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APPENDIX 16(e)

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2000 WL 1784193 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

GOOD NEWS CLUB, et al., Petitioners,
v.
MILFORD CENTRAL SCHOOL, Respondent.

No. 99-2036.
October Term, 2000.
November 30, 2000.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* SALLY CAMPBELL IN SUPPORT OF PETITIONERS

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*i QUESTIONS PRESENTED

1. Whether the Establishment Clause *requires* the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

2. Whether the Free Speech, Free Exercise, and Equal Protection Clauses *permit* the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

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*1 INTEREST OF AMICUS CURIAE [1]

[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amicus curiae and counsel for amicus curiae made a monetary contribution to the preparation or submission of this brief. *See id.*

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Amicus Curiae Sally Campbell has challenged a local policy in St. Tammany Parish, Louisiana, that is similar to the Milford policy at issue in this case. The school board of St. Tammany Parish allows after-hours use of its buildings for civic, recreational, and entertainment uses, and for other uses that pertain to the "welfare of the public." *Campbell v. St. Tammany School Bd.,* 206 F.3d 482, 484 (5th Cir. 2000). The St. Tammany policy expressly excludes partisan political activity, for-profit fundraising, and "religious services or religious instruction." *Id.* Ms. Campbell asked to use school facilities in St. Tammany School District for religious purposes. Relying on its policy, the School Board denied her request.

Ms. Campbell brought suit, alleging a violation of her First and Fourteenth Amendment rights. A panel of the United States Court of Appeals for the Fifth Circuit ruled that the Constitution does not require St. Tammany to allow religious speech in its facilities. *Id.* On October 26, 2000, over the dissent of Judges Jones, Smith, Barksdale, Garza, and DeMoss, the Court denied rehearing en banc. 2000 WL 1597749 (5th Cir.). Ms. Campbell intends soon to file a petition for writ of certiorari in this Court.

In their dissent from denial of rehearing en banc, Judges Jones, Smith, Barksdale, Garza, and DeMoss correctly contended that St. Tammany has created a public forum and that the content-based exclusion of religious speech from that forum is unconstitutional. For a forum to be considered a public forum, "[a]ll that is required is that the forum be 'generally open' to the public." *Id.* at *6 (Jones, J.). The St. Tammany facilities are "open 'indifferently' for use by private ***2** groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple." *Id.* at *8.

These five Judges also correctly explained that St. Tammany's exclusion of religious speech is, in any event, unconstitutional even under the test applicable to limited public fora. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995). Exclusions of speech from such fora must be both reasonable and viewpoint-neutral. The St. Tammany policy is unreasonable because it bears no relationship to the purposes of the forum: "To describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9 (Jones, J.). In addition, the St. Tammany policy discriminates on the basis of viewpoint, as is inherent in the exclusion of religious speech: "The crux of the issue is this: when measured against the 'welfare of the public standard,' how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" *Id.*

In summary, these five Judges stated: "It is unfortunate for the citizens of the Fifth Circuit that this court has seen fit to retreat from equal treatment of religious speech and to deviate from fifteen years of consistent Supreme Court jurisprudence on the subject. The St. Tammany school board was not required to open its facilities for the 'welfare of the public.' Once it did so, however, it could not arbitrarily discriminate against religious speakers." *Id.* at *10.

As this description reveals, the Milford case currently before the Court is not unique, but rather exemplifies a broader national problem of unjustified discrimination against religious speech in public facilities (as in St. Tammany). For that reason, and because the Court's resolution of this case is likely to affect the resolution of Ms. Campbell's case, Ms. Campbell respectfully submits this amicus curiae brief.

*3 SCHOOL POLICY INVOLVED

The relevant portions of the Milford Community Use of School Facilities policy are as follows:
The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes;

1. For the purpose of instruction in any branch of education, learning or the arts.

***

3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public.

***

Use for Nonreligious Purposes. School premises shall not be used by any individual or organization for religious purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Community Use policy for the Milford Central School District, members of the public may use public school facilities for (i) "instruction in any branch of education, learning or the arts," (ii) "holding social, civic and recreational meetings and entertainment events," or (iii) "other uses pertaining to the welfare of the community." Milford's expansive public access policy contains one - and only one - express exception: "School premises shall not be used by any individual or organization for religious purposes." Pursuant to this policy, the Milford Board of Education denied the request of the Good News Club (a community-based youth organization that provides moral instruction from a Christian perspective) to use its facilities. *See* 202 F.3d 502 (2d Cir. 2000).

***4** The discriminatory policy enacted by Milford Central School District targets religious speech for a distinctive burden. Milford's discrimination against private religious speech in general, and against the Good News Club in particular, is unconstitutional. As the Court has concluded in several virtually identical cases, the Constitution demands that private religious speech, religious people, and religious organizations receive at least the same treatment as their secular counterparts in gaining access to public facilities and public property. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993); *Widmar v. Vincent,* 454 U.S. 263 (1981). Indeed, with respect to the precise issue of access to public school facilities that is raised in this case, the Court has repeatedly (and often unanimously) held that "schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). In so ruling, the Court has emphasized time and again that the Free Speech and Free Exercise Clauses protect "*private* speech endorsing religion." *Id.* at 841 (majority opinion).

Because the Court has already ruled decisively on the two central issues raised here, this case requires the Court to break no new ground, but merely to reaffirm its prior holdings. *First*, the Establishment Clause does not *require* the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility. *Second*, the Free Speech, Free Exercise, and Equal Protection Clauses do not *permit* the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility.

***5 ARGUMENT**

I. THE CONSTITUTION DOES NOT *REQUIRE* THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

One fundamental question in this case is whether the Establishment Clause *requires* the government to exclude private religious groups such as the Good News Club from open and neutrally available public facilities. The answer is plainly

no. The government may open public facilities on a neutral basis - for use by religious and secular groups alike - without violating the Establishment Clause.

To be sure, the Court has held that the Establishment Clause prohibits *government*-led or *government*-encouraged prayer to student audiences at certain public school events. *See, e.g., Santa Fe Indep. School District v. Doe,* 120 S. Ct. 2266 (2000); *Lee v. Weisman,* 505 U.S. 577 (1992); *Engel v. Vitale,* 370 U.S. 421 (1962). But the Court has flatly rejected the broader and more extreme proposition that the Establishment Clause requires the government to eradicate *all* religious expression, *public and private*, from public schools and other public facilities. The Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 767 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.); *see also id.* at 775 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) (Establishment Clause not contravened "where truly private speech is allowed on equal terms in a vigorous public forum" so long as there is no "government manipulation of the forum"). The Court thus has emphasized time and again the critical distinction "between *government* speech endorsing religion, which the Establishment ***6** Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quotation omitted).

Therefore, it is by now clear that the government does not violate the Establishment Clause when it allows religious individuals or groups to use public facilities or take public assistance that is available on a neutral basis to secular and religious alike. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990); *Widmar v. Vincent,* 454 U.S. 263 (1981); *see also Mitchell v. Helms,* 120 S. Ct. 2530 (2000); *Agostini v. Felton,* 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1 (1993); *Witters v. Washington Dept. of Services for the Blind,* 474 U.S. 481 (1986); *Mueller v. Allen,* 463 U.S. 388 (1983). When the government provides facilities or aid on a neutral basis to religious and secular alike, there is no danger that the government has favored (and thereby endorsed) the religious over the secular - and thus no Establishment Clause violation. *Lamb's Chapel*, 508 U.S. at 395 ("Under these circumstances …, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed …. "). A public facility open for use by private groups is "in a sense, surplus land" such that the government "conveys no message of endorsement" when it permits "privately organized and privately led groups of students (or others)" to use the facility. Laurence Tribe, American Constitutional Law § 14-5, at 1175 (2d ed. 1988).

If the rule were otherwise - that is, if the Establishment Clause barred the neutral extension of general facilities or benefits to religious groups - "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." ***7** *Widmar*, 454 U.S. at 274-75 (quotation omitted). The Constitution requires no such discrimination against religious people and groups.

In assessing neutrality for purposes of the Establishment Clause, moreover, a government forum or benefit readily qualifies as neutral when (as here) the government makes the forum or benefit available to "a wide variety of private organizations." *Lamb's Chapel*, 508 U.S. at 395. *See also Rosenberger*, 515 U.S. at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."); *Mergens*, 496 U.S. at 252 (neutrality requirement met given that "broad spectrum" of secular groups could use the facilities); *Widmar*, 454 U.S. at 277 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect"). In other words, the fact that numerous secular groups enjoy the same rights as religious groups more than suffices to demonstrate that the government has not impermissibly favored religion.

The fact that younger (and at least potentially more impressionable) children may attend school or play at a particular public building or park does not alter the Establishment Clause analysis, or the significance of neutrality as the

government's essential safe harbor in complying with the Establishment Clause. On the contrary, with younger and more impressionable children, it is doubly important for the government to be scrupulously neutral so as not to convey a message that religion is disfavored. Otherwise, "[w]ithholding access" to religious groups, because they are religious, "would leave an impermissible perception that religious activities are disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). Justice O'Connor's assessment applies to young as well as old. After all, if a young student cannot "understand toleration of [private] religion in the schools" - which is the necessary premise of the impressionability argument - he or she ***8** would be just as "incapable of understanding exclusion of [private] religion from the schools." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 19 (1987). [2]

[2] If the Court were to accept the mistaken attribution/impressionability argument, the appropriate remedy, as Justice Marshall stated in *Mergens*, would not be an outright ban on private religious speech, but merely a disclaimer making clear that the school does not endorse the groups or clubs that use its facilities. *See Mergens*, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold access program at issue in *Mergens* because school could allow private "religious speech and affirmatively "disclaim] any endorsement of the private speech when necessary); *see also Pinette*, 515 U.S. at 794 n.2 (Souter, J., concurring) (if there is a danger of confusion, "no reason to presume that an adequate disclaimer could not have been drafted); *id.* at 769 (plurality) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.).
As to any possibility of student peer pressure, as was stated in *Mergens*, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. *Mergens*, 496 U.S. at 251. Again the appropriate remedy for the possibility of such pressure would not be an overbroad ban on religious speech, but a neutral mechanism for ensuring, for example, that only students with parental permission were allowed into meetings of private groups occurring in public school facilities. Of course, parental permission is already necessary to attend meetings of the Good News Club, which eliminates any such issue in this case.

In this case, the Establishment Clause does not require the exclusion of religious speech in general - or the Good News Club in particular - from Milford's open and neutrally available public facility. It is undisputed that the Good News Club is a private group, not a government organization, and it is undisputed that the Milford school is available to a broad class of secular educational events, "social, civic and recreational meetings and entertainment events," and other uses pertaining to the welfare of the community. The School District therefore would not be favoring (and thereby endorsing) religion over ***9** non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter. When, as here, the government ensures neutrality by making its facilities available to religious and secular groups alike, "the message is one of neutrality rather than endorsement" and the Establishment Clause is not violated. *Mergens*, 496 U.S. at 248.

II. THE CONSTITUTION DOES NOT *PERMIT* THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

Because the Establishment Clause raises no barrier to religious speech in an open and neutrally available public facility, the remaining question is whether the Constitution *permits* the Milford School District to exclude religious groups such as the Good News Club from school facilities. Stated more directly, can the government unapologetically and unabashedly discriminate against private religious speech in a public facility? The answer to that question as well is no.

The basic principles that guide the free speech analysis are settled. "[P]rivate religious speech … is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760. A "free-speech clause without religion" would be, in the words of the Court, "Hamlet without the prince." *Id.* (opinion of Court for 7 Justices). The Constitution's protection for religious speech applies not just to speech from a religious perspective, but also to religious

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"proselytizing," *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647 (1981), and religious "worship," *Pinette*, 515 U.S. at 760; *Widmar*, 454 U.S. at 269 n.6.

It is "axiomatic" that the government "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. When the ***10** government targets not just subject matter, "but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* (internal citation omitted).

It is true that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Pinette*, 515 U.S. at 761. But when the government maintains a forum open to at least some speakers and subject matters, the government's "right to limit protected expressive activity is sharply circumscribed." *Id.*

In a public forum (whether a traditional public forum such as a park or a public forum designated by the government such as an open bandstand), the government may impose reasonable content-neutral time, place, and manner restrictions. But content-based exclusions from a traditional or designated public forum are subject to strict scrutiny and presumptively unconstitutional. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). When the government operates not a traditional or designated public forum, but what is referred to as a "limited public forum" or a "non-public forum," the government's ability to impose content-based exclusions may be more expansive. But the government still "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (internal quotations omitted); *Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 806 (1985); *Perry*, 460 U.S. at 46. [3]

[3] There is substantial confusion regarding the appropriate terms to describe these three categories. Some cases use the term "non public forum to describe what we refer to as a "limited public forum. *See, e.g., Cornelius,* 473 U.S. at 800. That, of course, creates no real confusion, but reveals that there are two terms that may describe the same kind of forum. Some cases (including many in the Second Circuit) use the term "limited public forum to describe what we refer to as a "designated public forum. *See Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207, 211 (2d Cir. 1997) ("designated public forum, sometimes called the 'limited public forum); *see also Good News Club*, 202 F.3d at 508 (referring to "designated or limited public forums as a single category). That can generate substantial confusion because the standards governing those two kinds of forums otherwise would be different. In any event, the terminology we use in this case traditional public forum, designated public forum, and limited public forum is consistent with *Rosenberger*, but we nonetheless caution that the use of terminology is not entirely consistent among courts, advocates, and commentators.

***11** In this case, Milford's exclusion of Good News Club from its facilities is unconstitutional for any of four independent reasons.

• *First*, Milford has created a designated public forum, and Milford's exclusion of religious speech (the Good News Club) from that forum is content-based and viewpoint-based, is not justified by a compelling state interest, and thus is unconstitutional under the Free Speech Clause.

• *Second*, even if Milford has not created a designated public forum, it maintains a limited or non-public forum, and the exclusion of religious speech in general (and instruction about morals from a religious perspective in particular) is viewpoint-based and thus unconstitutional under the Free Speech Clause.

• *Third*, in order to exclude speech from a limited or non-public forum, the government's exclusion must also be reasonable in light of the purpose of the forum. The blanket exclusion of religious speech, because it is religious, from a forum is facially unreasonable where, as here, it bears no relationship to the purpose for which the forum was created. Milford's policy is thus unconstitutional under the Free Speech Clause for that reason as well.

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***12** • *Fourth*, putting aside the intricacies of free speech doctrine (whether a forum is a designated public forum or merely a limited public forum, whether an exclusion is viewpoint-based or merely content-based), the Milford policy contains a more basic constitutional flaw. The government's exclusion of religious speech, *because it is religious*, from a public facility violates the Free Exercise and Equal Protection Clauses, both of which bar governmental discrimination against religious people, religious organizations, and religious speech.

1. The policy adopted by the Milford Central School District has created a designated public forum with respect to Milford's school facilities. As a result, the content-based exclusion of religious speech (including the Good News Club) from those facilities is unconstitutional.

A government entity's traditional public fora are those places such as streets and parks that have "immemorially been held in trust for the use of the public." *Hague v. CIO,* 307 U.S. 496, 515 (1939). In addition, the government can create a public forum for free speech (create the legal equivalent of, for example, a park) by opening public facilities to general use. *Perry*, 460 U.S. at 45. Public school facilities, in particular, become public fora when school authorities "by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 267 (1988) (internal quotations omitted).

The Court's decision in *Widmar* is instructive on the forum definition issue. There, the University of Missouri at Kansas City made its facilities "generally available for the activities of registered student groups." 454 U.S. at 264-65. The school policy also stated: "No University buildings or grounds … may be used for purposes of religious worship or religious teaching." *Id.* at 265 n.3. Because the university had created a public forum, the Court subjected the content-based exclusion of religious speech from the forum to strict scrutiny: "[T]he ***13** UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. … In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to *content-based exclusions*" - namely, strict scrutiny. *Id.* at 269-70 (emphasis added).

In *Lamb's Chapel*, the Court similarly considered whether the government policy at issue there - providing that school facilities were available to the public for educational, social, civic, and recreational purposes, and for other uses pertaining to the welfare of the community - created a public forum, or rather a limited public forum. The Court stated that the argument that the school district had created a public forum carried "considerable force," but the Court ultimately decided not to "rule on this issue" because the exclusion of religious groups was plainly viewpoint-based and unconstitutional regardless of the nature of the forum. 508 U.S. at 392-93.

The Court's "strong suggestion" in *Lamb's Chapel* that open school facilities may well be a public forum is a useful starting point, however, for considering the nature of the forum in this case. *See Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207, 218 (2d Cir. 1997) (Cabranes, J., concurring). The Milford policy, in our view, plainly creates "a forum generally open to the public." *Perry*, 460 U.S. at 45. Indeed, it is hard to conjure up a more expansive access policy than one in which a public facility is open for any "social, civic, or recreational use," for uses pertaining to the welfare of the community, and for "instruction in any branch of education." [4] For that reason, numerous courts ***14** of appeals analyzing similarly expansive policies where school facilities were open for social, civic, and recreational use by outside groups have held that the schools created public fora. *See, e.g., Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5,* 941 F.2d 45, 48 (1st Cir. 1991); *Gregoire v. Centennial School Dist.,* 907 F.2d 1366, 1378 (3rd Cir. 1990); *National Socialist White People's Party v. Ringers,* 473 F.2d 1010 (4th Cir. 1973) (en banc).

4 To be sure, Milford requires that groups using its facilities also make its events "open to the general public. That is a "manner restriction imposed on groups seeking to use the school facilities. That is not a content based restriction and thus does not

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> in any way call into question the conclusion that Milford operates a public forum. Indeed, if anything, the non exclusivity requirement buttresses the notion that this is a designated public forum.

For example, in the *Grace Bible* case, the First Circuit panel (including then-Chief Judge Breyer) assessed a policy that, as the Court characterized it, provided access for groups that were "good for the community unless, in the judgment of the school board, it is injurious to the school." 941 F.2d at 48. The school district excluded a group that wished to engage in religious speech. The First Circuit stressed that a school district opening its facilities for public use under such a policy "has no greater right to pick and choose among users on account of their views than does the government in general when it provides a park, or a hall, or an auditorium, for public use." *Id.* The Court concluded: "The bare fact is, [the school district] has volunteered expressive opportunity to the community at large, excluding some because of the content of their speech. This is elementary violation." *Id.*

This Court has looked not just to the policy, but also to the "practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. In this case, the factual record buttresses what the plain terms of the policy reveal. In particular, Milford has granted access to numerous groups such as the Boy Scouts, Girl Scouts, and 4-H Club. ***15** This practice is persuasive evidence regarding the open nature of the forum. [5]

[5] The government cannot rely on a vague definition of the forum to escape the conclusion that it has created a public forum. "If the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite. *Gregoire*, 907 F.2d at 1375. Were the rule contrary, " a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. *Mergens*, 496 U.S. at 244.

In sum, the policy and the record show that Milford Central School has created a public forum. Thus, Milford's indisputably content-based exclusion of religious speech in general (and the Good News Club in particular) from that forum is unconstitutional. *See Widmar*, 454 U.S. at 269; *see also Campbell*, 2000 WL 1597749 at *8 (Jones, J.) ("The St. Tammany facilities are "open 'indifferently' for use by private groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple."). [6]

[6] The court of appeals suggested that the parties had agreed that Milford created only a limited public forum. 202 F.3d at 509. But as explained above, Second Circuit precedent conflates the categories of designated public fora and limited public fora by suggesting that the categories are governed by the same rules. *See Bronx Household of Faith*, 127 F.3d at 211 ("designated public forum, sometimes called the 'limited public forum); *see also Good News Club*, 202 F.3d at 508 (referring to "designated or limited public forums as a single category). Any concession that a "limited public forum was involved in this case is, therefore, not a concession at all given Second Circuit precedent that equates a designated public forum and a limited public forum. For that reason, the Court should independently assess the nature of the forum in this case, unconstrained by the parties' prior Second Circuit induced characterizations.

2. If Milford's forum is not a designated public forum, it is a limited public forum from which viewpoint-based exclusions are unconstitutional. The decisions in *Lamb's Chapel* and ***16** *Rosenberger* demonstrate, moreover, that Milford's exclusion of religious speech in general (and of the Good News Club in particular) from its school facilities is viewpoint-based and thus unconstitutional.

In *Lamb's Chapel*, the Court considered a school policy like the one at issue in this case that provided: "[S]chool premises shall not be used by any group for religious purposes." 508 U.S. at 387. Pursuant to that policy, the school denied a church's request to use school premises "to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today." *Id.* The record did not indicate "that the application to exhibit the particular film series … was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective." *Id.* at 393-94. The Court held that this exclusion of

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religious perspectives was viewpoint-based and "plainly invalid." *Id.* at 394. The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious viewpoint." *Id.* at 393.

The Court reached the same result in *Rosenberger.* The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious student group. The Court held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. Relying on *Lamb's Chapel*, the Court stressed that "discriminating against religious speech [is] discriminating on the basis of viewpoint." *Id.* at 832 (emphasis added). In particular, "[r]eligion may be a vast area of inquiry, but it also provides … a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. As that language demonstrates, the *Rosenberger* Court concluded that the exclusion of religious speech, ideas, ***17** thought, and uses from a forum is *inherently* and *by definition* viewpoint-based.

In this case, *Lamb's Chapel* and *Rosenberger* make clear that Milford's policy and exclusion of the Good News Club is patently unconstitutional. The Milford School District allows instruction about morals provided from a secular perspective, but disallows instruction about morals from a religious perspective. As Judge Cabranes observed in a factually similar case, "the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination." *Bronx Household of Faith*, 127 F.3d at 220 (concurring and dissenting). Similarly, in *Campbell*, Judge Jones correctly analyzed a vague "welfare" standard similar to that in Milford: "when measured against the 'welfare of the public' standard, how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" *St. Tammany*, 2000 WL 1597749 at *9. [7]

[7] Bound by Second Circuit precedent, Judge Cabranes' opinion in that case did not take issue with the circuit's distinction between religious speech and religious worship. Such a distinction is, however, flawed for the reasons discussed below.

Of course, under *Rosenberger*, the express exclusion of religious uses is, in any event, *inherently* viewpoint-based, and thus unconstitutional regardless of the nature of the forum. As the Court said, "[r]eligion may be a vast area of inquiry, but it also provides … a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. [8]

[8] The four dissenters in *Rosenberger* likewise recognized that discrimination against religious speech was unacceptable. "The common factual thread running through *Widmar, Mergens*, and *Lamb s Chapel*, is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in *Widmar* and *Mergens*) or to suppress a particular religious viewpoint (as in *Lamb s Chapel*). … Each case … drew ultimately on the unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum. 515 U.S. at 888 (Souter, J., dissenting) (internal citations omitted).

***18** Milford's exclusion of certain religious speech cannot be saved or cabined by positing a distinction between (i) speech from a religious perspective and (ii) religious prayer or worship. The court of appeals attempted to split the atom and to draw such a line, but that is impossible: Religious worship is religious speech and religious thought. As Judge Jacobs persuasively explained, moreover, "[d]iscussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially - quintessentially - religious." 202 F.3d at 515 (dissent).

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So, too, the Court in *Widmar* flatly dismissed the idea that religious worship could be segregated from religious speech for purposes of free speech doctrine. The Court said that it is impossible to draw the line where singing, reading, and teaching transforms into "worship." 454 U.S. at 269 n.6 The *Widmar* analysis is surely correct, as there is no basis in precedent or logic for placing religious speech in one First Amendment category and religious worship in another First Amendment category.

In sum, even assuming that the Milford policy does not create a designated public forum, but only a limited or nonpublic forum, the exclusion of the Good News Club is viewpoint-based and thus unconstitutional.

3. A third independent reason why the exclusion of Good News Club violates the Free Speech Clause is the utter unreasonableness of the exclusion in light of the forum's ***19** purposes. In a limited public forum, the government's exclusion of particular speech not only must be viewpoint-neutral, but also must be "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806; *see also Rosenberger*, 515 U.S. at 829 (same); *Perry*, 460 U.S. at 49 (same; government may limit activities in forum, but cannot exclude "activities compatible with the intended purpose of the property"). In this case, Milford's express exclusion of religious speech does not serve any legitimate purpose of the forum.

In *Lamb's Chapel*, having found that the exclusion was viewpoint-based and thus unconstitutional, the Court did not reach the additional question whether the exclusion was "unreasonable in light of the purposes of the forum." But the Court did pointedly note that the Second Circuit had "uttered not a word in support of its reasonableness holding" and that if the rule were unreasonable, "it could be held facially invalid." 508 U.S. at 393 n.6. As suggested by the Court in *Lamb's Chapel*, therefore, the reasonableness analysis is a separate and vitally important aspect of the inquiry in limited public forum cases. And it provides an independent basis for striking down Milford's action in this case.

The "reasonableness" inquiry necessarily focuses, first, on the purpose of the Community Use policy and, second, on how that purpose is allegedly thwarted by allowing the forum to be used for religious purposes. The Milford policy allows the forum to be used for instruction in any branch of education, for uses pertaining to the welfare of the community, and for holding social, civic, and recreational meetings and entertainment events. The clear purpose of the Milford policy on its face is to provide the community with a place to meet and to speak as individuals and groups - a public service provided by the government in the same way that parks are a public service to the people. It is inconceivable, however, that allowing religious speech in that public building would somehow undermine or thwart those purposes. That is especially so given that the policy allows uses pertaining to the "welfare of the community." ***20** As Judge Jones said in analyzing a similar policy in *Campbell*, "[t]o describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9.

Indeed, the only possible bases for excluding religious speech would be (i) a blatant desire to disfavor religious speech or (ii) a claim that the Establishment Clause required exclusion. The former argument is unreasonable as a matter of law (and unconstitutional, as discussed below), and the latter is unavailing under this Court's precedents. In short, then, the Community Use policy's exclusion of use for "religious purposes" is unreasonable in light of the purposes served by the forum. *See St. Tammany*, 2000 WL 1597749, at *8 (Jones, J.) (policy excluding religious speech is "unreasonable" and "doomed"); *see also* Br. of Amicus Curiae American Center for Law and Justice at 17-29.

4. Aside from the intricacies of free speech doctrine, a more fundamental point demonstrates that Milford's exclusion of the Good News Club is unconstitutional. Under the Free Exercise and Equal Protection Clauses (as well as the Establishment Clause), the government may not discriminate against religion, just as the government may not discriminate on the basis of race. The government thus may not impose a burden or deny a benefit because of the religious nature of a group, person, writing, speech, or idea. To use the words of Justice Brennan, the government "may not use religion as a basis of classification for the imposition of duties [and] penalties …" *McDaniel v. Paty,* 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Of course, the non-discrimination principle articulated by Justice Brennan is by

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now firmly entrenched in this Court's jurisprudence. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 US 520, 532 (1993) (government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit [] conduct because it is undertaken for religious reasons"); *Employment Division v. Smith,* 494 U.S. 872, 877 (1990) ("The government "may not ***21** impose special disabilities on the basis of religious views or religious status.").

Except in the context of a permissible accommodation of religion, the government must act on a religion-neutral basis, based on objective and discernible criteria that do not refer to or target religion. For example, if the government bars certain categories of speech or activities from a public facility (say, events with more than 50 people in attendance) and defines the limitation without reference to religion, the Constitution is not violated even though a religious meeting with more than 50 people in attendance would be excluded from the facility. In such a case, the government has not *discriminated* against religion (putting aside, of course, any issue of required accommodation under the Free Exercise Clause).

On the other hand, where the government excludes religious speech - *because* it is religious - from a public facility, the government has plainly discriminated against religion and just as plainly violated the Constitution. And that is precisely what Milford has done in this case by targeting religion for a distinctive burden.

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS.

In closing, it bears mention that the Milford policy poses two additional and important threats to religious liberty and freedom - threats that this Court has emphasized before and that should inform the analysis in this case.

First, Milford's policy creates grave dangers of excessive entanglement - namely, of the government seeking to monitor and inquire into the content of speech to determine whether it is sufficiently "religious" to require exclusion. This Court on many occasions has emphasized the constitutional dangers implicated when the government intrudes in this way into the ***22** nature of speech. *See Mergens*, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); *cf. Lee v. Weisman,* 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible").

The Court in *Rosenberger* elaborated on the problem, stating that the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." 515 U.S. at 835. The Court continued: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. *That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion.…"Id.* at 845-46 (emphasis added).

Second, the School District's policy necessarily induces people seeking to use public facilities to water down their speech and to hide the religiosity of their message in order to satisfy a government administrator that a proposed meeting is not *really* for "religious purposes." That demeaning and disturbing exercise is neither mandated nor permitted by the Constitution. The Constitution is not "some sort of homogenizing solvent" that forces religious groups "to choose between assimilating to mainstream American culture or losing their political rights." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 730 (1994) (Kennedy, J., concurring). The Constitution in no way licenses the government to operate a checkpoint where religious people who hide their beliefs and intentions are allowed through, but those who express their true beliefs and intentions are turned away.

***23** In short, these two factors underscore the sound prudential and historical reasons why the Constitution neither requires nor permits discrimination against religious people and religious speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision of the court of appeals should be reversed.

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1999 WL 1272963 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

SANTA FE INDEPENDENT SCHOOL DISTRICT, Petitioner,
v.
Jane DOE, et al., Respondents.

No. 99-62.
December 30, 1999.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER

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*i QUESTION PRESENTED

Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

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*1 INTEREST OF AMICI CURIAE [1]

[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

Congressman Steve Largent represents the First District of Oklahoma in the United States House of Representatives. Congressman J.C. Watts represents the Fourth District of Oklahoma in the United States House of Representatives. Both Mr. Largent and Mr. Watts played professional football; Mr. Largent is a member of the Hall of Fame.

Congress has substantial authority to enact legislation and vote on constitutional amendments regarding student religious speech, particularly in the Nation's public schools. *See generally Board of Ed. of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990). As citizens and Members of Congress, Mr. Largent and Mr. Watts have a deep interest in ensuring appropriate protection for student religious speech in our public schools and in preventing discrimination against religious organizations, religious persons, and religious speech. Mr. Largent and Mr. Watts thus have a strong interest in this case and submit that Santa Fe High School's religion-neutral policy for a brief student statement before varsity football games is entirely appropriate and consistent with the Constitution.

SCHOOL POLICY INVOLVED

The Santa Fe Independent School District in Galveston County, Texas, maintains the following policy for Santa Fe High School:
The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and ***2** student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect *a student*, from a list of student volunteers, to deliver the statement or invocation. *The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.*

Pet. App. F1 (emphases added).

SUMMARY OF ARGUMENT

Santa Fe High School allows a student to make a brief statement to the crowd before home varsity football games "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Santa Fe High School's policy does not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind. Nor, on the other hand, does the school policy *prevent* the student from doing so. The policy is thus entirely neutral toward religion and religious speech.

Respondents nonetheless claim that the school policy *on its face* violates the Establishment Clause because an individual student (not a school or government official) might invoke God's name, utter religious words, or say a prayer in his or her pre-game statement. Respondents' Establishment Clause theory directly conflicts with this Court's settled jurisprudence. The Court has held that the Establishment Clause permits a *neutral* school speech policy in which individuals may engage in religious or other speech as they see fit in a school forum. *See* ***3** *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990); *Widmar v. Vincent,* 454 U.S. 263 (1981). In these cases, the Court has

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stressed the critical distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250).

Similarly, in *Lee v. Weisman,* 505 U.S. 577 (1992), a case striking down *government*-led and *government*-composed prayer at school graduations, the Court repeatedly distinguished government religious speech from private religious speech. Indeed, in concurrence, Justice Souter, joined by Justices Stevens and O'Connor, foreshadowed and effectively answered in advance the question presented in this case: "If the State had chosen its … speakers according to wholly secular criteria, *and if one of those speakers (not a state actor) had individually chosen to deliver a religious message*, it would have been harder to attribute an endorsement of religion to the State." *Id.* at 630 n.8 (Souter, J., concurring) (emphasis added) (citing *Witters v. Washington Dept. of Services for the Blind,* 474 U.S. 481 (1986)).

The Court's cases show, moreover, that respondents' theory of the Constitution is exactly backwards. If Santa Fe High School took steps to *prevent* the student speaker from invoking God's name or uttering religious words or saying a prayer in his or her pre-game statement, then the school *would* violate the Constitution - the Free Speech and Free Exercise Clauses of the First Amendment. The Constitution protects the Santa Fe student speaker who chooses to mention God just as much as it protects the Santa Fe student speaker who chooses not to mention God. The school cannot force the student to "say a prayer," nor can the school prohibit the student from "saying a prayer." By adhering scrupulously to this principle ***4** of neutrality, the Santa Fe High School policy for pre-game student statements satisfies the Constitution.

As seven Justices indicated in *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753 (1995), the school need not issue any sort of "disclaimer" because this case involves an individual's verbal *speech* (in contrast to a case such as *Pinette* involving a *fixed* visual display in a public area). That said, we understand that a disclaimer is currently read over the public address system at Santa Fe High School football games. Given that fact and, in any event, given that this case involves a facial challenge, the Court can uphold the Santa Fe policy without considering whether and/or under what circumstances a school disclaimer ever might be necessary.

The forum's scarcity (namely, the fact that only one student per game speaks) does not alter the constitutional analysis. The Court explained in *Rosenberger* that "nothing" in the Court's decisions suggests that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835.

Finally, respondents' theory would cause severe practical harm. Schools would have to monitor and censor religious words by all non-governmental speakers (a high school football player in a pre-game pep rally, a student newspaper writer, the guest speaker at a school speakers' series, the valedictorian at graduation). This Court, however, has never forced or even allowed the public schools of this country to censor students and speakers who happen to be religious or wish to speak religious words at a school event. On the contrary, as the Court has said, the absolutist legal theory of those who seek to cleanse public school events of all *private* religious expression evinces a pervasive "hostility to religion" that is neither required nor permitted under the Religion Clauses. *Rosenberger*, 515 U.S. at 846.

***5 ARGUMENT**

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT - INDEED, CONSTITUTIONALLY CANNOT - BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT.

Respondents do not dispute that a public high school may set aside a moment before a football game for a student to deliver a public message solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition. The sole question is whether, as respondents submit, the high school must actively *prohibit* that student speaker from invoking God's name, uttering religious words, or saying a prayer.

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A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy.

Three mutually reinforcing strands of this Court's jurisprudence demonstrate that a public high school such as Santa Fe constitutionally need not (indeed, constitutionally *cannot*) prohibit the student from religious speech in his or her pre-game statement to the crowd.

First, the Court's cases striking down *government* school prayer have carefully distinguished governmental religious speech from protected private religious speech. *Second*, in a series of related cases, the Court has held that student religious speech in a school forum is not attributable to the State and therefore does not violate the Establishment Clause. Indeed, it is constitutionally impermissible for the government to discriminate against religion and prevent a student from engaging in religious speech at a school event. *Third*, the Court has similarly held that decisions by *private individuals* to use neutrally available government aid for religious purposes are not attributable to the State for purposes of the Establishment ***6** Clause, a principle akin to the theory of neutrality employed in the student speech cases.

1. The Court has held that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayer in classes or at graduation ceremonies. [2]

[2] The Establishment Clause generally does not prohibit governmental religious speech at *non school* events so long as no one is compelled to speak or indicate agreement with the religious message. *See Lynch v. Donnelly,* 465 U.S. 668 (1984); *Marsh v. Chambers,* 463 U.S. 783 (1983); *see also County of Allegheny v. ACLU,* 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting). The examples of such governmental religious speech are pervasive and long standing. The President issues Thanksgiving Day proclamations; this Court starts its sessions with a plea that "God save the United States and this Honorable Court ; both Houses of Congress begin the day with official prayer; the phrase "In God We Trust adorns our currency; the list goes on.

The facts in the leading case, *Engel v. Vitale,* 370 U.S. 421 (1962), are well-known. A school board in New York had directed that teachers and students begin each school day with an official prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. The Court struck down the policy, stating that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

In concurrence, Justice Douglas emphasized a critical theme that would recur in the Court's decisions in subsequent years: "Under our Bill of Rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, *it is to be done by individuals and groups*, not by the Government." *Id.* at 442-43 (Douglas, J., concurring) (quotation omitted; emphasis added). ***7** "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." *Id.* at 443.

In *Lee v. Weisman,* 505 U.S. 577 (1992), the Court held that *Engel* applied to public school graduation ceremonies. The Court pointed to the following "dominant facts": The school had "decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at 586-87; *see also id.* at 588 (State made "decision to include a prayer"). Moreover, the school principal selected the clergy member and "directed and controlled the content of the prayers." *Id.* at 588. The degree of school involvement "made it clear that the graduation prayers bore the imprint of the State." *Id.* at 590. In concurrence, Justice Blackmun, joined by Justices Stevens and O'Connor, reiterated the critical facts: The "government composes official prayers, selects the member of the clergy to deliver the prayer, [and] has the prayer delivered at a public school event." *Id.* at 603 (Blackmun, J., concurring) (quotation omitted).

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But the *Lee* Court cabined its holding in a way important to this case by stressing the critical distinction between (i) individual religious speech in schools, which is protected by the Constitution, and (ii) government-required religious speech in schools, which the Court held to be prohibited by the Constitution. The Court stated, for example, that "*the First Amendment does not allow the government to stifle prayers.*" *Id.* at 589 (emphasis added). The Court explained that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.*

The problem the Court identified in *Lee*, therefore, was not that students were exposed to religious speech, but that they were exposed to *governmental* religious speech. "In religious debate or expression the government is not a prime participant …. A *state-created orthodoxy* puts at grave risk ***8** that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 591-92 (emphasis added). The First Amendment thus is not concerned with actions that do not "so directly or substantially involve *the state* in religious exercises or in the favoring of religion." *Id.* at 598 (quotation omitted; emphasis added).

