therefore will pay up to $375. Each defendant thus has an incentive to rush to settlement. *See* John J. Donahue III, *The Effect of Joint and Several Liability on the Settlement Rate*, 23 J. LEGAL STUD. 543, 545–46 (1994).

rates is impossible to predict ex ante and therefore should be ignored in deciding whether to retain such liability.[90] These writers claim that the same proposition also holds true for the effect of joint and several liability on deterrence.[91] One commentator argues that, while joint and several liability increases the likelihood of settlement, it can also lead to excessive deterrence.[92] As a result, whether joint and several liability is beneficial from a societal perspective remains unclear.

Other modernist writers are more supportive of joint and several liability. First, several recent studies show that joint and several liability is seldom used and, therefore, unworthy of constant attention and criticism.[93] Further, some commentators argue that the elimination of joint and several liability would actually lead to increased insurance rates and transaction costs, because nonjoint liability necessitates the impleader of additional parties, requires more proceedings, and results in longer court delays.[94] From a deterrence perspective, modernist writers use simple economic theory to caution against eliminating joint and several liability. In the absence of joint and several liability, potential tortfeasors as a group will discount their legal liability for committing a tort by the probability that they will become insolvent before having to pay a judgment.[95] For example, if a firm

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[90] Two of the foremost legal experts on joint and several liability note:

> The central conclusion of our analysis is that the comparison of the settlement-inducing properties of joint-and-several liability and nonjoint liability depends critically on the correlation of the plaintiff's probabilities of success. When these probabilities are independent, joint-and-several liability unambiguously discourages settlements . . . . When, in contrast, these probabilities are perfectly correlated, joint-and-several liability . . . encourages settlement when the litigation costs are low but may discourage settlements when these costs are high.

Lewis A. Kornhauser & Richard L. Revesz, *Evaluating the Effects of Alternative Superfund Liability Rules*, *in* ANALYZING SUPERFUND: ECONOMICS, SCIENCE AND LAW 115, 130 (Richard L. Revesz & Richard Stewart eds., 1995).

[91] *See id.* The deterrent effect of liability rules is not always indeterminate, however. Kornhauser and Revesz note that "[n]egligence . . . does not necessarily provide the right incentives when it is coupled with nonjoint liability." *Id.* at 122. They also argue that both joint and nonjoint liability can lead to underdeterrence when coupled with strict liability; this claim undercuts the classical argument that joint and several liability should be eliminated in order to prevent defendants from overinvesting in care. *See id.* at 116.

[92] *See* Kathryn E. Spier, *A Note on Joint and Several Liability: Insolvency, Settlement, and Incentives*, 23 J. LEGAL STUD. 559, 560 (1994) (noting that, "[w]hile out-of-court settlement is . . . desirable because it minimizes the private and public costs of litigation," it is likely that "the excessive value that the plaintiff derives from settlement will induce the defendants to overinvest in precautions ex ante").

[93] *See* Bargren, *supra* note 82, at 473–74. One Wisconsin study of 834 personal injury jury verdicts showed that joint and several liability played a role in only 1.6% of these cases. *See id.* at 473. That joint and several liability is not an important doctrine makes intuitive sense because joint liability only makes a practical difference if a potential defendant is insolvent or cannot be joined to the trial for some reason. *See* Wade, *supra* note 79, at 211.

[94] *See* Philip A. Talmadge & N. Clifford Petersen, *In Search of a Proper Balance*, 22 GONZ. L. REV. 259, 264–65 (1986).

[95] *Cf.* Manzer, *supra* note 25, at 648 ("By eliminating joint and several liability, legislatures have eliminated an element of an actor's expected accident costs.").

has a ten percent chance of becoming insolvent before the legal system forces it to pay the $10,000 cost of potential harm, the firm will take only liability-avoiding precautions that cost less than $9,000, *ceteris paribus*. With joint and several liability, firms must also consider the potential liability they may face for other joint tortfeasors who become insolvent. If each of several tortfeasors could cause a $10,000 harm and has a ten percent chance of becoming insolvent, the expected liability for each firm is $10,000, equal to the cost of the social harm, and optimal for deterrence purposes. Joint and several liability may roughly counterbalance the underdeterence that results from the possibility that a firm will go insolvent before paying a tort judgment, and may produce better deterrence.[96]

New scholarship also suggests that joint and several liability can serve important insurance purposes. In the absence of joint and several liability, the plaintiff bears the risk that tortfeasors will later become insolvent. Because individuals are generally risk averse, social utility can be increased by ensuring that losses are spread throughout society, rather than left with a single victim. Joint and several liability tends to shift losses to deep-pocket defendants who "can generally spread throughout society any extra damages the joint and several liability rule requires."[97]

Nonetheless, critics charge that using joint and several liability to further the insurance goal of spreading pecuniary losses involves unnecessarily high administrative costs[98] and that market sources of insurance may be cheaper for these kinds of losses. This argument does not hold true for nonpecuniary losses; tort liability can still serve an important insurance purpose by ensuring that plaintiffs are more fully compensated for their nonpecuniary losses and by spreading these costs throughout society.[99] Indeed, tort law may be uniquely suited to provide nonpecuniary loss insurance.[100] If so, eliminating joint and several liability will make achieving this objective more difficult.

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[96] *See id.* at 649. There are counter-arguments to this point of view. Large corporations may fear systematic liability for the harms of numerous small, short-lived corporations and, as a result, be discouraged from engaging in socially desirable activities.

[97] Bargren, *supra* note 82, at 476.

[98] "In the tort system, there is a dollar of administrative costs" for every dollar that reaches the plaintiff. Kramer, *supra* note 1, at 9.

[99] Critics argue that the absence of a market for nonpecuniary loss insurance indicates that people do not value such insurance. *See* George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REG. 237, 243 (1992). However, there are other factors that may explain why such a system did not develop, such as the legal constraints and social norms against providing insurance for nonpecuniary losses. *See* Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1851–56 (1995). Another explanatory factor may be that insurers seeking to provide nonpecuniary loss insurance would face heightened dangers of moral hazard because of special information asymmetries present in this context. *See id.* at 1848–51.

[100] Unlike market-provided insurance, nonpecuniary loss insurance provided by the tort system would not violate social norms and legal constraints. *See id.* at 1906–14. The tort system's use of

Even if joint and several liability has faults, these faults can be remedied by modifying the doctrine to make it fairer to defendants. For example, when there are multiple tortfeasors, juries could be required to find the defendants' "individual percentages of fault."[101] Each defendant would then be liable for this percentage of the harm. Moreover, one modernist scholar suggests, "if any defendant's equitable share is uncollectible, it should be divided among all the other parties at fault, whether plaintiff or defendant, according to their fault percentages."[102] This system would answer the classical claim that joint and several liability forces defendants who have committed minimal wrongs to shoulder the entire burden of the plaintiff's damages. It also requires potential joint tortfeasors as a group to internalize costs imposed by the tort that would otherwise have been externalized when an individual tortfeasor became insolvent.

Thus, at the very least, modernist literature cautions against repealing joint and several liability en masse and provides some affirmative support for maintaining it. Yet the Common Sense reform bills do not reflect the moderation of this scholarship.

C. *Discouraging Frivolous Lawsuits*

In the age of progressive tort reform, the problem of "frivolous lawsuits" did not attract much attention. Because the existing common law rules were pro-defendant, commentators felt that meritless suits were unlikely to survive pretrial screening mechanisms or lead to settlement. As reforms liberalized the common law, plaintiffs were able to bring suits of more questionable merit. Classical tort reformers suggested that plaintiffs with no real claims were bringing suit in the hopes that the defendants would settle in order to avoid legal fees or the threat of a large damage award at the hands of an unduly plaintiff-sympathetic jury.[103] Insurance premiums, they claimed, had "consequently risen to unmanageable heights."[104] As concern over the insurance crisis grew, classical reformists urged legal reform to discourage or punish plaintiffs directly for bringing frivolous lawsuits. Classical reformists focused first on Rule 11 of the Federal Rules of Civil Procedure, which allows sanctions to be imposed on parties who file frivolous motions or lawsuits.[105]

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civil juries to evaluate plaintiff claims also alleviates the market problem of insureds who possess asymmetric information. *See id.* at 1900–06.

101 Wade, *supra* note 79, at 198.

102 *Id.*

103 *See* Bebchuk, *supra* note 57, at 448.

104 Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 HOUS. L. REV. 1915, 1918 (1994).

105 Originally, Rule 11 was seldom used by courts. *See* William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 7 (1994). In 1983, as a result of rising discontent over frivolous lawsuits, Rule 11 was amended to ensure that sanctions would be imposed often enough to act as a serious deterrent. *Cf.* FED. R. CIV. P. 11, Proposed Amendment to the Federal Rules

Since 1994, tort reform designed to minimize frivolous lawsuits has taken a slightly different — neoclassical — form. Rather than impose penalties directly on plaintiffs, the proposals would shift attorney's fees — a more reciprocal solution. Currently, most tort suits are governed by the American rule: each party is responsible for his or her own attorney's fees.[106] The Common Sense bills would adopt the British rule:[107] the loser in a civil lawsuit pays for part or all of the winner's attorney's fees.[108] The British rule is neither directly biased in favor of defendants nor focused on deterring frivolous lawsuits. Unlike Rule 11, the British rule requires the losing party to pay even if that party had a meritorious but unsuccessful claim. The rule is neoclassical, however, because its primary intended effect is to discourage plaintiffs from bringing claims that they are likely to lose.[109] It also decreases defendants' incentives to settle frivolous cases to avoid the costs of trial, by ensuring that these costs will be born by losing plaintiffs.[110]

Although the Common Sense reform acts thus enjoy neoclassical support, they once again ignore the valuable insights of modernist tort scholars. For example, recent law and economics scholarship has shown that the British rule may actually *increase* the administrative costs of the judicial system.[111] A primary reason that parties settle cases is to avoid litigation and trial costs.[112] Under the British rule, when parties are optimistic about the merits of their cases, they "perceive the size of the [cost savings of settlement] to shrink because they expect to win, thereby avoiding all litigation costs."[113] When both parties are optimistic, settlement is less likely. If fewer cases settle under the British rule, society will have to pay for more trials, and the administrative costs of the tort system will increase.

The British rule might also increase the administrative costs of the tort system by encouraging overinvestment in attorneys' fees. Most legal scholars agree that, to some degree, the likelihood that a party

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of Civil Procedure, Advisory Committee's Note, *reprinted in* 97 F.R.D. 165, 198 (1983) ("The new language is intended to reduce the reluctance of courts to impose sanctions.").

106 *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 9 (1984).

107 *See* H.R. 10, 104th Cong., 1st Sess. § 101 (1995).

108 *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting*, 1982 DUKE L.J. 651, 651.

109 As some commentators note, the primary benefit of the British rule is that it "can discourage parties from participating in meritless lawsuits . . . by increasing the cost of losing." Maggs & Weiss, *supra* note 104, at 1926.

110 *See id.* Reformists who favor the British rule note that the rule will also solve the problem of defendants with valid defense claims being driven out of business by unmanageable insurance premiums or astronomical legal expenses. *See id.* at 1918.

111 *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 564–74 (4th ed. 1992); Steven A. Shavell, *Suit, Settlement, and Trial*, 11 J. LEGAL STUD. 55, 59 (1982).

112 *See* Shavell, *supra* note 111, at 62–68.

113 John J. Donahue III, *Opting for the British Rule*, 104 HARV. L. REV. 1093, 1099 (1991).

will prevail at trial rises with the amount and quality of the legal assistance it secures.[114] Assume, for example, that a plaintiff suffers $5000 worth of injuries and knows that, if she invests an extra $550 in legal fees, her chances of prevailing will increase by ten percent. Under the American rule, the plaintiff *will not* make such an investment, because the increase in legal cost, $550, is greater than the expected increase in the judgment, $500.[115] Under the British rule, the plaintiff *will* make the investment; the plaintiff's expected judgment is still $500, but the expected cost of the additional legal fees is only $495.[116] Attorney's fees will be higher under the British rule because in deciding how much to spend, each party will discount the expected cost of legal fees by the likelihood of prevailing at trial.[117] An additional inefficiency may stem from the fact that fee shifting increases the "stakes" of the trial for the parties. If parties are risk averse, they would prefer to have as little wealth as possible riding on the uncertain outcome of the trial.[118] By raising the stakes of the "gamble" of trial, the British rule lowers the utility of these risk-averse parties.

Some modernist scholars argue that both the British and American rules are inferior to a one-way fee shifting rule for deterrence reasons. Under the American rule, the expectation that legal fees will be substantial may dissuade plaintiffs with meritorious cases from bringing suit. A potential defendant who knows that the victim's litigation costs will exceed his or her potential recovery — the cost of the harm imposed by the defendant's actions — may confidently predict that the victim will not sue. Self-interested defendants in this position will choose to ignore potential tort liability and to forego precautionary measures even when their cost is less than the expected potential liability.[119] The British rule does not solve this problem, because while plaintiffs do not pay costs if victorious, a victim may still be reluctant to bring suit because the victim fears the possibility of paying a victorious defendant's legal fees.[120] A one-way fee-shifting rule in favor of

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114 *See, e.g.*, Thomas J. Miceli, *Do Contingency Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211, 213 (1994).

115 The expected judgment increases by 0.1 x $5000, or $500.

116 The likelihood that the plaintiff will pay the additional $550 decreases by the additional 10% chance that the plaintiff will prevail and be reimbursed by the defendant. Therefore, the expected cost of the additional legal fees (0.9 x $550) is $495.

117 *See* Ronald Braeutigam, Bruce Owen & John Panzer, *An Economic Analysis of Alternative Fee Shifting Systems*, 47 LAW & CONTEMP. PROBS. 173–85 (1984).

118 *See, e.g.*, Linda Babcock, Henry S. Farber, Cynthia Fobian & Eldar Shafir, *Forming Beliefs About Adjudicated Outcomes*, 15 INT'L REV. L. & ECON. 289, 300 (1995).

119 *See* Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1072 (1993).

120 Scholars have shown that the British rule cannot be justified in terms of economic efficiency or deterrence. *See* Clinton F. Beckner III & Avery Katz, *The Incentive Effects of Litigation Fee Shifting When Standards are Uncertain*, 15 INT'L REV. L. & ECON. 205, 207 (1995) ("[J]ust as there is no good theoretical reason to think the British rule generally reduces litigation costs, there is also no good theoretical reason to think it promotes efficient primary behavior.").

plaintiffs does not suffer from this defect. One-way fee-shifting would alleviate the problem by reducing plaintiffs' litigation costs in meritorious cases without penalizing them for unsuccessfully pursuing a legal remedy.[121] As one modernist tort scholar has noted, "fee shifting [solely] in favor of prevailing plaintiffs generates the greatest incentive to comply with the law."[122]

Lastly, recently discovered market evidence seems to provide little empirical support for the claim that the British rule benefits all parties. Litigating parties that believe that the British rule is beneficial, "can simply agree through private contract to litigate their dispute under a fee-shifting arrangement."[123] The virtual nonexistence of such contracts[124] provides circumstantial evidence that both parties do not consider the British rule advantageous.[125]

IV. CONCLUSION

This Note has analyzed progressive, classical, and modernist legal scholarship on tort reform. Analyzing recent federal tort reform efforts in light of these three distinct schools of thought reveals that, while the Common Sense bills receive the widespread support of big business, the proposals they embody rest on outdated and disfavored legal arguments. Common Sense tort reform is little more than a revived version of the classical tort movement of the 1970s and 1980s. That this neoclassical reform is couched in rhetoric that is less anti-plaintiff cannot disguise the fact that it has not advanced with the progress of legal scholarship. The tort reform movement as a whole, and the Common Sense tort reform bills in particular, would benefit from incorporating the insights of modernist tort scholars. These scholars have shown that wholesale elimination of all of the Progressive Era's pro-plaintiff common law tort rules is not necessary or desirable. Rather, these rules should be modified to alleviate the tort crisis without sacrificing deterrence or insurance benefits.

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[121] *See* Hylton, *supra* note 119, at 1089–91. Because one-way fee shifting would encourage plaintiffs to sue, it is not politically popular at present. This fact supports this Note's proposition that legal scholarship and political popularity are not in sync.

[122] *Id.* at 1071.

[123] Donahue, *supra* note 113, at 1101.

[124] *See id.* at 1116–18.

[125] The strength of this argument is somewhat undercut by the fact that parties in England could, but apparently do not contract to the American system. There are two possible explanations for their failure to do so. First, there may be barriers to contracting around the default fee-shifting rules in both countries, in which case the failure of Americans to include the British rule in their contracts does not necessarily show strong support for the American rule. Second, because of differences in the American and British systems, each country may already have the most efficient system for its particular circumstances.

This market evidence does not, however, undermine the claim that plaintiffs would prefer a one-way fee-shifting rule in their favor, because defendants have no incentive to agree to such contracts.

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RECENT CASE

CRIMINAL DEFENSE — LEGAL MALPRACTICE — NEVADA LIMITS THE RIGHTS OF INMATES TO SUE THEIR FORMER ATTORNEYS FOR MALPRACTICE.

(*Morgano v. Smith*, Nos. 24958, 25215, 1994 WL 419906 (Nev. Aug. 10, 1994).

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RECENT CASES

CRIMINAL DEFENSE — LEGAL MALPRACTICE — NEVADA LIMITS THE RIGHTS OF INMATES TO SUE THEIR FORMER ATTORNEYS FOR MALPRACTICE. — *Morgano v. Smith*, Nos. 24958, 25215, 1994 WL 419906 (Nev. Aug. 10, 1994).

"Criminal malpractice"[1] is a relatively new field.[2] In both criminal and civil malpractice proceedings, a plaintiff must prove four basic elements — duty, breach, causation, and damages.[3] Unlike civil malpractice, however, some courts have held that criminal malpractice requires the plaintiff to overcome certain "threshold" matters.[4] In *Morgano v. Smith*,[5] the Supreme Court of Nevada joined a growing number of states that require a plaintiff to prove, as a prerequisite to recovery, that he is innocent of the underlying charge. Although courts have advanced many justifications for an "innocence requirement," the force driving the recent decisions is a desire to promote the criminal law goals of deterring and punishing crime. By following this unfortunate trend, the Nevada court's decision fails in this attempt to further criminal deterrence and retribution.

In *Morgano*, the Nevada Supreme Court consolidated two appeals from final district court judgments addressing malpractice actions against criminal defense attorneys.[6] Plaintiff Jerome Morgano commenced a malpractice action against his former lawyer, James Smith, whose representation resulted in Morgano's guilty plea to one count of selling a controlled substance.[7] The district court granted summary judgment to Smith and, after labelling the malpractice action "frivolous," imposed sanctions of attorney's fees, court costs, and a $500 fine.[8] In the second action, plaintiff Andre Schoka sued his former attorney Jerome Polaha for malpractice after Polaha's representation

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[1] "Criminal malpractice" is a term of art, and is used to refer to attorney malpractice that occurs "in the course of defending a client accused of a crime." Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel–Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1191 n.2 (1974) (internal quotations omitted).

[2] Before 1973, only eight cases involving criminal malpractice had been reported. *See id.* at 1192 & n.4 (citation omitted).

[3] *See, e.g.*, Herston v. Whitesell, 348 So. 2d 1054, 1057 (Ala. 1977); Budd v. Nixen, 491 P.2d 433, 436 (Cal. 1971).

[4] *See* David H. Potel, Note, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 542–43. Such barriers include immunity for court-appointed counsels and public defenders, *see* Robinson v. Bergstrom, 579 F.2d 401, 411 (7th Cir. 1978); Minns v. Paul, 542 F.2d 899, 900–02 (4th Cir. 1976), *cert. denied*, 492 U.S. 1102 (1977); collateral estoppel, *see* Walker v. Kruse, 484 F.2d 802, 803–04 (7th Cir. 1973); or the plaintiff's prior receipt of post-conviction relief, *see* Shaw v. State, 816 P.2d 1358, 1360 (Alaska 1991).

[5] Nos. 24958, 25215, 1994 WL 419906 (Nev. Aug. 10, 1994).

[6] *See id.* at *1.