Given that private individuals can engage in religious speech in school settings, the Court recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Id.* at 598-99. But that is hardly some constitutional vice; to the contrary, it is a constitutional virtue. Indeed, the Court expressly warned that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.* at 598.

In a concurring opinion, Justice Souter, joined by Justices Stevens and O'Connor, elaborated by distinguishing the situation in *Lee* from a hypothetical policy that presumably would satisfy the Constitution (a policy that happens to be precisely akin to that employed by Santa Fe High School for football games): "If the State had chosen its graduation day speakers according to wholly secular criteria, *and if one of those speakers (not a state actor) had individually chosen to deliver a religious message*, it would have been harder to attribute an endorsement of religion to the State." *Id.* at 630 n.8 (Souter, J., concurring) (emphasis added) (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986)).

The opinions and analyses of the *Engel* and *Lee* Courts foreshadowed - and effectively approved in advance - the Santa Fe High School policy at issue here. The Establishment Clause permits a student speaker to deliver a religious message in a neutrally available school forum, so long as the school ***9** itself does not select, compose, deliver, or require a religious message.

2. We need not rely solely on statements in *Lee* and *Engel*, however, to support our argument. In a series of cases over the last two decades, the Court has held that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. Indeed, the Court has held that the Constitution *prohibits* the government from excluding private religious speech, because it is religious, from a school event.

These cases arose after certain schools and plaintiffs read *Engel* and other decisions as license (or judicial compulsion) to eradicate all traces of religion, *government and private*, from the public schools. The Court has rejected these homogenizing efforts to cleanse public schools of private religious expression, emphasizing time and again the critical distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250).

The cases affirming this dispositive principle are by now familiar: *Widmar, Mergens, Lamb's Chapel, Rosenberger*, and *Pinette.* Because of their importance to this case, we briefly review each.

In *Widmar v. Vincent,* the Court held that the Constitution "forbids a State to enforce certain exclusions [of religious speakers] from a forum generally open to the public, even if it was not required to create the forum in the first place." 454 U.S. 263, 267-68 (1981). A public university had justified its exclusion of religious speakers by citing the Establishment Clause as interpreted in *Tilton v. Richardson,* 403 U.S. 672 (1973), but the Court in *Widmar* reaffirmed "the right of religious speakers to use public forums on equal terms with ***10** others." 454 U.S. at 273 n.12. As the Court stated, "by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there." *Id.* at 272 n.10.

In *Board of Ed. of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990), the Court extended the principle of *Widmar* to the high school context - in a case where Congress through the Equal Access Act had mandated equal treatment of religious speech in public schools. A high school religious group sought permission to meet at the high school, as other groups did. The school denied the request, arguing that "official recognition of [the students'] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students." *Id.* at 247-48. The Court, without dissent on the constitutional issue, rejected that Establishment Clause argument. The Court relied on the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250 (plurality). The Court added that "*[t]he proposition that schools do not endorse everything they fail to censor is not complicated.*" *Id.* (emphasis added). And if a state "refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Id.* at 248 (plurality).

The Court reached the same conclusion in *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993). The Court struck down a school board rule that allowed schools to open their facilities except to religious uses. The Court unanimously concluded that the policy violated the Free Speech Clause and stated that "there would have been no realistic danger that the community would think that the ***11** District was endorsing religion or any particular creed" by allowing religious uses in the school. *Id.* at 395.

The Court again relied on the neutrality principle in *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995). The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious group on the ground that the group's student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 823.

The Court first held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." *Id.* at 831. As to the Establishment Clause analysis, the Court began with the "central lesson": A "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. In the speech context, the Court stated: "[M]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Id.*

The Court found that a program including payments for expenses of the religious magazine as well as other student publications would be "neutral toward religion." *Id.* at 840. Such a program would respect the "critical difference between *government*speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 841 (quotation omitted); *see also id.* at 834 (speech of "private persons" and "University's own speech" controlled "by different principles"); *id.* (referring to "distinction between the University's own favored message and the private speech of students").

***12** The Court applied those same principles of neutrality outside the educational context in *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753 (1995). The State there had excluded a private religious display (a cross) from a public square generally open to private displays.

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The Court stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Id.* at 760. A plurality stated that the Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 767 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.).

In a concurring opinion, Justice Souter, joined by Justices O'Connor and Breyer, largely agreed with those principles, albeit finding that a state disclaimer might be necessary in cases of fixed visual displays. *Id.* at 784 (Souter, J., concurring). As to the need for a disclaimer, the concurring Justices distinguished a fixed visual display from an individual's verbal speech: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Id.* at 786.

In sum, as this series of cases makes clear, state action prohibiting a student speaker from engaging in religious speech, because it is religious, is a First Amendment violation. But even if it were not a First Amendment free speech/free exercise violation to *exclude* religious speech, these cases show that it is surely not a First Amendment Establishment Clause violation for a school to *permit* religious speech on a neutral basis at a school event. As Justice Kennedy has explained, "in some circumstances the First Amendment may *require* that ***13** government property be available for use by religious groups, *and even where not required, such use has long been permitted.*" *County of Allegheny v. ACLU,* 492 U.S. 573, 667 (1989) (Kennedy, J., concurring and dissenting) (citations omitted; emphasis added).

3. The principle that the government does not violate the Establishment Clause when it enacts a neutral program available to religious and non-religious alike finds additional doctrinal support in a separate strand of this Court's Establishment Clause jurisprudence. The Court has rejected challenges to government programs through which a "religious" individual or religious organization may take advantage of a neutrally available government benefit (the analytic equivalent of the neutrally available school speech forum). Four cases illustrate this principle.

In *Mueller v. Allen,* 463 U.S. 388 (1983), the Court considered a tax deduction program that allowed deductions for school expenses, including for parents who sent their children to religious schools. Citing *Widmar*, the Court held that where religion is advanced only "as a result of decisions of individual parents 'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (quoting *Widmar*, 454 U.S. at 274).

The Court applied the same principle in *Witters v. Washington Dept. of Services for the Blind,* 474 U.S. 481 (1986). The government provided financial assistance to blind students, one of whom used the assistance to attend a seminary. The Court, through Justice Marshall, stated: "Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." *Id.* at 488-89.

Mueller and *Witters* laid the constitutional foundation for the Court's decision in *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1 (1993). There, the school district provided ***14** sign-language interpreters to students, but refused to provide them to students attending religious schools on the ground that the assistance would violate the Establishment Clause. The Court rejected that defense: "[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

Finally, in *Agostini v. Felton,* 521 U.S. 203 (1997), the Court relied on *Mueller, Witters*, and *Zobrest* in concluding that Title I's aid program did not violate the Establishment Clause. The Court held that the Constitution permits government

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aid to students on "a neutral basis" - aid available regardless whether the student attends a sectarian or non-sectarian school. *Id.* at 234-35. Such a program "cannot reasonably be viewed as an endorsement of religion." *Id.* at 235.

4. The decisions in *Widmar, Mergens, Lamb's Chapel, Rosenberger*, and *Pinette* - when read together with *Lee v. Weisman* and cases such as *Mueller, Witters, Zobrest*, and *Agostini* - establish two critical principles that speak directly to the issue in this case. *First*, the Establishment Clause permits a citizen or student or religious group to utilize a neutrally available school forum to speak religious words or invoke God's name or say a prayer. *Second*, if the government were to prevent citizens or students at a school event from religious speech, because it is religious, the government would violate the free speech and free exercise [3] rights of the speakers.

[3] *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993) ("protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs).

These principles, which validate the policy at issue in this case, should not be controversial. The President of the ACLU, for example, has correctly analyzed the issue presented here:

***15** [T]he First Amendment would protect the right of a student speaker to voluntarily make religious statements even at a school-sponsored event. … [I]f the student were truly expressing his or her own views, that should be protected. Justice Souter made precisely this point in his concurring opinion in *Weisman.* … "If the State had chosen its graduation speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."

Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 Wm. & Mary Bill Rts. J. 607, 631 (1995) (quoting *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring)).

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge.

This case involves a student's verbal speech at a school event, as opposed to a fixed visual display in a public square. As a result, the school need not issue a disclaimer to eliminate any claimed audience misperception of government endorsement of a student's private speech.

Seven Justices suggested as much in *Pinette*, with Justice Souter, joined by Justices O'Connor and Breyer, explaining the rationale in concurrence: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." 515 U.S. at 786 (Souter, J., concurring). A four-Justice plurality added that the Court's "Religion Clause jurisprudence is complex enough without the addition of th[e] highly litigable feature" of sometimes-mandatory government disclaimers. ***16** *Id.* at 769 n.4 (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.).

That said, the Court in this case need not consider whether and/or under what circumstances a disclaimer ever might be necessary, for two reasons.

First, this is a facial challenge to the Santa Fe High School football game policy. The Court thus could uphold the school's policy against the facial attack and simply leave for another day the question whether and/or under what circumstances a disclaimer ever might be necessary. *See Pinette*, 515 U.S. at 784, 794 n.2 (Souter, J., concurring) (even a *fixed* display in the public square would not violate the Establishment Clause "in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it"; "there is no reason to presume that

an adequate disclaimer could not have been drafted"); *Mergens*, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold program at issue in *Mergens* because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary).

Second, and buttressing the first point, we understand that Santa Fe High School in fact issued the following oral disclaimer over the public address system at games after October 15 of this past season:

> Marian Ward, a Santa Fe High School Student, has been selected by her peers to deliver a message of her own choice. Santa Fe ISD does not require, suggest, or endorse the contents of Ms. Ward's choice of a pre-game message. The purpose of the message is to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. [4]

[4] This statement is recited in an October 15, 1999, letter agreement between counsel in a separate case involving student pre game speech at Santa Fe High School football games. *See Ward v. Santa Fe Independent School District,* No. G 99 556 (S.D. Tex., Houston Division). We have been informed that the letter agreement reciting that statement is part of the record in that case.

***17** As the Court concluded in *Pinette* and *Mergens*, this kind of disclaimer, while not constitutionally necessary, would leave the audience (even the "unreasonable" listeners) with absolutely no doubt that the student's speech is not approved or endorsed by the government. *See Pinette*, 515 U.S. at 776 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); *id.* at 769 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such."); *id.* at 784 (Souter, J., joined by O'Connor and Breyer, JJ., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."); *Mergens*, 496 U.S. at 251 (plurality opinion of O'Connor, J.) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, … students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."). [5]

[5] In this case, moreover, any chance of widespread audience confusion is all but nonexistent given that the students themselves elect the speaker and are thus necessarily aware of the school policy.

In short, a disclaimer is *not* constitutionally required here. But given that this is a facial challenge and given the current practice at Santa Fe High School, the Court could leave for ***18** another day the question whether and/or under what circumstances a disclaimer ever might be necessary.

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis.

The forum in this case is scarce, in the sense that only one student uses it at each home varsity football game, and there are only three to six home games a year. But the fact of scarcity does not alter the neutrality analysis.

First, as the Court in *Rosenberger* explained, the government's provision of a neutral forum does not suddenly become problematic if only a few speakers can utilize the forum. In such circumstances, it is "incumbent on the State … to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in *Lamb's Chapel*] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835. The Court thus flatly rejected the suggestion that scarcity provided a rationale for discrimination against religious speech: "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different." *Id.*

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Justices Marshall and Brennan also helpfully analyzed the possible effects of scarcity in their separate opinion in *Mergens.* Considering the possibility of a forum that did not "include the participation of more than one advocacy-oriented group," 496 U.S. at 268 (Marshall, J., concurring), those two Justices still did not suggest that such a development would be unconstitutional. Rather, that fact would simply make the school responsible, they said, to "affirmatively disclaim any endorsement" of the private speech. *Id.*

Second, and this is important, the school here does not decide whether the speaker will utter religious words, nor does ***19** the school premise availability of the forum on whether the speaker will utter religious words. The forum is neutral, and the choice whether to invoke God' s name or speak religious words is within the sole discretion of the student.

Compare, by contrast, a situation where the government could allow only a single school group to meet on school grounds. Suppose that a number of clubs applied for the facility. Suppose further that the school chose a religious club - because it was religious - rather than allocating the scarce facility on a religion-neutral basis. In that case, an Establishment Clause issue would arise. In this case, however, the school has done nothing to favor or promote a speaker who may choose to speak religious words over a speaker who may choose not to speak religious words.

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games.

The Court has stated that Establishment Clause jurisprudence is "delicate and fact-sensitive," *Lee*, 505 U.S. at 597, and that "[e]very government practice must be judged in its unique circumstances," *Lynch v. Donnelly,* 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). In this case, that principle suggests particular attention to the following points.

First and most importantly, as we have already explained, this case involves a facial challenge to a student speech policy where the student is free to speak a religious message - *or not* - as he or she sees fit.

Second, as we have said, the Court could uphold the student speech policy without reaching the question whether and/or under what circumstances a disclaimer ever might be necessary.

***20** *Third* this case involves a high school. The Court need not consider whether the same principles would apply to elementary school events.

Fourth, the speech policy before the Court applies only to football games. A football game is extracurricular and more in the nature of a student event than are curricular, school-dominated events such as graduations and daily classes. While graduations and classes unmistakably bear "the imprint of the State," *Lee*, 505 U.S. at 590, extracurricular activities generally provide an opportunity for students to participate without the same degree of school control. To be sure, faculty advisors or coaches are important, but the football team, the debate team, the cheerleading squad, the newspaper, the yearbook, the school play are activities designed to give students an extra degree of freedom to grow and learn and err in a less autocratic, less structured environment. In short, the coercive, state-dominated atmosphere described in *Lee* simply does not translate to extracurricular events such as football games. *Cf. Mergens*, 496 U.S. at 267 (Marshall, J., concurring) ("To the extent that a school emphasizes the autonomy of its students, … there is a corresponding decrease in the likelihood that student speech will be regarded as school speech.").

II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS."

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By allowing the student speaker to say what he or she chooses (so long as the message is within the very broad bounds of the school policy), the Santa Fe school district avoids entangling itself in the difficult task of determining what is religious speech and what is not. Respondents' position, by contrast, would generate enormous practical problems that only highlight the flaws in their argument.

If the student speaker must avoid "prayer," as respondents demand, does that mean all references to God? What about ***21** references to the "Father"? The "Father above"? Must the student avoid a reference to "our Creator"? Can the student ask the crowd to observe a moment of silence for the crowd members "to pray" as they wish? Can the student refer to the afterlife? Can the student, without invoking God, use phrases that originated in the Bible? Is the word "bless" ok?

Who knows. What we do know is that the public schools - and then the courts - would have to monitor the private speech of individuals to make these and hundreds of other nuanced judgments and try to draw a line between religious and non-religious speech. But just as this Court is "ill-equipped to sit as a national theology board," *County of Allegheny*, 492 U.S. at 678 (Kennedy, J., concurring and dissenting), so too Santa Fe High School is ill-equipped to sit as a local Religion Censor, ordered by this Court to painstakingly eliminate all traces of private religious expression from its school. *See Mergens*, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); *cf. Lee*, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.").

And the school would need to play the role of Religion Censor not just at football games, but at all school events and gatherings. What to do about: A student running for student council who wants to say at an pre-election debate that the philosopher most influential to her was Jesus Christ and to explain why? A student at an awards banquet who wants to give thanks to God? A football captain who speaks to the team before the game and wishes to say a prayer and to ask God to bless the team? A student newspaper writer who wishes to write why his religion is important to him?

***22** Logically at least, all are *prohibited* in respondents' Orwellian world. The schools throughout the country would have to review statements and messages at all school events to ferret out religious content. Schools would necessarily engage in "government censorship, to ensure that all student [speech] meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844. As the Court stated in *Rosenberger*, however, the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835.

There should be no mistake, then, about what's at stake here. If the theory advanced by respondents is to become enshrined in this Court's case law, the full extermination of private religious speech from the public schools would be well on its way. *See Adler v. Duval County School Bd.,* 174 F.3d 1236, 1256-57 (11th Cir. 1999) (Marcus, J., dissenting) ("[T]he majority opinion has come perilously close to pronouncing an absolute rule that would excise all private religious expression from a public graduation ceremony ….").

The Court should adhere to the principle of neutrality, avoid entangling schools in the review of student speech for religious words and influences, and uphold the Santa Fe policy.

III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES.

The express purpose of the Santa Fe policy for football games is "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. Those are "legitimate secular purposes." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) ("solemnizing public occasions,

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expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" are legitimate secular purposes).

***23** The policy also provides an opportunity for the individual student speakers to express themselves publicly, thereby improving their own confidence and skills. And it allows the student speakers to seek unity within and reflection among the student body, thereby helping to heal some of the schisms and frustrations that inevitably develop in high schools. One need not reflect long on some of the horrific events in this country's public high schools in the past year to appreciate the desirability and validity of such goals.

The court of appeals did cast negative aspersions on the fact that the school policy states that the student may give an "message and/or invocation." But that language is neutral toward religious speech - and thus is entirely permissible. As Justice O'Connor explained in *Wallace v. Jaffree*, even if a "statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." 472 U.S. 38, 73 (1985) (O'Connor, J., concurring). Thus, Justice O'Connor noted that a neutral moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others," would pass muster. *Id.* at 76.

Chief Justice Burger and Justice White both concurred with Justice O'Connor's analysis on this point. Chief Justice Burger explained: "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion." *Id.* at 85 (Burger, C.J., dissenting). The Chief Justice agreed with Justice O'Connor that it "makes no sense to say" that a state "endorse[s] prayer" by specifying that "voluntary prayer is *one* of the authorized activities." *Id.* And Justice White noted that the student who asked whether he can pray during a moment of silence must be told "yes," and "[i]f that is the case, I would not invalidate a statute that at the outset ***24** provided the legislative answer to the question, 'May I pray?'" *Id.* at 91 (White, J., dissenting).

As Justice O'Connor suggested in *Wallace*, it would be a bizarre rule, to put it charitably, that condemned a school policy where a student could give a "message and/or invocation," but allowed a policy where a student could give a "message" - when in fact the student was free under both policies to speak religious words. If the Constitution turned on such a strange distinction, the school here surely would re-adopt its policy without the word "invocation" and then school officials would spend their time answering "yes" to students asking whether they could utter religious words. That makes no sense, as the three Justices who addressed the issue concluded in *Wallace.*

In that regard, we note that the five-Justice majority opinion in *Wallace* never said that inclusion of the word "prayer" as a mere alternative rendered the Alabama statute unconstitutional. Rather, there was "unrebutted evidence of legislative intent," *id.* at 58 - evidence that "ma[de] it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words 'or voluntary prayer' to the statute." *Id.* at 61.

Santa Fe's policy carefully follows the path charted by Justice O'Connor in *Wallace.* The policy's neutral phrase "message and/or invocation" makes clear that the student *may* - but need not - choose to invoke God's name or speak religious words.

But "the neutral language is itself skewed," respondents no doubt will argue. To begin with, such a suggestion borders on the incoherent, particularly in the context of a facial challenge. More to the point, a fundamental problem to which student speech policies such as Santa Fe's must respond is that many people have misread *Engel* and *Lee v. Weisman* to require the wholesale elimination of religious speech - *even private religious speech* - from the public schools. Indeed, the Court ***25** can take judicial notice of the fact that those cases led to such widespread misinterpretation by public school officials that the President in 1995 ordered the Secretary of Education to distribute guidelines nationwide explaining that student religious speech is not only permitted, but protected, in public schools. *See* Secretary Riley's Statement on

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Religious Expression, http://www.ed.gov/Speeches/08-1995/ religion.html (May 1998) ("The purpose of promulgating these presidential guidelines [in 1995] was to end much of the confusion regarding religious expression in our nation's public schools …. Schools may not discriminate against private religious expression by students ….").

The Santa Fe policy also combats that widespread misinterpretation by clarifying in a neutral way that religious speech is simply an alternative that is permitted, but not required, from student speakers at football games - akin to what the presidential guidelines stated and this Court held in *Widmar, Mergens, Lamb's Chapel*, and *Rosenberger.*

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE.

Respondents may suggest that most speakers at football games ultimately will choose to say religious words. But in this facial challenge to the policy, with no record to analyze, there is no basis to assume that the forum in fact will be used primarily by speakers employing religious words. *See United States v. Salerno,* 481 U.S. 739, 745 (1987). The Court here has only to determine "whether it is possible for the [policy] to be implemented in a constitutional manner." *Mergens*, 496 U.S. at 260 (Kennedy, J., concurring); *see also Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

In any event, if most speakers express religious words, that development could raise (at most) claims of audience confusion over whether the government had somehow encouraged or ***26** endorsed religion. Of course, a disclaimer making clear that the private speech is not approved or endorsed by the state, while not constitutionally necessary with respect to an individual's verbal speech, *see Pinette*, 515 U.S. at 786 (Souter, J., concurring), would eliminate any conceivable problem, *see Mergens*, 496 U.S. at 266-70 (Marshall, J., concurring).

There is a more direct and persuasive answer, however, to this kind of argument. The fact that some percentage (even 100%) of the speakers at a public school event may choose to engage in religious speech in a neutrally available forum cannot be a constitutional problem any more than if 100% of government workers donate a portion of their salaries to religious organizations. *Cf. Witters*, 474 U.S. at 486; *see also Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of citizens claimed benefits under the law.").

Consider the following practical example of the problems with this kind of approach: If High School A has events where 10% of the students utter religious words, High School B holds events where 50% of the students utter religious words, and High School C has events where 95% of the students utter religious words, what result? Do the percentages matter? Do the *relative* percentages matter? How? Does High School C have to tell some students to stop speaking religious words? Which ones? (And what exactly are sufficiently "religious words" to use in making this calculation, in any event?) [6]

6 Respondents may also raise the specter that school officials will in fact coerce students into providing religious messages. If so, that will provide occasion for an as applied challenge to the school's implementation of its policy. *See Bowen*, 487 U.S. at 618 21; *Pinette*, 515 U.S. at 766 (plurality opinion of Scalia, J.) (discussing hypothetical applications where a "governmental entity manipulates its administration of a public forum).

*27 V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

In Establishment Clause cases, the search for an overarching test is not always necessary, *see Lee*, 505 U.S. at 586, and can sometimes be counterproductive or even harmful, *see Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512

U.S. 687, 718 (1994) (O'Connor, J., concurring) ("Any test that must deal with widely disparate situations risks being so vague as to be useless. … *Lemon* has, with some justification, been criticized on this score.").

The Court, of course, has been closely and deeply divided regarding the appropriate test and way to analyze government practices (i) that favor or promote religion over non-religion and (ii) that are deeply rooted in our history and tradition. *See Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (decision "lays waste a tradition that is as old as public-school graduation ceremonies themselves"); *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring and dissenting) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); *Lynch*, 465 U.S. at 674 (upholding government's nativity display: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); *Marsh*, 463 U.S. at 792 (legislative prayer constitutional because it has become "part of the fabric of our society"); ***28** *Engel*, 370 U.S. at 446 (Stewart, J., dissenting) ("What is relevant to the issue here is … the history of the religious traditions of our people ….").

But those deep juridical divisions about the proper Establishment Clause "test" and analysis have by and large disappeared - or been muted as irrelevant - when the Court has analyzed laws *neutral* toward religion in cases such as *Widmar, Mergens, Lamb's Chapel,* and *Witters.* As Justice Thomas has explained, while the Court's Establishment Clause jurisprudence arguably is "in hopeless disarray" in several areas, the principle that government neutrality satisfies the Establishment Clause "has enjoyed an uncharacteristic degree of consensus." *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring). No matter what Establishment Clause test might be employed, the Court generally has held that a law neutral toward religion satisfies Establishment Clause scrutiny (with a limited exception not relevant to this case [7]).

7 The Court has suggested that neutrality may not suffice in that limited class of cases where government monies in a neutral benefits program would go directly to religious institutions. Of course, that exception is of questionable validity and is inconsistent with the thrust of the Court's modern jurisprudence establishing neutrality as an Establishment Clause safe harbor. *See Rosenberger*, 515 U.S. at 852 63 (Thomas, J., concurring). But this case, in any event, does not involve a funding program.

It is true, of course, that some citizens hostile to religion in any form may argue that even government neutrality toward private religion is still "too favorable" toward religion. These citizens may not want to see private displays of religion in the open public square (as in *Pinette*), to hear private individuals express religion in the public square (as here), to read religious speech as an expressly listed alternative in a student speech policy, to know that religion is obtaining taxpayer-funded assistance on a neutral basis (as with police and fire protection for churches), to see places of worship built alongside other buildings in residential communities (as most zoning ordinances allow). Some citizens may want to be free of ***29** *private* religious speech and organizations just as much as they want to be free from the *government's* "exercise of religion." But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society - below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid.

The Religion Clauses, of course, do not require any such "hostility to religion, religious ideas, religious people, or religious schools." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring). On the contrary, the Constitution, this Court's precedents, and our traditions demand that government accord religious speech, religious people, and religious organizations *at least* the same treatment as their secular counterparts. This Court therefore has stated time and again, and often unanimously, that government neutrality toward religion- meaning no discrimination between religious and non-religious organizations, people, and speech - is not an Establishment Clause violation. Striking down a law neutral toward religion, the Court has said, would reflect the "hostility to religion" that the Constitution neither requires nor permits. *Rosenberger*, 515 U.S. at 846; *see generally* Eugene Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999).

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Respondents ask this Court to ignore the neutrality of the school policy and, as a necessary result, to cleanse public schools throughout the country of *private* religious speech. The Court should reject respondents' submission and affirm, as it has done many times before, that a neutral government policy of the kind maintained by Santa Fe High School satisfies the Establishment Clause.

*30 CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

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1999 WL 1049898 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Alexis GEIER, et al., Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, et al., Respondents.

No. 98-1811.
November 19, 1999.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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*i QUESTION PRESENTED

Amici will address the following question: Whether a civil action seeking to hold an automobile manufacturer liable under state tort law for failing to include an airbag in a vehicle that was manufactured at a time when the applicable Federal Motor Vehicle Safety Standard gave manufacturers an option as to whether to install airbags is expressly preempted by the National Traffic and Motor Vehicle Safety Act of 1966.

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*1 INTEREST OF *AMICI CURIAE*[1]

[1] Petitioners and respondents have consented to the filing of this brief, in letters that are on file in the Clerk's office. The undersigned counsel alone have authored this brief, and no other person or entity other than the two *amici* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.3.

The Alliance of Automobile Manufacturers ("Alliance") and the Association of International Automobile Manufacturers, Inc. ("AIAM") are non-profit national trade organizations whose member companies are principally

engaged in the production and sale of motor vehicles. They include all of the major distributors of motor vehicles in the United States market. [2]

[2] The members of the Alliance are BMW of North America, Inc., DaimlerChrysler Corp., Fiat Auto S.p.A., Ford Motor Co., General Motors Corp., Isuzu Motors America, Inc, Mazda Motor of America, Inc., Nissan North America, Inc., Toyota Motor North America (Toyota Motor Sales USA Inc,), Volkswagen of America, Inc., and Volvo Cars of North America, Inc. The members of AIAM are American Honda Motor Co., Inc., American Suzuki Motor Corp., BMW of North America, Inc., Daewoo Motor Co., Ltd., Hyundai Motor America, Isuzu Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Porsche Cars of North America, Inc., Saab Cars USA, Inc., Subaru of America, Inc., Toyota Motor Sales USA, Inc., Volkswagen of America, Inc., and Volvo North America Corp.

The vehicles that these companies distribute in the United States must comply with the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1988) (recodified at 49 U.S.C §§ 30101-30169 (1994)) (the "Safety Act"), and with the Federal Motor Vehicle Safety Standards that are adopted by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the statute. Among those standards is FMVSS 208, 49 C.F.R. § 571.208 (1998) ("Standard 208"), which addresses occupant restraint systems.

The version of Standard 208 applicable to petitioners' automobile, a 1987 Honda Accord, expressly permitted ***2** and encouraged manufacturers to install a variety of occupant restraint systems in vehicles produced that year, of which airbags were but one option. Petitioners' legal claim is that, notwithstanding the choice granted to manufacturers by Standard 208, the States are nevertheless free to impose civil liability on manufacturers for failing to install airbags in 100 percent of the vehicles manufactured in that year. This legal claim, if upheld, would punish automobile manufacturers for carrying out an express federal policy in favor of diversity among restraint systems in 1987. It would also allow motor vehicles to be subject to a multitude of safety standards in different States.

The result would be intolerable. Motor vehicles are produced and distributed on a national scale. And, once sold, they are resold through a national wholesale market for used vehicles. If States were free to set safety standards that differ from federal standards dealing with the very same safety issues, after-the-fact through their tort law, manufacturers would have no way of anticipating which standard would eventually apply to any given car. Some States might follow the federal standard and permit but not require airbags. Some might decide that all vehicles must have airbags. A few might even decide that no vehicles should have airbags. It is doubtful at best whether the resulting uncertainty would have any positive effect on motor vehicle safety, although the litigation it would spawn would certainly increase the costs to consumers.

The resolution of the express and implied preemption issues presented in this case are therefore of great interest to *amici.* This brief will focus, in particular, on the express preemption issue.

***3** SUMMARY OF ARGUMENT

1. The Safety Act contains an express preemption clause, 15 U.S.C. § 1392(d), which prohibits the States from establishing or continuing in effect "any safety standard" which is "not identical" to a federal motor vehicle safety standard that applies to "the same aspect of performance" of a vehicle or its equipment. The plain language of this clause makes clear that Congress established a fundamental principle of uniformity with respect to safety standards. Once the federal agency has established a safety standard with respect to a particular aspect of performance, that standard is the only safety standard with which the vehicle must comply, no matter where in the United States it may be subsequently driven or resold.

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Petitioners' no-airbag claim in this case falls squarely within Standard 208, which governs vehicle occupant restraint systems. Under the version of Standard 208 that applies to petitioners' vehicle, manufacturers had a choice either to install a manual seat belt and shoulder harness system, an automatic belt passive restraint system, or a passive restraint system including an airbag. A requirement that manufacturers install airbags in all vehicles is "not identical to" a standard that says manufacturers have a choice among a variety of occupant restraint systems, of which an airbag is only one option.

2. This conclusion does not change because petitioners seek the same result through the adoption of a common-law tort standard. This Court has held that words such as "equirement" or "prohibition" in express preemption clauses include standards of care enforced through common-law damages actions. The basis for concluding that the operative language of Section 1392(d)-"any safety standard"-includes common-law standards of care is if anything even stronger, since the common law proceeds more often by articulating standards than by prescribing requirements.

***4** Petitioners also err in asserting that interpreting "any safety standard" to include common-law standards would preempt "virtually all" common-law causes of action. Pet. Br. 24-25. The preemptive effect of Section 1392(d) extends only to common-law actions that seek to impose a standard with respect to the "same aspect of performance" addressed by a federal safety standard. Thus, claims of improper design or manufacture falling outside the performance requirements of a federal standard would not be preempted. In addition, Section 1392(d) expressly excludes from preemption state standards that seek to enforce a standard identical to a federal standard. This means that States are free to impose common-law liability on manufacturers for failing to adhere to the requirements of federal standards.

3. Section 1397(k) of the Safety Act likewise does not change the conclusion that petitioners' action is expressly preempted by Section 1392(d). That provision states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." One cannot be "exempted" from common-law liability unless one is first subject to such liability. Because Section 1392(d) deprives the States of any authority to adopt safety standards that are not identical to federal safety standards with respect to the same aspect of performance, a defendant who properly establishes preemption under Section 1392(d) is not subject to a common-law duty the breach of which could give rise to any liability.

Properly construed, Sections 1392(d) and 1397(k) each play an important role in determining when common-law claims are preempted. Where a federal standard governs an aspect of performance, Section 1392(d) establishes that the States can enforce an identical standard, but may not enforce any safety standard as to that aspect of performance, through the common law or otherwise, ***5** that is not identical to the federal standard. By contrast, where an aspect of performance is not governed by a federal standard-even where a federal safety standard has been adopted with respect to some other aspect of performance for the specific equipment involved-Section 1397(k) makes clear that the States are free to enforce their own standards of care and impose them by means of state tort law. Specifically, Section 1397(k) establishes in these circumstances that the Safety Act does not create a federal "compliance with government standards" defense, and that such compliance does not preempt the field of state tort liability. Finally, even if a federal safety standard is in effect as to a particular aspect of performance, Section 1397(k) establishes that the States may enforce other common-law standards-under the law of contract, for example-as long as they are not related to safety.

Harmonizing Section 1392(d) and Section 1397(k) in this fashion is especially appropriate here, given the established canon that a savings provision should not be construed so that the Act "destroy[s] itself." See *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 446 (1907). Petitioners' interpretation of Section 1397(k), which would exempt all common law from preemption, destroys the uniformity of safety standards commanded by Congress. Harmonizing these two provisions as suggested herein is not only consistent with the Act's language and structure; it also preserves the Act's fundamental policy of uniformity.

ARGUMENT

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The court of appeals in this case addressed two theories as to why petitioners' legal action is preempted by the Safety Act and Standard 208: express preemption and implied preemption. The court ultimately concluded that it was not necessary to resolve the express preemption issue because it found that petitioners' action conflicts ***6** with Standard 208, and hence is preempted by implication. *Amici* concur fully in the lower court's conclusion and reasoning with respect to implied preemption. Nevertheless, *amici* also believe that the judgment below can be affirmed on the alternative theory of express preemption, which was also raised below by respondent American Honda Motors Co. The purpose of this brief is to discuss more fully the legal basis supporting the express preemption theory.

I. THE PLAIN LANGUAGE OF SECTION 1392(d) PREEMPTS A STATE SAFETY STANDARD THAT WOULD MANDATE THE INSTALLATION OF AIRBAGS IN VEHICLES WHEN THE APPLICABLE FEDERAL STANDARD MADE AIRBAGS OPTIONAL.

The Safety Act includes an express preemption clause, 15 U.S.C. § 1392(d). The first sentence of that clause sets forth the scope of state activity that is preempted, and is followed by two sentences setting forth exceptions. Because the language of the clause is critical to the express preemption argument, we set it forth here in full:

> [1] Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. [2] Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. [3] Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment ***7** procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. 1392(d). [3]

[3] The recodified version of the express preemption clause uses fewer words, but is to the the same effect. *See* 49 U.S.C. § 30103(b) (1994). Following the lead of the lower court and the parties, we refer in this brief to the earlier version of the Act.

1. As is obvious from its language, Section 1392(d) enacts a fundamental federal policy of *uniformity* with respect to certain key motor vehicle safety standards. Under the clause, where the federal government has established a standard with respect to a particular safety issue, the States are prohibited from adopting any safety standard that is "not identical to the Federal standard." Thus, Congress decreed that when a federal safety standard is in effect with respect to "an aspect of performance" of a vehicle or item of equipment, there shall be only one safety standard with which the vehicle must comply-and that is the standard set forth in the federal safety standard.

This policy of uniformity is confirmed by the second and third sentences of the preemption clause. The second sentence recognizes a narrow exception to the express preemption created by the first sentence, to wit, where States are seeking to enforce safety standards that are "identical to a Federal safety standard." 'This reveals that Congress had no objection to state enforcement of safety standards as such. See S. Rep. No. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. The point of the preemption clause was not to confer a federal monopoly on enforcement, but to assure that, whoever does the enforcing, there will be a single uniform standard applied once a federal safety standard is in effect.

The third sentence also confirms the importance of uniformity by recognizing another narrow exception for ***8** procurement decisions by governmental authorities. This sentence clarifies that governmental authorities are free to

establish "safety requirement[s]" for vehicles they purchase for their own use (such as highway patrol cars) that reflect a "higher standard of performance" than the federal safety standards. It is telling that Congress thought it necessary to specify that state and local governmental entities have authority to enter into contracts for vehicles that have different safety requirements than are required by federal standards. This underscores Congress's understanding that, whenever a federal standard exists with respect to a particular safety issue, the preemption clause otherwise mandates the strictest uniformity in governmental standards.

Congress adopted this policy of uniform safety standards to prevent the motor vehicle market from being balkanized by a proliferation of different safety standards in different jurisdictions. As the Senate Report observed in explaining the rationale for the express preemption clause: "The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." *Id.* Although divergent standards might cause little disruption in markets involving products having a fixed location or products and services having a limited geographic distribution, such a regime would wreak havoc with products manufactured and distributed on a national scale. Motor vehicles, in particular, are typically mass-produced on assembly lines in one or two locations and then distributed throughout the fifty states. After they are first sold, they are often driven to different jurisdictions or resold through the national wholesale market for used cars. Subjecting such a product to "50 standards in 50 different States" would be "chaotic" and "unthinkable." 112 Cong. Rec. 14253 (1966) (statement of President Johnson).

***9** To implement this policy of uniform national safety standards, the Safety Act confers authority on the Secretary of Transportation to adopt motor vehicle safety standards that regulate the design, construction, and performance of motor vehicles and associated equipment. See 15 U.S.C. §§ 1392(a), 1391(1) & (2). [4] The Safety Act does not disregard the role of the States in the development and enforcement of these standards. The statute requires the Secretary to "consult with … State or interstate agencies" when establishing a federal safety standard. *Id.* § 1392 (f)(2). And, as expressly recognized in § 1392(d), the States are free to enforce the federal standards after they are adopted. But the plain language of the express preemption clause and the structure of the Act make clear that once a federal safety standard is established, that standard serves as the nationally uniform standard for all vehicles it covers.