[7] *See id.*

[8] *See id.*

resulted in Schoka's guilty plea to one count of attempting to obtain money by false pretenses.[9] The district court granted defendant's motion to dismiss for failure to state a claim.[10] Both plaintiffs appealed.

The Supreme Court of Nevada affirmed per curiam. In an opinion as remarkable for its brevity as for its novelty, the court held that to state a claim for legal malpractice against a private criminal defense lawyer, the plaintiff must plead that he has obtained appellate or post-conviction relief.[11] Without explanation, the court also held that to prevail at trial the plaintiff must prove his innocence of the underlying charge.[12] Noting that "[n]either appellant meets this standard" since neither had obtained post-conviction relief,[13] the Nevada Supreme Court upheld the dismissals.[14] The court also explained that, as a general rule, court-appointed counsel and public defenders enjoy complete immunity from malpractice.[15]

Although the *Morgano* court did not state directly its reasons for adopting a "proof of innocence" requirement, related cases have suggested three justifications.[16] Two of these, ensuring representation of criminals and deterring frivolous litigation, are misguided and pretextual. The remaining goal — a desire to punish the underlying crime — is served unsuccessfully by the innocence requirement.

The first justification for the innocence requirement is that it is necessary to ensure the willingness of lawyers to take criminal defense cases. In *Carmel v. Lunney*[17] the New York Court of Appeals claimed that "public policy prevents [the] maintenance of a malpractice action against [an] attorney" without first alleging innocence.[18] Four years

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[9] *See id.*

[10] *See id.*

[11] *See id.* at *2.

[12] The court cited to two recent cases in other jurisdictions with similar holdings. *See id.* Requiring the defendant to prove his innocence of the underlying crime is so strongly pro-attorney that it troubled attorney Smith. *See* Jon Hoffman, *At the Bar: Nevada Limits the Right of Inmates to Sue Their Attorneys, a Decision that Troubles Even Lawyers*, N.Y. TIMES, Sept. 2, 1994, at A22.

[13] Post-conviction relief might include, for example, a sentence reversal based on ineffective assistance of counsel.

[14] *See Morgano*, 1994 WL 419906 at *2–*3.

[15] *See id.* at *1–*2. The Nevada Supreme Court had previously held that a Nevada statute barred malpractice suits against public defenders. *See* Ramirez v. Harris, 773 P.2d 343, 343–44 (Nev. 1989). The *Morgano* court stated that a recent amendment to this statute extended its protection to include court-appointed counsel. *See Morgano*, 1994 WL 419900 at *2. Although Morgano's attorney was court-appointed, he could not seek the statute's protection because he ceased to represent Morgano before the statute was amended. *See id.*

[16] *See* Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 729–33 (1991).

[17] 511 N.E.2d 1126 (N.Y. 1987) (upholding the innocence requirement). The sole source cited by the *Carmel* court to support the innocence requirement was a single law review article, which actually critiqued the innocence requirement. *See* Kaus & Mallen, *supra* note 1, at 1200–06.

[18] *Carmel*, 511 N.E.2d at 1128.

later, in *Glenn v. Aiken*,[19] the Massachusetts Supreme Judicial Court stated: "[t]he public has a strong interest in encouraging the representation of criminal defendants," especially indigent defendants.[20] The *Glenn* court noted that an innocence requirement "reduc[es] the risk that malpractice claims will be asserted and, if asserted, will be successful." As a result, reasoned the court, the requirement encourages attorneys to take criminal defense cases.[21]

However, ensuring representation for indigent criminal defendants through an innocence requirement is a second-best solution. Many courts, including *Morgano*, have instead chosen to provide public defenders and court-appointed attorneys with complete immunity from malpractice claims.[22] Without commenting on the merits of immunity itself, granting immunity to attorneys representing indigents better encourages attorneys to accept indigent cases. Immunity guarantees freedom from liability, whereas an innocence requirement only protects attorneys "fortunate" enough to represent guilty individuals. Granting immunity is also a flexible approach: unlike the innocence requirement, courts can grant immunity on a case-by-case basis to influence an individual attorney's decision to represent a given individual.[23] If the sole factor motivating the *Morgano* court was a desire to ensure the representation of indigents, the court could have simply reaffirmed the state's statutory grant of immunity to public defenders.

The second justification for an innocence requirement is that it is necessary to deter frivolous litigation.[24] This argument assumes that incarcerated persons occupy their free time "'by pursuing [frivolous] civil actions against their former attorneys.'"[25] Such an assumption is misguided; statistics show that prisoners do not file criminal malpractice suits in large numbers.[26] In fact, such claims accounted for only

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[19] 568 N.E.2d 783 (Mass. 1991).

[20] *Id.* at 788.

[21] *See id.* How best to provide incentives for pro bono representation of criminal indigents is an issue that continues to concern legal scholars. As one ex-public defender has noted, "[t]he loss of public defenders to burnout threatens the ability of the system to fulfill its commitment to [effective legal representation]." Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1241 (1993). Professor Ogletree suggests that the situation can best be remedied by, inter alia, a change in the teaching techniques of law schools rather than a change in the law itself. *See id.* at 1289–94.

[22] *See, e.g.*, *Morgano*, 1994 WL 419906 at *1–*2; Ramirez v. Harris, 773 P.2d 343, 344 (Nev. 1989); Stricklan v. Koella, 546 S.W.2d 810, 814 (Tenn. Ct. App. 1976); Potel, *supra* note 4, at 556–60.

[23] *See* Potel, *supra* note 4, at 560–64.

[24] *See* Shaw v. State, 816 P.2d 1358, 1361 (Alaska 1991); Treyz, *supra* note 16, at 729–30; *see also* Kaus & Mallen, *supra* note 1, at 1193 (commenting on the litigious nature of convicts).

[25] Stevens v. Bispham, 851 P.2d 556, 563 (Or. 1993) (quoting 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 21.3, at 290 (3d ed. 1989)).

[26] *See* Jeffrey H. Rutherford, Comment, Dziubak v. Mott *and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 992 (1994) (stating that criminal malpractice is a rare complaint).

three percent of total malpractice claims recorded by 1986.[27] In addition, a court truly concerned with deterring frivolous litigation could accomplish its goal in a more effective manner. For example, the court could merely require a showing of appellate or post-conviction relief by the plaintiff as a condition precedent to recovery.[28] Obtaining relief for incompetent counsel would require the defendant to pass the Supreme Court's rigorous *Strickland v. Washington* standard.[29] The *Strickland* requirements — a showing of deficiency (breach of duty) and of prejudice (damages) — establish a prima facie case of malpractice, and would filter out the most frivolous cases. A second method of deterring frivolous suits, common in other areas of tort law, is to alter the "standard of care."[30] That the *Morgano* court chose to limit criminal malpractice litigation via the innocence requirement suggests that other policy concerns are guiding its decision, particularly when altering standards of care would be a more equitable solution.[31]

The facade of concern with the nature of malpractice litigation obfuscates the court's third objective in imposing an innocence requirement: ensuring deterrence and punishment of the underlying crime. Courts pursuing these goals believe that one who is guilty of the underlying offense does not deserve malpractice compensation because it "reward[s] him indirectly for his crime."[32] Although the criminal justice system occasionally allows guilty individuals to go free in order to safeguard constitutional rights,[33] some courts feel that criminals should not be allowed to collect "windfall damages from their attorney's failure to procure a 'windfall acquittal.'"[34] Collecting such damages potentially interferes with the deterrence and retribution goals of punishment.[35]

Retribution notwithstanding, the innocence requirement theoretically accomplishes deterrence by reducing the utility of committing a crime in two ways. Deterrence theory assumes that the criminal is a

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[27] *See* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 1.7, at 22 n.4 (3d ed. 1989).

[28] *See Morgano*, 1994 WL 419906 at *2.

[29] 466 U.S. 668 (1984). Under *Strickland*, to prove prejudice the plaintiff must show a "reasonable probability" that, but for his attorney's errors, "the result of the proceeding would have been different." *Id.* at 694. *Strickland* prejudice is a more pro-plaintiff standard than the innocence requirement because the burden of proof is lighter, and guilty plaintiffs who receive excessive sentences may obtain relief.

[30] *See* Kaus & Mallen, *supra* note 1, at 1213–19.

[31] There is no reason to assume that one who commits an offense is more likely to file a frivolous suit than one who does not. Acts of "technical" negligence — such as a failure to assert a valid statute of limitations defense — are the most evident malpractice errors and affect innocent and guilty defendants alike. *See Potel*, *supra* note 4, at 547; Treyz, *supra* note 16, at 728–29.

[32] Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991).

[33] An example of such constitutional protection is the Fourth Amendment exclusionary rule.

[34] Treyz, *supra* note 16, at 731.

[35] *See generally* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 113–65 (5th ed. 1989) (discussing the purposes of criminal punishment).

rational actor who will commit a crime when "the expected benefits of the crime to him exceed the expected costs."[36] In other words, the person commits a crime if his expected utility exceeds the probability that he will receive punishment multiplied by the disutility of the punishment.[37] Without an innocence requirement, the criminal's utility is increased by the expected amount of recovery from malpractice causes of action that the criminal may accrue while being defended.[38] The first way an innocence requirement deters crime is by taking away this extra incentive for the criminal to commit the crime. Secondly, imposing an innocence requirement may result in higher conviction rates because it decreases the quality of the defense available to the individual by raising a barrier to malpractice claims.[39] The enhanced probability of receiving punishment may make the rational actor less likely to commit the crime in an innocence requirement regime.[40]

Even if an innocence requirement helps deter criminals, malpractice law is an inappropriate means by which to pursue criminal law goals. Criminal malpractice is a tort claim; courts that manipulate tort remedies to further criminal law goals risk reckless, and unnecessary, doctrinal blurring. Courts should avoid inefficient tort law mechanisms in favor of more efficient criminal law mechanisms to achieve the optimal levels of punishment and deterrence.

Employing the innocence requirement as a proxy for enhancing punishment undercuts the requirement's retributive justification. Retributive theorists claim that punishment is society's way of taking equal revenge for criminal acts.[41] Retributive punishment therefore requires that the degree of punishment be equal to the harm caused to society, or that "an eye be taken for an eye."[42] However, creating a barrier to malpractice claims will increase attorney negligence and

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[36] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 7.2, at 205 (3d ed. 1986). This can be expressed mathematically by stating that a person commits a crime if $E(B) > E(C)$, where B represents the benefit the criminal receives (e.g., the value of stolen merchandise) and C represents the cost to the criminal of the punishment imposed (e.g., the amount of a criminal fine, etc.)