4 The Secretary's statutory authority to adopt safety standards has been delegated to NHTSA, which is the expert agency with respect to motor vehicle safety. *See* 49 C.F.R. § 1.50(a) (1998). Over the years, NHTSA has exercised this authority by adopting numerous regulations imposing specific safety standards in many different areas. *See* 49 C.F.R. §§ 571.101 .500 (1998). A manufacturer is subject to federal civil penalties and injunctive relief for failure to comply. *See* 15 U.S.C. §§ 1398(a), 1399(a).

2. To understand the proper application of Section 1392(d) in this case, it is useful to begin by considering what would have happened if the District of Columbia (which the Act treats as a State, see 15 U.S.C. § 1391(8)), had adopted an ordinance directing that all 1987 model automobiles in the District, such as the Honda involved in this case, include an airbag.

The version of the federal standard that addresses occupant restraint systems, Standard 208, took effect in 1984. See Federal Motor Vehicle Safety Standard, 49 Fed. Reg. 28,962 (1984) (codified at 49 C.F.R. pt. 571). With respect to 1987 model vehicles, Standard 208 expressly ***10** authorized and encouraged manufacturers to provide a variety of occupant protection systems as the best means of promoting safety. See, *e.g.,* 49 C.F.R. § 571.208 (1998). These included manual lap and shoulder belt systems as well as passive restraint systems, *i.e.,* systems that require no action by the occupant to make the system operational after the ignition has been turned on. The authorized types of passive restraint systems included both automatic seat belts and airbags as well as other passive technologies. *Id.* Standard 208 further required during this period that manufacturers of passenger cars phase in progressively higher percentages of cars having passive restraint systems. *Id.* With respect to the 1987 model year, each manufacturer was required to install some form of passive restraint in at least ten percent of its passenger cars. See *id.,* S4.1.3.1 (1998). [5]

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5 The requirements of Standard 208 evolved over time, and eventually were replaced by a mandate requiring the installation of airbags. All passenger cars manufactured after September 1, 1997, must have "an inflatable restraint system at the driver's and right front passenger's position, which is the regulatory description of an airbag. 49 C.F.R. § 571.208, S4.1.5.3. For a time, Congress specifically prohibited NHTSA from requiring airbags to be installed without prior congressional review. *See* 15 U.S.C. § 1410b. Now that airbags are mandatory, this provision has been repealed. *See* Act of July 5, 1994, Pub. L. No. 103 272, § 7(b), 108 Stat. 745, 1379, 1385.

The occupant restraint system built into petitioners' 1987 Honda, a manual three-point lap belt and shoulder harness, is one of the systems explicitly authorized by Standard 208 for vehicles manufactured at that time. Thus, petitioners' vehicle was manufactured in full compliance with Standard 208 and in furtherance of the Secretary's policy to introduce passive restraints gradually.

If the District of Columbia attempted to enforce an ordinance requiring airbags in all 1987 model year passenger vehicles in the District, there is no question that such an action would be preempted by Section 1392(d) and ***11** Standard 208. The analysis is straightforward. The "aspect of performance" is whether an automobile must include an occupant restraint system and, if so, whether it must be of a particular kind. This aspect of performance is expressly addressed by Standard 208, which for the year in question allowed manufacturers to choose among different restraint systems, including manual seat belts and airbags. The hypothesized ordinance, in contrast, would compel manufacturers to install airbags in all vehicles. Such a state standard clearly regulates the same "aspect of performance," but in a way that is plainly not "identical" to Standard 208. As a result, the ordinance or regulation would be preempted.

Note that the District of Columbia could not defend such an ordinance on the ground that, since Standard 208 is elective and the local ordinance compulsory, it is "not impossible" to comply with both. Cf. Pet. Br. 41-42. Nor could such an enactment be sustained on the ground that the federal standards should be construed as "minimum" standards that States are free to supplement with higher standards. Cf. *Id.* at 42-43. Section 1392(d) does not preempt only state standards that are "impossible" to meet consistent with the terms of the federal standard, nor does it preempt only those state standards that fall "below" the federal standard. It preempts *any* state standard that is "not identical" to the federal standard.

II. THE EXPRESS PREEMPTION OF "ANY SAFETY STANDARD" NOT IDENTICAL TO A FEDERAL STANDARD INCLUDES A SAFETY STANDARD IMPOSED BY STATE COMMON LAW.

Given that Section 1392(d) expressly preempts any state statute or regulation that would mandate the installation of airbags in cars during years when Standard 208 gave manufacturers the option to install airbags, the next question is whether a different result should apply if the state standard is adopted after-the-fact as a matter of state common ***12** law. Petitioners and their supporting *amici* advance a number of arguments in an effort to cabin the uniformity required by Section 1392(d) to the realm of positive regulation, leaving common-law standards free to proliferate. None of these arguments is persuasive in the context of the Safety Act.

A. "Any Safety Standard" Is Not Limited To Positive Regulations.

First, petitioners and their *amici* argue that the phrase "any safety standard" in Section 1392(d) should be interpreted restrictively to mean only "state legislative and administrative enactments." See Pet. Br. 18-25. This position- which would permit even a mandatory injunction based on a common-law standard- is wrong, for several mutually supporting reasons.

To begin with, the claim that "any safety standard" refers only to positive enactments is contrary to this Court's decisions construing other express preemption clauses. Those decisions hold that terms such as "equirement," "prohibition," and "standard" in a preemption provision do in fact encompass rules of decision established by common-law damages

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actions. See *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood,* 407 U.S. 658, 664 (1993); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 503-05 (1996) (Breyer, J., concurring); *id.* at 510-12 (O'Connor, J., concurring and dissenting in part). The Court's repeated holdings on this interpretive point have been fully and deliberately considered and should be adhered to as a matter of *stare decisis.*

Indeed, if any distinction is to be drawn between *Cipollone, CSX,* and *Medtronic* and this case, it would favor a finding that Section 1392(d) is more easily construed as covering common-law standards of care. The word "requirement," ***13** which provided the focal point of the discussion in *Cipollone* and *Medtronic,* denotes an "order," "command," or "directive." *Random House Dictionary of the English Language* (Unabridged ed. 1966). The word "standard," in contrast, denotes a "rule or principle" that is "used as a basis for judgment." *Id.* Although the common law sometimes adopts precise requirements (as in the Rule Against Perpetuities), it more often employs general standards. See, *e.g.,* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking,* 3 J. Legal Stud. 257, 261 (1974) (noting that "precise rules" are most commonly associated with legislative decisionmaking while "standards" are associated with judicial decisionmaking). Thus, if anything, an express preemption clause that refers to "any safety standard" is more naturally construed as covering common-law rules of decision than were the preemption clauses construed in *Cipollone* and *Medtronic.* [6]

6 The Court has indicated in a variety of contexts that the term "standards refers to state common law as well as state positive law. *See, e.g., Atherton v. FDIC,* 519 U.S. 213, 217 26 (1997) (state common law may be taken as setting the "standard of conduct and the "standard of care that directors and officers owe to a federally chartered financial institution); *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 114 15 (1987) (referring to "safety standards set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.,* 381 U.S. 392, 400 (1965) (referring to "common law standards); *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630 31 (1959) (referring to "standard s] of care imposed by common law).

The conclusion that "any safety standard" includes common-law duties of care is reinforced by the definitions of the Safety Act. The Act does not specifically define the phrase "any safety standard," which necessarily refers to a variety of possible state standards. But it does define "motor vehicle safety standards," which are the federal standards to which state "safety standards" must be identical. That definition requires, among other things, that a ***14** motor vehicle safety standard must "meet the need for motor vehicle safety." [7]

7 The full definition is as follows:
"Motor vehicle safety standards means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.
15 U.S.C. § 1391(2). Petitioners (at 23) and the Government (at 13) stress that this definition requires that federal standards provide "objective criteria, a characterization more appropriate for positive regulation than common law. But the relevant statutory term for preemption purposes is "any safety standard, not "motor vehicle safety standard. The best indication of what is covered by "any safety standard is the definition of "motor vehicle safety, which demarcates the *content,* as opposed to the *form,* of the federal standards.

The Safety Act goes on to define "motor vehicle safety" in a way that is highly significant in determining whether common-law tort rules are included in the meaning of "any safety standard." That definition provides as follows:

> "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against *unreasonable risk of accidents* occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable risk of death or injury to persons* in the event accidents do occur, and includes nonoperational safety of such vehicles.

15 U.S.C. § 1391(1). The highlighted phrases in this definition- "unreasonable risk of accidents" and "unreasonable risk of death or injury"- are of course identical to the conventional formulation of the duty of care recognized in the common law of torts. See, *e.g., Restatement (Second) of Torts* § 282 (1965) (defining negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"); *id.* § 284 (defining negligent conduct as "an ***15** act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another"); *Restatement (Third) of Torts: Product Liability* § 2 (1997) (a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design … and the omission of the alternative design renders the product not reasonably safe"). In other words, federal motor vehicle standards and the common law of torts are both grounded in the same general principle-the avoidance of unreasonable risks of accidents, death or injury.

It follows that federal motor vehicle safety standards and state common-law tort rules cover the same terrain, and have similar objectives. This of course heightens the potential that these two sources of law will develop nonidentical standards with respect to the same aspect of performance. At the very least, the definition of motor vehicle safety establishes that it is nonsense to speak of motor vehicle safety standards and state tort law as being "entirely different," see Brief Amicus Curiae of Missouri *et al.,* at 14, and hence as presenting no potential for conflict. [8]

[8] Petitioners argue that common law claims regulate *design* rather than *performance* and that performance alone is what the Safety Act regulates. *See* Pet. Br. 21 24. But this is clearly untrue. The Safety Act authorizes the Secretary to adopt standards. *See* 15 U.S.C. § 1392. The standards must "meet the need for motor vehicle safety, *id.,* which is defined as "the performance of motor vehicles or motor vehicle equipment in a way that protects the public "against unreasonable risk of accidents occurring because of the *design,* construction or performance of motor vehicles. *Id.* § 1391(1) (emphasis added). The Safety Act thus authorizes the agency to regulate the design, construction, and performance of such equipment as a means of meeting the need for motor vehicle safety.

Finally, petitioners' argument that common-law judgments do not establish "standards" simply defies common ***16** sense. This Court has long recognized that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959). Justice Breyer made the point in *Medtronic* by alluding to a hypothetical federal regulation requiring a 2-inch wire in a hearing aid component:

> If the federal law, embodied in the "2-inch" … regulation, preempts the state "1-inch" agency regulation, why would it not similarly preempt a state-law tort action that premises liability upon the defendant manufacturer's failure to use a 1-inch wire (say, an award by a jury persuaded by expert testimony that use of a more than 1-inch wire is negligent)? *The effects of the state agency regulation and the state tort suit are identical.*

Medtronic, 518 U.S. at 504 (Breyer, J., concurring in judgment) (emphasis added).

Petitioners' *amici* advance a variety of arguments in an effort to show that positive regulation and common-law liability are different. They are of course different in many respects. But none of the *amici* denies that common-law liability performs the important regulatory function of forcing defendants to internalize the social costs of their behavior. [9] Indeed, several of petitioners' *amici* celebrate ***17** this feature of the common law, and argue that it creates more powerful incentives for safety than do federal safety standards. See, *e.g.,* Brief Amicus Curiae of The Association of Trial Lawyers of America, at 11-12; Brief Amicus Curiae of Robert E. Leflar, *et al.,* at 17-19. Petitioners' *amici* are of course free to espouse the superiority of common-law liability as a mode of safety regulation. But they cannot at the same time take the position that the standards on which such liability is premised are not "safety standards." That, of

course, is the only relevant question to be answered in determining whether common-law standards of care come within the terms of Section 1392(d).

9 The academic writings relied upon by petitioners' *amici* are in full agreement with the basic proposition that safety regulation and common law liability are alternative means to the same end. *See* Guido Calabresi, *The Costs of Accidents,* 68 129 (1970) (discussing safety regulation (which he calls "specific deterrence) and tort liability (which he calls "general deterrence) as alternative means of reducing the sum of accident costs and accident prevention costs); Stephen Breyer, *Regulation and Its Reform,* 177 (1982) (noting that tort liability rules are, "in some instances, a possible substitute for (or supplement to) a classical system of regulation); Steven Shavell, *Liability for Harm Versus Regulation of Safety,* 13 J. Legal Stud. 357, 374 (1984) (noting that "the injunction and safety regulation may be viewed as substitutes, but not perfect ones, and similarly with the fine and liability); Mary L. Lyndon, *Tort Law and Technology,* 12 Yale J. on Reg. 137, 143 (1995) (tort law and safety regulation "can best be thought of as branches of health and safety law, which provide different procedural options or formats for addressing the social costs of technical change).

B. Common-Law Standards Are "Established" Or "Continued In Effect" By A "State."

Petitioners (Br. 23) and the Government (Br. 13) further argue that Congress was concerned only with positive laws and regulations because it chose to describe the preempted safety standards as ones that are "establish[ed]" or "continue[d] in effect" by a "State or political subdivision of a State." This language, they suggest, is more apposite to standards adopted by legislative or regulatory bodies than to the rules of decision adopted and applied by courts.

Petitioners and the Government may be right that this language is not what one would most naturally select if one were drafting a preemption clause to apply *only* to judicial standards. But Congress was writing broadly, and wanted to cover nonidentical standards from all sources of state and local authority, including, for example, counties and municipal governments. Naturally, it had to ***18** choose language that is not precisely tailored to courts. Once again, however, careful attention to the exact words Congress used rebuts any notion that Section 1392(d) does not apply to standards adopted by courts.

Consider, first, the use of the word "establish" to refer to the prohibited safety standards. Although petitioners and the government claim this word is not ordinarily used to describe common-law rules of decision, this is in fact untrue. This Court, for example, has referred to "common-law rules *established* by the different States" precisely in the context of discussing the scope of preemption of state standards. *International Paper Co. v. Ouellette,* 479 U.S. 481, 496 (1987) (emphasis added). In any event, even if there were something anomalous in speaking about common-law rules being "established," the statute speaks in the alternative: States are forbidden "to establish, *or to continue in effect*" nonidentical safety standards. There is nothing anomalous about speaking of States "continuing in effect" common-law standards. Indeed, in virtually every State, the courts' ultimate authority to apply common-law standards in resolving disputes rests on legislation that "continues" the common law of England. See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States,* 4 Vand. L. Rev. 791, 798-800 (1951).

Nor is there anything unusual in referring to common-law standards as being established or continued in effect by a "State." In *Medtronic,* for example, the statute at issue contained the same phrase-" 'State or a political subdivision' " found in Section 1392(d). *Medtronic,* 518 U.S. at 481. Yet a majority of the Court held that the preemption clause in that case reached common-law claims. *Id.* at 503-05 (Breyer, J., concurring); *id.* at 509-10 (O'Connor, J., concurring and dissenting in part).

Moreover, this Court has concluded in a variety of contexts that common-law judgments rendered by state ***19** courts are a form of state action. See, *e.g., BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 572 n. 17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); *New York Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964) ("It matters not that that law has been applied in a civil action and that it is

common law only, though supplemented by statute."); *Shelley v. Kraemer,* 334 U.S. 1, 19-20 (1948) (judicial enforcement of racially restrictive covenant is state action). It is hard to imagine a plausible argument that would reach the opposite conclusion. Not only are parties expected to comply with the judgments of courts as a matter of direct legal obligation, see, *e.g., Cooper v. Aaron,* 358 U.S. 1, 18 (1958), their failure to comply with a judgment, even if only one for the payment of damages, can bring down upon them the coercive powers of the State in the form of execution against their property or garnishment of their wages.

Petitioner's argument that Congress differentiated between the standards adopted by courts and standards adopted by the "State" is also at odds with *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). *Erie* of course held that the "laws of the several states," as that phrase is used in the Rules of Decision Act, 28 U.S.C. § 1652, includes common-law rules of decision. The *Erie* doctrine reflects an important background principle of law, and it is unlikely that Congress legislated based on a different understanding. See *Cipollone,* 505 U.S. at 522-23; see also *id.* at 549 (Scalia, J., concurring and dissenting in part). Accordingly, for all these reasons, Congress could not have meant to exclude common-law standards and rules when it extended the prohibition in Section 1392(d) to all safety standards "estabilsh[ed] or … continue[d] in effect" by a "State."

***20 C. Construing "Any State Standard" To Include Common-Law Standards Does Not Preempt "Virtually All" Common-Law Claims.**

In a last-ditch effort to avoid the conclusion that Section 1392(d) includes common-law claims, petitioners argue that the preemption clause must be limited to positive regulation to avoid preempting "virtually *all* common law claims involving aspects of motor vehicle performance." Pet. Br. 24-25. In fact, reading the preemption clause to include common-law standards would delineate only a narrow scope of preemption: it would proscribe only those common-law claims that adopt a safety standard with respect to "the *same* aspect of performance" addressed by a federal standard, and even then only insofar as the common-law standard is "*not identical* to the Federal standard."

In the context of restraint systems, for example, the Safety Act leaves the States free to enforce any standard of care with regard to an aspect of vehicle safety that does *not* involve "the same aspect of performance" covered by a federal safety standard. Thus, Section 1392(d) and Standard 208 do not preempt common-law claims that the particular occupant restraint system selected by the manufacturer, such as an airbag, was improperly designed or was improperly manufactured. See, *e.g., Perry v. Mercedes Benz of N. Am., Inc.,* 957 F.2d 1257, 1265-66 (5th Cir. 1992) (manufacturer that installs airbag may be liable for defect in design or manufacture). For purposes of this case, only the claim that a manufacturer installed one rather than another of the authorized occupant restraint systems (*e.g.,* a "no-airbag" claim) is expressly preempted.

In addition, under the second clause of Section 1392(d), the States could enforce the "identical" standard embodied in Standard 208 by allowing tort suits against any manufacturer that did not install any of the occupant ***21** restraint systems required by federal law during the relevant period. Thus, now that airbags are required for the driver and right front seating positions in all new vehicles, state "no-airbag" claims no longer are preempted with respect to such equipment in new vehicles because they would impose the identical standard of care as is embodied in the current version of Standard 208. See 49 C.F.R. § 571.208, S4.1.5.3 (1998). The scope of express preemption is thus quite measured and sensible as a matter of federal-state regulatory policy.

III. SECTION 1397(k) DOES NOT LIMIT OR QUALIFY THE PREEMPTIVE FORCE OF SECTION 1392(d).

Petitioners and the Government also seek refuge in what some have called the Safety Act's "savings" clause, which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). They contend that this provision overrides, limits, or qualifies

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the express preemption mandated by Section 1392(d), so that common-law claims are placed entirely beyond the reach of Section 1392(d). See Pet. Br. 25-28; U.S. Br. 13-15. This interpretation, however, does not square with the Act's text (including the language of Section 1397(k) itself), or with its structure and context. Indeed, such an interpretation would destroy the very uniformity of federal standards that the Act was designed to create, in violation of the important canon that savings provisions should not be construed so that the Act "destroy[s] itself." *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 445 (1907). Sections 1392(d) and 1397(k) can and should be harmonized so that some common-law claims-those that defeat the uniformity of federal standards-are preempted, whereas other types of common-law claims are preserved.

***22 A. The Language Of Section 1397(k) Does Not Limit Or Qualify The Scope Of Section 1392(d).**

Section 1397(k) does not by its terms limit or qualify the scope of express preemption mandated by the preemption clause in Section 1392(d). In fact, when read closely and in accordance with their plain meaning, the two provi sions are not, as the Government assumes (Br. 15), even in "tension" with each other.

Section 1397(k) speaks of an "exemption" from "common-law liability." A defendant who properly invokes Section 1392(d) has no need for an "exemption" because he is not subject to a duty the breach of which could ever give rise to any liability. As one court of appeals recently held in rejecting the very interpretation advanced by petitioners here, "[t]o be 'exempted' from liability [under Section 1397(k)], one must first be subject to it." *Harris v. Ford Motor Co.,* 110 F.3d 1410, 1415 (9th Cir. 1997).

It is axiomatic that "common-law liability" in tort can arise only for breach of a duty or standard. See, *e.g., Restatement (Second) of Torts,* § 4(c) (1965). By depriving the States of "any authority either to establish, or to continue in effect, … any safety standard" that is not identical to the federal standard, Section 1392 (d) deprives the States of authority to create any such duties or standards with respect to the same "aspect of performance." Indeed, any attempt to impose such a duty or standard would be "void" and "without effect." *Maryland v. Louisiana,* 451 U.S. 725, 746, 747 (1981). Thus, no liability for the breach of such a standard or duty could ever arise in the first place, and Section 1397(k) simply would not apply in that situation.

This conclusion is confirmed by the fact that Section 1397(k) is expressly triggered by a manufacturer's "compliance" with a federal safety standard. A defendant who ***23** properly invokes 1392(d) does not need to be in compliance with the federal standards for that provision to preempt a non-identical state standard. By its terms, that provision preempts a non-identical State safety standard of its own force, regardless of the manufacturer's actions. This too suggests that Section 1397(k) cannot reasonably be construed as blocking, limiting, or qualifying the ordinary operation of Section 1392(d). If Section 1397(k) had been intended to have that effect, Congress simply would not have chosen the language it did.

B. Sections 1392(d) And 1397(k) Play Complementary Roles In Determining Which Common-law Claims Can Be Maintained.

Petitioners, joined by the Government, nevertheless contend that unless all common-law standards are excluded from preemption under Section 1392(d), "there would be no meaningful role for Section 1397(k)." U.S. Br. 14. This is incorrect. When one carefully examines the Act's structure and makes a good-faith effort to construe both provisions in tandem, it is apparent that both Section 1392(d) and Section 1397(k) can each apply to common-law actions, depending on the relationship of the particular common-law claim to existing motor vehicle safety standards. See, *e.g., CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993) (in interpreting an express preemption provision, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute"); *Smith v. United States,* 508 U.S. 223, 233 (1993) (provisions should be construed in tandem, not in isolation). Indeed, Section 1397(k) plays an important role in the statutory scheme,

albeit one quite different from that urged by petitioners and the Government. This is seen from an examination of the four scenarios in which preemption of common-law claims might be an issue.

1. The first is the situation presented by this case, *i.e.,* where the proposed state safety standard applies to the ***24** same "aspect of performance" as the federal standard, but is not identical to it. As explained above, Section 1397(k) does not, by its terms, apply in this situation, because Section 1392(d) prevents the creation or retention of a non-identical "safety standard'-common-law or otherwise-on which liability could be based.

2. The second scenario is one in which a state safety standard applies to the same aspect of performance, but is identical to it. Section 1397(k) has no role to play in this scenario either because, as discussed above, the second sentence of Section 1392(d) expressly allows states to "enforce[] any safety standard which is identical to a Federal safety standard."

3. Section 1397(k), however, does play an important role in the third scenario, one in which a state tort-law standard allegedly governs an "aspect of performance" that is *not* directly covered by a federal standard. That would be the case, for example, if a plaintiff claimed that a manufacturer, although installing an airbag in compliance with Standard 208, nevertheless violated state tort law by using a defective design. *E.g., Perry,* 957 F.2d at 1265.

Absent Section 1397(k), as Honda, the Government, and several other *amici* discuss at length, manufacturers in these circumstances might have argued that the Safety Act impliedly creates a federal-law "government standards" defense which shields them from tort liability as long as they complied with all applicable standards. Section 1397(k) makes clear that the Act does not create such a defense or "exemption from liability," and therefore does not preempt state-law rules foreclosing or refusing to recognize such a defense. Thus, whenever there is no federal standard with respect to the specific "aspect of performance" at issue, it is up to the States to determine what effect, if any, a manufacturer's compliance with any or all of the extant federal standards have on its liability.

***25** This reading of Section 1397(k) is consistent not only with the statute's language and structure, but also with the relevant legislative history. [0] This reading is also strengthened by the fact that in 1966, when the Safety Act was passed, the States differed-and still differ-in their views regarding such an affirmative defense and the admissibility of evidence of compliance with federal standards.

10 For example, one of the conferees, Senator Cotton stated:
The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from liability under common law. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it.
112 Cong. Rec. 21,490 (1966); *accord id.* at 21,487 (remarks of Senator Magnuson, quoted in Pet. Br. 31 32). That is exactly what Section 1397(k) did. It ensured that the fear of a broad "government standards defense expressed by some congressional witnesses would not materialize, and that states would therefore have flexibility to decide whether and to what extent a party's compliance with federal standards exempts a manufacturer from being subject to "any liability under state tort law.

11 Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.,* Mich. Comp. Laws Ann. § 600.2946(4) (West 1999); Kan. Stat. Ann. § 60 3304(a) (1999). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive, *e.g., Wagner v. Clark Equip. Co.,* 700 A.2d 38, 49 50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.,* 902 P.2d 54, 63 (N.M. 1995), while some States hold generally that compliance conclusively negates any defect *see e.g., Beatty v. Trailmaster Prods.,* 625 A.2d 1005, 1013 14 (Md. 1993).

In addition, without Section 1397(k), manufacturers could have argued that the Act should be construed to occupy the entire field of motor vehicle safety standards. [2] ***26** Such an argument would have been highly plausible in 1966. At that time, it had been only ten years since this Court, in *Pennsylvania v. Nelson,* 350 U.S. 497 (1956), held that a congressional

act was deemed to occupy a particular field when-as is also true of the Safety Act-the statute created a pervasive federal regulatory scheme, was based on a perceived need for national uniformity, and there existed a danger of conflict between state laws and the administration of the federal program. *Id.* at 502, 504-05. And it had only been seven years since this Court had held, in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), that the National Labor Relations Act ("NLRA") completely occupied the field of labor-management relations, so as to preclude a state-law tort action for damages occasioned by union picketing-even where no provision of the NLRA dealt with that issue. *Id.* at 241-43, 245. [3]

12 As the Government points out (Br. 14 n.11), the second sentence of Section 1392(d) makes clear that Congress did not attempt to occupy the field of safety standard *enforcement,* inasmuch as the provision expressly allows the States to enforce federal standards. But that section does not expressly authorize the States to establish state law standards that are not identical to an applicable federal standard, and therefore does not by itself foreclose the field occupation argument discussed in the text.

13 Even today, the argument would have force given that NHTSA has promulgated comprehensive regulations governing motor vehicle safety. *See* 49 C.F.R. §§ 571.101 .500 (1998). "Where a multiplicity of federal … regulations govern and densely criss cross a given field, the pervasiveness of such federal laws will help to sustain a conclusion that Congress intended to exercise exclusive control over the subject matter. Laurence H. Tribe, *American Constitutional Law* § 6 31, at 1206 07 (3d ed. 1999).

In the wake of *Nelson* and *Garmon,* it would only have been prudent for Congress to insert a provision making clear that the Safety Act did not completely occupy the field of motor vehicle safety standards, and therefore that common-law actions would be permitted to enforce state standards dealing with "aspects of performance" not covered by a federal standard, even if the manufacturer was otherwise complying fully with all federal standards. See ***27** *Gracia v. Volvo Europa Truck, N.V.,* 112 F.3d 291, 298 (7th Cir. 1997), *cert. denied,* 118 S.Ct. 697 (1998). That, among other things, is exactly what it did in Section 1397(k).

4. Section 1397(k) would also play an important role in a fourth scenario as well. That is where a federal safety standard is in effect with regard to a particular aspect of performance or "item of equipment" within the meaning of Section 1392(d), but the plaintiff claims that the manufacturer's actions with respect to that aspect or item violate a body of common law that is unrelated to safety-specifically, contract law.

For example, suppose that, during the time Standard 208 allowed manufacturers the option of installing airbags or other occupant restraint devices, a manufacturer signed a contract to provide to a rental company a fleet of vehicles equipped with airbags. In a breach-of-contract action seeking to enforce that promise, Section 1397(k) makes clear that the manufacturer could not invoke its compliance with federal safety standards to block the claim. Cf. *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 228-33 (1995) (express preemption clause did not protect airline from "alleged breach of its own, self-imposed undertakings").

In other words, Section 1397(k) makes clear that state common-law actions can be maintained to enforce the manufacturer's own commercial contracts, even if the standard the manufacturer agrees to by contract is not one the State could otherwise impose consistent with Section 1392(d), and even if the manufacturer is complying with the applicable federal standard. This view of Section 1397(k) likewise finds support in the legislative history. [4]

14 It is, for example, consistent with Representative Dingell's statement during the floor debates that in the Safety Act, "we have preserved every single common law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer. 112 Cong. Rec. 19,663 (1996) (quoted in Pet. Br. 30 31). As explained above, Sections 1392(d) and 1397(k) can easily be read as preserving all common law "remedies and "devices, including commercial contract actions. The statements from the House Committee Report, cited by the petitioners (Br. 30), and the statement by Senator Magnuson, cited by the petitioners (*id.* at 28 29), are likewise consistent with this reading.

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***28** In short, properly construed, Section 1392(d) and Section 1397(k) each play important roles in determining which common-law claims may go forward, and in what circumstances. In contrast, petitioners' sweeping interpretation of Section 1397(k) deprives Section 1392(d) of any meaning in the context of common-law standards. Such a result would be contrary not only to the language and structure of the Act, but also to its legislative history, which clearly indicates an awareness that Section 1392(d) would sometimes preempt common-law tort actions notwithstanding Section 1397(k). [5]

15 Referring to Section 1397(k), Senator Magnuson noted to his Senate colleagues that it simply "makes explicit, in the bill, a principle developed in the Senate report. 112 Cong. Rec. 21,487 (1966). But the "principle developed in the Senate report to which Senator Magnuson referred is that federal safety standards "*need not* be interpreted as restricting State common law standards of care, and that " c]ompliance with such standards would thus *not necessarily* shield any person from product liability at common law. S. Rep. No. 89 1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added). By negative implication, these statements clearly evince an understanding that, in some circumstances, the Safety Act would restrict the range of permissible common law product liability actions.

C. Section 1397(k) Should Not Be Interpreted To Destroy The Uniformity Of Safety Standards.

This reading of the interplay between Sections 1392(d) and 1397(k) is also most consistent with the underlying purposes of the Safety Act. As explained above (*supra* at 7-8), Congress wanted not only to promote safety, but ***29** also to preserve a single market for the production and distribution of automobiles. Petitioners' extreme reading of Section 1397(k), however, would destroy the uniformity that Congress sought to create. Petitioners' interpretation therefore runs headlong into the fundamental axiom of statutory construction that so-called "savings clauses" should not be interpreted so as to destroy the fundamental policies of the statute in which they appear.

The principle was first stated almost a century ago in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* In spite of that savings clause, the Court held that an existing but conflicting common-law claim was preempted because a savings clause "cannot in reason be construed as continuing … a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*

The *Abilene Cotton* holding is a settled principle of statutory construction that has been consistently applied in a variety of contexts. Thus, where necessary, the Court has given savings clauses an appropriately narrow reading so as not to impair the preemptive thrust of the statute as a whole. [6]

16 *See, e.g., AT&T Co. v. Central Office Tel., Inc.,* 118 S.Ct. 1956, 1965 (1998) (savings clause "preserves only those rights that are not inconsistent with the statute's requirements); *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not " 'abridge or alter the remedies now existing at common law or by statute); *International Paper Co. v. Ouellette,* 479 U.S. 481, 485 97 (1987) (state common law claims impliedly preempted because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 51 52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy) (internal quotation marks omitted); *Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 328 31 (1981) (same).

***30** Moreover, the *Abilene Cotton* canon is not limited to cases involving implied preemption claims. In *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992), for example, the Court implicitly recognized this principle when it held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385.

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Indeed, if a saving provision generally cannot be construed to negate a conclusion of implied preemption, *a fortiori* a savings provision ought not be construed to negate an express preemption clause. A statute should not be held "to destroy itself," *Abilene Cotton,* 204 U.S. at 446, whether that destruction occurs because of a conflict with an implied feature of the federal scheme, or, as here, because of a conflict with an express congressional command that federal and state safety standards must be uniform whenever they govern the same aspect of performance.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondents' brief, the decision below should be affirmed.

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1999 WL 345639 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Harold F. RICE, Petitioner,
v.
Benjamin J. CAYETANO, Governor of the State of Hawaii, Respondent.

No. 98-818.
October Term, 1998.
May 27, 1999.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR EQUAL OPPORTUNITY, NEW YORK CIVIL RIGHTS COALITION, CARL COHEN, AND ABIGAIL THERNSTROM IN SUPPORT OF PETITIONER

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*i QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

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*1 INTEREST OF AMICI CURIAE [1]

[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

The Center for Equal Opportunity is a non-profit organization dedicated to the idea that America should be one nation and that citizens of all races, colors, and ethnicities ***2** should be treated equally. The New York Civil Rights Coalition is a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste, or discrimination. Carl Cohen is a Professor of Philosophy at the University of Michigan, has served for many years in the leadership of the American Civil Liberties Union, and is the author of *Naked Racial Preference* (1995). Abigail Thernstrom is the co-author of *America in Black and White: One Nation, Indivisible* (1997) and the author of *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987). Amici submit that the Fourteenth and Fifteenth Amendments prohibit Hawaii's racial voting qualification.

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SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment, by its language and history, applies to all state elections.

Notwithstanding the clear language of the Fifteenth Amendment, Hawaii determines a citizen's qualifications to vote in elections for the Office of Hawaiian Affairs *solely on the basis of the citizen's race.* Hawaii's racial voting qualification is a clear violation of the Fifteenth Amendment, and that violation alone requires reversal of the decision of the court of appeals.

The racial voting qualification also violates the Equal Protection Clause of the Fourteenth Amendment. This Court's cases establish that the Equal Protection Clause prohibits racial classifications except when such classifications are necessary and narrowly tailored to serve a compelling government interest.

***3** Outside of an immediate threat to life or limb, as in a prison race riot, a compelling government interest exists only when the government has imposed the racial classification as a remedy for past, identified discrimination in that jurisdiction and field (such as discrimination in the schools in a particular jurisdiction). Hawaii has not shown or attempted to show that its racial voting qualification in elections for the Office of Hawaiian Affairs is designed to remedy past discrimination in voting against """"Hawaiians" in Hawaii.

In any event, even assuming such past discrimination, a racial qualification to *vote* has never been held necessary and narrowly tailored to remedy past discrimination. Moreover, this racial voting qualification is not narrowly tailored in scope: It is a strict racial qualification that *categorically* excludes members of certain racial groups (all but "Hawaiians") from the ballot in elections for the Office of Hawaiian Affairs -- including members of racial groups historically discriminated against in the United States and in Hawaii. Nor is the racial qualification narrowly tailored in duration: Hawaii established the racial classification in 1978, and it has no termination date.

Hawaii has explained that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But a state has no right to engage in racial classifications on the right to vote in a state election simply to preserve a particular culture. This Court has forbidden analogous "cultural" justifications for racial classifications in cases ranging from *Brown v. Board of Education* to *Loving v. Virginia.*

Finally, Hawaii's attempt to end-run the Equal Protection Clause by analogizing "Hawaiians" to American Indian tribes is entirely unavailing. As this Court repeatedly has held, differential treatment of Indian tribes *as tribes* is justified by the Constitution's specific reference to Indian tribes as separate sovereigns. The Constitution does not contain a Hawaiian ***4** Commerce Clause, and Hawaiians do not and could not qualify as an American Indian tribe.

ARGUMENT

INTRODUCTION

Hawaii determines a citizen's qualifications to vote in state elections for the Office of Hawaiian Affairs *on the basis of the citizen's race.* As is clear from that introductory sentence alone, Hawaii's racial restriction on voting is a patent violation of the United States Constitution. *See City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989); *Loving v. Virginia,* 388 U.S. 1 (1967); *Anderson v. Martin,* 375 U.S. 399 (1964); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Guinn v. United States,* 238 U.S. 347 (1915). [2]

[2] We will use the terms "race and "racial throughout this brief to encompass the overlapping concepts of race, ethnicity, ancestry, and national origin, as government distinctions based on such characteristics are subject to the same stringent constitutional scrutiny. *See Oyama v. California,* 332 U.S. 633, 646 (1948); *Yick Wo v. Hopkins,* 118 U.S. 356, 374 (1886). We will adopt the convention of state law and use the term " " "Hawaiian to refer to those whose ancestors were Hawaiian. For purposes of our brief, there is no need to further distinguish by blood amount between " "Hawaiians and "native Hawaiians, although state law does so.

Two provisions of law provide the backdrop for this controversy: the federal Admission Act of 1959 and the Hawaii Constitution, as amended in 1978. The Admission Act, enacted by Congress at the time of Hawaii's admission to the Union, ceded to the State approximately 1,800,000 acres of land that the United States had owned since 1898. The Admission Act restricted the State's use of land to five purposes: (1) support of public schools; (2) betterment of the conditions of native Hawaiians; (3) development of farm and home ownership on as widespread a basis as possible; (4) making of public improvements; and (5) provision of lands for public use. Admission Act of March 18, 1959, 73 Stat. 4, § 5(f).

***5** The Admission Act further provided that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide." *Id.* The Act thereby permitted the State to use those lands in a race-neutral way and/or for the benefit of *all* citizens of Hawaii. Indeed, that is precisely how the State administered the lands from 1959 to 1978 when the State used money from the lands on a race-neutral basis primarily for state educational purposes. Pet. App. 5a. [3]

[3] A discrete block of 200,000 acres is administered by the State's Department of Hawaiian Home Lands pursuant to a separate statutory regime. A 1920 federal statute (the Hawaii Homes Commission Act, 42 Stat. 108) dealt with those lands by means of an express racial classification, albeit one that was not applied in the decades that followed. In any event, the HHCA program is not at issue here, although it also has serious constitutional problems to the extent that it relies on racial classifications.