[37] Thus if the probability of punishment equals P, the crime is committed if $(1\text{-}P)\ (B) > (P)\ (C)$.

[38] In other words, the crime is committed if: $(P)\ (O)\ (J) + (1\text{-}P)\ (B) > (P)\ (C)$. J equals the expected value of a malpractice recovery and O represents the probability of successfully pursuing a malpractice cause of action. Note that this additional incentive to commit a crime assumes that damages awarded will exceed the amount required to compensate the person for additional time spent in jail as a result of malpractice actions (for example, the plaintiff also receives punitive damages). Otherwise the person would be indifferent.

[39] In the absence of malpractice claims, rational attorneys may spend less time preparing cases, and as a result make more negligent mistakes. *But see* Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991) (claiming the innocence requirement will not encourage attorney negligence).

[40] Both (P) and (C) in our equation increase.

[41] *See* HERBERT MORRIS, ON GUILT AND INNOCENCE 33–34 (1976).

[42] *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, PART I OF THE METAPHYSICS OF MORALS 99–102 (John Ladd trans., 1965), *reprinted in* KADISH & SCHULHOFER, *supra* note 35, at 187–88 (arguing that retributive theory determines the degree of punishment by a

thereby increase expected criminal sentences. This increase in sentences will be spread across the convicted defendants in a manner not necessarily proportionate to the crime's social harm. The increased risk of disproportionate punishment undercuts criminal punishment's retributive purpose, because "revenge" taken by society is not "equal." If tougher criminal sentences are desirable, then the legislature should impose them explicitly by statute. Increased statutory sentences effect all criminals equally, and therefore better reflect the retributive notion of equal revenge for social harm.

Punishing crime in a way that is disproportionate to the harm caused also undercuts the deterrent purposes of punishment. An individual contemplating a crime may not be familiar with the punishment for the crime in her jurisdiction, but nonetheless may be able to determine the amount of social harm her crime will cause.[43] Therefore, if punishment is imposed in proportion to a crime's harm, and if this tendency is common knowledge, the potential criminal may be accurately deterred. In this way proportional punishment has a socially efficient deterrent effect on an individual's behavior ex ante.[44] Because an innocence requirement divorces punishment from the amount of harm caused by increasing punishment in an arbitrary manner, it will discourage individuals from assuming that punishment is given in relation to the social harm caused by the crime. In this way, the innocence requirement interferes with the decision-making calculus of the individual and makes the deterrence of crime more uncertain.

Because they have avoided explicitly recognizing that they seek to deter and punish crime via proof-of-innocence requirements, *Morgano* and other high courts have created a wolf-in-sheep's-clothing. Citing pretextual reasons for this new anomaly in tort law, *Morgano* and its antecedents not only sharply limit the rights of the convicted, but distort the decision-making calculus of wrongdoers. In so doing, they undermined the very goals of deterrence and retribution that they seek to advance. In the future, courts concerned with doctrinal coherence and rational policy-making would be well-advised to recognize criminal malpractice for what it is — a civil tort — and address criminal law concerns in the more appropriate legislative forum.

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principle of equality, and that "any undeserved evil that you inflict on someone else . . . is one that you do to yourself").

[43] *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. OF LEGAL STUD. 307, 335 (1994) (discussing the value of fitting the punishment of a given crime to the harm it causes in the context of the Federal Sentencing Guidelines).

[44] *See id.*

No. 00-191

IN THE
SUPREME COURT OF THE UNITED STATES

FEDERAL ELECTION COMMISSION
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the
United State Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE

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Dated: January 12, 2001

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BRIEF OF AMICUS CURIAE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE

INTEREST OF AMICUS CURIAE

Amicus Curiae National Republican Congressional Committee ("NRCC") is a national political party committee, established in 1866 and currently organized under Section 527 of the Internal Revenue Code, devoted to increasing Republican membership in the U.S. House of Representatives. The NRCC supports the election of Republicans to the House through direct financial contributions to candidates and Republican Party organizations; coordinated party expenditures;[1] technical and research assistance to Republican

[1] The NRCC, like all political committees, conducts its coordinated expenditures using hard dollars. Although several amici curiae supporting the petitioner have submitted papers before this Court discussing the

candidates and Party organizations; voter registration, education and turnout programs; and other Party-building activities. The NRCC's primary sources of funding are transfers of excess campaign funds and other contributions from Members of Congress, and individuals from all walks of life making small donations of $100 or less.

The NRCC is governed by a chairman and an executive committee composed of thirty Republican members of the U.S. House of Representatives. The Chairman is elected by the House Republican Conference after each congressional election. The day-to-day operations of the NRCC are directed by a deputy chairman and conducted by a professional staff of over 50 people with expertise in campaign strategy development, planning and management, research, communications, fund raising, administration, and legal compliance.

Unlike the petitioner and its amici curiae, as a national political party committee, the NRCC is authorized to make coordinated party expenditures by the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, and has made such contributions in the past. *See Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41 (1981). The NRCC has followed FECA's limitations when making coordinated expenditures since FECA's enactment. The NRCC's experience with making expenditures that are coordinated with congressional candidates in light of the FECA provision at issue places it in a unique position to comment on the practical effects of that provision. With the benefit of years of experience of laboring under the old regime prior to the Tenth Circuit's decision in this case, the NRCC

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dangers of soft money, concerns over soft money are simply not implicated by any of the issues before the Court in this case.

can explain precisely how the expenditure limitation at issue restricts the NRCC's right to free speech. In addition, the experience of the NRCC poignantly demonstrates that the claim of the Petitioner and its amici – that a decision by this Court to uphold the decision below would result in a regime in which there was corruption or the appearance of corruption in the political process - is simply inaccurate.

SUMMARY OF ARGUMENT

In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), this Court struck down as violative of the First Amendment FECA's provision limiting the amount of independent expenditures that could be made by political party committees in political campaigns. Because the particular expenditure before the Court was an independent expenditure, the Court did not reach the broader issue of the constitutionality of FECA limitations on coordinated expenditures in that case. *See id.* at 623. The Court did observe that "coordinated expenditures do share some of the constitutionally relevant features of independent expenditures," although "[the] issue is complex." *Id.* at 624. Today, as the Court seeks to resolve the issue of whether coordinated expenditures may be limited consistent with the strictures of the Constitution, it must necessarily decide whether, for constitutional purposes, a coordinated expenditure more closely resembles a direct contribution to a candidate's campaign or an independent expenditure made on his behalf.

Coordinated expenditures are very similar to independent expenditures in every constitutionally important sense. Unlike direct contributions, title to the money being spent remains with the party committee, not with the campaign. The party committee, not the campaign, assumes any legal liability that may result from the expenditure. The

party committee, not the campaign, decides how and for what purpose the money will be spent. The FEC has recognized each of these points and, for twenty-five years, has expressly drawn a distinction between coordinated expenditures and direct contributions. Only now, in a *post hoc* attempt to justify the constitutionality of the provision before the Court today, the FEC attempts to equate the acts of a contribution and a coordinated expenditure. There is no reason to follow the FEC down this path.

But whether treated as a contribution or an expenditure, the provision at issue cannot survive constitutional scrutiny because it serves no important government interest. The primary purpose of the FECA is to prevent corruption and the appearance of corruption. The Petitioner justifies the coordinated expenditure limitation as serving this goal by preventing large donors from circumventing FECA's direct contribution limitations and "funneling" money to campaigns through political party committees by contributing to those party committees and then compelling those party committees to expend those funds as an coordinated expenditure on behalf of the candidate to whom they wish to contribute. However, the FECA's limitation on coordinated expenditures is absolutely useless at preventing this imaginary concern, for numerous reasons. First, FECA's limitation on contributions from private donors to political party committees, which will remain in effect regardless of the outcome of this case, prevents any donor from donating large enough sums of money to any party committee as to create the appearance of the danger that either the party committee, or the political candidate with whom the committee conducts an expenditure, will fall under the donor's influence. Second, the structure and organization of party committees is sufficiently large and bureaucratic in nature to prevent any donor or group of donors

from exerting undue influence over the committee. Third, the NRCC's experience in the 2000 election cycle shows that donations from outside individuals are largely unnecessary as a source of funding for coordinated expenditures, because the excess campaign funds of Members of Congress transferred to the NRCC alone could have funded all of the NRCC's coordinated expenditures for the entire election cycle many times over. And fourth, the NRCC's experience in the 2000 election cycle also shows that coordinated expenditures are rarely and sparingly used in races involving incumbent Members of the House and almost never made for the benefit of senior Members – the kind from whom a large donor would want to seek influence. Instead, such expenditures are almost uniformly made in a limited number of races each election cycle – usually those involving open seats, a kind of race in which there can be little appearance that the money is being used to curry favor from a powerful elected officials.

For these and other numerous reasons, FECA's limitations on coordinated expenditures serves little purpose other than to restrict the ability of party committees to get their message out before the general public with the approval of a campaign. While many view any rule which keeps money out of politics as a good rule, this Court has never embraced such a draconian approach. Absent any showing of a compelling need to keep coordinated expenditures limited in order to prevent the appearance of corruption – and none has been provided by the petitioner – this Court must affirm the right of the party committees to engage in their political speech in the manner, and to the extent, that they see fit.

ARGUMENT

I. Coordinated Expenditures Are, And Have Traditionally Been Deemed By the Petitioner, To Be

More Akin to Constitutionally Protected Expenditures Than To Contributions That May Be Limited Consistent with the First Amendment.

Petitioner and its amici have consistently failed to recognize the fundamental differences in fact and in law between a coordinated expenditure and a direct contribution. The petitioner would have this Court equate the two, arguing that jurisprudence upholding the constitutionality of limits on direct contributions compels this Court to uphold the expenditures limits at 2 U.S.C. § 441a(d)(3) of FECA. But this conflation fails to take into account the very real and important distinctions between the two types of activities.