In 1978, however, Hawaii dramatically changed course. The State enacted a constitutional amendment, *see* Haw. Const. art. xii, which along with a statute enacted shortly thereafter accomplished three things. *First,* the State required that 20% of the proceeds from the Admission Act lands be used solely to benefit certain native Hawaiians. *Id.;* Haw. Rev. Stat. §§ 10-3(1); 10-13.5. *Second,* the State created the Office of Hawaiian Affairs (OHA) to administer that 20% portion of the proceeds *and* to administer solely for the benefit of Hawaiians other monies received from general state funds. The OHA's officers must be Hawaiians. Haw. Const. art. xii. *Third,* the State imposed still another racial qualification, allowing only Hawaiians to vote in the OHA elections. Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register *as a voter* for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian ....").

***6** The entire scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century. *See generally Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687, 730 (1994) (Kennedy, J., concurring in judgment). The scheme benefits one preferred racial class within the State of Hawaii to the exclusion of all others and creates collateral racial classifications that are unnecessary even to serve that (itself unconstitutional) purpose. The scheme is a clearcut and extensive violation of the Constitution: None of its three elements, particularly the voting qualification at issue here, is constitutional.

Under the State's theory, the State of Massachusetts could declare certain state funds in Massachusetts to be distributed for the benefit of Irish-Americans, establish an Office of Irish Affairs composed solely of Irish-Americans to administer the funds, and restrict the vote for that Office to those citizens of Massachusetts with Irish blood. The State of Florida could do the same for Cuban-Americans, the State of Wisconsin for German-Americans, the State of Texas for Mexican-Americans, and so on. As a matter of logic and of constitutional law, affirmance of the court of appeals decision could usher in an extraordinary racial patronage and spoils system.

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Hawaii no doubt will label such concerns an exaggeration, suggesting that other states would not adopt such a scheme. But we do not possess so clear a crystal ball as to confidently predict how a state 10 or 25 or 50 years from now might utilize a decision in Hawaii's favor in this case. And ultimately the Court must consider what a ruling in Hawaii's favor would *authorize. See Morrison v. Olson,* 487 U.S. 654, 731 (1988) (Scalia, J., dissenting). As Justice Jackson stated, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court ***7** for all time has validated the principle of racial discrimination .... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States* 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The aspect of the OHA program specifically at issue here is the racial voting qualification, which violates both the Fifteenth Amendment and the Fourteenth Amendment.

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

The Fifteenth Amendment to the Constitution, ratified in the wake of the Civil War on February 3, 1870, speaks clearly and definitively: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment repaired the Constitution's original tolerance of racial restrictions on the right to vote and stands as a legal bulwark against the racial strife and ethnic balkanization that has troubled this country since its founding -- and that to this day plagues this Nation and others around the globe. *See generally Holder v. Hall,* 512 U.S. 874, 894-95 (1994) (Thomas, J., concurring in judgment); *South Carolina v. Katzenbach,* 383 U.S. 301, 309-13 (1966).

Since 1978, however, the State of Hawaii has prohibited citizens of certain races, *because of their race,* from voting in elections for the Office of Hawaiian Affairs -- a government office that controls and disburses a significant amount of state funds, formulates policy, and administers certain state lands. *See* Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person ... is Hawaiian...."). Hawaii excludes not just ***8** Caucasians from voting in elections for the Office of Hawaiian Affairs, it turns away citizens who are African-Americans, Japanese-Americans, Chinese-Americans, and indeed members of all racial and ethnic groups except the preferred Hawaiians.

The primary question presented to this Court is whether Hawaii, by prohibiting individuals from voting in a state election *because of their race,* has violated the Fifteenth Amendment, which prohibits States from denying individuals the right to vote *because of their race.* To pose the question is to resolve the case. As this Court has stated, the Fifteenth Amendment is "unequivocal[]" and prohibits race-based voting qualifications (as well as facially race-neutral voting qualifications that are intended to harm members of a particular race). *Shaw v. Reno,* 509 U.S. 630, 639 (1993); *see City of Mobile v. Bolden,* 446 U.S. 55, 62 (1980); *Gomillion,* 364 U.S. at 339; *Smith v. Allwright,* 321 U.S. 649, 657 (1944); *Guinn,* 238 U.S. at 347; *cf. Chisom v. Roemer,* 501 U.S. 380, 392 (1991) ("*every election in which registered electors are permitted to vote*" is covered under § 2 of Voting Rights Act of 1965, which enforces the Fifteenth Amendment) (quotation omitted; emphasis added).

Hawaii has offered an array of historical and policy considerations in support of its racial voting scheme, primarily based on preserving the culture of Hawaiians. But all such arguments are, for purposes of the Fifteenth Amendment, nothing but diversions. Hawaii restricts the right to vote in a state election based on a citizen's race, and the clear and unequivocal language of the Fifteenth Amendment flatly prohibits such state action.

What is perhaps most telling about the unconstitutionality of Hawaii's racial voting qualification is that in the nearly 130 years since the Fifteenth Amendment was ratified -- troubled though those years have been with respect to racial relations and racially motivated voting devices -- no State so far as we are aware has thought it permissible to enact into law a

facial ***9** racial qualification on the right to vote in any state election. Indeed, several States, no doubt recognizing that the language of the Fifteenth Amendment was clear and unequivocal, resorted instead to pretext and subterfuge to try to evade what all understood to be the meaning of the Fifteenth Amendment. *See Shaw,* 509 U.S. at 639-40 (describing various forms of "[o]stensibly race-neutral devices" used "to deprive black voters of the franchise"); *see Gomillion,* 364 U.S. at 341; *Guinn,* 238 U.S. at 364-65.

In light of the plain conflict between Hawaii's racial qualification for voting and the clear language of the Fifteenth Amendment, the question that comes to the fore in this case focuses on the court of appeals: How did it go so far astray? The court of appeals recognized, after all, that the voter qualification at issue here was "expressly racial" and "clearly racial on its face." Pet. App. 10a, 15a. The court also acknowledged that the Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote." Pet. App. 15a (quoting Laurence H. Tribe, *American Constitutional Law* 335 n.2 (2d ed. 1988)).

The court explained, however, that "restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for." Pet. App. 11a. The court concluded that a state could allow racial restrictions on the right to vote when the underlying state office was, in essence, devoted to distributing funds for the benefit of a racially restricted class. Pet. App. 15a. The court held that such a scheme "does not deny non-Hawaiians the right to vote *in any meaningful sense.*" Pet. App. 15a (emphasis added). The court did not explain, however, from what source it derived a "meaningful sense" exception to the Fifteenth Amendment's ban on racial voting qualifications, nor did it say how voting in elections to a state office that, among other things, controls and spends substantial sums of state money is not "meaningful."

***10** The court said that it found guidance in cases in which this Court has held that limited special-purpose elections are consistent with the right to vote that the Court has inferred from the Fourteenth Amendment. *See Ball v. James,* 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.,* 410 U.S. 719 (1973); *cf. Reynolds v. Sims,* 377 U.S. 533 (1964). But in relying on those cases, the court of appeals overlooked a critical point: Those cases did not deal with *racial* restrictions on the right to vote. The Fifteenth Amendment places voting qualifications based on race in a constitutionally different class from voting qualifications based on non-suspect characteristics. Thus, the Constitution does not expressly provide that all citizens in a jurisdiction can vote in all elections (a point confirmed by the *Salyer* case), but it expressly prohibits denial of the right to vote in any state election *on account of race. Cf. Powers v. Ohio,* 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); *Buchanan v. Warley,* 245 U.S. 60, 74-75, 82 (1917) (state can limit property rights, but cannot do so on the basis of race).

In sum, this Court's resolution of this case should be quite straightforward. Nearly 130 years after the Fifteenth Amendment's ratification, the State of Hawaii seeks the Court's blessing to strip an American citizen of his right to vote in a state election based on his race. The words of the Fifteenth Amendment mean what they say, however, and the Fifteenth Amendment thus flatly bars Hawaii's denial of the right to vote in a state election on account of race.

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

Hawaii's racial restriction on voting also violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

*11 A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment, also ratified in the wake of the Civil War on July 9, 1868, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." While not

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phrased in the plain and crystalline terms of the Fifteenth Amendment, the """"central purpose" of the amendment is "to prevent the States from purposefully discriminating between individuals *on the basis of race.*" *Shaw,* 509 U.S. at 642 (emphasis added). [4]

4 *See Miller v. Johnson,* 515 U.S. 900, 904 (1995) ("central mandate is racial neutrality in governmental decisionmaking); *Powers,* 499 U.S. at 415 (Fourteenth Amendment's mandate is that "race discrimination be eliminated from all official acts and proceedings of the State); *Palmore v. Sidoti,* 466 U.S. 429, 432 33 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.); *Loving,* 388 U.S. at 10 ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.); *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964) ("historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States); *Strauder v. West Virginia,* 100 U.S. 303, 307 (1880) ("What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States ....).

To be sure, the Court has not as yet adopted the most stringent rule for analyzing racial classifications under the Equal Protection Clause--that "only a social emergency rising to the level of imminent danger to life and limb ... can justify an exception to the principle embedded in the Fourteenth Amendment that our Constitution is color-blind, and neither knows nor tolerates classes among citizens." ***12** *Croson,* 488 U.S. at 521 (Scalia, J., concurring in judgment) (quotation omitted). [5] The Court's decisions have nonetheless established that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 272 (1979). As a result, "all laws that classify citizens on the basis of race ... are constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie,* No. 98-85, 1999 WL 303677, at *4 (May 17, 1999); *see Adarand,* 515 U.S. at 235-36; *Shaw,* 509 U.S. at 642-43; *Croson,* 488 U.S. at 493-94 (plurality).

5 *See also Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 240 41 (1995) (Thomas, J., concurring); *Fullilove v. Klutznick,* 448 U.S. 448, 522 23 (1980) (Stewart, J., joined by Rehnquist, J., dissenting); *Defunis v. Odegaard,* 416 U.S. 312, 343 44 (1974) (Douglas, J., dissenting); *McLaughlin,* 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring); *Bell v. Maryland,* 378 U.S. 226, 287 88 (1964) (Goldberg, J., joined by Warren, C.J., concurring); *Hirabayashi v. United States,* 320 U.S. 81, 110 11 (1943) (Murphy, J., concurring); *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

The Court has stressed that racial classifications must be strictly scrutinized because classifications of citizens solely on the basis of race """"are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). They "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw,* 509 U.S. at 657. They "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the Government by history and the Constitution." *Miller,* 515 U.S. at 912 (quoting *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)). And they reflect "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from ***13** those of other citizens." *Johnson v. DeGrandy,* 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring) (quotation omitted). [6]

6 Strict scrutiny applies regardless of the race benefited or burdened because a "benign racial classification is a contradiction in terms, *Metro Broadcasting,* 497 U.S. at 609 (O'Connor, J., dissenting) (quotation omitted), and there is "no principled basis for deciding which groups would merit heightened judicial solicitude and which would not, *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 296 (1978) (Powell, J.). Strict scrutiny also applies, of course, even when the racial classification burdens or benefits the races equally. *Powers,* 499 U.S. at 410; *Brown v. Board of Education,* 347 U.S. 483, 494 95 (1954).

Racial classifications are offensive to the Constitution for a more practical reason as well. There is no way to apply them without formal rules for deciding who is and is not a member of a given race and without some governing body to apply

and enforce those rules. *Cf. Plessy,* 163 U.S. at 552. As Justice Stevens has emphasized, however, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove,* 448 U.S. at 535 n.5 (Stevens, J., dissenting). Justice Stevens thus stated in *Fullilove* that a "serious effort" to "define racial classes" must "study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935." *Id.; see also Metro Broadcasting,* 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (comparing racial set-aside to South African Population Registration Act). This case illustrates the point: The State of Hawaii has struggled mightily to define who exactly is a "Hawaiian," an enterprise that has led to a variety of conflicting definitions and generated numerous lawsuits.

Strict scrutiny under the Equal Protection Clause applies with particular force to racial classifications affecting the voting process. *See Shaw,* 509 U.S. at 644.[7] The Court has ***14** stated that "[r]acial classifications *with respect to voting* carry particular dangers" -- including "balkaniz[ing] us into competing racial factions." *Shaw,* 509 U.S. at 657 (emphasis added). """"When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller,* 515 U.S. at 911-12 (quotation omitted); *cf. Batson v. Kentucky,* 476 U.S. 79, 97-98 (1986). As Judge Wisdom stated over a generation ago, "*If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth.*" *Anderson v. Martin,* 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting) (emphasis added), *rev'd,* 375 U.S. 399 (1964).[8]

7 *See Gomillion,* 364 U.S. at 349 (Whittaker, J., concurring); *see also City of Mobile,* 446 U.S. at 86 (Stevens, J., concurring in judgment) (*Gomillion* is "compelled by the Equal Protection Clause).

8 The Justices who dissented in *Shaw* still would consider a "direct and outright deprivation of the right to vote on account of race (as here) subject to the strictest scrutiny. *Shaw,* 509 U.S. at 659 (White, J., dissenting); *id.* at 682 (Souter, J., dissenting).

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest.

Hawaii's law facially discriminates on the basis of race in determining which voters are qualified to vote in elections for the Office of Hawaiian Affairs.[9] Because the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial ***15** classifications -- or, at most, only rarely allows them -- the Court has held that racial classifications such as Hawaii's racial voting qualification are "presumptively invalid" and subject to strict scrutiny under the Fourteenth Amendment, meaning that they can be upheld only if based upon an "extraordinary justification." *Feeney,* 442 U.S. at 272 (*quoted in Shaw,* 509 U.S. at 643-44). Under the strict scrutiny standard, racial classifications thus violate the Equal Protection Clause unless they are both necessary and narrowly tailored to serve a compelling state interest. *Shaw,* 509 U.S. at 643; *Croson,* 488 U.S. at 509 (plurality) (Only in the "*extreme case"* may "some form of narrowly tailored racial preference ... be *necessary.*") (emphases added).[10]

9 When, as here, "the racial classification appears on the face of the statute, then " n]o inquiry into legislative purpose is necessary to determine whether the law is designed to harm members of a particular race. *Shaw,* 509 U.S. at 642; *see Hunt,* 1999 WL 303677; *cf. Washington v. Davis,* 426 U.S. 229 (1976).

10 *See also Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 280 (1986) (plurality); *id.* at 286 (O'Connor, J., concurring); *Palmore,* 466 U.S. at 432 (classifications must be "necessary to accomplishment of " " "compelling governmental interest); *Fullilove,* 448 U.S. at 496 (Powell, J., concurring) ("racial classification ... is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest); *Loving,* 388 U.S. at 11 (racial classifications, "if they are ever to be upheld, ... must be shown to be necessary to the accomplishment of some permissible state objective). In some cases, the Court has used the term "necessary ; in some cases, the Court has used the term "narrowly tailored ; and in some cases, the Court has

used both terms. The Court's consistent analysis incorporates both ideas. The Court has made it clear, for example, that past discrimination does not justify a racial classification if race neutral alternatives are available.

These requirements impose a number of important barriers that a government entity must surmount before it may impose a racial classification. The rationale is simple: "If there is no duty to attempt ... to measure the recovery by the wrong ... our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a piece of the action for its members." *Croson,* 488 U.S. at 510-11 (plurality) (quoting *Fullilove,* 448 U.S. at 539 (Stevens, J., dissenting)). Taken together, as ***16** Justice Kennedy has pointed out, these stringent requirements explain why the strict scrutiny standard "operate[s] in a manner generally consistent with the imperative of race neutrality." *Croson,* 488 U.S. at 519 (Kennedy, J., concurring).

First, the government must show a compelling interest that justifies its racial classification. Except in situations where there is an imminent threat to life or limb (as in a prison race riot), racial classifications must be """"strictly reserved for remedial settings." *Id.* at 494 (plurality); *Metro Broadcasting,* 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); *Wygant,* 476 U.S. at 274-76 (plurality). Furthermore, the bare desire to remedy *societal* discrimination is too "amorphous" a concept of injury to qualify as a "compelling interest." *Croson,* 488 U.S. at 497 (plurality) (quoting *Bakke,* 438 U.S. at 307 (Powell, J.)); *see also Wygant,* 476 U.S. at 274 (plurality) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification."). In order for the government to show that the classification is truly remedial, the classification must be preceded by """"judicial, legislative, or administrative findings of constitutional or statutory violations." *Croson,* 488 U.S. at 497 (plurality) (quoting *Bakke,* 438 U.S. at 308-09 (Powell, J.)). In *Croson,* for example, the Court explained that there was "nothing approaching ... a constitutional or statutory violation by anyone in the Richmond construction industry." *Id.* at 500.

11 Any legislative or executive findings must be strictly scrutinized, for " t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. *Croson,* 488 U.S. at 501.

Second, the government must show that the classification remedies discrimination that was committed both *within that jurisdiction,* and *within the industry or field* in which the ***17** classification is imposed (such as school segregation in a district). *Id.* at 500, 504-05. The Court explained the point in *Croson:* "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond ... does little to define the scope of any injury to *minority contractors in Richmond* or the necessary remedy." *Id.* at 505 (emphasis added). The Court added that "none of the evidence presented by the city points to any identified discrimination in the *Richmond construction industry.*" *Id.* (emphasis added). The Court has "never approved the extrapolation of discrimination in one jurisdiction from the experience of another." *Id.*

Third, the government must show that the racial classification is necessary in the sense that race-neutral remedies have been or would be ineffective in remedying the discrimination. *Adarand,* 515 U.S. at 237-38 (court of appeals """"did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means") (quotation omitted); *Croson,* 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."); *United States v. Paradise,* 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."); *id.* at 201 (O'Connor, J., dissenting) ("strict scrutiny requires ... that the District Court expressly evaluate the available alternative remedies."). The decision in *Croson* illustrated the importance of this requirement: Only in the "*extreme case*" may "some form of narrowly tailored racial preference ... be *necessary* ...." *Croson,* 488 U.S. at 509 (plurality) (emphases added). In *Croson,* the Court stated that a racial set-aside was not necessary because a "race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation" and remedy any discrimination that had occurred. *Id.* at 507.

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***18** *Fourth,* the government must show that it cannot devise an individualized procedure to "tailor remedial relief to those who truly have suffered the effects of prior discrimination" -- in other words, that the racial classification is not simply a product of "administrative convenience." *Id.* at 508; *cf. Korematsu,* 323 U.S. at 241 (Murphy, J., dissenting) ("[n] o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal"). The interest in "avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson,* 488 U.S. at 508.

Fifth, the government must show that it has minimized harm to innocent members of other racial groups. For this reason, a specific numerical quota, or outright racial exclusion, rarely (if ever) could satisfy the narrow tailoring requirement. *See id.* The Court applied this principle in *Croson:* "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur ... enjoys an absolute preference over other citizens based solely on their race. We think it *obvious* that such a program is not narrowly tailored to remedy the effects of prior discrimination." *Id.* (emphasis added); *see also id.* at 515 (Stevens, J., concurring) ("Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.").

Sixth, the government must show that the racial classification is tailored in terms of duration: that it "will not last longer than the discriminatory effects it is designed to eliminate." *Adarand,* 515 U.S. at 238 (quoting *Fullilove,* 448 U.S. at 513 (Powell, J., concurring)).

***19 C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny.**

Based on the foregoing principles, it is plain that Hawaii's racial voting qualification violates the Equal Protection Clause for any one of a host of alternative and independent reasons.

At the outset, Justice Ginsburg's opinion in *Adarand* identified the simplest reason for holding this racial voting qualification violative of the Equal Protection Clause. As she explained, while this Court has not as yet held that the strict scrutiny standard is automatically fatal for *all* racial classifications, at a minimum "the strict scrutiny standard" is "fatal for classifications burdening groups that have suffered discrimination in our society." *Adarand,* 515 U.S. at 275 (Ginsburg, J., dissenting). The principle identified by Justice Ginsburg applies here. In elections for the Office of Hawaiian Affairs, Hawaii turns away would-be voters who are, for example, African-Americans, Japanese-Americans, Chinese-Americans, Mexican-Americans, and even American Indians -- all of whom belong to racial groups whose members """"have suffered discrimination in our society" and some of whom have suffered discrimination *in Hawaii.* As Justice Ginsburg rightly suggested, therefore, the strict scrutiny analysis is "fatal" to Hawaii's racial voting qualification, and no further equal protection analysis is necessary.

Apart from that threshold point, the racial classification here fails to meet *any* of the specific requirements (much less all of them) that the government must meet in order to show that a racial classification is necessary and narrowly tailored to serve a compelling governmental interest.

First, Hawaii has not shown that its racial voting qualification remedies prior discrimination. In particular, Hawaii has not identified any competent judicial, legislative, or administrative findings of constitutional or statutory violations by any party to justify its racial voting qualification.

***20** *Second,* and as a necessary consequence of the first point, Hawaii obviously has not shown that its racial voting qualification remedies a prior denial or infringement of the ability of Hawaiians *to vote in Hawaii.* Hawaii's racial classification thus fails to meet a critical requirement under this Court's equal protection jurisprudence for a racial classification -- that it serve a compelling governmental interest in remedying prior discrimination *in the jurisdiction and field* in which the classification is imposed.

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Third, even had the State shown prior abridgements on the ability of Hawaiians to vote, it has not shown that a race-based voting scheme is necessary to remedy that discrimination. Indeed, an outright denial of the right to vote on the basis of race can *never* be sufficiently necessary to remedy past discrimination in voting. To be sure, there is a compelling governmental interest in remedying prior racial restrictions on the right to vote, but the constitutionally authorized remedy is imposition of a race-neutral voting scheme (and, if needed, the elimination of various race-neutral voting devices that can be a pretext for racial discrimination). *See, e.g.,* 42 U.S.C. § 1973; *Fullilove,* 448 U.S. at 546-47 (Stevens, J., dissenting) (Voting Rights Act, if it required that 10% of elected officials be minorities, "would merely create the kind of inequality that an impartial sovereign cannot tolerate"); *cf. Bazemore v. Friday,* 478 U.S. 385, 407-09 (1986) (race-neutral admissions policy is constitutionally proper remedy for club's prior discriminatory admissions). In this regard, we cannot improve upon Judge Wisdom: "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." *Anderson,* 206 F. Supp. at 705 (Wisdom, J., dissenting).

Fourth, even assuming prior denials of the right to vote, Hawaii has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior voting discrimination -- ***21** in other words, to show that the racial classification is not simply a product of "administrative convenience" in grouping together all Hawaiians. *Cf. Croson,* 488 U.S. at 508.

Fifth, Hawaii has imposed a 100% racial voting set-aside in OHA elections that absolutely excludes members of races other than Hawaiian from the ballot. Faced with a 30% set-aside in *Croson,* the Court found "it *obvious* that such a program [wa]s not narrowly tailored to remedy the effects of prior discrimination." *Id.* at 508 (emphasis added). Given Hawaii's 100% exclusion of individuals who are not Hawaiian from the ballot in OHA elections (particularly when combined with the lack of findings of prior discrimination), the same conclusion applies here *a fortiori.*

Sixth, Hawaii's racial qualification is not limited in time. The State established it in 1978, and it is scheduled to last indefinitely. This qualification is not tailored "such that it will not last longer than the discriminatory effects it is designed to eliminate." *Adarand,* 515 U.S. at 238 (quotation omitted).

In sum, Hawaii's law satisfies none of the requirements this Court has imposed for holding a racial classification permissible under the Equal Protection Clause.

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship With Hawaiians Do Not Justify Hawaii's Racial Voting Qualification.

The State has constructed a tortured defense of its racial voting qualification that links (a) the *racial* restriction on the beneficiaries of OHA-controlled funds, (b) the *racial* qualifications to be an OHA officer, and (c) the *racial* qualifications for voting in elections for OHA officers. To begin with, this defense does not purport to meet the requirements this Court has imposed for racial classifications.

Even addressing the State's argument on its own terms, moreover, the short answer to it is fairly simple: Three blatant ***22** constitutional wrongs do not make a right. A massive unconstitutional scheme of racially restricted distribution of state funds, racial restrictions on serving in the state office that oversees and distributes those funds, and racially restricted elections to that office hardly makes the State's voting restriction *more* constitutionally palatable. *See* Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians,* 106 Yale L.J. 537, 594 (1996) (""""It seems unlikely that many, if any, of Hawaii's current programs singling out Native Hawaiians could meet [strict scrutiny] standards. The compelling interest requirement alone would pose an enormous hurdle.").

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Hawaii has suggested that the racial voting qualification is constitutional because the racial restriction on the use of the OHA-controlled funds is constitutional and is not challenged here. As a matter of logic, that conclusion makes no sense even if the premise is accepted. If a state refused to hire a black teacher for an all-white school in 1952 because of his race, it could not have defended against a claimed equal protection violation by saying that the racial restriction on hiring was constitutional because the racially segregated schools were not challenged and had not yet been declared unconstitutional.

In addition, the racial restriction on the use of funds is itself unnecessary and not narrowly tailored to serve a compelling interest. Even assuming, for example, that the average Hawaiian suffers poverty to a greater extent than the average individual of another race, the State can institute a race-neutral social welfare program. It cannot engage, however, in a racially restricted distribution of funds that is both over-inclusive and under-inclusive.

Even if the State had a justification to pay monies to members of a racial group because of their race, a state does not have a compelling interest in establishing a racially restricted office *whose members are elected in racially restricted elections* in order to administer the program. In that regard, it ***23** bears emphasis that a racial *voting* qualification is perhaps the most pernicious of all racial classifications because it implies that "individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens." *Miller,* 515 U.S. at 914 (quotation omitted). This is the "precise use of race as a proxy the Constitution prohibits." *Id.; cf. Powers,* 499 U.S. at 410. Here, only by assuming that *all* Hawaiians think differently and vote differently from *all* other Hawaiian citizens can the categorical racial voting qualification be explained. Such an offensive assumption is patently unconstitutional under this Court's precedent.

Hawaii has invoked the term "trust" to describe its scheme and the term "trust lands" to describe lands transferred to the State by the 1959 Admission Act. But the terminology is simply camouflage for Hawaii's 1978 decision that certain state funds (derived both from the state lands and from other state funds) will be used to benefit a racially defined group -- even though the State is free to use those funds in a race-neutral way. [2] In any event, the existence of trust lands does not justify a racial qualification *to vote* in *state* elections for the *state* office that oversees and administers the lands.

12 Even were the State compelled by federal law to impose a racial classification (which it is not), *Adarand* establishes that the constitutional analysis would remain the same.

Hawaii also has explained -- correctly -- that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But the State has no right to engage in a racially restricted distribution of state funds, or racial classifications on the right to vote in a ***24** state election, simply to preserve a particular "culture." [3] As Justice Kennedy has explained, "There is more than a fine line, however, between the voluntary association that leads to a political community ... and the forced separation that occurs when the government draws explicit political boundaries ...." *Kiryas Joel,* 512 U.S. at 730 (Kennedy, J., concurring in judgment).

13 As two leading political and social commentators said of Hawaii: "It is one thing to celebrate a cultural heritage and a sometimes tragic history, but it is another, as Canadians have learned, to widen splits and schisms in a state that more than almost any place in the world has proved that diverse people can live amicably and successfully together. Michael Barone & Grant Ujifusa, *The Almanac of American Politics* 439 (1998).

The dangers of allowing a state's cultural justifications to supersede the limitations of the Equal Protection Clause are quite evident: One need only change the state from Hawaii to Louisiana and the year from 1999 to 1896. *See Plessy,* 163 U.S. at 550 (legislature is free "to act with reference to the established usages, customs, and traditions of the people"). This Court has forbidden that kind of "cultural" justification for racial classifications in cases ranging from *Brown v.*

Board of Education to *Loving v. Virginia.* Now is no time to return to an era when "cultural" justifications could trump the dictates of the Equal Protection Clause. *Cf. Loving,* 388 U.S. at 11 (ban on interracial marriage designed to "maintain White Supremacy").

E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed.

The lower courts suggested that American Indian tribes are exempt from the Equal Protection Clause (at least, treatment of Indian tribes that facilitates self-government is exempt), and that Hawaiians as a group are sufficiently similar to American Indian tribes that discrimination in favor of Hawaiians can be ***25** permitted under the Equal Protection Clause. *See, e.g.,* Pet. App. 13a-14a, 17a.

This argument is flawed at every turn. To begin with, it misconceives the basis for differential treatment of American Indian tribes under the Constitution. And it simultaneously creates from whole cloth a constitutional authorization for members of other racial and ethnic groups (for example, African-Americans, Latino-Americans, and Korean-Americans) to assert *ipse dixit* that they are "similar to American Indian tribes" for purposes of equal protection analysis.

1. American Indian tribes are a distinctive category in our law. *See Cherokee Nation v. Georgia,* 30 U.S. 1 (1831). The tribes are separate sovereigns within the United States -- and have been so considered since before the Constitution was ratified. The Commerce Clause thus provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. i, § 8. In addition, the Treaty Clause, which grants the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," has been a source of authority for the federal government to deal with American Indian tribes as sovereigns. U.S. Const. art. ii, § 2.

As mandated by the Constitution, this Court has drawn a clear constitutional distinction between (a) laws that benefit or burden Indian *tribes* (or *tribal members*) with respect to self-governance or activities on or near an Indian reservation and (b) laws that burden or benefit Indians solely *because of their race* and do not relate to tribal activities (in which case, American Indians are treated like members of other races).

Equal protection strict scrutiny thus applies to classifications by race of individuals who happen to be American Indian so long as the classification in question does not relate to their tribal membership and their activities on or near the reservation. In both *Adarand* and *Croson,* for ***26** example, the Court held that a racial preference program that gave preferences to American Indians, as well as members of other racial groups, was subject to strict scrutiny. As the Court stated in *Croson,* "[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, *Indian,* Eskimo, or Aleut persons." 488 U.S. at 506 (emphasis added). In *Adarand* as well, the program provided a preference for "Native Americans," but the Court held that *all* racial classifications are subject to strict scrutiny. (In dissent, Justice Stevens raised the subject of American Indians, 515 U.S. at 244-45 n.3, but the Court did not distinguish American Indians from the other racial groups.) So, too, in both *Fullilove* and *Metro Broadcasting,* the laws at issue gave a preference to American Indians, *see Metro Broadcasting,* 497 U.S. at 553 n.1; *Fullilove,* 448 U.S. at 454, but no member of this Court suggested that a racial preference for African-Americans is more strictly scrutinized than a preference for American Indians.

2. In holding Hawaii's special treatment of Hawaiians consistent with the Equal Protection Clause, the courts below erroneously relied in part on this Court's decision in *Morton v. Mancari,* 417 U.S. 535 (1974). In that case, the Court upheld a hiring preference granted to tribal Indians for employment in the Bureau of Indian Affairs.

Three points about *Mancari* are critical, however, and completely undercut the lower courts' reliance on it. *First,* the Court in *Mancari* stated that the justification for differential treatment for Indian tribes stemmed not from some idiosyncratic ordering of different racial groups, but "from the Constitution itself" -- namely, the Indian Commerce

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Clause and the Treaty Clause. *Id.* at 552; *see also Adarand,* 515 U.S. at 244-45 n.3 (Stevens, J., dissenting) (*Mancari* relied in part on "plenary power of Congress to legislate on behalf of Indian tribes"); *United States v. Antelope,* 430 U.S. 641, 646 (1977) (*Mancari* "involved preferences ... directly promoting Indian ***27** interests in self-government.... Federal regulation of Indian tribes ... is governance of once-sovereign political communities; *it is not to be viewed as legislation of a 'racial' group consisting of Indians.*") (quotation omitted; emphasis added). So, too, the government's brief in *Mancari,* advocating the position that the Court adopted, cautioned that the Constitution "permits special arrangements [with respect to Indian tribes] *that might not be appropriate with respect to other groups.*" Br. for Appellants, No. 73-362, at 33 (emphasis added). By linking its decision to the Indian Commerce Clause, the Court accepted that argument. The Court did not adopt, by contrast, the suggestion of an amicus curiae who argued that *benign* racial preferences are not subject to strict scrutiny, and that preferences to """"members of a minority group" such as American Indians "are constitutional." Br. for Amicus Curiae Mexican American Legal Defense and Educational Fund, Nos. 73-362, 73-364, at 22-23.

Second, consistent with its view of the proper scope of the equal protection exception for Indian tribes embodied in the Indian Commerce and Treaty Clauses, the *Mancari* Court went out of its way to make clear that the BIA preference applied only to Indians who were members of Indian tribes and thus "operate[d] to exclude many individuals who are racially to be classified as Indians." *Mancari,* 417 U.S. at 554 n.24. In particular, the Court relied on the definition of Indian used in BIA regulations, which expressly conditioned the preference on tribal membership. *Id.; see* Benjamin, 106 Yale L.J. at 612 n.38 ("One of the most important aspects of the Court's conclusion was left unstated: The Court ignored the statutory definition of 'Indian' and looked only to the BIA regulation's definition."); *see also id.* at n.121. The government stressed at oral argument, moreover, that the "preference is limited to Indians who are members of federally recognized [tribes]." Tr. of Oral Arg., Nos. 73-362, 73-364, at 7. The government pointed out that members of terminated tribes or never-recognized tribes were not eligible for the preference and noted ***28** that "there are many Indians, many people who racially could be considered an Indian who don't get this preference." *Id.* at 13.

Third, the Court treated the preference as an aspect of constitutionally authorized Indian self-governance. *See* 417 U.S. at 553 (preference provision designed to give "Indians a greater control of their own destinies"). Indeed, as the government pointed out at argument, some 11,500 BIA employees out of approximately 14,000 at the time worked on the reservations. Tr. of Oral Arg. at 5-6. Moreover, the preference had actually begun as a substitute for a proposal to provide Indian tribes an absolute veto over any person the BIA proposed to send to work on the reservation. *Id.* at 12. The Court took all of that into account, noting that an "obviously more difficult question ... would be presented" by a general Indian preference in government employment. 417 U.S. at 554. [4]

14 That "question, which was unanswered at the time, was whether the same level of scrutiny afforded racial discrimination *against* minorities would apply to racial preferences *for* minorities a question before the Court that Term, *Defunis v. Odegaard,* 416 U.S. 312 (1974), and which was subsequently addressed in cases such as *Bakke, Fullilove, Croson,* and *Adarand.*

In reaching its conclusion, the Court stated that the BIA classification was not "in this sense" a "racial" preference. *Id.* at 553 & n.24. By that, the Court clearly meant that a classification involving Indian tribes (or involving Indian tribal members engaged in activities of self-governance or activities on or near a reservation) must be analyzed differently from purely racial classifications.

Mancari is thus simply another in the line of cases in which the Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation *that* ***29** *might otherwise be constitutionally offensive.*" *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 500-01 (1979) (quotation omitted; emphasis added).

3. Hawaii's attempts to analogize Hawaiians to Indian tribes for purposes of this case are unavailing for two main reasons.

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First, the Constitution does not contain a Hawaiian Commerce Clause, but only an Indian Commerce Clause. Pet. App. 14a. Under the Constitution, therefore, a state's differential treatment of Hawaiians is no more acceptable than a state's differential treatment of Croatian-Americans or African-Americans or Italian-Americans.

Second, Hawaiians are not a federally recognized Indian tribe such that Hawaiians could receive the same treatment as American Indian tribes under the Constitution. Since the annexation in 1898, the United States has not dealt with Hawaiians as a sovereign nation. To be sure, certain federal statutes refer to Hawaiians, just as certain statutes refer to African-Americans, but Congress has never established that Hawaiians are an Indian tribe. This is not a trivial point. Without such recognition, a group of people united by race or ethnicity is not entitled to the same treatment as an American Indian *tribe.* As the BIA puts it, express federal recognition as a tribe is a "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2; *see* Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process,* 66 Wash. L. Rev. 209, 215-16 (1991).

As a matter of law and tradition, moreover, federal courts do not grant tribal status that neither Congress nor the Executive has granted. *United States v. Holliday,* 70 U.S. 407, 419 (1865); *see* ***30** *Cherokee Nation of Okla. v. Babbitt,* 117 F.3d 1489, 1496 (D.C. Cir. 1997). Therefore, this Court cannot simply declare that Hawaiians are an American Indian tribe.

Indeed, the constitutional constraints on Congress and the Executive in recognizing tribes, as well as existing BIA regulations, establish that Hawaiians could not possibly qualify as a tribe. *See* 25 C.F.R. § 83; *Price v. Hawaii,* 764 F.2d 623, 628 (9th Cir. 1985) (group of Hawaiians not a tribe and thus could not sue under jurisdictional statute granting Indian tribes right to sue); Benjamin, 106 Yale L.J. at 574, 576 ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and """"there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe' ...."). Even the courts below recognized that Hawaiians have not and could not at this time receive formal recognition as an Indian tribe. Pet. App. 14a.

In any event, even were Hawaiians a recognized Indian tribe, the OHA's racial restriction on voting in elections for a *state* government office dealing with such an "Indian tribe" would still be unconstitutional. The "unique legal status of Indian tribes under federal law permits the *Federal Government* to enact legislation singling out tribal Indians, ... [but] *States do not enjoy the same unique relationship with Indians ....*" *Yakima Nation,* 439 U.S. at 500-01 (quotation omitted; emphases added).