The petitioner would gloss over the fact that this Court has expressly drawn a legal distinction between contributions and expenditures for purposes of constitutional analysis. Only last year, this Court established that restrictions on expenditures require a higher level of constitutional scrutiny than those on contributions. *See Nixon v. Shrink Mo. Gov't PAC*, 120 S.Ct. 897, 901-902 (2000). As this Court explained, limitations on expenditures closely implicate the right to Free Speech, whereas limits on contributions implicate "more heavily on the associational right than on freedom to speak." *Id.* at 904. The Tenth Circuit below properly recognized that the constitutional distinction between expenditures and contributions was a longstanding one when it observed that this Court had, in the case of *Buckley v. Valeo*, 424 U.S. 1 (1976), "recognized [a] distinction between (permissible) restrictions on contributions and (impermissible) restrictions on expenditures[,] impl[ying] that different types of FECA limits require different levels of justification." *FEC v. Colorado Republican Campaign Committee*, 213 F.3d 1221, 1226 (10th Cir. 2000).

In deciding whether the Court below correctly held that FECA's limitation on coordinated expenditures was unconstitutional, this Court should contrast the nature of conducting a coordinated expenditure with the making a direct contribution. Because the act of contributing may not be equated with the act of conducting a coordinated expenditure, this Court should apply the same level of scrutiny to limitations on coordinated expenditures that it has applied to other expenditure provisions. *See Colorado v. Republican Federal Campaign Committee*, 518 U.S. 616, 620 (1996) ("*Colorado I*") (striking down FECA's restrictions on independent expenditures).

Important differences between the two activities caution against this Court accepting the FEC's self-serving claim that coordinated expenditures are the same for constitutional purposes as cash contributions. Coordinated expenditures are simply not the legal, factual, or functional equivalent of contributions. As a starting point, the fact that the coordinated activity of a campaign and a party committee has been labeled by the FECA and the FEC as a coordinated "expenditure," rather than coordinated "contribution," is revealing. The selection of this nomenclature is no mere accident; in every meaningful sense, a coordinated expenditure is more similar to an independent expenditure than a contribution.[2] The proof of this point is contained both in the fundamental nature of the two activities as well as in the FEC's own regulations and materials.

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[2] Indeed, coordinated expenditures need not even be "coordinated" in the perjorative sense. "Although consultation or coordination with the candidate is permissible, it is not required." 15 Op. Fed. Elect. Comm. 3 (1984).

Like private citizens, political party committees have the right to make direct contributions to the campaigns of political candidates. When a party committee does so, with the exception of certain "in-kind" contributions, the organization makes out a check to that particular candidate for the amount of money the party committee wishes to contribute. Then the check is delivered and presumably cashed by the campaign. At that point, *title and ownership to the money has transferred* from the party committee to the candidate. The money now belongs in every real sense to the campaign, not the party committee. This simple fact carries with it an important implication – the campaign can spend the money however the campaign sees fit. The party committee makes no attempt to track the way in which the campaign spends the contribution, nor does it mandate that the money be used for certain purposes or otherwise attempt to place strings upon the contribution. Consequently, the campaign can spend the money on advertisements, staff salaries, direct mailings or anything else the campaign chooses. Given the wide latitude the FEC has generally accorded to campaigns over the way in which they spend their own money,[3] the campaign could, if it so chose, elect to spend the party committee's contribution in a way that the party committee might view as wasteful, such as by spending it on frivolous items like balloons or embroidered napkins. Simply put, the party committee's involvement with the money ceases from the moment the check is delivered.

In the situation of a coordinated expenditure, on the other hand, title, ownership, and even possession of the money is never transferred to the campaign. *The party committee expends its own money directly to vendors*. The money never

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[3] *See, e.g.*, 1 Op. Fed. Elect. Comm. 2 (1977) ("The Act does not limit the discretion of campaign committees to make their own determination as to the types of expenditures which should be made.").

at any point enters the campaign's accounts. This distinction between coordinated expenditures and cash contributions has long been recognized by the FEC. In 1975, in an Advisory Opinion regarding contributions, the FEC stated:

> In reaching this conclusion [that a political committee's check constituted a contribution] the Commission is mindful that . . . a state party and its lawfully designated subcommittee may expend up to $10,000 on the general election campaign of a Congressional candidate. *However, a direct donation of money to a candidate – as in the present instance – is not the same as an expenditure "in connection with the general election campaign" of a candidate.* In one case, the candidate acquires exclusive use of the monies in question; in the other, the state party, although it may consult with the candidate as to how to expend the funds, has control over how the monies are used.

120 Op. Fed. Elect. Comm. 3 (1975) (empahsis added). From that time until the present case, the FEC has never reconsidered its decision that a party committee's retention of control over coordinated expenditures means that such expenditures are not legally the same as contributions. Now, abandoning twenty-five years of its own agency jurisprudence, the FEC seeks to conflate expenditures and contributions for purposes of defending FECA's last remaining involuntary limitation on expenditures contained in the statute.[4]

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[4] Limitations on expenditures for candidates who accept public financing of their campaigns have not been struck down by courts in the same manner as every other limitation on expenditures has been struck down

But the longstanding and crucial distinction between coordinated expenditures and campaign contributions has not only been drawn expressly by the FEC in advisory opinions, but is implicitly made throughout the entire structure of federal campaign law. The FECA itself addresses limitations on party contributions and limitations on party coordinated expenditures in separate provisions. Limitations on the total dollar amount of contributions that may be made by a party to a candidate are contained in 2 U.S.C. § 441a(a)(2)(A), which prohibits a political committee from making contributions to any particular candidate's campaign "with respect to any election for Federal office which, in the aggregate, exceed $5,000." Coordinated expenditures are addressed by a separate provision appearing several subsections later, at 2 U.S.C. § 441a(d)(3), which limits such expenditures to $10,000, $20,000, or two cents multiplied by the voting age population of the State, depending on the particular office being sought by the candidate. This view of coordinated expenditures and direct contributions as distinct activities is carried through in the text of the penalty provision of the statute which describes the acts of "accepting any contribution" and "making any expenditure" as separate violations of the act. *See* 2 U.S.C. § 441a(f). If Congress had desired to treat contributions by political parties the same as coordinated expenditures, it could easily have done so. The existence of the separate provisions addressing these issues demonstrates that the two activities were considered distinct from each other by Congress. The choice of Congress to keep these two activities separate deserves deference, since the "choice of means" for regulating elections "presents a question primarily addressed to the

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outside the area of public financing. By accepting government financing of their speech, candidates who accept public monies voluntarily choose to have their right to engage in free speech limited. *See Buckley*, 424 U.S. (passim).

judgment of Congress." *Bourroughs v. United States*, 290 U.S. 534, 547 (1934).

Petitioner's attempt to equate coordinated spending with direct contributions is also at odds with petitioner's own regulations and publications. The FEC's regulations have imposed very strict reporting requirements on campaigns for all contributions. For example, 2 U.S.C. § 434(b)(2)(C) requires candidate committees to report contributions from party committees, and 2 U.S.C. § 434(b)(3)(B) requires that report to include the amount, date of receipt, and the contributing committee's name and address. When the money received is spent by the campaign, this too must be reported. *See* 2 U.S.C. § 434(b)(4)(A). Political committees must also report making the contribution to the campaign. *See* 2 U.S.C. § 434(b)(2)(D). *Coordinated expenditures, on the other hand, are not reported by the campaign at all* – neither as an expenditure nor as a receipt. The coordinated expenditure is reported only by the political party committee, and in fact is reported as an expenditure, not a contribution to the campaign. *See* 2 U.S.C. § 434(b)(4)(H). If the FEC truly believed in the position that it has taken before this Court – that coordinated expenditures should be viewed and treated as contributions – it would long ago have required the campaigns to report coordinated expenditures as a contributions. Instead, the FEC's regulations reflect what the FEC has always, prior to this appeal, told the public: "Coordinated party expenditures differ from contributions in [many] ways." Federal Election Commission, Campaign Guide for Political Committees, August 1996, at 16.

These and other incongruities belie the FEC's post hoc attempt to justify as constitutionally permissible its limitation on expenditures. In fact, these expenditure limitations are

analytically similar to the limitations on expenditures that were struck down by this Court in *Buckley*. Like limitations on independent expenditures, limitations on coordinated expenditures "preclude[] most associations from effectively amplifying the voice of their adherents." *Buckley*, 414 U.S. at 20-21; *see also Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) ("[A]llowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system"). While restrictions on the voice of the people may be justified where necessary to avoid the appearance of corruption, *see Shrink Missouri*, 120 S.Ct. at 905, in this case, contrary to the petitioner's suggestion, there is no genuine concern that the striking down of expenditure limits will result in any impropriety or appearance of impropriety. An understanding of the NRCC's coordinated expenditures during the 2000 election cycle will serve to highlight this point.

II. The NRCC'S Experience In The 2000 Election Cycle Contradicts Petitioner's Claims That Allowing Unlimited Coordinated Expenditures Will Result In The Circumvention Of Other Provisions Of The Election Code Or Create The Appearance Of Impropriety.

Petitioner's sole justification for equating contributions and coordinated expenditures for purposes of constitutional analysis is petitioner's assertion that absent a limitation on coordinated expenditures, large donors will use political committees to "launder" large contributions to the candidates. Petitioner and its amici curiae (none of whom have ever actually made coordinated expenditures) seek to create a fear

that FECA's direct limits on contributions to political campaigns will be circumvented by large donors, who will contribute money to political committees with the understanding that these committees will pass the money directly on to the campaign in the form of coordinated expenditures that are in fact controlled by the campaign.[5] This concern is simply contrary to the reality of the way coordinated expenditures are actually conducted.

These concerns are misplaced for numerous reasons. First, FECA's limits on contributions to political party committees render its coordination expenditure limits superfluous as a means to prevent campaigns and political committees from falling under the influence of large donors. Section 441a(a) of FECA limits the size of annual contributions that can be given by an individual donor to $20,000 for national party committees and $5,000 to other political action committees, $1,000 per election to individual campaign committees, with an overall umbrella limitation of $25,000 (a limit that has not changed since 1975). *See* 2 U.S.C. §441a(a)(1)(B) & (C). Regardless of what limitation there is on coordinated expenditures (and we think there should be none), it will not disturb these congressionally-mandated limits on the contributions the NRCC can receive to fund its these expenditures. As this Court correctly observed in *Colorado I*, the existence of these contribution limitations means that the opportunity for corruption "is, at best attenuated." *Colorado I*, 518 U.S. at 616. Absent any limit on coordinated expenditures, the contribution limitations will prevent donors from donating a large enough sum to any one political committee as to create the appearance that the donor

[5] A political committee could not simply donate the money to the campaign directly because of the $5000 limit on party committee contributions contained in 2 U.S.C. § 441a(a)(2)(A).

might acquire an undue influence over the committee's activities.