For all of these reasons, the State's attempt to analogize Hawaiians to American Indians does not justify its racial voting qualification in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

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U.S. COURT OF APPEALS
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IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

ELIAN GONZALEZ, A MINOR, BY AND THROUGH LAZARO GONZALEZ, AS NEXT FRIEND, OR ALTERNATIVELY, AS TEMPORARY LEGAL CUSTODIAN,

Plaintiff-Appellant,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DORIS MEISSNER, COMMISSIONER, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; ROBERT WALLIS, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; AND UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

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

PETITION FOR REHEARING AND REHEARING *EN BANC*

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Gonzalez v. Reno, No. 00-11424

DISCLOSURE STATEMENT

Neither Plaintiff-Appellant Elian Gonzalez, nor his next friend (or alternatively temporary legal guardian), Lazaro Gonzalez, are nongovernmental corporations. They therefore have nothing to disclose under Fed. R. App. P. 26.1.

Additional Disclosures Mandated by 11th Cir. R. 26.1-1

In the form required by 11th Cir. R. 26.1-3 and to the best knowledge of counsel for the Plaintiff-Appellant, the following is a list of all trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates and parent corporations:

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STATEMENT REGARDING STUDIED NEED FOR FURTHER REVIEW

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions of this Court:

> *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), and the line of Supreme Court cases under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), that it applies.

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, as set forth below:

> Whether the panel erred in according *Chevron* deference to the INS's statutory interpretation and thus erred in resolving this case of extraordinary national and international significance.

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves a second question of exceptional importance, on which there is a split among the circuits, set forth below:

> Whether the 1980 Refugee Act's creation of an entitlement for any alien to apply for asylum gives rise to constitutional due process rights protecting that entitlement.

Brett M. Kavanaugh

Attorney for Plaintiff-Appellant

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INTRODUCTION AND STATEMENT OF *EN BANC* ISSUES

This case concerns the procedures to which alien children seeking asylum are entitled under the Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a),[1] and under the Fifth Amendment to the United States Constitution. In January 2000, the INS set forth an interpretation of the relevant provisions of the Refugee Act in an internal INS memorandum and three opinion letters. The INS concluded that a six-year-old child cannot seek asylum against his parent's wishes. The panel here granted *Chevron* deference to the INS's interpretation, finding that the interpretation was "within the outside border of reasonable choices." Op. at 33; *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Rehearing is plainly warranted because the panel's decision to extend *Chevron* deference to the INS internal memorandum and opinion letters is in direct conflict with the Supreme Court's very recent and important decision in *Christensen v. Harris County*, 120 S. Ct. 1655 (May 1, 2000). In *Christensen*, the Supreme Court squarely held that *Chevron* deference does not apply to an agency interpretation of a statute that is "contained in an opinion letter" as opposed to an interpretation "arrived at after, for

[1] Section 1158(a)(1) provides: "*Any alien* who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), *irrespective of such alien's status, may apply for asylum* in accordance with this section or, where applicable, section 1225(b) of this title." (emphasis added).

example, a formal adjudication or notice-and-comment rulemaking." *Id.* at 1662. The Supreme Court added – unequivocally – that "[i]nterpretations such as those in opinion letters, . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* The panel in this case thus erroneously accorded *Chevron* deference to precisely the kinds of *informal* agency interpretations that, under *Christensen*, are not entitled to *Chevron* deference.

This error undeniably affected the outcome of the case: The panel emphasized that resolution of the statutory issue hinged on whether the INS's interpretation warranted *Chevron* deference. *See, e.g.*, Op. at 11-12, 14-16. Indeed, the panel repeatedly suggested doubts about the correctness of the INS's statutory interpretation, but ultimately concluded (erroneously, given *Christensen*) that it was constrained under *Chevron* to accept that interpretation. *Id.* at 15-17, 19-20, 24, 27.

The nature and scope of *Chevron* deference is, of course, a ubiquitous issue in the federal courts. By itself, therefore, the panel's error on such an important and recurring legal principle would justify rehearing. Apart from that jurisprudential point, there is plainly a critical national need that *this individual case* be decided correctly. The extraordinary importance of *this individual case* – to the United States, to the Administration's foreign policy and dealings with Cuba, to the Cuban-American community, to the American citizenry more broadly, and to the Gonzalez family – is

too obvious to require extended discussion. That factor alone also justifies rehearing to correct the error.

While the *Chevron* issue itself necessitates rehearing, the constitutional issue presents an additional question of exceptional importance that independently warrants *en banc* review: whether the Refugee Act of 1980 grants aliens an entitlement to seek asylum that cannot be deprived without due process of law. Relying on circuit precedent, the panel summarily concluded that aliens have *no due process rights* in connection with asylum proceedings. *See* Op. at 9 (citing *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc)). But the *Jean* Court's conclusion that aliens lack *any* such due process rights is incorrect, as the dissent in *Jean* by Judge Kravitch (joined by Judges Johnson, Hatchett, and Clark) explained. The dissenting judges correctly stated that "the Refugee Act of 1980 does create at a minimum a *constitutionally protected right* to petition our government for political asylum" – a statutory entitlement that triggers certain procedural due process rights for aliens seeking asylum. 727 F.2d at 989 (quotation omitted) (emphasis added). In accord with the reasoning in Judge Kravitch's dissent, several courts of appeals have subsequently held that the Refugee Act grants an entitlement to seek asylum that thereby gives aliens certain procedural due process rights in the asylum process. *See, e.g., Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999). Those decisions highlight the wrong turn this Court made in *Jean* and underscore the need for *en banc* review to reconsider that case.

As with the statutory issue, proper resolution of the constitutional issue would alter the outcome of this case. If *Jean* were overruled, Elian Gonzalez would possess a due process right to have his asylum application appropriately and fairly considered, which would require the INS to hold a hearing and hear from Elian himself.

ARGUMENT AND SUPPORTING FACTS

I. THE PANEL'S DECISION TO APPLY *CHEVRON* DEFERENCE IS DIRECTLY CONTRARY TO RECENT SUPREME COURT PRECEDENT.

The Supreme Court's May 1, 2000, decision in *Christensen v. Harris County* established a simple and unambiguous prohibition on extending *Chevron* deference to "opinion letters, . . . policy statements, agency manuals, and enforcement guidelines." 120 S. Ct. at 1662. Rehearing is necessary because the panel's decision is flatly inconsistent with *Christensen*.

The *Christensen* case involved the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*. The statutory provision in question permitted States and their political subdivisions to compensate employees for overtime work by granting them compensatory time in lieu of cash payment. The government of Harris County, Texas, adopted a policy *requiring* its employees to schedule time off in order to reduce the amount of accrued compensatory time.

The Department of Labor had previously issued an opinion letter stating that "neither the statute nor the regulation permit an employer to require an employee to use

accrued compensatory time." Br. for United States as Amicus Curiae, 1999 WL 1128266, at *6. After the County instituted its policy, various parties sued the County, claiming that the FLSA should be interpreted as the Department of Labor had interpreted it – to prohibit an employer from compelling an employee to use compensatory time.

The suit ultimately reached the Supreme Court, where the Government as amicus curiae supported the plaintiffs and argued:

> [A]ny uncertainty about the proper disposition of this case should be resolved by reference to the Secretary of Labor's reasonable regulations and interpretive guidance implementing the FLSA . . . . *[S]ee generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Br. for United States as Amicus Curiae, 1999 WL 1128266, at *15. The Supreme Court rejected the argument for *Chevron* deference advanced by the United States. The Court observed that under *Chevron* "a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." 120 S. Ct. at 1662. But the *Christensen* Court emphasized that it was "confront[ing] an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. *Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency*

manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference." *Id.* (emphasis added).[2]

The panel's decision in this case is in direct conflict with the recent Supreme Court decision in *Christensen*. There can be no question that the INS internal memorandum and letters are the kinds of agency statements that the *Christensen* Court held are not entitled to *Chevron* deference. Nor is there any doubt that the panel, in fact, employed *Chevron* deference. *See* Op. at 16, 20 & n.13. The panel's decision to grant *Chevron* deference to the INS memorandum and opinion letters cannot stand.

The panel's *Chevron* analysis in this case, to be sure, may be consistent with some of *this Court's* current jurisprudence, for this Court has often granted *Chevron* deference to informal agency pronouncements.[3] But that body of circuit law is erroneous in light of *Christensen* – a fact that further demonstrates the need for *en banc* review to bring this Court's jurisprudence in line with that of the Supreme Court.

It is also true, of course, that debates about *Chevron* deference can be academic in those cases where the court on its own would have interpreted the statute in the same

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[2] *See also Reno v. Koray*, 515 U.S. 50, 61 (1995); *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 256-58 (1991); 1 K. Davis & R. Pierce, *Administrative Law Treatise* § 3.5 at 120 (3d ed. 1994) ("Congress has not delegated to any agency the power to make policy decisions that bind courts and citizens through formats like letters, manuals, [and] guidelines . . . .").

[3] *See, e.g., Hawthorne v. MAC Adjustment, Inc.*, 140 F.3d 1367, 1372 n.2 (11th Cir. 1998); *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997).

manner that the agency did. In this case, however, *the panel itself* suggested that, freed from *Chevron*, it likely would have interpreted the statute differently than did the INS. *See* Op. at 23 ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24 ("we cannot disturb the INS policy in this case just because it might be imperfect."); *id.* ("The final aspect of the INS policy also worries us some."); *id.* at 33 ("The policy decision that the INS made was within the outside border of reasonable choices."); *see also* Order of Apr. 19, 2000 ("plain language of the statute seem[s] to support Plaintiff's argument").[4]

On rehearing, therefore, this Court should interpret the statute based on the statutory text, structure, intent, and policy (and without *Chevron* deference to the INS's interpretation). The statute provides for an asylum hearing for "any alien" who has "applied" for asylum. The phrase "any alien" by its terms *and* intent includes any child, and Elian Gonzalez has in fact "applied" for asylum by any plausible definition of that term. While a parent's views can and should be heard at a child's asylum

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[4] The 1980 Refugee Act was enacted to conform United States asylum law to this country's international obligations with respect to asylum. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987). The Supreme Court requires that statutes be interpreted to avoid conflict with such international law obligations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Thus, to the extent the panel purported to give greater deference to the Executive in this asylum case because of the Executive Branch's independent powers over foreign affairs, that extra deference was misplaced.

hearing, the statute leaves no room for the INS simply to refuse outright to hold *any hearing*. Indeed, even *the INS interpretation* found in the most closely analogous *formal* INS regulation, 8 C.F.R. § 236.3(f), contemplates a hearing in certain immigration matters involving a child. In granting Plaintiff-Appellant's motion for injunction pending appeal, the panel stressed the statutory language and that regulation:

> [G]iven the plain language of the statute, [Elian] might be entitled to apply personally for asylum. . . . Not only does the plain language of the statute seem to support Plaintiff's argument, . . . [t]he existing INS regulations do envision situations where a minor may act on his own behalf in immigration matters. Moreover, the regulations contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents.

Order of Apr. 19, 2000. In short, the language, structure, and intent of the statute mandate an asylum hearing for Elian Gonzalez in this case.[5]

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[5] The panel's *Chevron* analysis was erroneous, in addition, because the INS's ultimate interpretation was the product of an unexplained (or, at best, insufficiently explained) change in interpretation. "In the first few days after Elian's arrival in the United States . . . INS indicated that it could not grant custody and that a request would have to be put before the state courts." Letter from Attorney General Reno to Spencer Eig (1/13/00), at 2 (Rec. Exc. Supp. 26). On January 3, 2000, however, Bo Cooper, INS General Counsel, sent an internal legal memorandum to INS Commissioner Doris Meissner, *see* Rec. Exc. Supp. 7-17, (a memorandum that was not publicly disclosed until litigation), and argued that *Cuban* law controlled and that Elian's father must be presumed to speak for Elian. *See id.* 1-6 (emphasis added). Finally, a few days later, in a letter from Attorney General Reno to Elian's lawyers, the Government asserted – without explanation regarding the change in interpretation – that "the question of who may speak for a six-year-old child in applying for admission or asylum is a matter of *federal immigration law*." Rec. Exc. Supp. 25 (emphasis added).

(continued...)

II. THE COURT SHOULD OVERRULE THE PROCEDURAL DUE PROCESS HOLDING IN *JEAN V. NELSON* AND, CONSISTENT WITH THE LAW OF OTHER CIRCUITS, AFFORD BASIC DUE PROCESS RIGHTS TO ALIENS IN ASYLUM-RELATED PROCEEDINGS.

A. The Refugee Act of 1980 Grants Aliens an Entitlement to Seek Asylum That Cannot Be Deprived Without Due Process.

The Refugee Act of 1980 established a uniform right to seek asylum:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), *irrespective of such alien's status*, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. §1158(a)(1) (emphasis added). Although the Supreme Court has never addressed the constitutional implications of this statute,[6] it is well settled that federal statutes creating entitlements simultaneously trigger certain procedural due process rights for affected individuals. *See Vitek v. Jones*, 445 U.S. 480, 488-91 (1980); *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970); L. Tribe, *American Constitutional*

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[5] (...continued)

The INS's multiple and shifting interpretations – shifts that occurred without sufficient explanation – preclude the courts from granting *Chevron* deference to the INS's final interpretation. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Moreover, the INS's ultimate interpretation is equivalent to a litigating position, and it is black-letter law that agency interpretations developed as litigating positions similarly warrant no deference under *Chevron*. *See* Op. at 18 (citing Eleventh Circuit cases).

[6] The Court did not mention this statute in *Landon v. Plasencia*, 459 U.S. 21 (1982).

Law 710 (2d ed. 1988) ("[T]he Court has extended the same procedural protections to statutorily created rights as to 'core' rights.").

By its plain terms, the Refugee Act grants all aliens an entitlement *to apply* for asylum. That entitlement plainly qualifies as a protected interest under the Due Process Clause. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (statutory "right to use . . . adjudicatory procedures" is a "property" right triggering due process protections under Due Process Clause); *Meachum v. Fano*, 427 U.S. 215, 226 (1976). As a result, the Government may not deprive an asylum applicant (including a child) of his entitlement to seek asylum without providing certain procedural due process protections.

Since 1980, most courts of appeals to consider the issue have concluded that the Refugee Act's entitlement to seek asylum triggers corresponding procedural rights in connection with asylum-related proceedings. In *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999), for example, the Fourth Circuit held that the statutory right to seek asylum also created a constitutional right to due process in asylum-related proceedings. *See id.* ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum*] envision."). Many other courts of appeals have reached similar conclusions.[7]

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[7] *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1036-38 (5th Cir. Unit B 1982) (asylum applicants' due process rights were violated by new regulatory program (continued...)

By contrast, this Court, in its 8-4 *en banc* decision in *Jean v. Nelson*, held that the Refugee Act grants aliens no entitlement to seek asylum – and that aliens therefore possess *no due process rights* in connection with asylum proceedings. That particular aspect of *Jean* is incorrect.[8] As Judge Kravitch's dissent for four judges rightly stated, "the Refugee Act of 1980 does create at a minimum a *constitutionally protected right* to petition our government for political asylum" – an entitlement that carries with it certain procedural due process rights for aliens seeking asylum. 727 F.2d at 989 (quotation omitted) (emphasis added). In line with Judge Kravitch's dissent and the holdings of other courts of appeals, the *en banc* Court should reconsider and overrule that portion of *Jean*.

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[7] (...continued)
designed to achieve expedited mass deportation of large numbers of back-logged applicants); *Marincas v. Lewis*, 92 F.3d 195, 203 & n.8 (3d Cir. 1996) (INS required to provide complete record and neutral decisionmaker to stowaways); *Campos v. Nail*, 43 F.3d 1285, 1288-89 (9th Cir. 1994) (asylum applicants intercepted at Mexican border had right to individualized venue determinations); *Augustin v. Sava*, 735 F.2d 32, 36-38 (2d Cir. 1984) (excludable alien had a right to translation services); *cf. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (unadmitted alien in INS custody cannot be detained in violation of constitutional due process).

[8] This aspect of *Jean* is contained at 727 F.2d at 981-83 and is distinct from the "central" portion of the *Jean* opinion, which is found at 727 F.2d 962-79. The central portion of the opinion focused on the broad question whether excludable aliens seeking admission enjoy free-standing constitutional rights, as opposed to the narrower question whether the Refugee Act grants an entitlement that thereby triggers corresponding due process rights.

Even if the Court rejects that argument, it should still hold that the Due Process Clause applies in this case. In its central holding, the *en banc* Court in *Jean* ruled that *deportable* aliens are entitled to due process, but that *excludable* aliens are not entitled to *any* due process in immigration matters. In drawing that distinction, the Court erroneously relied on the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). *See* 727 F.2d at 969-71.

In analyzing that same constitutional issue in his subsequent opinion in *Jean*, Justice Marshall stated that "excludable aliens do, in fact, enjoy Fifth Amendment protections" and "the principle that unadmitted aliens have no constitutionally protected rights defies rationality." 472 U.S. at 873, 874. (The Supreme Court majority did not reach this constitutional issue.) Indeed, any other conclusion, Justice Marshall pointed out, would mean that courts could not intervene even if the Government were to "invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens." *Id.* at 874. As to any stare decisis concern with respect to *Mezei* (and stare decisis as to *Mezei* had been the foundation of this Court's holding in *Jean*, *see* 727 F.2d at 970-71), Justice Marshall carefully explained that the relevant statements in *Mezei* (statements on which this Court had relied in *Jean)* were dicta and deserved no deference. 472 U.S. at 872-73.[9]

[9] A ruling that the Due Process Clause applies to all aliens within the authority of the United States Government would not unduly hamper immigration authorities, for it is (continued...)

In accord with Justice Marshall's conclusion that *all* aliens, not just deportable or resident aliens, possess some due process rights in connection with immigration asylum and removal proceedings, Congress has eliminated the distinction between excludable and deportable aliens in both the Refugee Act, *see* 8 U.S.C. § 1158(a)(1), and in the relevant 1996 amendments now codified at 8 U.S.C. § 1229 *et seq*. The fact that even *the relevant statutes* no longer distinguish between excludable and deportable aliens is compelling support for Justice Marshall's conclusion that this outdated distinction makes no sense in determining whether a particular alien comes within the protections of the Due Process Clause. The central holding of *Jean* is also incorrect, therefore, and should be reconsidered consistent with the approach advocated by Justice Marshall.[10]

B. The INS's Procedures in This Case Did Not Satisfy Due Process.

Assuming that the Due Process Clause applies here, the remaining inquiry focuses on what process is due. As Justice Kennedy wrote for the Supreme Court in

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[9] (...continued)
settled that the *amount* of process due will vary with the circumstances and the nature of the proceeding in question. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

[10] Even if the Court adheres to the outdated idea that excludable aliens enjoy *no due process rights whatsoever*, there appears to be a substantial factual question in this case whether Elian Gonzalez is, in fact, an excludable alien. New evidence produced under FOIA suggests that the Government itself is uncertain of Elian's status in this regard. *See* App. A-1 (urgent e-mails of D.B. Lay and D.N. Vara) (as late as January 7, 2000, Attorney General still lacked knowledge of "critical" fact of "whether Elian was brought to US soil by the fisherman or by the US Coast Guard").

United States v. James Daniel Good Real Property, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." 510 U.S. 43, 53 (1993). The purpose of a hearing "is to ensure the requisite neutrality that must inform all governmental decisionmaking." *Id.* at 55. These core principles of due process apply to children in matters that affect children's rights. *See Parham v. J.R.*, 442 U.S. 584 (1979).

The question here, then, is what process – what kind of hearing – is necessary to satisfy the due process rights of a child who has applied for asylum. The proper rule is that a child who seeks to apply for asylum has a due process right to an asylum hearing (an asylum hearing where, to be sure, the parents are entitled to be heard as well). And even if a child is not *automatically* entitled to an asylum hearing when the child seeks asylum over the objection of a parent, the child clearly still possesses a due process right *to a fair hearing* to determine the parent's ability to represent the child's best interests in any asylum proceedings (at least when the parent's ability to properly do so is called into question).

The Supreme Court's due process decision in *Parham v. J.R.* requires that conclusion. There, the Court found that a child has a due process interest in avoiding institutional commitment – notwithstanding the desires of the parent – and "that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral

factfinder.'" 442 U.S. at 606. The Court added that the inquiry "must also include an interview with the child." *Id.* at 607.[11]

In this case, whatever the *minimum* elements of due process might be for alien children in asylum proceedings, the INS did not come close. It did not hold an asylum hearing. In fact, it did not hold *any hearing* at all to determine whether Elian's father represented Elian's best interests. Indeed, *the INS agents never even interviewed Elian Gonzalez* as part of the INS's supposed "assessment" of the father's ability to represent Elian's best interests. Nor did the INS ask his father a single question about possible harm to Elian should he return to Cuba. The INS's ad hoc and haphazard procedures fell woefully short of due process.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests that the Petition for Rehearing or Rehearing *En Banc* be granted.

Respectfully submitted,

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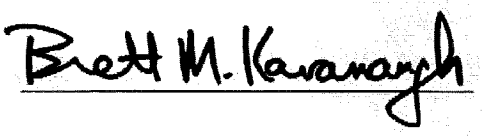
[11] *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (child's exercise of constitutional right cannot be controlled or thwarted by her parent); *see also Plyler v. Doe*, 457 U.S. 202, 219-21 (1982).



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No. 00-11424

D. C. Docket No. 00-206-CV-KMM

ELIAN GONZALEZ, a minor, by and through
LAZARO GONZALEZ, as next friend, or,
alternatively, as temporary legal custodian,

Plaintiffs-Appellants,

versus

JANET RENO, Attorney General of the United States;
DORIS MEISSNER, Commissioner, United States
Immigration and Naturalization Service;
ROBERT WALLIS, District Director,
United States Immigration and Naturalization Service;
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE; and UNITED
STATES DEPARTMENT OF JUSTICE,

Defendants-Appeellees,

JUAN MIGUEL GONZALEZ,

Intervenor.

Appeal from the United States District Court
for the Southern District of Florida

(June 1, 2000)

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

EDMONDSON, Circuit Judge:

This case, at first sight, seems to be about little more than a child and his father. But, for this Court, the case is mainly about the separation of powers under our constitutional system of government: a statute enacted by Congress, the permissible scope of executive discretion under that statute, and the limits on judicial review of the exercise of that executive discretion.

Elian Gonzalez ("Plaintiff"), a six-year-old Cuban child, arrived in the United States alone. His father in Cuba demanded that Plaintiff be returned to Cuba. Plaintiff, however, asked to stay in the United States; and asylum applications were submitted on his behalf. The Immigration and Naturalization Service ("INS") -- after, among other things, consulting with Plaintiff's father and considering Plaintiff's age -- decided that Plaintiff's asylum applications were legally void and refused to consider their merit.

Plaintiff then filed this suit in federal district court, seeking on several grounds to compel the INS to consider and to determine the merit of his asylum applications. The district court dismissed Plaintiff's suit. Gonzalez ex rel.

Gonzalez v. Reno, 86 F. Supp.2d 1167, 1194 (S.D. Fla. 2000). Plaintiff appeals,[1] and we affirm.

I.

In December 1993, Plaintiff was born in Cuba to Juan Miguel Gonzalez and Elizabeth Gonzalez. When Plaintiff was about three years old, Juan Miguel and Elizabeth separated. Elizabeth retained custody of Plaintiff after the separation. Juan Miguel, however, continued to have regular and significant contact with his son. Plaintiff, in fact, attended school in the district where his father lived and often stayed at Juan Miguel's home.

In November 1999, Elizabeth decided to leave Cuba and to take her son to the United States. In the pre-dawn hours of 22 November, Plaintiff and Elizabeth, along with twelve other Cuban nationals, left Cuba aboard a small boat. The next day, the boat capsized in strong winds and rough seas off the coast of Florida. Eleven of the

[1]Several defendant-appellees are involved in this appeal. All these defendants are part of the executive branch of our government. For the sake of simplicity, we refer to the defendants collectively as the "INS."

passengers, including Elizabeth, died. Plaintiff, clinging to an inner tube, endured and survived.

Two days later, Plaintiff was rescued at sea by Florida fishermen and was taken to a hospital in Miami for medical treatment. While Plaintiff was receiving medical treatment, the INS was contacted by Plaintiff's great-uncle: Miami resident Lazaro Gonzalez. INS officials decided, upon Plaintiff's release from the hospital, not to remove Plaintiff immediately to Cuba. Instead, the INS deferred Plaintiff's immigration inspection and paroled Plaintiff into Lazaro's custody and care.

Soon thereafter, Lazaro filed an application for asylum on Plaintiff's behalf with the INS. This application was followed shortly by a second application signed by Plaintiff himself. A third asylum application was filed by Lazaro on Plaintiff's behalf in January 2000, after a state court awarded temporary custody of Plaintiff to Lazaro.[2] The applications were prepared by a Miami lawyer.

The three applications were substantially identical in content. The applications stated that Plaintiff "is afraid to return to Cuba." The applications claimed that Plaintiff had a well-founded fear of persecution because many members of Plaintiff's family had been persecuted by the Castro government in Cuba. In particular,

[2]A Florida state court since has dismissed Lazaro's petition for custody of Plaintiff. See In re the Matter of Lazaro Gonzalez, No. 00-00479-FC-28 (Fla. 11th Cir. Ct. 2000).

according to the applications, Plaintiff's stepfather had been imprisoned for several months because of opposition to the Cuban government. Two of Plaintiff's great-uncles also had been imprisoned for their political acts. Plaintiff's mother had also been harassed and intimidated by communist authorities in Cuba. The applications also alleged that, if Plaintiff were returned to Cuba, he would be used as a propaganda tool for the Castro government and would be subjected to involuntary indoctrination in the tenets of communism.

Plaintiff's father, however, apparently did not agree that Plaintiff should remain in the United States. Soon after Plaintiff was rescued at sea, Juan Miguel sent to Cuban officials a letter, asking for Plaintiff's return to Cuba. The Cuban government forwarded this letter to the INS.

Because of the conflicting requests about whether Plaintiff should remain in the United States, INS officials interviewed both Juan Miguel and Lazaro. An INS official, on 13 December, met with Juan Miguel at his home in Cuba. At that meeting, Juan Miguel made this comment:

> [Plaintiff], at the age of six, cannot make a decision on his own .... I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family .... As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

Juan Miguel denied that Lazaro was authorized to seek asylum for Plaintiff; Juan Miguel also refused to consent to any lawyer representing Plaintiff. Juan Miguel assured the INS official that his desire for Plaintiff's return to Cuba was genuine and was not coerced by the Cuban government.

One week later, INS officials in Miami met with Lazaro, Marisleysis Gonzalez (Plaintiff's cousin), and several lawyers representing Plaintiff. At that meeting, the parties discussed Juan Miguel's request. Lazaro contended that Juan Miguel's request for Plaintiff's return to Cuba was coerced by the Cuban government.[3] INS officials also inquired about the legal basis for Plaintiff's asylum applications; Lazaro replied this way: "During the time he's been here, everything he has, if he goes back, it's all changed. His activities here are different from those that he would have over there." Plaintiff's lawyers told the INS again of the persecution of Plaintiff's relatives in Cuba because of their political opposition to the Castro government.

[3] As proof of this contention, Lazaro told INS officials that, before Plaintiff was discovered at sea, Juan Miguel telephoned Lazaro and asked Lazaro to take care of Plaintiff if Plaintiff made it to the United States. Lazaro stated that, after Plaintiff's rescue, Juan Miguel's demeanor had changed noticeably and that, according to Juan Miguel's neighbors in Cuba, Juan Miguel was "[g]etting extra protection" from Cuban authorities.

On 31 December, an INS official again met with Juan Miguel in Cuba to investigate further Lazaro's claim that Juan Miguel's request had been coerced.[4] At that meeting, Juan Miguel repeated that he desired Plaintiff's return to Cuba. Juan Miguel also reasserted that he was under no undue influence from any individual or government. The INS official -- taking Juan Miguel's demeanor into account -- determined that Juan Miguel, in fact, genuinely desired his son's return to Cuba.

The INS Commissioner, on 5 January 2000, rejected Plaintiff's asylum applications as legally void. The Commissioner -- concluding that six-year-old children lack the capacity to file personally for asylum against the wishes of their parents -- determined that Plaintiff could not file his own asylum applications. Instead, according to the Commissioner, Plaintiff needed an adult representative to file for asylum on his behalf. The Commissioner -- citing the custom that parents generally speak for their children and finding that no circumstance in this case warranted a departure from that custom -- concluded that the asylum applications submitted by Plaintiff and Lazaro were legally void and required no further

[4] To reduce third parties' opportunities to eavesdrop upon the meeting, this interview was held at the residence of a United Nations official near Havana. Also, some of the interview was conducted in writing to prevent eavesdropping.

consideration. Plaintiff asked the Attorney General to overrule the Commissioner's decision; the Attorney General declined to do so.

Plaintiff then, by and through Lazaro as his next friend, filed a complaint in federal district court seeking to compel the INS to consider the merits of his asylum applications. In his complaint, Plaintiff alleged, among other things, that the refusal to consider his applications violated 8 U.S.C. § 1158 and the Fifth Amendment Due Process Clause. The district court rejected both claims and dismissed Plaintiff's complaint. Plaintiff appeals.[5]

II.

On appeal, Plaintiff argues that the district court erred (1) by dismissing Plaintiff's claim under 8 U.S.C. § 1158, (2) by dismissing Plaintiff's due process claim, and (3) by failing to appoint a guardian ad litem to represent Plaintiff's

[5] During the pendency of this appeal, the INS revoked Plaintiff's parole and removed Plaintiff from Lazaro's custody. The INS then paroled Plaintiff into the custody of Juan Miguel, who had traveled to the United States to reclaim his son. After Juan Miguel came to the United States, we permitted Juan Miguel to intervene in this case.

To ensure that Plaintiff would not be returned to Cuba, depriving Plaintiff of a day in court and depriving this Court of jurisdiction over Plaintiff's appeal, we enjoined Plaintiff's removal from the United States pending appeal. Considering that we affirm the judgment of the district court, the injunction will dissolve (without a further order) when the Court's mandate is issued.

interests.[6] We have reviewed carefully the record and the briefs filed by all parties. We conclude that Plaintiff's due process claim lacks merit and does not warrant extended discussion. See Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc) ("Aliens seeking admission to the United States . . . have no constitutional rights with regard to their applications . . . ."), aff'd on other grounds, 105 S. Ct. 2992 (1985). Plaintiff's guardian ad litem claim, because Plaintiff was ably represented in district court by his next friend, also lacks merit and similarly does not warrant extended discussion. See Fed. R. Civ. P. 17(c) (providing for appointment of guardian ad litem in discretion of district court); see also Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958) (noting that guardian ad litem may be unnecessary where child already represented adequately by next friend). We, accordingly, affirm the district court's dismissal of the constitutional claim and the

[6] The INS contended in district court that the district court lacked subject-matter jurisdiction over Plaintiff's suit. The district court, however, rejected this argument and concluded that subject-matter jurisdiction did exist. The INS has not renewed its jurisdictional contention on appeal.

We, however, are mindful of our own jurisdictional limits. So, we have considered our subject-matter jurisdiction over this appeal. We conclude that this Court does have subject-matter jurisdiction over Plaintiff's appeal.

district court's refusal to appoint a guardian ad litem.[7] We now turn, however, to a more difficult question: the district court's dismissal of Plaintiff's statutory claim.

III.

Plaintiff contends that the district court erred in rejecting his statutory claim based on 8 U.S.C. § 1158. Section 1158 provides that "[a]ny alien . . . may apply for asylum." 8 U.S.C. § 1158(a)(1). Plaintiff says that, because he is "[a]ny alien," he may apply for asylum. Plaintiff insists that, by the applications signed and submitted by himself and Lazaro, he , in fact, did apply for asylum within the meaning of section 1158. In addition, Plaintiff argues that the summary rejection by the INS of his applications as invalid violated the intent of Congress as set out in the statute.

The INS responds that section 1158 is silent about the validity of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the wishes of the child's parent. The INS argues that,

[7]Also before this Court is a recently filed motion of Intervenor, Juan Miguel Gonzalez, to remove Lazaro Gonzalez as Plaintiff's next friend and to substitute Plaintiff's father as next friend. Notwithstanding that much has happened since Lazaro brought this suit as Plaintiff's next friend, Lazaro (aided by a troop of seasoned lawyers) has completely and steadfastly pressed Plaintiff's claimed rights in the district court and in this Court. We see no powerful reason to make a change at this point. We, therefore, deny Intervenor's motion to remove Lazaro and to substitute Intervenor as next friend for the purposes of this litigation.

because the statute does not spell out how a young child files for asylum, the INS was free to adopt a policy requiring, in these circumstances, that any asylum claim on Plaintiff's behalf be filed by Plaintiff's father. As such, the INS urges that the rejection of Plaintiff's purported asylum applications as legally void was lawful. According to the INS, because the applications had no legal effect, Plaintiff never applied at all within the meaning of the statute.

Guided by well-established principles of statutory construction, judicial restraint, and deference to executive agencies, we accept that the rejection by the INS of Plaintiff's applications as invalid did not violate section 1158.

A.

Our consideration of Plaintiff's statutory claim must begin with an examination of the scope of the statute itself. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2781 (1984); see also INS v. Aguirre-Aguirre, 119 S. Ct. 1439, 1445 (1999) (instructing that analysis set out in Chevron is applicable to immigration statutes); Jaramillo v. INS, 1 F.3d 1149, 1153 (11th Cir. 1993) (en banc) (same). In Chevron, the Supreme Court explained: "First, always, is the question whether Congress has directly spoken to the precise question

at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 104 S. Ct. at 2781. We turn, therefore, to the plain language of the statute.

Section 1158 provides, in pertinent part:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: "[a]ny alien . . . may apply for asylum." See Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1956 (1998) (observing that statute is not ambiguous just because it is broad and that statute may apply to circumstances not envisioned by Congress). That "[a]ny alien" includes Plaintiff seems apparent.[8] See 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); see also Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (noting that word "any" has "an

[8] The INS concedes that Plaintiff is eligible to apply for asylum pursuant to section 1158.

expansive meaning"). Section 1158, therefore, plainly would permit Plaintiff to apply for asylum.

When an alien does apply for asylum within the meaning of the statute, the INS -- according to the statute itself and INS regulations -- must consider the merits of the alien's asylum claim. See 8 U.S.C. § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section.") (emphasis added); 8 C.F.R. § 208.9(a) (requiring INS to "adjudicate the claim of each asylum applicant whose application is complete"). The important legal question in this case, therefore, is not whether Plaintiff may apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six-year-old child has applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent.

About this question, more important than what Congress said in section 1158 is what Congress left unsaid. In reading statutes, we consider not only the words Congress used, but the spaces between those words. Section 1158 is silent on the precise question at issue in this case. Although section 1158 gives "[a]ny alien" the right to "apply for asylum," the statute does not command how an alien applies for asylum. The statute includes no definition of the term "apply." The statute does not

set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure. See 8 U.S.C. § 1158.

B.

Because the statute is silent on the issue, Congress has left a gap in the statutory scheme.[9] From that gap springs executive discretion.[10] As a matter of law,

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[9] That Congress left a gap in the statutory scheme does not mean that Congress has done something wrong. Whether Congress could or should legislate with sufficient detail to address every conceivable set of circumstances that might arise is highly debatable. See generally Loving v. United States, 116 S. Ct. 1737, 1744 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."). Congress may properly commit something to the discretion of the other branches of government.

[10] This case is about the discretion of the executive branch to make policy, not about ministerial enforcement of the "law" by executive officials. It has been suggested that the precise policy adopted by the INS in this case was required by "law." That characterization of this case, however, is inaccurate. As we have explained, when the INS made its pertinent policy, the preexisting law said nothing about the validity of Plaintiff's asylum applications.

Instead, Congress just provided that "[a]ny alien" may apply for asylum and left the details of the application process to the discretion of the INS. See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1140 (9th Cir. 1988) (en banc) (Hug, J., dissenting) (explaining that sometimes "Congress enacts quite general provisions, with the specifics to be filled in by the agency"). The INS, in its discretion, decided to require six-year-old children – who arrive unaccompanied in the United States from Cuba – to act in immigration

it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to fill such gaps.[11] See Chevron, 104 S. Ct. at 2793. Moreover, the authority of the executive branch to fill gaps is especially great in the context of immigration policy.[12] See Aguirre-Aguirre, 119 S. Ct. at 1445. Our proper

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matters only through (absent special circumstances) their parents in Cuba. The INS could have shaped its policy in a different fashion, perhaps allowing relatives (for example, those within the fourth degree of relationship) in the United States to act for such children. But it did not, and we cannot. That choice was the sole prerogative of the executive branch. According to the principles set out in Chevron, we can only disturb that choice if it is unreasonable. See Chevron, 104 S. Ct. at 2793; see also Mistretta v. United States, 109 S. Ct. 647, 678 (1989) (Scalia, J., dissenting) (explaining discretionary authority of executive branch in administering statutory scheme).

[11] When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute. See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). But the ordinary rule does not always apply: where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch (a political branch accountable to the people and fit for making policy judgments), then the gaps should not be filled in by federal judges. Where Congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency. And the Supreme Court has directed that, for such statutes, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 104 S. Ct. at 2782.

[12] The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials (such as the INS) in matters touching upon foreign affairs. See Aguirre-Aguirre, 119 S. Ct. at 1445. Respect for the authority of the executive branch in foreign affairs is a well-established theme in our law. See United States v. Curtiss-Wright Export Corp., 57 S. Ct. 216, 221 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). And the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress. See Youngstown Sheet & Tube Co. v. Sawyer, 72 S. Ct. 863, 870 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of

review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited. See Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524, 2534 (1991).