Second, as a simple practical matter, political committees have become too large and bureaucratic to readily lend themselves to "capture" by private parties.[6] The NRCC has over thirty Members serving on its board. It maintains a sizable and growing full-time staff. The staff of the NRCC, like most party committees, is divided into different divisions. The finance division oversees matters relating to the receipt of contributions. The political division makes decisions relating to election campaigns such as whether and how much money to spend on coordinated expenditures. In simple terms, this means that the party committee personnel who receive money are not the same personnel who make decisions regarding how that money is to be spent. While petitioner and its amici curiae would have this Court uphold the expenditure limitation out of fears that cabals will form between employees in these divisions that might allow some sort of linkage between contributions and expenditures, the reality is that the number of employees involved in these decisions and the segregation of these responsibilities makes the existence of this kind of conspiracy, or the appearance of such a conspiracy, highly farfetched.

Third, political committees exert a degree of control over coordinated expenditures that is inconsistent with the petitioner's claim that corruption will erupt if the expenditure limits are removed. When the NRCC engages in coordinated

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[6] As we have discussed, where the party committee elects to contribute $5000 directly to a campaign, that money becomes the property of the campaign and is spent in any way the campaign sees fit, without any say from the party committee. Just as a party committee loses control over the money when it contributes it to a campaign, so too does a donor lose control over money once it has been donated to a party committee.

expenditures, it does not take actions that are tantamount to handing the campaign a blank check, as petitioner implies. Rather, control over coordinated expenditures remains in the hands of the NRCC. Particular coordinated expenditures are ultimately selected by the NRCC, not the campaign. If the NRCC decides to pay for advertising for the benefit of a particular candidate, for example, then it is the NRCC, not the campaign, that has final approval and review of that advertisement for content. The NRCC, not the campaign, assumes legal liability for the content of the advertisement. The political committee's retention of control over coordinated expenditures is reflected in FECA itself. When a Committee runs an advertisement as part of a coordinated expenditure, the statute requires the publication of a disclaimer which states: "Paid for by the NRCC and authorized by candidate Smith." *See* 2 U.S.C. § 441d(2). This required disclaimer exemplifies the relative balance of power between the political candidates and party committees when it comes to the coordinated expenditure of the party committee's money. Of course, the candidate retains some say regarding the content of the advertisement; the party committee would not run an advertisement directly contrary to the message of the candidate's campaign, for example. But in every meaningful sense, the advertisement contains a message from the NRCC, not the campaign.

As a result, the NRCC views advertisements resulting from coordinated expenditures as its own speech. The process by which the NRCC engages in that speech is virtually identical to the process by which it engages in protected free speech by making an independent expenditure, with the sole exception that the coordinated expenditure is done with the authorization of a particular candidate's campaign. The fact that a coordinated expenditure reflects a party committee's

own speech renders the expenditure analytically similar to an independent expenditure, and not at all similar to a direct contribution, whose only communicative aspects comes from the act of giving. Despite their similarity, however, the existence of independent expenditures as an alternative to coordinated expenditures as a method for engaging in speech unfortunately does not serve to limit the degree of infringement on the NRCC's speech posed by the coordinated expenditure limit. The FEC's stringent rules regarding the characteristics necessary for an expenditure to qualify as independent are so murky, and precedent on the subject so unclear, that political committees have been unable to ascertain exactly how "independent" an expenditure needs to be to qualify as an independent rather than a coordinated expenditure. As a result, fear of investigation by the FEC and possible liability has chilled this form of speech so much that it is rarely if ever used by political committees. In fact, the NRCC did not make a single independent expenditure in conjunction with the November 2000 general election.[7] If the decision of the court below is reversed, the real possibility exists that the NRCC's political speech will be silenced almost in its entirety.

A study of the sources of the funds used for coordinated expenditures and the races in which coordinated expenditures are made further dispels any notion that coordinated expenditures could be utilized by large donors to circumvent direct contribution limits or improperly "buy influence" with powerful Congressmen. As a starting point, the NRCC's reports show that it spent just over 3.5 million

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[7] In fact, the NRCC has only made one independent expenditure, and that was done under unique circumstances presented by a special election held last year. Without any basis, the FEC questioned the independence of that expenditure, requesting additional information on the matter.

dollars on coordinated expenditures during the 2000 election cycle. During the same cycle, Members of Congress transferred over 11 million dollars of their own excess campaign funds to the NRCC. *See* 2 U.S.C. § 439a (allowing Members of Congress to transfer excess campaign funds to party committees. Consequently, the NRCC could have funded all of its coordinated expenditures many times over simply by using the money left over from various Congressional campaigns; *private contributions from any source were not essential* to the making of any of the NRCC's coordinated party expenditures. The large donors imagined by the petitioner and its amici simply have not attempted to circumvent the contribution limitations or otherwise exert on undue influence over the political process in the manner they suggested.

Nor would large donors have been successful even if they had attempted to make large contributions in the 2000 election cycle with the purpose that the contributions be spent on coordinated expenditures that would "purchase" influence in the House of Representatives. Following the petitioner's logic, in order to "buy influence" in Congress, a major contributor would want for his or her contribution to be used to pay for a coordinated expenditure for the campaign of a powerful Congressman, such as the head of a major House Committee. Yet no such senior members of the House or other similarly situated Congressman benefited from any coordinated expenditures from the NRCC during the 2000 election cycle.

Furthermore, if major donors seeking to evade FECA's direct contribution limitation to political campaigns were to exist (notwithstanding the presence of FECA's limitations on contributions to political party committees), those donors

would want, at a minimum, for his or her expenditure to benefit a sitting incumbent. A candidate who has yet to win office would be a bad investment – very likely to lose (and therefore have nothing to offer the donor but a hearty handshake), or if the new challenger were fortunate enough to prevail, as a freshman Congressman he or she would have very little influence that could benefit the wealthy donor. Again, the facts show that just the opposite occurred in the 2000 election cycle. The vast majority of NRCC's coordinated expenditures were done not for the benefit incumbents, but in open seats or in seats where the NRCC deemed the democratic incumbent to be politically vulnerable. In fact, of the 435 House elections in the 2000 election cycle (59 of which were uncontested), the NRCC made coordinated expenditures in only 57, and of those only 22 were races involving Republican incumbents. In the elections in which a Republican incumbent benefited from a coordinated expenditure by the NRCC, that incumbent was in serious danger of losing the election. If individual donors had been depending on the NRCC to make coordinated expenditures on their behalf in order to curry favor with powerful politicians, then they would have been sorely disappointed.

That large coordinated expenditures are rarely if ever made to benefit incumbent politicians should come as no surprise to any student of politics. The NRCC, as a body, exists to increase the Republican membership of Congress. As a means of furthering this end, coordinated expenditures made on behalf of incumbent Representatives are largely useless. Incumbent Representatives are usually re-elected without the need for assistance in the form of coordinated expenditures, and any hard money that is available for such expenditures is better spent seeking to increase the number of Republican seats by targeting open seats or seats with politically vulnerable

Democrats. In the rare case in which an incumbent benefits from a coordinated expenditure, it is because his or her seat has become politically vulnerable to a Democratic challenger (heavily supported by his or her party) due to changes in the makeup of his or her constituency, the perception of poor job performance, or other such factors. By the time the candidate benefits from the expenditure, it is already extremely likely that the seat will be lost.

For these reasons, if the NRCC were permitted to expend an unlimited amount of money on coordinated expenditures, the NRCC still would not suddenly begin to spend money in races involving powerful incumbent Congressmen. Instead, if given the opportunity, the NRCC would spend additional money in the races that in which it would already make coordinated expenditures – races involving open seats or politically vulnerable Democratic incumbents.[8] Additional spending in these types of races simply does not create any sort of appearance of corruption. If anything, it creates the opposite impression – that the NRCC is using its right to free speech to introduce the public to the relatively unknown challengers that the Republican Party supports, and perhaps possibly that the NRCC is seeking urge the American people to remove those of its opponent's politicians who have been corrupted by their tenure in Washington.

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[8] Despite having the Tenth Circuit's decision as controlling legal authority on its side, the NRCC did not exceed the coordinated expenditure limit in the 2000 election cycle, because the petitioner threatened to retroactively pursue any party committee that exceeded the limit, even in the Tenth Circuit, in the event this Court reversed the court below after the election was over. *See* Mike Allen, *GOP May Defy Curb on House Campaigns; Spending Would Test Court Ruling*, **Washington Post**, July 10, 2000, at A1.

Consequently, neither logic nor facts bear out the petitioner's suggestion that, absent reversal of the court below, large donors will take advantage of the existence of the ability of political parties to make unlimited coordinated expenditures in order to make an end run around FECA's contribution limitation and thus exert a "corrupting influence" over Congress. So understood, the petitioner can simply afford this Court no reason to ignore the NRCC's important First Amendment right to expend its money as it sees fit, and in any amount it sees fit. Petitioner has simply failed to provide any important government interest that would support such a restriction in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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No. 04-55732

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Plaintiffs-Appellants/ Cross-Appellees,

v.

BOY SCOUTS OF AMERICA, *ET AL.*,
Defendants-Appellees/ Cross-Appellants.

On Appeal from the United States District Court for the Southern District of California

BRIEF OF THE STATES OF TEXAS, ALABAMA, KANSAS, OKLAHOMA, SOUTH DAKOTA AND VIRGINIA AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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INTEREST OF *AMICI CURIAE*

The State of Texas and the other *amici* States have a strong interest in being able to engage in noncompetitive value-for-value leases. Such leases often allow for public lands to be developed for the enjoyment of all citizens at virtually no cost to the State, to the benefit of all concerned. The State of Texas and the other *amici* States are major proprietors of public property, and have long had broad discretion to engage in value-for-value leases of public lands with organizations such as the Boy Scouts of America, without having to concern themselves as to whether the leases were awarded on a competitive or noncompetitive basis. The court below held that providing a value-for-value lease to an organization with some religious aspects on a noncompetitive basis was providing aid to religion generally, in violation of the neutrality principle of the Establishment Clause. Should this faulty logic be adopted by other courts, the State of Texas and the other *amici* States may lose their discretion to award non-competitive value-for-value leases to civic organizations that arguably possess some religious aspects. The *amici* States have a strong interest in ensuring this does not happen, and that States retain wide discretion to engage in value-for-value leases to promote the development of public lands in the manner they believe best serves the public interest.

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v.

BOY SCOUTS OF AMERICA, *ET AL.*,
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TO THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT:

The District Court in this case ruled that a City's decision to provide two leases to the Boy Scouts Association of America on non-competitive basis violated the Establishment Clause of the United States Constitution. The court below reached this conclusion by erroneously holding that the Boy Scouts is a religious organization for purposes of Establishment Clause analysis, and by misreading the applicable Supreme Court precedent to require that all government value-for-value contracts provided to

arguably religious organizations also be offered to secular organizations on similar terms. The decision below unnecessarily constrains the discretion of state and local governments to award value-for-value contracts on a non-competitive basis to organizations that possess religious aspects when it is in the public interest to do so, and violates the very principle of government neutrality towards religion that it purports to uphold. For these reasons, the decision of the court below should be reversed.

STATEMENT OF THE ISSUES

Whether the Establishment Clause forbids state and local governments from awarding value-for-value leases of public lands to the Boy Scouts of America and similar non-profit organizations on a noncompetitive basis.

STATEMENT OF THE CASE

The City of San Diego, like many state and local governments, has a history of awarding value-for-value leases to a diverse group of nonprofit organizations. These nonprofit organizations generally offer little or no cash in return for the lease. Instead, the lessees assist the City by developing and maintaining the property, generally for public use. Many lessees are religious groups, but many others are organizations based on common ethnicity, country of origin, or cultural heritage. In this case, the City awarded two value-for-value leases to the Boy Scouts Association

of America ("Boy Scouts"). The City did so on a noncompetitive basis. In one case, the Fiesta Island lease, the City reached its decision based on the fact that the Boy Scouts had been identified by a dedicated committee as the organization best positioned to improve the property in question, and in the other, the City simply decided to renew an existing lease based on its positive prior experience in dealing with the Boy Scouts as a lessee. In the case of the lease for Fiesta Island, the terms of the lease required the Boy Scouts to provide funds for the construction and maintenance of a community water park, and to run its operations. In the case of the Balboa facility, the lease required the Boy Scouts to spend at least $1.7 million over the next several years on improvements. Both leases required the Boy Scouts to allow all members of the public to have access to the facilities in question, and prohibited the Boy Scouts from engaging in discrimination in access to the properties based on scouting membership, religion, or sexual orientation.

The District Court struck down both leases under the Establishment Clause.[1] The District Court first concluded that the Boy Scouts is a religious organization. *See Barnes-Wallace v. Boy Scouts of Am.*, 275 F.Supp.2d 1259, 1270-73 (S.D. Cal. 2003); *Barnes-Wallace v. Boy Scouts of Am.*, No. 00CV1726-J, slip op. at 6 n.2 (S.D. Cal. Apr. 12, 2004) (Order Granting in Part and Denying in Part Further Cross-Motions for Summary Judgment) ("Slip Op."). It then concluded that the neutrality principle of the Establishment Clause prohibits the granting of leases to religious organizations on a noncompetitive basis; the court explained that "aid is [only] neutral if the religious, irreligious, and areligious are equally eligible." Slip Op. at 6; *see also Barnes-Wallace*, 275 F. Supp. 2d at 1267. Because noncompetitive leases are (virtually by definition) not offered to "a broad range of recipients," the District Court

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1. The first of the District Court's two opinions commenced neither with the usual summarizing of the opinion that follows, nor by reciting the facts of the case or its procedural history. Instead, the District Court began by summarizing and criticizing an unrelated Supreme Court case—*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the Supreme Court upheld the constitutional right of the Boy Scouts as a private, expressive organization to exclude gay members from leadership roles. *See Barnes-Wallace*, 275 F.Supp.2d at 1263. This decision had no bearing on validity of the plaintiffs' Establishment Clause claim, or any other issue then before the District Court. In its ensuing discussion, the District Court expressly attacked the Boy Scouts' policy of excluding homosexuals and atheists from its leadership positions (a policy that was not before the court) by proclaiming that "it is clear that the Boy Scouts of America's strongly held private, discriminatory beliefs are at odds with values requiring tolerance and inclusion in the public realm. . . ." *Id.* Thereafter, the District Court expressly linked the current lawsuit with the unrelated Supreme Court decision, by explaining that "lawsuits like this one are the predictable fallout from the Boy Scouts' victory before the Supreme Court." *Id.* By publishing this unnecessary criticism of the Supreme Court, the court below created the unfortunate impression that its disagreement with the outcome of *Dale* may have played a role in its decision-making in the case at bar.

concluded that the reasonable observer would conclude that the leases were meant to endorse the Boy Scout's "inherently religious program and practices." Slip Op. at 6, 13 (internal quotation omitted); *see also Barnes-Wallace*, 275 F.Supp.2d at 1274-1276. The Boy Scouts timely appealed.

SUMMARY OF ARGUMENT

The District Court erred in the concluding that state and local governments cannot offer the Boy Scouts (or similarly-situated nonprofit organizations) a noncompetitive value-for-value lease, for at least two independent reasons. First, contrary to the District Court's conclusion, the Boy Scouts of America is not an inherently religious organization. The Boy Scouts of America is a nonprofit organization that promotes good civic, mental, physical and emotional health among its members, and does so in a way that is consistent with, rather than in opposition to, any religious teaching that its members may receive from other sources. The Establishment Clause does not mandate State-sponsored atheism, and consequently secular activity is not converted into sectarian activity simply because the secular activity in question is done in a way that is consistent with any private sectarian teaching that an individual may happen to receive elsewhere. The District Court's determination that the Boy Scouts is a religious organization is inconsistent with both the record in the case and Supreme Court precedent.

Second, the District Court erroneously concluded that the neutrality principle of the Establishment Clause could be satisfied only if any leases between the City and the Boy Scouts were competitive, and only if the City offered to allow interested secular parties to lease the property in question on the same terms as those offered to the Boy Scouts. The District Court reached this erroneous conclusion by making the following mistake of logic: the United States Supreme Court has held "if A, then not B." Therefore, the District Court concluded, "if not A, then the court must hold B." To wit, the District Court correctly recognized that the Supreme Court has held that the Establishment Clause's principle of neutrality is not violated where government financial aid "is made available by the government to both religious and secular beneficiaries on a nondiscriminatory basis." However, this holding does not imply, much less require (as the district court erroneously concluded, *see* Slip Op. at 6), that the reverse is also true—that all government aid which is *not* made available to both religious and secular beneficiaries on a nondiscriminatory basis *necessarily violates* the Establishment Clause (or as the district court phrased it, "aid is neutral if the religious, irreligious, and areligious are equally eligible." *Id.*). As a result of having misread the applicable Supreme Court precedent, the District Court issued a decision that is tantamount to a bright-line rule that state and local governments may never award noncompetitive contracts to organizations that might have some religious

aspect, because noncompetitive contracts are almost by definition not offered to others (whether they be secular or religious) on equal terms. This form of discrimination against religious organizations in the kinds of contracts they may receive is not only not *required* by the Establishment Clause, but in fact violates the very neutrality principle it purports to implement. The neutrality principle, as developed by the Supreme Court, would require any State offering noncompetitive contracts to secular groups to extend the same "benefit" to religious organizations as well. For these reasons, the judgment of the court below should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT THE BOY SCOUTS IS A RELIGIOUS ORGANIZATION.

The District Court erred in concluding that the Boy Scouts is a religious organization for purposes of Establishment Clause analysis. The Boy Scouts is not a church. Its leaders are not religious figures. The Boy Scouts does not promise any benefits in the afterlife (or supernatural benefits in this life) to anyone who strictly follows its teachings. The Boy Scouts and its members do not proselytize. Virtually all of the activities its members engage in are secular in nature—swimming, hiking, camping, and the like. To be sure, the Boy Scouts tries to conduct these activities in a manner that is consistent with, not in opposition to, any religious instruction its

members may receive from other sources. But while submerging itself in America's broad religious tradition, rather than fighting against it, may make the Boy Scouts unique in an increasingly secular society, it does not by and of itself transform the Boy Scouts into a religious organization.

The record in this case amply supports the conclusion that the District Court simply ignored the important distinction between being a "religious" and "religion-friendly" organization. The members of the Boy Scouts do not practice the "Boy Scouts" religion. As the District Court observed, the Boy Scouts does not require members to engage in daily religious practices. Instead, the program "offers *opportunities* for the daily practice of religion by each individual." *Barnes-Wallace*, 275 F. Supp.2d at 1270 (emphasis added). Scout activities are not themselves religious activities. Instead, Scout activities are supposed to "include an opportunity for members to meet their [own] religious obligations." *Id.* at 1271. While Scouts have the opportunity to join in prayer at mealtime, "no one individual is compelled to participate." *Id.* Scouts have the opportunity to, but are not compelled to, wear their own private religious emblem on their uniform. *See id.*

Members of the Boy Scouts are required to take an oath that requires them to uphold their duty to God and the country. But every President takes an oath before taking office, yet the federal government could hardly be called a religious

organization. Similarly, Scout Masters occasionally meet with members of religious communities to discuss ways in which to make Scouting consistent with a variety of religious lifestyles. *See id.* The Boy Scouts also occasionally helps organize nondenominational worship services for its members who desire to participate. *See id.* at 1272. Yet various branches of the United States Armed Forces also have similar programs to assist their members who wish to pursue their own religion within the context of these organizations, but one would be hard pressed to label the United States Army as a religious organization. The United States Constitution does not require the Boy Scouts to eliminate these aspects of its program, nor does it require the Boy Scouts to schedule mandatory activities on the morning of the Sabbath, immediately commence eating when food is served without an opportunity for prayer, or to prohibit its members from wearing religious insignia on their uniforms, in order to avoid being deemed a "religious organization" for Establishment Clause purposes.