That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy. Executive agencies must comply with the procedural requirements imposed by statute. See Morton v. Ruiz, 94 S. Ct. 1055, 1073 (1974). Agencies must respect their own procedural rules and regulations. See id. at 1074; see also Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. 1981). And the policy selected by the agency must be a reasonable one in the light of the statutory scheme. Chevron, 104 S. Ct. at 2782. To this end, the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness. But the courts cannot properly reexamine the wisdom of an agency-promulgated policy.[13] See SEC v. Chenery

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Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); see also United States v. Frade, 709 F.2d 1387, 1402 (11th Cir. 1983) (same).

[13] The Supreme Court has instructed us with these words:

> [F]ederal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 104 S. Ct. at 2793 (citation omitted).

Corp., 67 S. Ct. 1575, 1582 (1947) ("The wisdom of the principle adopted is none of our concern.").

In this case, because the law -- particularly section 1158 -- is silent about the validity of Plaintiff's purported asylum applications, it fell to the INS to make a discretionary policy choice. The INS, exercising its gap-filling discretion, determined these things: (1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist-totalitarian state (such as Cuba),[14] in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative. Our duty is to decide whether this policy might be a reasonable one in the light of the statutory scheme. See Chevron, 104 S. Ct. at 2782.

But we first address Plaintiff's contention that the "policy" relied on by the INS in this case is really no policy at all but is, in reality, just a litigating position. An

[14] See U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) (noting that "Cuba is a totalitarian state," where Communist Party "exercises control over all aspects of Cuban life").

after-the-fact rationalization of agency action -- an explanation developed for the sole purpose of defending in court the agency's acts -- is usually entitled to no deference from the courts. Bradberry v. Director, Office of Workers' Comp. Programs, 117 F.3d 1361, 1366 (11th Cir. 1997). But we are unable to say that the position of the INS here is just an after-the-fact rationalization.

The INS policy toward Plaintiff's application was not created by INS lawyers during litigation, but instead was developed in the course of administrative proceedings before litigation commenced.[15] Cf. IAL Aircraft Holding, Inc. v. FAA, 206 F.3d 1042, 1046 & n.5 (11th Cir. 2000). While the policy announced by the INS may not harmonize perfectly with earlier INS interpretative guidelines (which are not law),[16] the parties have cited, and we have found, no statutory provision, no regulatory authority, and no prior agency adjudication that "flatly contradicts" the policy. Cf. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 411 (1976); see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866 (1983)

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[15] The INS policy on unaccompanied six-year-old children purporting to file for asylum against their parents' wishes was set out in these writings: (1) a memorandum, dated 3 January 2000, from the INS General Counsel to the INS Commissioner; (2) two letters, dated 5 January, from an INS district director to Plaintiff's lawyers and Lazaro, letters explaining the decision of the INS Commissioner; and (3) a letter, dated 12 January, from the Attorney General to Plaintiff's lawyers and Lazaro.

[16] The INS Guidelines "do not have the force and effect of law." Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1511 (11th Cir. 1992).

(noting that agencies have latitude to "adapt their rules and policies to the demands of changing circumstances"). That the INS policy was developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does not render the policy altogether unworthy of deference. See Chenery, 67 S. Ct. at 1580; see also Cook v. Wiley, 208 F.3d 1314, 1319-20 (11th Cir. 2000) (explaining that executive policies not "subjected to the heightened scrutiny of [formal] rulemaking" are nonetheless entitled to "some deference"); Bigby v. INS, 21 F.3d 1059, 1063-64 (11th Cir. 1994) (finding Chevron deference appropriate even though agency policy had not been adopted as regulation); U.S. Mosaic Tile Co. v. NLRB, 935 F.2d 1249, 1255 n.6 (11th Cir. 1991) ("Although the agency action in Chevron involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications . . . ."). And that the INS policy may not be a longstanding one likewise affects only the degree of deference required.[17] See

[17] The INS claims that the approach taken in Plaintiff's case is the INS's longstanding position on young, unaccompanied aliens. The INS, however, points to no evidence in the record showing that the INS, in the past, has taken this approach. But, even assuming that Plaintiff's case triggered the making of this policy to fit cases like Plaintiff's peculiar circumstances, deference to the INS policy would still be due if the policy is a reasonable one. See Chenery, 67 S. Ct. at 1580 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

Chenery, 67 S. Ct. at 1580. The INS policy, therefore, is entitled to, at least, some deference under Chevron; and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable.

We accept that the INS policy at issue here comes within the range of reasonable choices. First, we cannot say that the foundation of the policy -- the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim -- is unreasonable.[18] See Polovchak v. Meese, 774 F.2d 731, 736-37 (7th Cir. 1985) (presuming that twelve-year-old child was "near the lower end of an age range in which a minor may be mature enough to assert" an

[18] In other words, we do not think that the INS, as a matter of law, must individually assess each child's mental capacity; we cannot say that looking at capacity instead of age for young children is required. Instead, we recognize that absolute line drawing – although necessarily sacrificing accuracy and flexibility for certainty and efficiency – is an acceptable approach. See Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2567-68 (1976). And, as long as the approach taken by the INS is a reasonable one, we need not decide what the best approach would be.

We, however, do not mean to suggest that the course taken by the INS is the only permissible approach. Although the INS is not required to let six-year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Even young children can be capable of having an accurate impression of the facts about which they might speak. To obtain asylum, we doubt that it is essential for a child to be able to debate the merits of Marxism-Leninism against the merits of Western-style democracy. Some reasonable people could conclude that it should be sufficient for a child to be able to speak about his fears and to recount the facts that support his fears about returning to another country. Not infrequently, the law does permit six-year-old children (and even younger children) to speak and, in fact, does give their words great effect. See, e.g., Pocatello v. United States, 394 F.2d 115, 116-17 (9th Cir. 1968) (affirming district court's admission of five-year-old's testimony); Miller v. State, 391 So.2d 1102, 1106 (Ala. Crim. App. 1980) (affirming decision of trial court to permit four-year-old to testify); Baker v. State, 674 So.2d 199, 200 (Fla. Dist. Ct. App. 1996) (affirming trial court decision admitting testimony and statements of six-year-old victim).

asylum claim against the wishes of his parents). Because six-year-old children must have some means of applying for asylum, see 8 U.S.C. § 1158(a)(1), and because the INS has decided that the children cannot apply personally, the next element of the INS policy -- that a six-year-old child must be represented by some adult in applying for asylum -- necessarily is reasonable.

The INS determination that ordinarily a parent (even one outside of this country)[19] -- and, more important, *only* a parent -- can act for his six-year-old child (who is in this country) in immigration matters also comes within the range of reasonable choices. In making that determination, INS officials seem to have taken account of the relevant, competing policy interests: the interest of a child in asserting a non-frivolous asylum claim; the interest of a parent in raising his child as he sees fit; and the interest of the public in the prompt but fair disposition of asylum claims. The INS policy -- by presuming that the parent is the sole, appropriate representative for a child -- gives paramount consideration to the primary role of parents in the

[19]We conclude that the approach taken by the INS about out-of-the-country representatives was a reasonable one. Other approaches might have been available. The INS might have selected a policy giving more weight to the fact that the parent of a child in the United States remained outside of this country's jurisdiction. For example, maybe the INS could have required that the adult representative -- purporting to act in immigration matters (either by applying for asylum on behalf of the child or in effect vetoing an application for asylum) for a child in this country -- be present in this country himself at the pertinent time. See, e.g., Cozine v. Bonnick, 245 S.W.2d 935, 937 (Ky. 1952) (requiring that next friend, purporting to represent child in court, be resident of state). But what else might have been done is not decisive for us.

upbringing of their children. But we cannot conclude that the policy's stress on the parent-child relationship is unreasonable.[20] See Ginsberg v. New York, 88 S. Ct. 1274, 1280 (1968) ("[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

Critically important, the INS policy does not neglect completely the independent and separate interest that a child may have, apart from his parents, in applying for asylum. See Polovochak, 774 F.2d at 736-37. Instead, according to the INS policy, special circumstances may exist that render a parent an inappropriate

[20] We do not suggest that recognizing the parent-child relationship to the exclusion of other familial relationships is the only reasonable approach. The parent-child relationship is obviously an important one. See Wisconsin v. Yoder, 92 S. Ct. 1526, 1541-42 (1972); Pierce v. Society of Sisters, 45 S. Ct. 571, 573 (1925); see also In re Custody of Smith, 969 P.2d 21, 27-28 (Wash. 1998), cert. granted sub nom. Troxel v. Granville, 120 S. Ct. 11 (1999). Still, although the common practice in the courts of this country seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be the next friend of his child as a matter of absolute right. See Fong Sik Leung v. Dulles, 226 F.2d 74, 82 (9th Cir. 1955) ("[No] parent [] may claim to be a guardian ad litem of his minor child as a matter of right."). Especially because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children – even where the parent is not generally "unfit" – is not without limits in this country. See, e.g., In the Matter of Sampson, 323 N.Y.S.2d 253; 255 (N.Y. App. Div. 1971) (affirming order requiring disfigured child to undergo risky cosmetic surgery against genuine wishes of child's only parent: the state contended surgery would have "a beneficial effect" upon child); Crommelin-Monnier v. Monnier, 638 So.2d 912, 916 (Ala. Civ. App. 1994) (requiring appointment of guardian ad litem where custodial parent sought to remove child to foreign country). In addition, the law in the United States frequently treats more distant familial relationships as important. See, e.g., Kan. Stat. Ann. § 38-1541 (permitting any person related within the fourth degree to child to move to intervene in "child in need of care" proceedings); Ala. Code § 12-16-150(4) (allowing challenge for cause where potential juror is related within ninth degree to party); O.C.G.A. § 15-12-135(a) (disqualifying persons related within the sixth degree to interested parties from jury service).

representative for the child.[21] Where such circumstances do exist, the INS policy appears to permit other persons, besides a parent, to speak for the child in immigration matters. So, to some extent, the policy does protect a child's own right to apply for asylum under section 1158 despite the contrary wishes of his parents.

We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction. Because Congress has decided that "[a]ny alien" (including six-year-old children) may apply for asylum, 8 U.S.C. § 1158(a)(1), Congress has charged the INS -- when it promulgates policy and fills gaps in the statutory scheme -- with facilitation, not hindrance, of that legislative goal. See Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988) (noting that Chevron does not provide agency with license to "frustrate[] the underlying congressional policy"). We recognize that, in some instances, the INS policy of deferring to parents -- especially those residing outside of this country -- might hinder some six-year-olds with non-frivolous asylum claims and prevent them from invoking their statutory right to seek asylum. But,

[21] Under the INS policy, a substantial conflict of interest between the parent and the child may require or allow another adult to speak for the child on immigration matters. In considering whether a substantial conflict of interest exists, the INS considers the potential merits of a child's asylum claim. If the child would have an exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.

considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect. See Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2875 (1980) (Burger, C.J., concurring) (noting that agency policy may be valid although policy does not perfectly accomplish legislative goals). And we cannot invalidate the policy -- one with international-relations implications -- selected by the INS merely because we personally might have chosen another. See Chevron, 104 S. Ct. at 2793; see also Jaramillo, 1 F.3d at 1152-53. Because we cannot say that this element of the INS policy -- that, ordinarily, a parent, and only a parent, can act for a six-year-old child in immigration matters -- is unreasonable, we defer to the INS policy.

The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance, sufficient in and of itself, to justify the consideration of a six-year-old child's asylum claim (presented by a relative in this country) against the wishes of the non-resident parent. We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people

living in Cuba.[22] See generally U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) ("[The Cuban Government] continue[s] systematically to violate fundamental civil and political rights of its citizens."). Persons living in such a totalitarian state may be unable to assert freely their own legal rights, much less the legal rights of others. Moreover, some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent -- even when he is not coerced -- demands that the child leave this country to return to a country with little respect for human rights and basic freedoms.

Nonetheless, we cannot properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion: where special circumstances -- such as definite coercion directed at an individual parent -- exist, a non-parental representative may

[22] According to the United States Department of State, the human rights record of the Cuban government is "poor." Cuban citizens who oppose or criticize the government routinely are "harass[ed], threaten[ed], arbitrarily arrest[ed], detain[ed], imprison[ed], and defame[d]." Cuba regularly denies citizens "the freedoms of speech, press, assembly, and association," and restricts the free exercise of religion. The Cuban constitution provides that "legally recognized civil liberties can be denied to anyone who actively opposes the 'decision of the Cuban people to build socialism.'" See U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000); see also UNHCHR Res. 2000/25, U.N. Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/2000/L.11 (2000) (expressing concern about "the continued violation of human rights and fundamental freedoms in Cuba").

be necessary to speak for the child. In addition and more important, in no context is the executive branch entitled to more deference than in the context of foreign affairs. See generally United States v. Curtiss-Wright Export Corp., 57 S. Ct. 216, 221 (1936). This aspect of the INS policy seems to implicate the conduct of foreign affairs more than any other. Something even close to a per se rule -- that, for immigration purposes, no parent living in a totalitarian state has sufficient liberty to represent and to serve the true, best interests of his own child in the United States -- likely would have significant consequences for the President's conduct of our Nation's international affairs: such a rule would focus not on the qualities of the particular parent, but on the qualities of the government of the parent's country. As we understand the legal precedents, they, in effect, direct that a court of law defer especially to this international-relations aspect of the INS policy.

We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158, although section 1158 does not require the approach that the INS has chosen to take.

C.

We now examine the INS's application of its facially reasonable policy to Plaintiff in this case. Although based on a policy permissible under Chevron, if the ultimate decision of the INS -- to treat Plaintiff's asylum applications as invalid -- was "arbitrary, capricious, [or] an abuse of discretion," the decision is unlawful.[23] See 5 U.S.C. § 706(2)(A); see also INS v. Yueh-Shaio-Yang, 117 S. Ct. 350, 353 (1996); Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S. Ct. 814, 822 (1971). But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here.

The application signed and submitted by Plaintiff himself, insofar as the INS has decided that six-year-old children cannot file for asylum themselves, necessarily was a nullity under the INS policy. As we have explained, the INS's per se rule -- prohibiting six-year-old children from personally filing asylum applications against their parents' wishes -- is entitled to deference under the law. The INS, therefore, did not act arbitrarily or abuse its discretion in rejecting Plaintiff's own purported asylum application as void.

[23] The INS asks us to apply the "facially legitimate and bona fide reason" standard of review set out in Kleindienst v. Mandel, 92 S. Ct. 2576, 2585 (1972), instead of the more stringent "arbitrary, capricious, or an abuse of discretion" standard. We think that the Kleindienst standard is not the correct standard to apply in this case. But we do note that, even if the Kleindienst standard were applied, the result in this case would remain the same.

Plaintiff contends that, even if the INS policy is facially reasonable under Chevron, the INS decision to reject the applications submitted by Lazaro was arbitrary. Plaintiff asserts that two special circumstances -- the alleged coercion of Juan Miguel by the Cuban government and the objective basis of Plaintiff's asylum claim -- bear negatively upon Juan Miguel's fitness to represent Plaintiff in immigration matters. The INS, according to Plaintiff, was therefore required to recognize some other adult representative -- namely, Lazaro -- to act on Plaintiff's behalf. We, however, conclude that the INS adequately considered these circumstances in reaching its ultimate decision.

The INS first determined that Juan Miguel, in fact, was not operating under coercion from the Cuban government or that, even if he was, his honest and sincere desires were aligned with those of the Cuban government. That determination was not clearly wrong and was no abuse of discretion. An INS official, on two occasions, interviewed Juan Miguel in person in Cuba. Aware of the possibility that Juan Miguel might be under some kind of coercion, the INS official took steps to ensure that Juan Miguel could express freely his genuine wishes about Plaintiff's asylum claim. The INS official, after meeting with Juan Miguel face-to-face, concluded -- based upon her observations of his demeanor -- that Juan Miguel's statement was not

the result of duress or coercion. We, therefore, cannot say that the INS's rejection of Plaintiff's contention about coercion was arbitrary.

The INS also preliminarily assessed the objective basis of Plaintiff's asylum claim and concluded that his claim for asylum probably lacked merit.[24] Again, we cannot conclude that the INS's determination was arbitrary or an abuse of discretion. In making this assessment, the INS considered the information contained in the asylum applications and information provided to the INS by Plaintiff's lawyers. In addition, the INS interviewed Lazaro and inquired about the basis for Plaintiff's asylum claim.[25]

The essence of Plaintiff's asylum claim was that, if he is returned to Cuba: (1) he will not enjoy the freedom that he has in the United States; (2) he might be forced to undergo "re-education" and indoctrination in communist theory; and (3) he might be used by the Cuban government for propaganda purposes. No one should doubt

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[24] We do not decide, as the INS advocates, that this summary and preliminary assessment of the merits of Plaintiff's asylum claim was a "consideration" of Plaintiff's purported asylum application within the meaning of the statute. But we do accept that this rough look at the potential merits was a legitimate part of deciding whether Plaintiff's father had a substantial conflict of interest with Plaintiff about asylum that would disqualify the father from representing Plaintiff.

[25] That the INS, in making a preliminary assessment of the strength of Plaintiff's asylum claim, never interviewed Plaintiff has worried us. But the INS did speak with persons representing Plaintiff – Lazaro, Marisleysis, and Plaintiff's lawyers – on more than one occasion about the nature of his asylum claim.

that, if Plaintiff returns to Cuba, he will be without the degree of liberty that people enjoy in the United States. Also, we admit that re-education, communist indoctrination, and political manipulation of Plaintiff for propaganda purposes, upon a return to Cuba, are not beyond the realm of possibility.

Nonetheless, we cannot say that the INS's assessment of Plaintiff's asylum claim -- that it probably lacked merit -- was arbitrary. To make a meritorious asylum claim, an asylum applicant must show that he has a "well-founded fear of persecution" in his native land. See 8 U.S.C. § 1101(a)(42). Congress largely has left the task of defining with precision the phrase "well-founded fear of persecution" to the INS. See Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990) (stating that, where statutory term is ambiguous, agency properly defined term through adjudications); see also Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998) (noting that statutes do not define "persecution" or specify acts constituting "persecution").

Plaintiff points to no earlier INS adjudications or judicial decisions where a person, in circumstances similar to Plaintiff's, was found to have established a "well-founded fear of persecution." Political conditions "which affect the populace as a whole or in large part are generally insufficient to establish [persecution]." See Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir. 1995). We cannot say that the INS had to treat

education and indoctrination as synonymous with "persecution." See Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995) (explaining that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive"); see also Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998) (stating that "persecution" "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty"); Bradvica v. INS, 128 F.3d 1009, 1012 (7th Cir. 1997) ("[M]ere harassment does not amount to persecution."); Ira J. Kurzban, Kurzban's Immigration Law Sourcebook, 254-61 (6th ed. 1998) (citing cases discussing meaning of "persecution"). Not all exceptional treatment is persecution. The INS's estimate of the purported applications -- as applications that were not strong on their merits -- is not clearly inaccurate.[26]

[26] We do not know for certain that, if Plaintiff's asylum applications were accepted and fully adjudicated, Plaintiff necessarily would fail to establish his eligibility for asylum. Depending on how the record was developed, we expect that a reasonable adjudicator might find that Plaintiff's fears were "well-founded." We also think that some reasonable adjudicator might regard things like involuntary and forcible "re-education" as persecution. But these issues are not questions that we, in the first instance, are to answer. The ultimate merits of an asylum petition are not before this Court at all. Instead, they are matters that would be committed to the discretion of the INS. The INS (and the courts) never have suggested that an asylum applicant in like circumstances was eligible for asylum. We cannot say that the INS's assessment of the likelihood of success of the applications in this case was arbitrary.

We have not the slightest illusion about the INS's choices: the choices -- about policy and about application of the policy -- that the INS made in this case are choices about which reasonable people can disagree. Still, the choices were not unreasonable, not capricious and not arbitrary, but were reasoned and reasonable. The INS's considerable discretion was not abused.

CONCLUSION

As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches' policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

When the INS was confronted with Plaintiff's purported asylum applications, the immigration law of the United States provided the INS with no clear answer. The INS accordingly developed a policy to deal with the extraordinary circumstances of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the express wishes of the child's parents (or sole

parent). The INS then applied this new policy to Plaintiff's purported asylum applications and rejected them as nullities.

Because the preexisting law compelled no particular policy, the INS was entitled to make a policy decision. The policy decision that the INS made was within the outside border of reasonable choices. And the INS did not abuse its discretion or act arbitrarily in applying the policy and rejecting Plaintiff's purported asylum applications. The Court neither approves nor disapproves the INS's decision to reject the asylum applications filed on Plaintiff's behalf, but the INS decision did not contradict 8 U.S.C. § 1158.

The judgment of the district court is AFFIRMED[27].

[27]NOTICE OF SHORTENED TIME: We order that, if petitions for rehearing or suggestions for rehearing en banc are to be filed, they must be filed within 14 days of this date. Expect no extensions.

APPENDIX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via facsimile and also by U.S. Mail on this 14th day of June 2000, to:

ANNE R. SCHULTZ, ESQ.
Chief, Appellate Division
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By: _____
JEFFREY BOSSERT CLARK

Lotus cc:Mail for Ronald W Whitney

Date: 01/07/2000 9:18 AM
Sender: Daniel N Vara
To: Bob A Wallis; J Kelly Ryan; Ronald W Whitney; Arthur D Strathern III; Dorothea B Lay; Bruce L Marmar; Rebeca Sanchez-Roig
Priority: Urgent
Subject: Re: Elian's mode of arrival

Thea,

Per the Acting Chief of Staff, Miami District, the answer is unknown.

Repeated requests to the USCG for their reports/info have been left unanswered.

Dan

Reply Separator

Subject: Elian's mode of arrival
Author: Dorothea B Lay at HQCOU
Date: 1/6/00 9:26 PM

Bob and Dan,

We need to verify the exact circumstances surrounding Elian's arrival in the US. This is critical for an Attorney General letter that we need to give our comments on by 9 AM tomorrow (Friday the 7th). Specifically we need to know whether Elian was brought to US soil by the fishermen or by the US Coast Guard, and how and at what point the INS became involved in bringing him to the hospital. Would you please respond to all recipients on this cc:mail as soon as possible? Also, in case the cc:mail is slow arriving, would you please call Ron Whitney at (202) 514-9699, Arthur Strathern at (202) 616-7975 or Kelly Ryan at (202) 514-3211?

Thanks very much.

630

2000 WL 34014582 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Elian GONZALEZ, a Minor, by and Through Lazaro Gonzalez, as Next Friend, or Alternatively, as Temporary Legal Custodian, Petitioner,
v.
Janet RENO, Attorney General of the United States, et al., Respondents.

No. 99-2079.
June 26, 2000.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

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***i** QUESTIONS PRESENTED

1. The Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a)(1), provides that "any alien" may "apply" for asylum and receive an asylum hearing. In contrast to the Eleventh Circuit's ruling in this case, at least five other courts of appeals - the D.C., Second, Third, Fourth, and Fifth Circuits - have held that this statute creates a liberty or property interest in petitioning for asylum that cannot be deprived without due process. The first question presented is whether an alien has a liberty or property interest in petitioning for asylum that cannot be deprived without due process - namely, a hearing and an opportunity to be heard.

2. The Refugee Act of 1980 provides, with exceptions not applicable here, that "any alien" may "apply" for asylum and receive an asylum hearing. *See*8 U.S.C. § 1158(a)(1). Elian Gonzalez is an alien and has applied for asylum. The 1998 INS *Guidelinesfor Children's Asylum Claims* recognize the right of minor aliens to apply for asylum and receive asylum hearings. The second question presented is whether the INS's refusal to grant Elian Gonzalez an asylum hearing violates the plain meaning of 8 U.S.C. § 1158(a)(1).

3. The court of appeals accorded *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), deference to opinion letters and an informal memorandum of the INS. In *Christensen v. Harris County,* 120 S. Ct. 1655 (2000), this Court held that *Chevron* deference does not extend to informal agency action such as opinion letters. Contrary to the Eleventh Circuit, the D.C. Circuit recently suggested that *Christensen* may preclude courts from extending *Chevron* deference to opinion letters issued in an informal adjudication. The third question presented is whether *Chevron* deference applies to opinion letters issued in an informal adjudication.

***ii** 4. The fourth question presented is whether the court of appeals otherwise erred in upholding the INS's decision not to hold an asylum hearing for Elian Gonzalez. *See infra* n. 11.

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*III LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this Petition are as listed in the caption of the case, with the following parties as additional Respondents: Doris Meissner, Commissioner, United States Immigration and Naturalization Service;

Robert Wallis, District Director, United States Immigration and Naturalization Service;

United States Immigration and Naturalization Service;

United States Department of Justice.

Pursuant to Supreme Court Rule 29.6, Petitioner states that the Petitioner is not a nongovernmental corporation and therefore has nothing to disclose under Supreme Court Rule 29.6.

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***1** INTRODUCTION

This petition raises three primary legal issues that boil down to a single straightforward question: Can the INS deprive an alien child of his statutory and constitutional right to apply for asylum without conducting *any* hearing of *any* kind - or *even interviewing the child himself?* The INS contends that it is not required to conduct any hearing, or even interview an alien child seeking asylum, if the child's parent wants to return the child to his former country. The INS advances this position even though a hearing or interview, if conducted, necessarily could reveal evidence that the child faces a risk of persecution in returning to his former country.

The INS's procedural approach is dramatically inconsistent with the Due Process Clause of the Fifth Amendment (which requires a hearing before a ""person," including a child, is deprived of a liberty interest) and with the Refugee Act of 1980 (which expressly provides that "any alien," which on its face includes an alien child, may "apply" for asylum and receive an asylum hearing). *See*8 U.S.C. § 1158(a).

As the Lawyers' Committee for Human Rights explained in its amicus brief in the court of appeals, moreover, "[t]he implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus Brief of Lawyers' Committee for Human Rights, at 19. The Lawyers' Committee pointed out the example of a young Togolese girl who applied for asylum, but whose parents "demand[ed] that the Attorney General dismiss their daughter's asylum claim [so] that she be returned to Togo" - where "she would be forced" to endure severe physical abuse. *Id.* In such a case, as the Lawyers' Committee explained, the INS's position would not require an asylum hearing (or even an interview of the girl). [2]

2 The INS may try to discount such examples, but it cannot. Without a hearing or even an interview, the INS cannot plausibly claim that it will discover the facts that could demonstrate a well founded fear of persecution. That is precisely why a hearing is central to the notion of procedural due process. *See Marshall v. Jerrico, Inc.,* 446 U.S. 238 (1980).

***2** In this case, no one can say for sure what would happen at the asylum hearing - whether INS immigration officials would find that Elian Gonzalez has a risk of persecution if he returns to Cuba. The court of appeals frankly acknowledged that "*we expect that a reasonable adjudicator might find that [[Elian's] fears were 'wellfounded.*"' Pet. App. 30a-3 la n.26 (emphasis added). In any event, predictions and debate about the possible *substantive* outcome of the asylum hearing are speculative and misplaced, for the question here concerns the *process* that the INS must employ to make the asylum determination.

In an immigration case decided nearly a half-century ago, Justice Jackson posed the question at the heart of this case: "[D]oes it matter what the procedure is?" *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 224 (1953) (opinion of Jackson, J., joined by Frankfurter, J.). He responded to his own question that "[o]nly the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty." *Id*

This case is about "procedural fairness and regularity": the procedures to which alien children seeking asylum are entitled under the Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a), and under the Fifth Amendment to the United States Constitution. Our petition raises three primary questions.

First, the *constitutional* question raised by the petition is whether aliens seeking asylum have due process rights in ***3** connection with an asylum application. Relying on its 16-year-old precedent in *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984), the Eleventh Circuit held that aliens seeking admission to this country (including aliens seeking asylum) have *no due process rights whatsoever.* In the Eleventh Circuit's view, such aliens possess neither an *inherent* liberty interest under the Due Process Clause in seeking asylum, nor an interest created by the Refugee Act of 1980. The D.C., Second, Third, Fourth, and Fifth Circuits have reached the opposite conclusion, holding that the RefUgee Act of 1980 gives aliens seeking asylum an interest in petitioning for asylum that thereby triggers at least the basic due process rights. *See, e.g., Selgeka v. Carroll,* 184 F.3d 337, 342 (4th Cir. 1999) ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum v. Fano,* 427 U.S. 215 (1976)] envision.").

The circuit split on the due process issue is deep, it is recognized by scholars and commentators, and it is ripe for resolution by this Court. The issue is important to the rights of aliens (including the thousands of alien children in this country) and to the Government's administration of the asylum process. And resolution of the due process question is critical to the outcome of this case: If aliens seeking asylum have due process rights, then alien children seeking asylum are, of course, also entitled to due process in seeking asylum (which, at a minimum, would entail an interview and some kind of hearing for a child asylum applicant). *See, e.g., Parham v. JR,* 442 U.S. 584 (1979); *cf* INS *Guidelinesfor Children's Asylum Claims* 19 (Dec. 10, 1998) (discussing how to interview minor children who apply for asylum and may "lack ... maturity").

Second, apart from any requirements dictated by the Constitution, the Refugee Act of 1980 grants alien children who apply for asylum the right to an asylum hearing. The plain language of the statute requires an asylum hearing for "any alien" who has "applied" for asylum. The statutory language is clear and unambiguous. An alien child is plainly included in the ***4** broad term "any alien," and Elian Gonzalez has in fact applied for asylum under any plausible definition of the term. The INS's Guidelines themselves recognize, moreover, that even very young children may apply for asylum. The INS's contrary interpretation adopted in this case flouts the statutory text and is therefore not entitled to *Chevron* deference. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 446-47 (1987); *id.* at 453 (Scalia, J.) ("INS's interpretation is clearly inconsistent with the plain meaning" and thus entitled to no deference).

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While the plain language is controlling, it bears emphasis that the plain language is fully consistent with sound policy for resolution of asylum applications submitted by minors. Indeed, before this case, the INS's *Guidelines* and the INS's most closely analogous regulation provided that alien children applying for asylum should receive an asylum hearing. *See*8 C.F.R. § 236.3(f). In short, "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents. So, too ... do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

Third, the petition raises an important additional question regarding the scope of *Chevron* deference. The court of appeals erroneously extended *Chevron* deference to the INS's interpretation although it was set forth in an internal INS memorandum and three opinion letters. In *Christensen v. Harris County,* 120 S. Ct. 1655 (2000), this Court squarely held that *Chevron* deference does not apply to an agency interpretation of a statute that is "contained in an opinion letter," as opposed to an interpretation "arrived at after, for example, a *formal* adjudication or notice-and-comment rulemaking." *Id* at 1662 (emphasis added). The Court added - unequivocally - that "[i]nterpretations such as those in opinion letters, ... policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference." *Id.* The court of appeals ***5** in this case thus erroneously accorded *Chevron* deference to precisely the kinds of *informal* agency interpretations (opinion letters in an "informal adjudication," *see* Pet. App. 147a-48a) that, under *Christensen,* are not entitled to *Chevron* deference.

Even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* may prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke,* 211 F.3d 638, 643 n.2 (D.C. Cir. 2000). While the divergence is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring issue warrants review and clarification. That is particularly true in this case given that the court of appeals' *Chevron* error undeniably affected its resolution of this case. *See, e.g.,* Pet App. 13a-26a, 32a.

In an ordinary case, then, certiorari would be warranted based on (i) the importance of these legal issues, (ii) the deep circuit split on the due process issue, (iii) the court of appeals' clear error in failing to heed the plain language of the statute, (iv) the court's error applying *Christensen,* and (v) the confusion in the lower courts on the *Chevron*/*Christensen* issue.

This is no ordinary case, to be sure, and that raises the question whether this is an appropriate case for this Court to resolve those important and recurring legal issues. We think so. Indeed, even absent the important legal issues at the heart of this petition, there is plainly a national need that *this individual case* be decided *correctly* and *be decided by this Court.* The extraordinary importance of *this individual case* - to the United States (with its myriad congressional denunciations of Cuba's gross human rights abuses), to the Cuban-American community, to the American citizenry more broadly, and to the Gonzalez family - is too obvious to require extended discussion. That factor alone justifies this Court's review. Only this Court has ***6** the constitutional stature and moral authority to render the final word that will stand the test of time in this divisive, difficult, and nationally momentous matter.

The petition should be granted. The importance of this case - particularly when coupled with the significance of the underlying constitutional and statutory issues, the circuit splits and confusion, and the court of appeals' errors - demonstrates the compelling need for this Court's review.

In order to ensure expedition in this case, we respectfully request that the Court grant certiorari during the summer. If so, counsel for petitioner will work with counsel for respondents to devise and propose an expedited briefing and argument schedule that would result in oral argument, if possible, no later than October 2000.

OPINIONS BELOW

The district court's opinion is reported at 86 F. Supp.2d 1167 and is reprinted at Pet. App. 47a-108a.

The Eleventh Circuit's opinion granting an injunction pending appeal is unreported and is reprinted at Pet. App. 33a46a. The Eleventh Circuit's opinion on the merits, which is not yet reported, is reprinted at Pet. App. la-32a. The Eleventh Circuit's opinion denying the petition for rehearing is unreported and is reprinted at Pet. App. 146a-150a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1346, 1361, and 2201. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set forth in an addendum at the end of this brief.

*7 STATEMENT OF THE CASE

A. Background

Petitioner Elian Gonzalez was born in December 1993 to Elizabeth Brotons and Juan Miguel Gonzalez. In the predawn hours of November 22, 1999, when Elian was nearly six years old, his mother and twelve other Cuban nationals boarded a small motorboat and attempted to reach the United States. The next day, the boat capsized in windy conditions and rough seas. Eleven of the passengers died, including Elian's mother. Elian survived by clinging to an inner tube. Pet. App. 3a.

Two days later, two fisherman rescued Elian. Elian later was taken into INS custody and brought to a hospital in Miami to recuperate from his ordeal. Elian's great uncle, Lazaro Gonzalez, contacted the INS and visited the boy in the hospital. Upon Elian's release, the INS paroled Elian into his great uncle's care, and Elian went to live with his great uncle. Pet. App. 3a-4a.

Soon thereafter, Lazaro Gonzalez filed an asylum application on Elian's behalf, which was followed by a similar application signed by Elian himself Lazaro Gonzalez filed a third application after a Florida state court judge, in a now-dissolved order, granted Lazaro temporary custody of Elian. Each application stated that petitioner Elian Gonzalez "is afraid to return to Cuba" on account of a well-founded fear of persecution. For support, the applications stated that many members of Elian's family have been persecuted by the Castro regime by being imprisoned and harassed. The applications also stated that Elian, if returned to Cuba, would be used as a propaganda tool for the Castro government and would be involuntarily indoctrinated. Pet. App. 4a.

B. The INS's Administrative Process

Through Cuban officials, Juan Miguel Gonzalez eventually expressed his views that he wanted his son returned ***8** to him. In December 1999, INS officials conducted interviews of Juan Miguel Gonzalez and of Lazaro Gonzalez (with Lazaro's daughter Marisleysis). *The INS never interviewed Elian Gonzalez about the asylum applications, whether he had a fear of persecution, or whether there was a possible conflict of interest between him and his father.* Pet. App. 5a.

On January 5, 2000, the Executive Associate Commissioner of the INS for Field Operations sent virtually identical letters to Lazaro Gonzalez and his attorneys. *See* Pet. App. 132a-135a, 136a-139a. The letters stated that INS Commissioner Doris Meissner had concluded that the asylum applications filed by and on behalf of Elian Gonzalez were void and required no further consideration. The letters further stated that "we have determined that Mr. [[Juan Miguel] Gonzalez-

Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters." *Id* at 133a, 137a.

One week later, on January 12, 2000, Attorney General Janet Reno sent a letter to Lazaro Gonzalez's attorneys. *See* Pet. App. 140a-145a. The Attorney General stated that she was unaware of"any basis for reversing Commissioner Meissner's decision that Juan Gonzalez - Elian's father - has the sole authority to speak for his son on immigration matters." *Id.* at 141a.

After this litigation commenced, the INS produced a copy of a legal memorandum written by the General Counsel of the INS for Commissioner Meissner (and signed "approved" by the Commissioner). Pet. App. 109a-13*l*a. The memorandum states that "*a child's right to seek asylum independent of his parents is well established* .... While Section 208(a)(2) of the ***9** INA describes certain exceptions to this right, those exceptions are not applicable to this case. *There are no age-based restrictions on applying for asylum.* Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances *even a very young child* may be considered for a grant of asylum." *Id.* at 123a-124a (emphasis added).

Despite this analysis, the memorandum concluded that "[t]he INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under Elian's signature." Pet. App. 13 la.

C. Litigation in the District Court

On January 19, 2000, petitioner filed a complaint in the United States District Court for the Southern District of Florida for injunctive and mandamus relief to compel the INS to adjudicate his asylum application as required by the Refugee Act of 1980 and the INS's implementing regulations. The complaint contended that the INS's actions in the case had violated Elian's constitutional, statutory, and regulatory rights. Pet. App. 60a-61a.

On January 27, 2000, the INS moved to dismiss, and on March 21, 2000, the district court granted the INS's motion. Citing *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984), the district court concluded that petitioner had no due process rights in connection with the asylum process. Pet. App. 90a. The decision in *Jean* had held that, in connection with the asylum process, excludable aliens have no *inherent* due process rights, nor any procedural due process rights created as a result of the statutory entitlement to seek asylum provided by 8 U.S.C. § 1158(a)(1).

As to the statutory claim, the district court acknowledged that 8 U.S.C. § 1158(a)(1) states that "[a]ny alien ... may apply for asylum." Pet. App. 92a-93a. Although ***10** recognizing that Congress has carved out specific rules for children in other immigration statutes (but not here) and that Congress had created several other exceptions to the asylum application process (none covering applications by children), the court stated that the phrase "any alien" was ambiguous as to whether it covered alien children. *Id.* at 100a-105a. The district court concluded, therefore, that the INS was entitled to *Chevron* deference in refusing to process Elian Gonzalez's asylum application. *Id.* at 105a.

D. Litigation in the Eleventh Circuit

1. On April 19, 2000, the Eleventh Circuit issued an opinion granting an injunction pending appeal. The injunction prevented Elian Gonzalez from departing the United States and required the Government to take steps to prevent his departure while the appeal was pending. Pet. App. 46a.

In granting the injunction, the court of appeals stated that "Plaintiff has made a 'substantial case on the merits' of his appeal." Pet. App. 36a. The court stated:

The statute in this case seems pretty clear. Section 1158(a)(1) provides that ""[a]ny alien ... irrespective of such alien's status, may apply for asylum." Plaintiff appears to come within the meaning of"[a]ny alien." *See*8 U.S.C. § 1101(a)(3). And the statute plainly says that such an alien "may apply for asylum." We, therefore, question the proposition that, as a matter of law, Plaintiff(unless his father consents) cannot exercise the statutory right to apply for asylum.... Congress's provision for "any alien" is not uncertain in meaning just because it is broad.

Id. at 39a. The court of appeals noted that "the INS cannot properly infringe on the plain language of the statute or the clear congressional purpose underlying it." *Id.* at 40a. The court also pointed out that the "[t]he existing INS regulations do ***11** envision situations where a minor may act on his own behalf in immigration matters .... [and] under some circumstances, may seek asylum against the express wishes of his parents. Also, the INS *Guidelinesfor Children's Asylum Claims* ... envision that young children will be active and independent participants in the asylum adjudication process." *Id.* at 40a-41a (footnotes omitted).

As to Elian' s case, the court stated that "[n]ot only does it appear that Plaintiff might be entitled to apply personally for asylum, it appears that he did so.... Plaintiff - although a young child - has expressed a wish that he not be returned to Cuba. He personally signed an application for asylum. Plaintiffs cousin, Marisleysis Gonzalez, notified the INS that Plaintiff said he did not want to go back to Cuba. And it appears that never have INS officials attempted to interview Plaintiff about his own wishes." Pet. App. 43a-44a.

2. Although it granted the injunction, on June 1, 2000, addressing the appeal on the merits, the court of appeals affirmed the district court. Pet. App. la-32a. First, as to the due process claim, the court ruled that it was constrained by its *en banc* decision in *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984), to rule that Elian Gonzalez had no procedural due process rights in connection with his application for asylum, whether through an inherent liberty interest or a liberty interest created by the Refugee Act of 1980. Pet. App. 8a.

On the statutory question, the INS had contended in the court of appeals that a child cannot ordinarily "apply" for asylum over the objection of his parent, that Elian Gonzalez thus had not really "applied" for asylum, and that the asylum applications were void. The court of appeals stated that the statute provides that "any alien" may "apply" for asylum and that the INS is required to adjudicate any such application. Pet. App. 1*I*a-12a. But the court of appeals ultimately concluded that the statutory term "apply" was ambiguous and the court ***12** thus extended *Chevron* deference to the INS's interpretation of the statute. *Id* at 13a-26a. The court made clear, however, that the INS's interpretation was merely "within the outside border of reasonable choices." *Id.* at 32a; *see also id* at 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect").

3. On June 14, 2000, petitioner filed a petition for rehearing and rehearing *en banc.* On the *Chevron* issue, petitioner emphasized that the panel's decision was inconsistent with this Court's recent decision in *Christensen v. Harris County,* 120 S. Ct. 1655 (2000), handed down on May 1, 2000. Specifically, petitioner pointed out that the Court in *Christensen* held that *Chevron* deference does not extend to "opinion letters, ... policy statements, agency manuals, and enforcement guidelines," 120 S. Ct. at 1662, and that the INS's interpretations in this case were contained in opinion letters and an internal memorandum - precisely the kinds of *informal* agency actions that *Christensen* said do not warrant deference.

The court of appeals denied the petition for *en banc* review, and the panel issued an opinion. The court distinguished *Christensen* on the ground that the agency decisionmaking in this case was an "*informal* adjudication." Pet. App. 147a. The panel said it would not interpret *Christensen* to apply to opinion letters in informal agency adjudications. *Id.* at 149a.

***13 REASONS FOR GRANTING THE WRIT**

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION WHETHER ALIENS SEEKING ASYLUM HAVE PROCEDURAL DUE PROCESS RIGHTS, AND THE ELEVENTH CIRCUIT'S DECISION DENYING SUCH RIGHTS IS ERRONEOUS.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property without due process of law." U.S. Const. amend. v. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth] Amendment's protection of liberty and property." *Board of Regents v. Roth,* 408 U.S. 564, 569-70 (1972). If a person's liberty or property interest is at stake, the "Constitution's command of due process" ordinarily requires "prior notice and a hearing" before a deprivation of that interest. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993).

A person's liberty or property interests stem from one of two sources. *First,* federal statutes may create liberty or property interests that cannot be deprived without procedural due process. *See Vitek v. Jones,* 445 U.S. 480, 488-91 (1980); *Goldberg v. Kelly,* 397 U.S. 254, 261-62 (1970). *Second,* individuals have certain "core" liberty or property interests that cannot be deprived without procedural due process. *See Kentucky Dep't of Corrections v. Thompson,* 490 U. S. 454,460 (1989) (protected liberty interests "may arise from two sources - the Due Process Clause itself and the laws" of the federal government or States). [3]

[3] The Court has extended "the same procedural protections to statutorily created rights as to 'core rights. Tribe, *American Constitutional Law* 710 (2d ed. 1988).

***14** In this case, both sources apply. First, as most courts of appeals other than the Eleventh Circuit have held, the Refugee Act of 1980 gives aliens seeking asylum a liberty or property interest in applying for asylum that cannot be deprived without due process. Second, even apart from the statute, aliens seeking asylum possess a core liberty interest in seeking asylum that cannot be deprived without due process.

Resolution of the due process issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question. Elian Gonzalez never received a hearing (the central requirement of due process); indeed, the INS never even interviewed him in connection with his asylum application.

A. The Circuits Are Divided on the Question Whether the Refugee Act of 1980 Grants Aliens an Entitlement to Seek Asylum That Creates Procedural Due Process Rights.

The Refugee Act of 1980 established a uniform right for aliens to seek asylum:

> Any alien who is physically present in the United States or who arrives in the United States ..., *irrespective of such alien's status,* may apply for asylum in accordance with this section ....

8 U.S.C. § 1158(a)(1) (emphasis added). Except in certain statutorily specified circumstances not applicable here, an alien who applies for asylum must receive a hearing. *See*8 U.S.C. § 1158(a)(2). INS regulations extensively set forth the procedures governing asylum applications and, consistent with the statute, state that "[t]he Service shall adjudicate the claim of each asylum applicant whose application is complete." 8 C.F.R. § 208.9(a).

By its plain terms, the Refugee Act grants all aliens an entitlement to apply for asylum. This Court's precedents ***15** establish that this entitlement qualifies as a protected interest under the Due Process Clause. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 431 (1982) (statutory "right to use ... adjudicatory procedures" is a "property" right triggering appropriate procedural protections under Due Process Clause); *see also Meachum v. Fano,* 427 U.S. 215, 226 (1976);

Bishop v. Wood, 426 U.S. 341, 344 (1976); *Goss v. Lopez,* 419 U.S. 565, 572-73 (1975); *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970). As a result, the Government may not deprive an asylum applicant of his entitlement to seek asylum without providing certain procedural due process protections.

This Court has never directly addressed the question whether the Refugee Act of 1980 creates a liberty or property interest for purposes of the procedural protections of the Due Process Clause. Confusion reigns in the lower courts, however, and the courts of appeals are deeply divided on the issue. "The constitutional standards to be applied to exclusion cases, wherein the government has refused to admit into the country persons from other nations who have arrived at United States borders, are less than clear." 3 Rotunda and Nowak, *Treatise on Constitutional Law* 65 n.102 (1999) (citing cases on split); *see also* Jones, *The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees,* 21 Hastings Const. L.Q. 1071, 1093 (1994) ("a split has developed among lower courts as to the extent to which unadmitted foreigners have due process rights"); Miller, *Aliens' Right to Seek Asylum,* 22 Vand. L. J. Transnational Law 187,204 (1989) ("the circuits are split as to whether aliens have due process rights").

Since 1980, the D.C., Second, Third, Fourth, and Fifth Circuits (and arguably the Seventh) have properly concluded that the entitlement to seek asylum granted by the Refugee Act triggers corresponding procedural due process rights in connection with asylum-related proceedings. We will briefly chronicle the leading circuit decisions.

***16** In *Selgeka v. Carroll,* 184 F.3d 337, 342 (4th Cir. 1999), the Fourth Circuit held that the statutory right to seek asylum also created a constitutional right to due process in asylum-related proceedings. *See id.* ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum*] envision."). [4]

[4] The Fourth Circuit rejected any suggestion that an alien seeking asylum has an *inherent* constitutional liberty interest in connection with the asylum process, as opposed to a statutorily created interest that triggers procedural due process protections. *See*184 F.3d at 342 ("Aliens have no *independent* constitutional rights in an asylum procedure.) (emphasis added).

The Third Circuit similarly has held that the Refugee Act creates such a protected liberty interest. *Marincas v. Lewis,* 92 F.3d 195, 204 (3d Cir. 1996). [5] As a result, there are "minimum due process rights required by fairness to which all asylum applicants are entitled." *Id.* (citing *Hewitt v. Helms,* 459 U.S. 460, 472 (1983) and *Meachum,* 427 U.S. 215). The court added that "[p]recisely what minimum procedures are due under a statutory right depends on the circumstances of the particular situation." *Marincas,* 92 F.3d at 203. The court explained, in addition, that other "[c]ourts have recognized that aliens seeking asylum are entitled to some due process protection." *Id* at 203 n.8 (citing Second Circuit cases).

[5] The Third Circuit, too, stated that aliens have no *inherent* constitutionally protected liberty interest in seeking admission, but do have a *statutorily created* entitlement that triggers procedural due process.

The D.C. Circuit likewise has squarely concluded that an alien has "a Fifth Amendment procedural due process right to petition the government for political asylum." *Maldonado-Perez v. INS,* 865 F.2d 328, 332 (1989). That due process right requires - at a "minimum" - "some form of meaningful or fair hearing." *Id*

***17** The Second Circuit similarly has held: "In the absence of protected interests which originate in the Constitution itself, constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit." *Augustin v. Sava,* 735 F.2d 32, 36 (2d Cir. 1984); *see also Yiu Sing Chen v. Sava,* 708 F.2d 869, 877 (2d Cir. 1983) ("refugee who has a 'well-founded fear of persecution' in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned" may enjoy due process protection). [6]

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6 The question of entitlement is based on the language of the statute, which grants an asylum hearing to "any alien who is physically present in the United States. Such aliens are indisputably "persons for purposes of the Due Process Clause. "Aliens ... have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments. *Plyler v. Doe,* 457 U.S. 202, 210 (1982). There would be no basis, therefore, for trying to draw a line between excludable and deportable aliens in determining whether *the statute* creates an entitlement that triggers procedural due process. *See generally* Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens Constitutional Rights in Immigration Processes,* 98 Yale L.J. 639, 658 (1989). Even were such a line drawn, the majority of these cases concern excludable aliens (the category historically held to have fewer *inherent* constitutional rights), yet the courts granted due process rights.

The Fifth Circuit also has reached the same result: "Besides protected interests which originate in the Constitution itself, the Supreme Court has also recognized that constitutionally protected liberty or property interests may have their source in positive rules of law, enacted by the state or federal government and creating a substantive entitlement to a particular governmental benefit. In this case we conclude that Congress and the executive have created, at a minimum, *a constitutionally protected right to petition our government for* ***18** *political asylum.*" *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1036-38 (5th Cir. Unit B 1982) (emphasis added).

Finally, the Seventh Circuit has indicated that both a minor child applying for asylum and his parents have due process rights in connection with the minor's asylum hearing. *See Polovchak v. Meese,* 774 F.2d 731 (7th Cir. 1985). Although the case concerned the due process rights of parents to be informed of their child's asylum application, the decision was premised on and assumed the due process right of the child to seek asylum over his parent's objection and to receive procedural due process protections. *Accord DeSilva v. DiLeonardi,* 125 F.3d 1110, 1115 (7th Cir. 1997).

In contrast to those decisions, the Eleventh Circuit had previously held (and held again in this case) that the Refugee Act of 1980 does *not* create an entitlement to seek asylum that is thereby protected by the Due Process Clause. In its 8-4 *en banc* decision in *Jean v. Nelson,* the Eleventh Circuit held that the Refugee Act grants aliens no entitlement to seek asylum and that aliens therefore possess *no due process rights* in connection with asylum proceedings. Judge Kravitch dissented for four judges, stating that "the Refugee Act of 1980 does create at a minimum a *constitutionally protected right* to petition our government for political asylum" - an entitlement that carries with it certain procedural due process rights for aliens seeking asylum. 727 F.2d at 989 (quotation omitted) (emphasis added).

This circuit split is deep, it is ripe, it is recognized by scholars and commentators, and it is obviously of critical importance to aliens who seek asylum and to the Government's immigration policies. The Government takes the view that the Eleventh Circuit's decision in *Jean v. Nelson* is correct and that excludable aliens seeking asylum have no due process rights. It is our submission, by contrast, that the D.C., Second, Third, Fourth, Fifth, and Seventh Circuits have correctly concluded ***19** that the Refugee Act of 1980 creates an interest in seeking asylum that triggers procedural protections under the Due Process Clause. As the lopsided nature of the split would suggest, the Eleventh Circuit - the court that decided *this case* - has decided the issue erroneously. This Court should grant certiorari to resolve the split. As we will explain in Section I.C below, moreover, resolution of this issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question.

B. Even in the Absence of Any Statutorily Created Interest, Refugees in the United States Who Apply for Asylum Possess an *Inherent* Liberty Interest in Seeking Asylum That Is a Protected Interest Under the Due Process Clause.

In the 1950s, this Court ruled that aliens seeking admission to this country possess no *inherent* liberty interest in admission that would trigger procedural due process rights. *See Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953); *United States ex rel. Knauffv. Shaughnessy,* 338 U.S. 537 (1950); *see also Landon v. Plasencia,* 459 U.S. 21 (1982). That is a different question, of course, from whether there is a statutorily created liberty interest. For that reason, these decisions in no way affect or diminish our argument that the Refugee Act creates a liberty or property interest for purposes of procedural due process.

That said, and even assuming these 1950s-era decisions are correct (which is a dubious proposition [7]), the cases do not ***20** speak directly to the distinct question whether that *subset* of unadmitted aliens who are *seeking asylum* have an inherent liberty interest in seeking asylum that triggers procedural protections under the Due Process Clause. Contrary to the Eleventh Circuit's *other* holding in *Jean,* we submit that aliens seeking asylum do possess such an interest.

[7] These decisions have been described as "patently preposterous, Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts,* 66 Harv. L. Rev. 1362, 1392 96 (1953), and among "the most shocking decisions the Court has ever rendered, 2 Davis, *Administrative Law Treatise* 358 (1979). In his separate opinion in *Jean,* Justice Marshall stated that "excludable aliens do, in fact, enjoy Fifth Amendment protections and "the principle that unadmitted aliens have no constitutionally protected rights defies rationality. 472 U.S. at 873, 874. Indeed, any other conclusion, Justice Marshall pointed out, would mean that courts could not intervene even if the Government were to "invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. *Id.* at 874. We agree with Justice Marshall that those decisions are wrongly decided and, if necessary, should be overruled. That said, the Court need not come near reaching that question to resolve this case in our favor.

Because the existence of the statutorily created liberty interest means that the Court need not reach this alternative ground for finding a liberty interest, we touch upon it only briefly. "Aliens ... have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler,* 457 U.S. at 210. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972). The Court has long rejected the concept that "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege."D' *Id.* "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss."D' *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

***21** The scope of "liberty" encompassed by the Due Process Clause plainly must include the interest of a "person" in this country to *petition for asylum.* This Court has long held that aliens subject to *deportation* have due process rights. *See Landon v. Plasencia,* 459 U.S. at 32-33. There is no plausible distinction - for purposes of determining whether procedural due process *applies* - between an alien subject to *deportation* and an unadmitted alien *seeking asylum.* Indeed, the alien seeking asylum is seeking to avoid persecution, which on its face is a more weighty interest than merely avoiding deportation. What is more, Congress itself has eliminated the distinction between excludable and deportable aliens in both the Refugee Act, *see*8 U.S.C. § 1158(a)(1), and in the relevant 1996 amendments now codified at 8 U.S.C. § 1229 *et seq.*

In short, regardless of any *statutorily created* liberty interest, we submit that the right of a "person" within the territory of the United States to seek asylum because of a well founded fear of persecution by returning to his former country is an inherent liberty interest that triggers procedural due process protections.

C. The INS's Procedures in This Case Did Not Satisfy Due Process.

We acknowledge, of course, that this Court generally does not grant certiorari to resolve a circuit split if resolution of the legal issue could not affect the outcome of the case at hand. In this case, however, a ruling that aliens seeking asylum have a liberty interest under the Due Process Clause would alter the outcome of this case - and require the INS to hold a hearing before depriving Elian Gonzalez of his right to seek asylum.

The reason is straightforward: As the Court stated in *United States v. James Daniel Good Real Property,* "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." 510 U.S. 43, 53 (1993). This core ***22** principle of due process applies to children in matters that affect children's rights. *See Parham v. J.R.,* 442 U.S. 584 (1979).

The question here, then, is what process - what kind of hearing - is necessary to satisfy the due process rights of a child who has applied for asylum. Given the child's extraordinarily important interest in an accurate assessment, the proper rule is that a child who seeks to apply for asylum has a due process right to an asylum hearing (an asylum hearing where, to be sure, the parents are entitled to be heard as well). *Cf. Reno v. Flores,* 507 U.S. 292, 309 (1993) ("At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge."). [7]

[7] Even if a child is not *automatically* entitled to an asylum hearing when the child seeks asylum over the objection of a parent, the child clearly still possesses a due process right *to a fair hearing* to determine the parent's ability to represent the child's best interests in any asylum proceedings.

Holding an asylum hearing protects the alien's weighty interest in obtaining asylum, but does not unduly burden any parental interest. *See Mathews v. Eldridge,* 424 U.S. 319 (1976). After all, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason a parent would have for returning the child to such persecution. In other words, the asylum hearing will necessarily produce a result either way - that will be consistent with the best interests of the child and, presumably, the parent. [8] In short, by following the ***23** statute, the INS not only will comply with due process requirements, it will reach the best result for the child.

[8] If a parent somehow made a convincing case that a child facing persecution should nonetheless be returned to his former country, the Attorney General may have authority to consider the parent's view, subject to constitutional and statutory constraints. *See*8 U.S.C. §§ 1158(b), 1231(b)(3).

The suggestion that a minor's liberty interests evaporate when a parent seeks to exercise control over the minor has been rejected time and again by this Court. To take just one example, in *Parham v. J.R.,* the Court found that a child has a due process interest in avoiding institutional commitment notwithstanding the desires of the parent - and "that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder."D' 442 U.S. at 606. The Court added that the inquiry ""*must also include an interview with the child.*" *Id.* at 607 (emphasis added). [9]

[9] *See Planned Parenthood v. Danforth,* 428 U.S. 52 (1976) (child's exercise of constitutional right cannot be controlled or thwarted by her parent).

In this case, whatever the *minimum* elements of due process might be for alien children in asylum proceedings, the INS did not come anywhere close. It did not hold an asylum hearing. In fact, it did not hold *any hearing at all* to determine, for example, whether Elian's father represented Elian's best interests. Indeed, *the INS agents never even interviewed Elian Gonzalez* as part of the INS's supposed "assessment" of the matter. Nor did the INS ask Elian (or even Juan Miguel Gonzalez, for that matter) a single question about possible harm to Elian should he return to Cuba, or provide any opportunity for consideration of objective evidence on that subject. The INS's ad hoc and haphazard procedures fell woefully short of due process.

***24** The Court should grant certiorari to resolve the split on the due process issue and reverse the judgment of the court of appeals.

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II. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AN ASYLUM HEARING FOR "ANY ALIEN" WHO "APPLIES" FOR ASYLUM, AND ELIAN GONZALEZ IS AN ALIEN WHO HAS APPLIED FOR ASYLUM.

The Refugee Act of 1980 provides for an asylum hearing for "any alien" who has "applied" for asylum. The phrase "any alien" by its terms includes any child, and Elian Gonzalez has in fact "applied" for asylum by any plausible definition of that term. While a parent's views can and should be heard at a child's asylum hearing, the statute leaves no room for the INS simply to refuse outright to hold *a hearing.*

This Court has emphasized repeatedly that statutory analysis "begins with the language of the statute. And where the statute provides a clear answer, it ends there as well." *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.,* 2000 WL 742912, at *9, No. 99-579 (U.S. June 12, 2000); *see Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotation omitted).

Because the statutory text is plain, there is no basis for extending *Chevron* deference to the INS's contrary interpretation. *See California Dental Ass'n v. FTC,* 526 U.S. 756, 766 (1999) ("[w]e have no occasion to review the call for deference here, the interpretation urged in respondent's brief ***25** being clearly the better reading of the statute under ordinary principles of construction.").

The INS claims that the term "apply" is undefined and ambiguous. But an undefined term is interpreted in accord "with its ordinary or natural meaning." *FDIC v. Meyer,* 510 U.S. 471, 476 (1994); *see also INS v. Phinpathya,* 464 U.S. 183, 189 (1984) ("assume that the legislative purpose is expressed by the ordinary meaning of the words used") (internal quotation omitted). The term ""apply" is ordinarily defined to mean "[t]o request or seek assistance, employment, or admission." American Heritage Dictionary 89 (3d ed. 1996); *see also* Black's Law Dictionary 96 (7th ed. 1999) ("[t]o make a formal request or motion"). Under any remotely plausible definition of the term "apply," Elian Gonzalez has applied for asylum.

The INS's supposed statutory construction of the word "apply" is, in reality, a rather transparent plea for the courts to recognize or create an implicit exception to the statute in cases involving minors who apply for asylum (at least in cases where the parent objects). The INS seeks, in effect, to superimpose a parental consent requirement onto the statute. But the statutory text contains no such exception. The omission of such an exception is significant, particularly given that Section 1158(a)(2) of the statute - entitled "Exceptions" - sets forth three specific exceptions to the right to apply for asylum. *See* 8 U. S.C. § 11 58(a)(2). The fact that Congress specified various exceptions (and did so in 1996) to the right to apply for asylum, but did not provide any exception for applications by children, strongly buttresses the natural reading of the text. *See United States v. Johnson,* 120 S.Ct. 1114, 1118 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *see also* ***26** *Andrus v. GloverConstr. Co.,* 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent.").

Nor can the INS claim that this was some kind of congressional mistake or mere oversight. As the 1998 INS *Guidelinesfor Children's Asylum Claims* state, "[d] uring the last 10 years, the topic of child asylum seekers has received increasing attention from the international community." INS *Guidelines* at 1.

In addition, Congress specified special rules for children in different provisions of the statute. *See*8 U.S.C. § 1182(a)(9)(B)(iii). Again, the fact that Congress spoke specifically to children in one portion of the statute, but not in the

asylum provision, buttresses the textual interpretation that the term "any alien" includes alien children and that alien children thus may ""apply" for asylum. *See Bates v. United States,* 522 U.S. 23,29-30 (1997) ("[W] here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983)); *see also INS v. Cardoza-Fonseca,* 480 U. S 421,432 (1987) ("The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term 'refugee,' [in the 1980 amendments to the Immigration and Naturalization Act] certainly indicate that Congress intended the two standards to differ").

The INS's contrary argument, accepted by the court of appeals under *Chevron,* ultimately seems premised on the notion that it would somehow be "bad policy" or "absurd" to apply the plain language here. *See Cardoza-Fonseca,* 480 U.S. at 452 (Scalia, J., concurring). As to the INS's naked policy arguments, the plain language of the statute controls. *See* ***27** *Harris,* 2000 WL 742912, at *9 (U.S. June 12, 2000) (party and amici "submit that the policy consequences ... could be devastating .... We decline these suggestions to depart from the text of § 502(a)(3)."); *Central Bank of Denver v. First Interstate Bank,* 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act.").

Nor can the INS squeeze this case into the rare case where the effect of implementing the ordinary meaning of the text would cause a "patent absurdity." *Cardoza-Fonseca,* 480 U.S. at 452 (Scalia, J., concurring). In fact, the plain language of the text is entirely consistent with the INS *Guidelinesfor Children's Asylum Claims,* with the most closely analogous INS regulation, with international law principles, and with common sense.

As the court of appeals recognized, the INS *Guidelines for Children's Asylum Claims* "envision that young children will be active and independent participants in the asylum adjudication process." Pet. App. 41a. In addition, INS regulations actually "contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents." *Id.* [0] Not only do "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents, [but] [s]o, too ... do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

10 *See*8 C.F.R § 236.3(f), quoted in full in addendum.

In short, all relevant legal sources to which this Court might look to determine whether the plain language of the statute reflects sensible policy strongly confirm application of the plain language in this case. By contrast, the INS has not uncovered any support in the relevant body of legal materials ***28** for its decision to flat-out refuse an asylum hearing for a minor alien who has applied for asylum.

The final point in assessing whether the plain language constitutes sensible policy is perhaps the most decisive. Holding an asylum hearing as the statute dictates is plainly the best way to protect the child's rights and preserve the integrity of the Refugee Act, while not unduly burdening the parental or government interests at stake. As we stated above, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason for a parent to return the child to such persecution. To reiterate, the asylum hearing will necessarily produce a result - either way - that will be consistent with the best interests of the child and, presumably, the parent.

In short, the plain language and structure of the statute mandate an asylum hearing for Elian Gonzalez and demonstrate that the INS violated the statute. Because of the unique importance of this particular case, and the need that it be resolved both correctly and by this Court, this statutory issue warrants certiorari.

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III. CONTRARY TO THIS COURT'S RECENT DECISION IN *CHRISTENSEN,* THE COURT OF APPEALS ERRONEOUSLY EXTENDED *CHEVRON* DEFERENCE TO THE INS's OPINION LETTERS AND MEMORANDUM.

This Court's recent decision in *Christensen v. Harris County* established a simple and unambiguous prohibition on extending *Chevron* deference to "opinion letters, ... policy statements, agency manuals, and enforcement guidelines." 120 S. Ct. 1655, 1662 (2000). The Court observed that under *Chevron* "a court must give effect to an agency's regulation ***29** containing a reasonable interpretation of an ambiguous statute." *Id.* But the Court emphasized that it was "confront[ing] an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference." *Id.*

The court of appeals' decision in this case is in conflict with the decision in *Christensen.* The INS internal memorandum and letters are the kinds of agency statements that the *Christensen* Court held are not entitled to *Chevron* deference. And even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* would prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke,* 211 F.3d 638, 643 n.2 (D.C. Cir. 2000); *cf. Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envt'l Protection,* 208 F.3d 1, 4-6 (1st Cir. 2000) (refusing to grant *Chevron* deference to an opinion letter issued by the EPA to resolve a matter referred to that agency under the doctrine of primary jurisdiction). While this divergence of interpretation is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring and important issue warrants review and clarification, particularly given that it altered the result in this case.

The court of appeals made clear that, freed from *Chevron,* it likely would have interpreted the statute differently than did the INS. *See* Pet. App. 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect."); *id.* ***30** ("The final aspect of the INS policy also worries us some."); *id* at 32a ("The policy decision that the INS made was within the outside border of reasonable choices.").

11 In order to preserve them for review on the merits, we also raise several other issues. First, the INS's ultimate interpretation was the product of an insufficiently explained change in interpretation. The INS's multiple and shifting interpretations shifts that occurred without sufficient explanation preclude the courts from granting deference to the INS's final interpretation. *See, e.g.,Motor Vehicle Mfrs. Ass n of the U.S., Inc. v. State Farm Auto. Ins. Co.,* 463 U.S. 29, 57 (1983). Second, the INS's policy was adopted some 20 years after the statute was enacted, which also diminishes any deference owed to it. *See EEOC v. Arabian American Oil Co.,* 499 U.S. 244 (1991). Third, the INS's ultimate interpretation is equivalent to a litigating position, and it is black letter law that agency interpretations developed as litigating positions similarly warrant no deference under *Chevron. See* Pet. App. 40. Finally, the INS's application of its policy in this case particularly its failure to interview Elian Gonzalez and to allow presentation of objective evidence about his risk of persecution was arbitrary and capricious under the Administrative Procedure Act.

The court of appeals also stated that the level of deference it applied in this case "was strengthened" by the "foreign policy implications of the administrative decisions dealing with immigration." Pet. App. 147a. The court's reference to foreign policy implications in an asylum case was plain error. As the Second Circuit has rightly explained, "[C]ongress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum." *Doherty v. INS,* 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'don other grounds,*502 U.S. 314 (1992).

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CONCLUSION

For the foregoing reasons, the petition should be granted.

Appendix not available.

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No. 99-A1076

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

ELIAN GONZALEZ, A MINOR, BY AND THROUGH LAZARO GONZALEZ, AS NEXT FRIEND, OR ALTERNATIVELY, AS TEMPORARY LEGAL CUSTODIAN,

Petitioner,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

FILED
JUN 26 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Eleventh Circuit

EMERGENCY APPLICATION TO CIRCUIT JUSTICE KENNEDY TO STAY ISSUANCE OF THE ELEVENTH CIRCUIT'S MANDATE OR IN THE ALTERNATIVE FOR AN INJUNCTION PENDING *CERTIORARI*

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June 26, 2000

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this Petition are as listed in the caption of the case with the following parties as additional Respondents:

Doris Meissner, Commissioner, United States Immigration and Naturalization Service;

Robert Wallis, District Director, United States Immigration and Naturalization Service;

United States Immigration and Naturalization Service;

United States Department of Justice.

Pursuant to Supreme Court Rule 29.6, Petitioner states that the Petitioner is not a nongovernmental corporation and therefore has nothing to disclose under Supreme Court Rule 29.6.

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MISCELLANEOUS

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 17.18 (7th ed. 1993) 1, 5

To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

1. Petitioner respectfully submits this emergency application for stay or injunction to preserve this Court's jurisdiction to consider and act upon the petition for certiorari that petitioner has filed today. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 22, 23. Absent a stay or injunction, petitioner Elian Gonzalez (who has applied for asylum under 8 U.S.C. § 1158, but never had an asylum hearing) could be removed from the United States as early as **4:00 p.m. eastern time on Wednesday June 28, 2000** – thus mooting this case, depriving this Court of its jurisdiction, ending petitioner's ability to seek asylum in the United States, and causing the return of petitioner to Cuba.[1] Given the timing, it may be necessary for the Circuit Justice to enter a temporary administrative stay pending consideration of this application.

2. In order to expedite this case and minimize the duration of any stay or injunction, petitioner respectfully proposes that the Circuit Justice (i) grant the stay or injunction; (ii) order respondents to file and serve any opposition to the certiorari petition by Wednesday July 5, 2000, at 3 p.m.; and (iii) order that petitioner file any reply brief by Friday July 7, 2000, at 3 p.m. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 17.18, at 686 (7th ed. 1993) ("The opposing party's filing schedule [regarding certiorari] may also be shortened as part of such a conditional stay.").

Under this schedule, the Court then would be positioned to consider and act on the certiorari petition no later than the week of July 10, 2000. The length of the stay necessary to allow this Court

---

[1] We have filed this application directly with the Circuit Justice because the Eleventh Circuit stated that it would not entertain a motion to stay its mandate. *See* Pet. App. 150a. Petitioner thus has satisfied the exhaustion requirement in Sup. Ct. R. 23.3.

to consider the certiorari petition thus would be, at most, a few weeks – a minimal cost in a case with stakes of such magnitude.[2]

3. Petitioner's application is styled as a request for the Circuit Justice to issue an order staying issuance of the Eleventh Circuit mandate or, in the alternative, for an injunction. We believe that a stay by the Circuit Justice of issuance of the Eleventh Circuit's mandate will suffice to maintain the status quo. The Eleventh Circuit stated that its injunction keeping Elian Gonzalez in the country would expire *only when* that court's mandate issued. *See* Pet. App. 7a-8a n.5 ("Considering that we affirm the judgment of the district court, the injunction will dissolve (without a further order) when the Court's mandate is issued.").

Out of an abundance of caution, however, petitioner also requests that the Circuit Justice make clear in his order, if he grants this application, that an injunction as issued by the Eleventh Circuit remains in force until the earlier of two events occurs: (i) the Court's order on or after its decision on the merits (if the Court grants the petition for certiorari), or (ii) denial of the petition for certiorari.[3]

---

[2] While the Court would not ordinarily announce its decision regarding certiorari until September, the Court can decide to grant certiorari on a more expedited basis where, as here, circumstances warrant.

[3] The Eleventh Circuit's injunction stated:

> [I]t is ordered that:
>
> (1) Plaintiff, Elian Gonzalez, is ENJOINED from departing or attempting to depart from the United States;
>
> (2) Any and all persons acting for, on behalf of, or in concert with Plaintiff, Elian Gonzalez, are ENJOINED from aiding or assisting, or attempting to aid or assist, in the removal of Plaintiff from the United States;
>
> (3) All officers, agents, and employees of the United States, including but not limited to officers, agents, and employees of the United States Department of Justice, are ENJOINED to take such reasonable and lawful measures as necessary to prevent the removal of Plaintiff, Elian Gonzalez, from the United States.

Pet. App. 46a (footnote omitted).

4. *Standard for Stay.*

An applicant for a stay or injunction pending certiorari review under Supreme Court Rules 22 and 23 ordinarily must satisfy:

> a four-part showing . . . . First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction . . . . Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous . . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay . . . . And fourth, in a close case it may be appropriate to 'balance the equities'; – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). These standards are plainly satisfied in this case.

5. *Irreparable Harm to Plaintiff.*

There is no conceivable doubt that petitioner would suffer irreparable harm absent a stay or injunction: This Court would lose jurisdiction, petitioner would lose his right to seek asylum, and petitioner would be removed from the United States to Cuba. Those facts warrant a stay: "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (quoting *New York Natural Resources Defense Council, Inc. v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J. in chambers)); *see also Garrison v. Hudson*, 468 U.S. 1301 (1984) (Burger, C.J. in chambers) (granting stay where criminal retrial would effectively deprive Supreme Court of jurisdiction to review habeas petition).

The Eleventh Circuit, in granting an injunction pending appeal, rightly noted that petitioner would suffer irreparable harm if a stay is not granted, and the same analysis pertains here: "[I]f

[petitioner] leaves the United States during the pendency of his appeal, his case will likely become moot. [This] could strip the Court of jurisdiction over this case and deprive [petitioner] forever of something of great value: his day in a court of law. That circumstance alone presents a significant risk of irreparable harm to [petitioner]." Pet. App. 36a.

The precise harm to Elian Gonzalez in this case, of course, would include removal from the country and deprivation of his right to seek asylum. These forms of injury are plainly irreparable. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (removing an alien "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom"); *see also Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1332 (1980) (Powell, J. in chambers) (irreparable harm for alien children to be denied the mere right to a public school education); *Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995) (Calabresi, J.) ("Absent a stay, Michael would suffer irreparable injury through deportation, thereby mooting this case."); *Polovchak v. Meese*, 774 F.2d 731, 737 n.10 (7th Cir. 1985) (discussing "finality of decision [to return a child seeking asylum to his country of origin] and its grave and potentially irreversible consequences").

Moreover, because there has been no asylum hearing and because this case was disposed of on a motion to dismiss, the Circuit Justice must assume that Elian would face persecution upon his return. Indeed, the court of appeals frankly stated that "*we expect that a reasonable adjudicator might find that [Elian's] fears [of persecution] were well founded.*" Pet. App. 30 n.26 (emphasis added).

In short, it is indisputable that irreparable harm will ensue to petitioner from denial of this application.

6. *Petitioner's Showing as to Certiorari and the Merits.*

In the extreme circumstances where irreparable harm of this nature will result absent a stay, the showing that petitioner must make on the merits of his certiorari petition is correspondingly modest: "If serious injury is truly irreparable, as when a death sentence or the right of children to go to a public school is involved, that will be the controlling factor unless the supporting argument has already been rejected by the Court or is completely insubstantial." Stern, et al., *Supreme Court Practice*, § 17.19, at 690 (7th ed. 1993) (citing *Jaffree v. Board of Sch. Comm'rs.*, 459 U.S. 1314 (1983) (Powell, J. in chambers)).

The certiorari petition that petitioner has filed today convincingly demonstrates that petitioner's claims far exceed the not-completely-insubstantial standard. Indeed, even assuming petitioner must satisfy the ordinary standard required for a stay or injunction – namely, a "reasonable probability" that the Court will grant certiorari and a "fair prospect" that the Court will reverse the judgment of the court of appeals, *see Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers) – the certiorari petition that petitioner has filed today surpasses that standard. "The substantiality of the federal questions presented by the case cannot be doubted." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (granting stay).

The petition for certiorari presents three issues. These are discussed in full detail in the accompanying certiorari petition, and we simply provide an overview here.