And aside from these preceding facts which show only more than that the Boy Scouts designs its programs to be religion-friendly, not religious in their own right—and there is nothing left to support the District Court's conclusion that the Boy Scouts is a religious organization, with the exception of a few statements made by the Boy Scouts in the course of this litigation, statements which the District Court improperly interpreted as all but concessions by the Boy Scouts that it was a religious

organization. *See id.* at 1270. But the District Court used these statements entirely out of context. When the Boy Scouts discussed things like its "religious purpose" and "faith-based mission to serve young people and their families," *id.*, it did not thereby concede the central issue of the case. These statements, like numerous others, must be read in the context of the Boy Scouts as a civic organization that conducts its programs in a manner consistent with the private religious beliefs of its members. Stripped of this support, the District Court's determination that the Boy Scouts is a religious organization is contrary to the evidence and should be reversed.

The District Court's determination that the Boy Scouts is a "religious" organization for purposes of an Establishment Clause analysis is also inconsistent with the Supreme Court's treatment of the Boy Scouts in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In *Dale*, the Supreme Court rejected a claim brought by an openly gay man that a state anti-discrimination law prevented the Boy Scouts from withholding a leadership position from him on the grounds of his sexual orientation. The Supreme Court did so by finding, after a lengthy analysis, that the Boy Scouts was an "expressive organization" and that "the forced inclusion of Dale would significantly alter [that] expression." *Id.* at 656. None of this discussion would have been necessary, and the court of appeals in *Dale* could have been summarily reversed, if the Boy Scouts were a religious organization; religious organizations have a well-

established right to make employment decisions with respect to their leaders consistent with the Free Exercise Clause. *See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."). If the Boy Scouts is not a religious organization for purposes of the protection of the Free Exercise Clause, it cannot be one for purposes of being subject to the rigors of the Establishment Clause, because if the two are not co-extensive, then if anything it is the definition of religion contained within the Free Exercise Clause that has the broader reach. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW at 827-28 (1978). The decision of the District Court that the Boy Scouts is a religious organization is inconsistent with the Supreme Court's decision in *Dale*, and should be reversed accordingly.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE ESTABLISHMENT CLAUSE FORBIDS STATE AND LOCAL GOVERNMENTS FROM OFFERING NON-COMPETITIVE LEASES TO ORGANIZATIONS WITH RELIGIOUS ASPECTS.

The District Court erroneously read Supreme Court precedent as forbidding state and local governments from offering non-competitive leases to organizations with religious aspects. As the District Court explained its decision, "[b]y entering into exclusive negotiations with the BSA-DPC without affording others a real

opportunity to compete, the City effectively prevented any secular groups from having an opportunity to obtain the benefit." *Barnes-Wallace*, 275 F.Supp.2d at 1276. Of course, the same can be said with respect to any noncompetitive contract a state or local government might enter into with an organization with religious aspects. By definition, a noncompetitive contract is not offered on the same terms to other entities, whether they be secular or sectarian. Consequently, to hold that the leases that are the subject of the present lawsuit are unconstitutional because other secular groups were not able to compete on the same terms as the Boy Scouts is simply to hold that state and local governments are forbidden by the Establishment Clause from providing groups like the Boy Scouts with noncompetitive contracts. Noncompetitive contracts offered to religious organizations will never be "religion neutral," *see id.* at 1273, as that term is understood by the District Court, and as a result offering a contract to a religious organization on a less than competitive basis will always violate the Establishment Clause under the District Court's view. But the Establishment Clause imposes no such categorical bar.

The District Court erroneously prevented the City from offering non-competitive lease contracts to the Boy Scouts because it misread the applicable Supreme Court precedent. Contrary to the District Court's impression, the Establishment Clause does not prevent state and local governments from offering

leases, even to religious organizations, unless "the leases have been made available on a neutral basis" as a result of an open and competitive selection process. *Id.* at 1269-70. That new requirement was on grafted on to the Establishment Clause as a result of the District Court's misreading of the Supreme Court's decision in *Mitchell v. Helms*, 530 U.S. 793 (2000), in which the Court upheld a federal program providing public funds to parochial schools. In that case, the plurality explained that the appropriate Establishment Clause test is whether or not the program results in indoctrination that is attributable to the state. In the context of the public funding of parochial schools at issue in that case, the plurality observed that "if the religious, irreligious, and areligious are all alike eligible for governmental aide, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Id.* at 809. The majority did not, however, make the corresponding contra-positive statement—that any aid by the government that is *not* available to religious, irreligious, and areligious groups on equal terms *would necessarily* violate the Establishment Clause. Rather, the natural implication of the Court's statement is that there may be many ways in which the government might avoid being perceived, in the mind of the reasonable observer, as not being responsible for any indoctrination that is conducted by the organization that is benefitting from the government's aid. A decision by the government to cast a broad

net, and distribute aid to a wide variety of secular and sectarian beneficiaries, is but one of a panoply of ways by which the government may avoid any attribution of indoctrination. As the Court explained, the "attribution of indoctrination is a relative question." *Id.* The plurality even provided a concrete example of another way by which the government can avoid such attribution: By ensuring that "any governmental aid that goes to a religious organization does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* at 810 (*quoting Agostini v. Felton*, 521 U.S. 203, 226 (1997)). But in the opinion below, any corresponding inquiry as to whether the government has avoided attribution by other means is entirely lacking.

Moreover, Justice O'Connor's concurrence in *Mitchell*, which is controlling on the issue, is even more clear with respect to this point than was the plurality. Justice O'Connor's concurrence explained that prior case law had established that "scrutiny of the manner in which a government-aid program identifies its recipients is *important* because 'the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination.'" *Mitchell*, 530 U.S. at 845 (O'Connor, J., concurring) (emphasis added) (*quoting Agostini*, 521 U.S. at 231). By using the word "important" rather than "dispositive" or "decisive," Justice O'Connor made clear that choosing recipients based on neutral,

secular criteria was not an absolute requirement of the Establishment Clause. Moreover, Justice O'Connor made quite clear that the rationale behind examining the basis on which a government program selects its recipients was to ensure that the program was creating no financial incentive to undertake religious indoctrination. That concern is not present in the facts of the instant case. On its face, the City's decision to give these two leases to the Boy Scouts on a noncompetitive basis creates no financial incentive for any particular individual to study religion.

Consequently, although the District Court was correct in concluding that government aid that is allocated on the basis of neutral, secular criteria is constitutional, it was incorrect in concluding that this form of neutrality "is a threshold factor that must be met when the government awards aid to religious organization [sic]." *Id.* at 1269. The District Court was likewise incorrect to conclude, "[w]hether a reasonable observer would perceive an advancement of religion as a result of the leases depends on whether the leases have been made available on a neutral basis." *Id.* at 1269-70. This test is flawed because noncompetitive contracts are never "made available on a neutral basis"—any constitutional analysis done using this test is over as quickly as it begins. Far from neutral, noncompetitive contracts are almost always made available on the basis of some rare or unique attribute or quality that is possessed by the lessee. That special

quality may be having a long-standing relationship with the lessor, a good history as a tenant, possessing a wide variety of resources that uniquely situate the lessee to develop the property, or any one of a seemingly innumerable host of tangible or intangible qualities that make providing a contract to a lessee on a noncompetitive basis more desirable than awarding the contract to a stranger as a result of a fully competitive free-enterprise system, as lessors would be inclined to do in normal circumstances. Under the rule developed by the District Court, the United States Constitution forbids state and local governments from reaching a reasoned decision to award a noncompetitive contract to any religious organization or organization with sane religious aspects. In many situations, such as where the government has a long-standing beneficial relationship with the organization in question, such a rule would be detrimental to the public interest. Regardless, it is simply not the test that has been developed by the Supreme Court.

The controlling test is the one articulated by Justice O'Connor in *Mitchell*: whether a reasonable observer would perceive that the two leases will "result[] in governmental indoctrination." *Mitchell*, 530 U.S. at 846 (O'Connor, J., concurring). Under that test, the two leases granted by the city to the Boy Scouts are entirely constitutional. The reasonable observer who understood that the City had entered into these value-for-value leases with the Boy Scouts would believe that the City did

so for purposes of encouraging the public to engage in aquatic activities and other nature-related endeavors. One reasonable observer would believe that the government had chosen the Boy Scouts as their lessee with respect to these two leases because the Boy Scouts is in the best position to develop those properties for use by the public for those various leisure activities. Moreover, as discussed above, the record in this case would not support a finding that the Boy Scouts itself is responsible for conducting any religious indoctrination—rather, the record would at most support a finding that the Boy Scouts conducts its activities in a manner not inconsistent with the religious faiths of its members. If the Boy Scouts themselves do not engage in religious indoctrination, it follows *a fortiorari* that the government does not engage in any indoctrination by providing assistance to the Boy Scouts in their scouting endeavors.

The rule developed by the District Court, categorically preventing the government from providing leases to religious organizations or organizations with religious aspects, is flawed for the additional reason that it violates the very neutrality principle it purports to uphold. Under the District Court's test, it is unconstitutional for a state or local government to provide noncompetitive contracts to religious organizations because it is not also offering those same contracts to non-religious organizations. But the District Court would impose no such ban on a state or local

governments offering such contracts to non-religious organizations. Assuming for purposes of argument that the District Court is correct in labeling these sorts of noncompetitive contracts as a government benefit, the District Court has perversely created a rule that would allow this government benefit to flow only to secular organizations. Withholding the access of religious groups, but not non-religious ones, to noncompetitive contracts "leave[s] an impermissible perception that religious activities are disfavored." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring). And this rule is no less pernicious in effect than a rule whereby a school district makes its rooms available for extracurricular use only to secular organizations, and not to religious ones. The Supreme Court has previously held that the latter rule violates the neutrality principle of the Establishment Clause, *see, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), and the District Court's proposed constitutional rule is equally unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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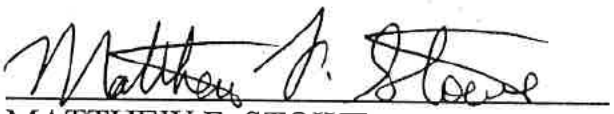

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