(i) *First*, the Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a)(1), provides that "any alien" may "apply" for asylum and receive an asylum hearing. In contrast to the Eleventh Circuit, at least five other courts of appeals – the D.C., Second, Third, Fourth, and Fifth Circuits – have held that this statute creates a liberty or property interest in petitioning for asylum that cannot be deprived without due process. The first question presented in the certiorari petition is

whether an alien has a liberty or property interest in petitioning for asylum that cannot be deprived without due process – namely, a hearing and an opportunity to be heard.

The showing of a circuit split and that petitioner's position reflects the majority position in the courts of appeals virtually suffices *per se* to demonstrate the requisite possibility of certiorari and reversal. It bears mention, moreover, that the Court regularly grants certiorari in immigration cases raising important questions of constitutional law or statutory interpretation. This case presents questions that warrant this Court's review as much as – if not far more than – the immigration cases the Court has considered on the merits in the past decade. *See INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999); *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996); *Stone v. INS*, 514 U.S. 386 (1995); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43 (1993); *Reno v. Flores*, 507 U.S. 292 (1993); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Doherty*, 502 U.S. 314 (1992); *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991); *Ardestani v. INS*, 502 U.S. 129 (1991); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Commissioner, INS v. Jean*, 496 U.S. 154 (1990).

Resolution of the due process question would alter the outcome of this case, which makes this case a good vehicle for certiorari. Whatever the *minimum* elements of due process might be required for aliens in asylum proceedings, the INS did not come anywhere close. It did not hold an asylum hearing for Elian Gonzalez. In fact, it did not hold *any hearing at all* to determine, for example, whether Elian's father represented Elian's best interests. Indeed, *the INS agents never even interviewed Elian Gonzalez* as part of the INS's supposed "assessment" of the matter. Nor did the INS ask Elian (or Juan Miguel Gonzalez, for that matter) a single question about possible harm to

Elian should he return to Cuba, or provide any opportunity for consideration of objective evidence on that subject. The INS's ad hoc and haphazard procedures fell woefully short of due process.

There is the requisite possibility that the Court will grant certiorari and reverse the judgment of the court of appeals on this issue.

(ii) *Second*, the Refugee Act of 1980 provides, with exceptions not applicable here, that "any alien" may "apply" for asylum and receive an asylum hearing. *See* 8 U.S.C. § 1158(a)(1). Elian Gonzalez is an alien and has applied for asylum. The second question presented in the certiorari petition is whether the INS's refusal to grant Elian Gonzalez an asylum hearing violates 8 U.S.C. § 1158(a)(1).

On this issue, the INS's interpretation strains the plain language of the statute beyond recognition. The INS, in reality, is simply seeking to create out of whole cloth an implicit exception to the statute for asylum claims filed by minors. But the statute does not admit of such an exception. What is more, the plain language of the text is entirely consistent with the INS Guidelines for Children's Asylum Claims, with the most closely analogous INS regulation, with international law principles, and with common sense. All relevant legal sources to which this Court might look to determine whether the plain language of the statute reflects sensible policy strongly confirm application of the plain language in this case.

Moreover, holding an asylum hearing in accord with the plain language of the statute is the best way to protect the child's rights and preserve the integrity of the Refugee Act, while not unduly burdening the parental or government interests at stake. If the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason for

a parent to return the child to such persecution.[4] In other words, the asylum hearing will necessarily produce a result – either way – that will be consistent with the best interests of the child and, presumably, the parent.

In short, there is the requisite possibility that the Court will grant certiorari and reverse the judgment of the court of appeals on the statutory issue.

(iii) *Third*, the court of appeals accorded *Chevron* deference to opinion letters and informal memoranda of the INS. In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), this Court held that *Chevron* deference does not extend to informal agency action such as opinion letters. Contrary to the Eleventh Circuit, the D.C. Circuit recently suggested that *Christensen* precludes courts from extending *Chevron* deference to opinion letters issued in an informal adjudication. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 n.2 (D.C. Cir. 2000); *cf. Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envt'l Protection*, 208 F.3d 1, 4-6 (1st Cir. 2000). The third question presented in the certiorari petition is whether *Chevron* deference applies to informal opinion letters issued in an informal adjudication.

Given the importance and recurring nature of this issue and the fact that the court of appeals' error on this issue plainly altered its resolution of the case, as the court itself admitted, there is the requisite possibility that the Court would grant certiorari and reverse the court of appeals on the *Chevron/Christensen* issue question as well.

(iv) *Fourth*, as the petition for certiorari explains, in an ordinary case, certiorari would be warranted based simply on (i) the importance of these legal issues, (ii) the deep circuit split on the due process issue, (iii) the court of appeals' clear error in failing to heed the plain language of the

---

[4] The statute grants the Attorney General discretion in deciding asylum claims, although the Attorney General cannot remove an alien to a country where there is a clear probability that his life or freedom would be threatened. *See* 8 U.S.C. § 1158(b), 1231(b)(3).

statute, (iv) the court's error applying *Christensen*, and (v) the confusion in the lower courts on the *Chevron/Christensen* issue.

But the requisite possibility of certiorari is present, we submit, for an additional reason as well. There is plainly a national need that *this individual case* be decided *correctly* and *be decided by this Court*. The extraordinary importance of *this individual case* – to the United States (with its myriad congressional denunciations of Cuba's gross human rights abuses), to the Cuban-American community, to the American citizenry more broadly, and to the Gonzalez family – is too obvious to require extended discussion. Only *this Court* has the constitutional stature and moral authority to render the final word that will stand the test of time in this divisive, difficult, and nationally significant case.

For that reason as well, we submit that there is the requisite possibility that the Court will grant certiorari.

7. *Balance of Harms*. The possible harm to the Government from a brief stay is non-existent. As the Eleventh Circuit concluded in its April 19, 2000 injunction opinion, "The suggestion than an injunction pending appeal, prohibiting the removal of Plaintiff from the United States until Plaintiff's expedited appeal is decided on the merits, will harm the INS is not compelling." Pet. App. 37a. That analysis applies at this juncture as well, particularly given the expedited schedule we have proposed.

Nor would intervenor Juan Miguel Gonzalez suffer any undue burden from a brief delay that would alter the balance of harms. Juan Miguel is now living in this country with Elian. In all events, any burden on Juan Miguel does not outweigh the truly irreparable harms discussed above that would be visited on Elian Gonzalez were a stay or injunction not issued.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Circuit Justice (i) grant petitioner's application for stay or injunction; (ii) order respondents to file and serve any opposition to the certiorari petition by Wednesday July 5, 2000 at 3 p.m.; and (iii) order that petitioner file any reply brief by Friday July 7, 2000 at 3 p.m. Petitioner further respectfully requests that the Circuit Justice make clear in his order, if he grants this application, that the injunction issued by the Eleventh Circuit (barring Elian's removal from the country) remains in force until the earlier of two events occurs: (i) the Court's order on or after its decision on the merits, if the Court grants the petition for certiorari, or (ii) denial of the petition for certiorari.

Respectfully submitted,

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June 26, 2000

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND
LEWIS C. MERLETTI, DIRECTOR OF THE
UNITED STATES SECRET SERVICE,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under Fed. R. Evid. 501, this Court should create a new common-law "protective function privilege" that would authorize law enforcement officers of the United States Secret Service to refuse to testify before a federal grand jury.

PARTIES TO THE PROCEEDING

The parties are the United States, represented by Kenneth W. Starr, Independent Counsel; Robert E. Rubin, Secretary of the Treasury, in his official capacity; and Lewis C. Merletti, Director of the United States Secret Service, in his official capacity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-93

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum opinion and order of the district court (Pet. App. 15a-27a) are not yet reported. The orders of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc (Pet. App. 28a-34a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1998, and a petition for rehearing and suggestion for rehearing en banc was denied on July 16, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE AND STATUTES INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

28 U.S.C. § 535(b) provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . . .

18 U.S.C. § 3056(a) provides:

> Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons: (1) The President . . . .

STATEMENT

The United States, represented by the Office of Independent Counsel Kenneth W. Starr ("OIC"), filed a motion to compel officers of the Secret Service's Uniformed Division to testify before a federal grand jury sitting in the District of Columbia. That grand jury is investigating "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential

witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*." Pet. App. 97a. The district court granted the motion to compel, and the court of appeals affirmed.

1. Monica Lewinsky is a former White House intern and employee of the White House's Office of Legislative Affairs. In December 1997, Ms. Lewinsky was placed on a list of witnesses to be called by Paula Jones in the *Jones v. Clinton* litigation and was served with a subpoena requiring her to testify at a deposition in that case. On January 7, 1998, Ms. Lewinsky executed an affidavit representing under penalty of perjury that she had not had a sexual relationship with President Clinton.

This Office subsequently received allegations (i) that Ms. Lewinsky's affidavit was false because she had in fact had a sexual relationship with President Clinton; (ii) that a friend of the President had advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury in connection with that case. On January 15, 1998, the OIC presented evidence relating to these allegations to officials of the Department of Justice. The next day, the Attorney General petitioned the Special Division, on an expedited basis, to expand the OIC's jurisdiction. In response to the Attorney General's request, the Special Division conferred jurisdiction on the OIC to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . ." Pet. App. 97a. On January 17, 1998, President Clinton was deposed in connection with the *Jones* case, and was asked a number of specific questions about his relationship with Monica Lewinsky.

From the beginning of its inquiry into this matter, the OIC has received—and continues to receive—numerous and credible reports that Secret Service personnel have

evidence relevant to the investigation. Specifically, the OIC is in possession of information that Secret Service personnel may have observed evidence of possible crimes while stationed in and around the White House complex.

2. On January 27, 1998, representatives of the OIC met with representatives of the Secret Service to discuss the issue of testimony by Secret Service employees. The Secret Service asserted that some testimony by its personnel would be covered by a "protective function privilege."

On April 10, 1998, the United States, represented by the OIC, moved to compel Secret Service witnesses to testify regarding the matters as to which they had previously invoked the proposed "protective function privilege." In an opinion and order entered May 22, 1998, Chief Judge Norma Holloway Johnson granted the motions to compel. Pet. App. 15a-27a.

Chief Judge Johnson began her analysis by describing the nature of the privilege that the Secret Service had asserted. The court observed that "[n]one of the questions at issue relate to the protective techniques or procedures of the Secret Service." Pet. App. 15a.

Turning to the decisions of this Court that govern the creation of proposed new privileges, the district court held that Fed. R. Evid. 501 and this Court's precedents require courts to consider "1) whether the asserted privilege is historically rooted in federal law; 2) whether any states have recognized the privilege; and 3) public policy interests." Pet. App. 16a-17a (citations omitted). After describing the traditional reluctance of the federal courts to create new evidentiary privileges, Chief Judge Johnson briefly summarized this Court's recent decisions regarding the subject, noting that new privileges are far more frequently rejected than recognized.

The district court next considered the history of the proposed "protective function privilege" in federal law. Recognizing that no court has ever adopted the privilege,

and finding no constitutional, statutory, or common-law basis for it, the district court proceeded to analyze the two federal statutes relevant to the issue: 18 U.S.C. § 3056(a) and 28 U.S.C. § 535(b). Section 3056(a), the court observed, requires the President and Vice President to accept the protection of the Secret Service, but does not create an evidentiary privilege for its employees. Section 535(b), in turn, imposes an affirmative duty on Executive Branch personnel to report "any information" regarding criminal activity by government officers and employees to the appropriate supervisory authority (normally, the Attorney General). The district court's analysis of this latter statute in particular led it to conclude that "a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials." Pet. App. 19a.

Chief Judge Johnson noted that the Secret Service has never attempted to assert the "protective function privilege" on any of the various occasions in which its employees have testified in the past. Accordingly, "the Secret Service's own history, the lack of any constitutional or statutory support for the claimed privilege, and the federal case law regarding newly asserted privileges under Rule 501 all weigh against recognizing the privilege." Pet. App. 21a.

Turning to the history of the proposed privilege in state law, Chief Judge Johnson observed that "[n]o state has ever recognized a protective function privilege or its equivalent," and that this "absence of any state support for the privilege not only militates against recognizing [it], but also distinguishes it significantly from the patient-psychotherapist privilege recognized [by the Supreme Court] in *Jaffee*." Pet. App. 21a. The fact that no state has ever adopted a "protective function privilege" for its governor, the court reasoned, indicates that the "reason and experience" that Fed. R. Evid. 501 requires for the

creation of a new privilege are lacking. Pet. App. 21a-22a.

The district court also examined the public policy justifications for the "protective function privilege" advanced by the Secret Service, including its argument that if testimony were compelled from its employees, "current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive." Pet. App. 22a. The court acknowledged that "[t]he physical safety of the President of the United States is clearly of paramount national importance." *Id.*

After carefully weighing the Secret Service's policy and fact-based arguments, however, the district court rejected them. "While the concerns of the Secret Service are legitimate, the Court is not convinced that compelling Secret Service personnel to testify before a grand jury regarding evidence of a crime would place Presidents in peril." Pet. App. 22a-23a. The basis for this conclusion was the district court's refusal to credit "the suggestion that the possibility that agents could be compelled to testify before a grand jury will lead a President to 'push away' his protectors," and its concomitant finding that "[w]hen people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury." *Id.* at 23a. Moreover, the court reasoned, it is by no means clear that a President "would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts," because such actions "are extremely unlikely to become the subject of a grand jury investigation." *Id.* In short, "[t]he claim of the Secret Service that 'any Presidential action—no matter how intrinsically innocent—could later be deemed relevant to a criminal investigation' is simply not plausible." *Id.* (citation omitted).

Finally, the district court noted that previous published accounts of candid observations of Presidents have not

caused them to push their protectors away. Pet. App. 23a. Presidents have a "very strong interest" in protecting their own physical safety, the court found, and the Secret Service's educational process with regard to incoming Chief Executives will continue to instruct them of "the vital importance of close proximity" and the corresponding danger of any ill-advised "pushing away." *Id.* at 24a.

3. The court of appeals affirmed.[1] The court began "with the primary assumption that there is a general duty to give what testimony one is capable of giving." Pet. App. 5a (citations omitted). Thus, privileges " 'are not lightly created nor expansively construed.' " *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

The court emphasized that, under this Court's case law, a party seeking judicial recognition of a new evidentiary privilege under Rule 501 must demonstrate "that the proposed privilege will effectively advance a public good." Pet. App. 6a. "In other words, the Secret Service must demonstrate that recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the President to 'push away' his protectors in situations where there is some risk to his safety." *Id.* As to newly asserted privileges, "[e]ven in cases where the proposed privilege is designed in part to protect constitutional rights, the Supreme Court has demanded that the proponent come forward with a compelling empirical case for the necessity of the privilege." *Id.* at 6a-7a.

The court then turned to the policy arguments for and against the asserted "protective function privilege." Notwithstanding the Secret Service's predictive judgments about the behavior of the President, judges "must also assure [them]selves that those conclusions rest upon solid

[1] This Office, on behalf of the United States, filed a petition for a writ of certiorari before judgment. The Court denied that petition without prejudice on June 4, 1998. *United States v. Rubin*, 118 S. Ct. 2080 (1998).

facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." Pet. App. 7a (quotation omitted). Here, the court stated, the Secret Service's argument was based upon nothing more than speculation. *Id.* at 8a.

The court of appeals noted, moreover, that two of the three former Presidents who have publicly expressed their views (Presidents Ford and Carter) have concluded that there should be no such privilege in criminal proceedings. Pet. App. 8a. The court also concluded that the President would not be inclined to push away his protectors. He is under a statutory duty to accept such protection, *see* 18 U.S.C. § 3056(a), and "the President has a profound personal interest in being well protected." Pet. App. 8a.

The D.C. Circuit went on to observe that the Secret Service's argument was "weakened" by the form of the proposed privilege. Pet. App. 9a. "An agent may not testify about the conduct of the President or anyone else unless the agent recognizes that conduct as felonious when he is witnessing it; a felony made apparent to the agent only by subsequent events . . . must remain secret." *Id.* The court explained that the proposed exception for contemporaneously recognizable felonies undermines the policies that the Secret Service has asserted and thus "strikes a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.* The court continued:

> On the one hand, because the President cannot know whether an agent will realize he is witnessing the commission of a felony—which depends in part upon how much the agent knows about prior events—the President will have to discount substantially the value of the protective function privilege (and thus perhaps be tempted to distance himself from his protectors all the same). On the other hand, the exception would prohibit testimony (and thus thwart the search for truth) even in cases where the evidence, viewed in the light of subsequent events, would supply a key element in the proof of a serious crime.

Id.

The D.C. Circuit also found it significant that the Secret Service does not require agents to sign a confidentiality agreement, which means that the Secretary cannot ensure the confidentiality of information held by former agents. "If preventing testimony is as critical to the success of its mission as the Secret Service now claims, it seem anomalous that the Service has no better mechanism in place to discourage former agents from revealing confidences or at least to alert the Secretary when testimony is about to be given." Pet. App. 10a.

The efficacy of the proposed privilege, the court found, was also "undermined" in that it was not vested in the President, whose behavior the privilege is designed to affect. The court stated that "we know of no other privilege that works that way. If the person whose conduct is to be influenced knows that the privilege might be waived by someone else, the effect of the privilege in shaping his conduct is greatly diminished if not completely eliminated." Pet. App. 10a.

Furthermore, an incumbent President's ability to control the privilege "would end when the President leaves office." Pet. App. 10a. And thus the privilege cannot serve its asserted purpose because "disclosures by Secret Service agents after the President leaves office [may] be as feared as disclosures during his incumbency." *Id.* at 11a.

The court found yet another anomaly in that "the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings." Pet. App. 11a. In addition, the court recognized that Secret Service agents had testified in the past and "disclosed observations from their protective experiences

in books, apparently without causing Presidents to distance themselves from their protectors." *Id.*

The court also pointed to Section 535(b) of title 28, which requires that any "information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported" to the appropriate federal law enforcement official. The court found that, at a minimum, Section 535(b) "evinces a strong congressional policy that executive branch employees must report information 'relating to violations of title 18 involving Government officers and employees.' That policy weighs against judicial recognition of the privilege proposed here." Pet. App. 13a.

4. The court of appeals denied a petition for rehearing and a suggestion for rehearing en banc. Pet. App. 29a. The court explained that "no judge on the court has even requested a vote on the Justice Department's suggestion for rehearing *en banc*." Pet. App. 36a.

The court also denied the Secret Service's application for a stay pending the filing of a petition for a writ of certiorari. The court stated that the Secret Service "has not made a sufficient showing that irreparable harm will result unless a stay and an order are issued, and it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges." Pet. App. 35a-36a. The harm asserted is "future harm, depending on a prediction about what the President will do in the absence of the privilege." *Id.* at 36a. But the Court recognized: "If harm of the sort the Department envisions is now occurring, it therefore must be because the President does not believe the Supreme Court will sustain the privilege. Neither a stay nor an order under the All Writs Act can alter or prevent that alleged harm. Testimony today by Secret Service agents regarding past events cannot change our ruling. And such testimony cannot affect how the Supreme Court will rule." *Id.*

ARGUMENT

The novel privilege asserted by the Secret Service has been thoroughly analyzed by the district court and by the court of appeals. All four judges to consider the privilege claim have flatly rejected it. Indeed, despite the Secret Service's forcefully worded suggestion for rehearing en banc, not a single judge on the D.C. Circuit even called for a vote. This deafening silence refutes petitioners' speculation that the panel's ruling would result in a serious risk of harm. Pet. App. 36a.

There is a good explanation for the unanimity of the federal judges who have examined the question. As a matter of law, history, and policy, the Secret Service's claim is meritless. No case, statute, regulation, rule, or agency opinion—*ever*—has concluded that there is (or even should be) a protective function privilege. And this Court has consistently refused to recognize privileges unrooted in historical or contemporary practice. That is particularly true where, as here, a federal statute affirmatively requires the disclosure of information that falls within the asserted common-law privilege. *See* 28 U.S.C. § 535(b).

What is more, the relevant policy considerations point decisively against this previously unheard-of privilege. Secret Service officers and agents are law enforcement officers sworn to enforce and uphold the law. They work for the people of the United States, who have a bedrock interest in detecting and prosecuting federal crimes, particularly crimes committed by high government officials. The speculation that Presidents might "push away" Secret Service officers and agents absent a privilege in criminal proceedings assumes that Presidents will both violate their legal obligation to accept protection and risk their own lives unnecessarily. It also rests on the discredited notion that Presidents can prevent other government officials from testifying about the President's acts and communications. *Cf. Nixon*, 418 U.S. at 683.

For those reasons, the petition should be denied.

I

At the outset, we emphasize the compelling national interest in prompt completion of this grand jury investigation. All parties agree: This criminal investigation should be concluded sooner rather than later. At this time, moreover, there is a particularized need for expedition.

The need for expedition is of greatest importance with respect to the Secret Service's stay application. As the court of appeals specifically explained, two separate reasons demonstrate why there is no basis for a stay (even if the Court determines that the legal question presented in the petition for a writ of certiorari warrants review).

First, there is no possibility of any harm, much less irreparable harm, if a stay is denied. If the point of this litigation is what the Secret Service says it is—to obtain a definitive determination that there is a "protective function privilege"—then denial of a stay causes no harm at all. Whether this Court denies or grants certiorari, the Secret Service soon will have a definitive ruling. And we have no intention of taking any action that would cause this litigation to become moot. We have not issued (and pending completion of the appellate process, will not issue) subpoenas to all of the individuals whose testimony is at stake in the motion to compel. Thus, denial of the stay will in no way cabin the ability of this Court to review the decision of the court of appeals.

Moreover, at least until this Court issues a final ruling, we will not question any officers and agents about on-duty "protective-function" observations that occur on or after this date. As a result, there could not be *any* conceivable current Presidential pushing away caused by denial of the stay—even if the petition for certiorari is granted.

Second and independently, we respectfully suggest that there is no significant possibility of reversal of the D.C.

Circuit's decision. *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). As the D.C. Circuit stated, "the Justice Department's likelihood of success before the Supreme Court is insufficient to warrant further delay in the grand jury's investigation" and "it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges." Pet. App. 36a. The lack of merit is important, for "there is no good reason for allowing a stay of the judgment below if it is certain to be affirmed, even if the case is worthy of Supreme Court review because of . . . the public importance of the question presented." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 693 (1993) (emphasis added). Therefore, even if the Court determines that this issue is of sufficient public importance that it must grant plenary review, there nonetheless is no reasonable prospect of reversal and thus no basis for a stay.

For both of those two alternative and independent reasons, the Court should deny the Secret Service's application for a stay—regardless whether it grants the petition for a writ of certiorari.

II

The petition should be denied because of the need for expeditious completion of this investigation and because the privilege asserted in this case lacks any merit. Three separate sources of law contravene the privilege claim: this Court's traditional considerations under Federal Rule of Evidence 501, the statutory disclosure obligations imposed by Section 535(b) of title 28, and an assortment of compelling public policy considerations. Moreover, as the court of appeals emphasized, the Secret Service's privilege claim on its own terms is internally inconsistent and logically incoherent. For those reasons, further review is unwarranted.

As the Secret Service notes, we previously sought certiorari before judgment. We did so in order to expedite

this investigtaion and because we firmly believed that the Secret Service would not back down from seeking this Court's review even in the face of a decisive defeat in the court of appeals. Our fears were well-founded, for the Secret Service has persisted in championing a privilege claim that has been roundly rejected in the court of appeals. The Solicitor General, on behalf of the Secret Service, nonetheless implies that we are somehow estopped from opposing this petition because of our earlier petition for certiorari before judgment. Pet. 12. He is wrong. A denial of certiorari from this Court, coupled with *no* prospect of any further lower court litigation, *will* constitute the "final ruling" with "moral authority and public credibility" that will end this meritless privilege litigation. *Cf.* Pet. 13. And all we have ever sought (unlike the Solicitor General, who did not support certiorari before judgment for reasons that remain unclear) is the quickest possible *final* ruling. At this point, that means a denial of the petition.

1. Under Rule 501, privileges are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Under this common-law standard, "courts have historically been cautious about privileges," *Nixon,* 418 U.S. at 710 n.18, because they obstruct the search for truth and "contravene the fundamental principle that the public has a right to every [person's] evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (quotation omitted). A privilege applies only where it is "necessary to achieve its purpose," *Fisher v. United States*, 425 U.S. 391, 403 (1976), and "promotes sufficiently important interests to outweigh the need for probative evidence," *Jaffee v. Redmond,* 518 U.S. 1, 9-10 (1996) (quotation omitted).

This Court has emphasized the important distinction under Rule 501 between determining the scope of an existing privilege, and creating an altogether new one. *See Swidler & Berlin v. United States,* No. 97-1192, 1998 WL 333019, at *7 (June 25, 1998). This Court's privilege decisions establish that the federal courts should not recognize a new privilege under Rule 501 unless it is (i) supported by important public policy considerations and (ii) either historically rooted in law or accepted by a vast majority of States. Thus, the Court has embraced only one new evidentiary privilege since the adoption of Rule 501, and has rejected numerous others. *See Jaffee*, 518 U.S. 1 (recognizing psychotherapist-patient privilege);[2] *University of Pennsylvania*, 493 U.S. 182 (rejecting privilege for academic peer review materials); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (rejecting accountant work-product privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege for "legislative acts" by state legislator); *Herbert v. Lando*, 441 U.S. 153 (1979) (rejecting "editorial process privilege").

The "protective function privilege" does not meet these requirements for a new federal privilege. It has never been recognized, cited, or even discussed by any legal authority. Indeed, as far as we are aware, nothing resembling the "protective function privilege" has ever been recognized in any body of law. It also is conspicuously absent from the list of privileges proposed to Congress in 1974, and upon which this Court relied in *Jaffee,* 518 U.S. at 13-14, and *Gillock,* 445 U.S. at 367-68.

In addition, the law enforcement officers who protect state governors and other officials have been called upon to testify about their protectees. *See, e.g., Mecham Aide Testifies at Impeachment Trial,* N.Y. Times, Mar. 3, 1988, at A19. The law enforcement responsibilities of those state law-enforcement bodies that are analogous to

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[2] In recognizing a new federal psychotherapist privilege, the Court in *Jaffee* relied on the fact that "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege," reasoning that the "consensus among the States" counseled in favor of Rule 501 recognition. *Jaffee*, 518 U.S. at 12. Moreover, the privilege had been one of the nine privileges contained in the proposed Federal Rules.

the Secret Service thus provide no support to the Secret Service's claim.

In this case, as in *University of Pennsylvania* and many others, the asserted "protective function privilege" is thus unavailing because it has no "historical or statutory basis." 493 U.S. at 195. The Secret Service should turn to Congress with its policy arguments, for this Court has oft stated "[t]he balancing of conflicting interests" when the privilege lacks historical or state law support "is particularly a legislative function." *Id.* at 189.

2. Even apart from its failure to satisfy traditional Rule 501 requirements, the Secret Service's privilege claim fails for a separate reason. Section 535(b) of title 28 requires that "[a]ny information" that government officers such as Secret Service personnel possess "relating to violations of title 18 involving Government officers and employees shall be expeditiously reported" to the proper federal law enforcement official (in this case the Independent Counsel).[3] The official undertaking such an investigation is to have "*complete cooperation* from the department or agency concerned." H.R. Rep. No. 83-2622 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3552.

The import of Section 535(b) is clear: The chief federal law-enforcement officer (here, within his limited jurisdiction, the Independent Counsel, *see* 28 U.S.C. § 594(a)) is to receive complete cooperation and free access to all units of the Executive Branch, unless some overriding constitutional privilege applies. A statute such as Section 535 that sets forth a right of access or disclosure precludes judicial recognition of a contrary *common-law*

[3] Section 535(b) requires that the information in question be reported to the Attorney General unless "the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law." 28 U.S.C. § 535(b)(1). Here, the responsibility to perform this investigation has been assigned to the Independent Counsel under 28 U.S.C. § 594(a) and the Special Division's order of January 16, 1998.

privilege. In *University of Pennsylvania*, for example, Title VII authorized government access to information relevant to a discrimination charge. The Court rejected a peer-review privilege claim, stating that the Title VII provisions "[o]n their face . . . do not carve out any special privilege relating to peer review materials." 493 U.S. at 191.

Similarly, in *Arthur Young*, Section 7602 of title 26 granted the IRS a right of access to an accountant's papers. The Court rejected an accountant's work-product claim, stating that "the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry. . . . If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, not this Court, to make." 465 U.S. at 816-17.

Arthur Young and *University of Pennsylvania*, when combined with Section 535's text and history, flatly refute the Secret Service's *common-law* privilege claims.

Even if Section 535(b) were not dispositive, it at least "evinces a strong congressional policy that executive branch employees must report information 'relating to violations of title 18 involving Government officers and employees.'" Pet. App. 13a. As the court of appeals explained, "[t]hat policy weighs against judicial recognition of the privilege proposed here." *Id.* Similarly, the district court found that "a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials." Pet. App. 19a.

Moreover, Section 3056(a) of title 18 authorizes the Secret Service to protect the President and requires the President to accept its protection. As the district court observed, Congress mandated protection of the President but has not created a "protective function privilege," further supporting the conclusion that Section 535(b) should be interpreted according to its terms. Pet. App. 18a.

3. Turning to policy, the Secret Service's principal argument for recognition of its privilege is that testimony by its personnel would inevitably cause a President to push away his security detail. That speculative prediction has found no adherents in the federal judiciary. Even apart from the decisive flaws in the Secret Service's argument (the lack of historical or contemporary support for the privilege and the obligation imposed by Section 535), an impressive list of compelling policy and logical reasons convincingly demonstrates that the Secret Service's speculative argument lacks merit.

First, as the court of appeals stated, Section 3056(a) *requires* that the President accept the proximity-based protection that the Secret Service is obliged to give him. Pet. App. 8a. A common-law privilege should not be created out of whole cloth on the assumption that the President otherwise would flout a statutory obligation.

Second, a President has a strong personal interest in his own life. As Chief Judge Johnson explained, therefore, it is hard to understand why a law-abiding President would push away his protectors in situations where there is a plausible fear of attack simply because of the lack of a protective function privilege. Pet. App. 24a.

Third, as the court of appeals explained, the President has ample privacy within the White House compound—the place where he is most likely to commit crimes or acts relevant to a criminal investigation or prosecution. Pet. App. 11a. And historically, the dangers to the President have increased when he is in crowd situations outside the White House. So the lack of the "protective function privilege" would not meaningfully deter the President who wished to take care to commit criminal or wrongful acts in the White House.[4]

[4] The Secret Service's coded suggestion that Congress has mandated "unremitting intrusion into the most intimate aspects" of the President's life is wrong. Pet. 4.

Fourth, the lack of a "protective function privilege" should have no effect on the President who "act[s] within the law," for such persons "do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury." Pet. App. 23a. Indeed, the district court found the contrary argument "simply not plausible." *Id.*

Fifth, numerous officers and agents have recounted what are now claimed to be "privileged" observations in widely published books. Pet. App. 11a, 23a. Yet we are not aware of, and the Secret Service has not offered, any indication that any of these published accounts has caused a President to distance himself from his protectors.

Sixth, the Secret Service does not require Secret Service personnel to sign confidentiality agreements as a condition of employment. *See* Pet. App. 9a-10a. Thus, a retired officer has no legal restriction preventing him from disclosing information, even if there were a protective function privilege. The lack of such an agreement simply exposes the contrived, tailored-for-the-occasion nature of the privilege claim that is preventing disclosure of highly relevant Secret Service testimony in this criminal investigation.

Seventh, the President controls the privilege only while he is in Office. Termination of control over the privilege after the President leaves office—but while the President is alive and subject to criminal liability—shows that the privilege cannot meet its stated goals even if it were recognized. *Cf. Swidler & Berlin,* 1998 WL 333019, at *5 ("Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."). This fact "weakens the claim that the privilege in the form proposed by the Secret Service will do anything to diminish the President's incentive to keep his protectors at a distance." Pet. App. 10a-11a.

Eighth, two former Presidents (Ford and Carter) have stated that there should be no protective function privi-

lege in criminal proceedings. *See* Pet. App. 8a. These statements by former Presidents sharply undercut the Secret Service's argument that Presidents would push away without this asserted privilege. (Former Attorneys General Bell, Meese, Thornburgh, and Barr also filed an amicus brief in the court of appeals emphatically opposing the asserted privilege.)

Ninth, under the Secret Service's theory, observations of the President become more sacrosanct than the constitutionally protected Presidential communications and deliberations that fall within the executive privilege. Given that the presidential communications privilege was found by this Court to be "fundamental to the operation of Government," yet overridden by the need for relevant evidence in criminal proceedings, the Secret Service's proposed privilege would create an irrational asymmetry in the law. *Cf. Nixon*, 418 U.S. at 707-13.

Tenth, under the Secret Service's theory, testimony about a President who has committed a contemporaneously recognizable felony would *not* be privileged whereas testimony about observations that constitute mere *evidence* of a felony would be. But if testimony about contemporaneously recognizable felonies will not cause "pushing away," how can testimony about evidence of felonies not recognized as such (or of misdemeanors) cause pushing away? Pet. App. 9a. In the end, there is not much to say about this gerrymandered privilege except that it strikes what the court of appeals charitably called "a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.*

In sum, as to policy, the proposed privilege would have the effect of forcing sworn law enforcement officers to remain silent while in possession of evidence that could affect serious federal criminal proceedings. And it would construct a rule premised on the assumption that a President of the United States, bound by his constitutional

oath, has a legitimate interest in engaging in criminal activity without fear of disclosure by his Secret Service personnel. Thus, even apart from the dispositive legal flaws in the Secret Service's privilege, it also lacks a coherent policy rationale.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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1998 WL 271193 (U.S.) (Appellate Brief)
United States Supreme Court Respondent's Brief.

SWIDLER & BERLIN, et al., Petitioners,
v.
UNITED STATES of America.

No. 97–1192.
October Term, 1997.
May 20, 1998.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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***i** QUESTIONS PRESENTED

1. Whether the attorney-client privilege in federal criminal proceedings applies to the same extent when the client is deceased as it does when the client is alive.

2. Whether the work product doctrine applies in federal criminal proceedings when the client for whom the work was performed is deceased and the work product consists of notes of an interview with the deceased client.

West Headnotes (2)

Privileged Communications and Confidentiality Death of client or attorney

Does attorney-client privilege in federal criminal proceedings apply to same extent when client is deceased as it does when client is alive? Fed.Rules Evid.Rule 501, 28 U.S.C.A.

Cases that cite this headnote

Criminal Law Work product

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Does work product doctrine apply in federal criminal proceedings when client for whom work was performed is deceased and work product consists of notes of interview with deceased client?

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***1 OPINIONS BELOW**

The opinion of the court of appeals (Pet.App.1a 26a) is reported at 124 F.3d 230. The order of the court of appeals denying the suggestion for rehearing in banc (Pet.App.27a 32a) is reported at 129 F.3d 637. The opinions of the district court (Pet.App.33a 53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1997. The court of appeals denied a petition for rehearing and suggestion for rehearing in bane on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Grand Jury Clause of the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...."

***2** Rule 501 of the Federal Rules of Evidence provides in relevant part: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT

Federal grand jury subpoenas were issued to petitioners for notes of a July 11, 1993, conversation between petitioner James Hamilton and his client, Vincent W. Foster, Jr., who is now deceased. Without elaboration, the district court concluded that the attorney-client privilege and work product doctrine protected the notes. The court of appeals reversed. Because the client was deceased, the court held that the attorney-client privilege did not bar production. The court also concluded that, under the facts of this case, the work product protection did not apply.

1.a. Vincent W. Foster, Jr., assumed office as Deputy White House Counsel on January 20, 1993. Before that date, Mr. Foster had been an attorney at the Rose Law Firm in Little Rock, Arkansas. At the Rose firm, he was ***3** a partner and friend of Hillary Rodham Clinton, Webster L. Hubbell, and William H. Kennedy.

On May 19, 1993, David Watkins, Assistant to the President for Management and Administration, discharged seven career employees of the White House Travel Office. White House spokesperson Dee Dee Myers announced that the FBI was conducting a criminal inquiry into the activities of the fired employees.

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1 The basic facts of the Travel Office matter are described in a variety of agency and congressional reports. See H.R. Rep. No. 104 849 (Sept. 26, 1996); GAO, *White House Travel Office Operations* (May 2, 1994); White House, *White House Travel Office Management Review* (July 2, 1993).

The dismissal of the Travel Office employees produced an immediate controversy about why the employees had been fired and why the White House had involved the FBI in the matter. Thereafter, the White House offered five of the employees reinstatement to government employment. The White House further responded by conducting an internal investigation into the firings. On July 2, 1993, the White House issued a public report of that investigation. Chief of Staff Thomas F. McLarty reprimanded four White House officers and employees (including David Watkins and Associate Counsel William Kennedy) for their actions in connection with the firings. Although Mr. Foster was not reprimanded, the White House report recounted his apparent role in the events leading to the firings.

Controversy over the Travel Office firings did not abate with the White House's report and the publicly announced reprimands. On July 2, 1993, the President signed the Supplemental Appropriations Act of 1993, Pub. L. No. 103 50, which required the General Accounting Office to conduct a review of the firings. At the same time, calls were issued for further congressional or federal law enforcement investigation into the matter.

b. On Sunday, July 11, 1993, Mr. Foster met with petitioner James Hamilton, an attorney at Swidler & Berlin ***4** (also a petitioner). Mr. Hamilton had provided legal assistance to the 1992 Clinton Campaign, had served as one of four Counsel to the Clinton Gore Transition, and had assisted Mr. Foster in the process of selecting nominees. The July 11 conversation between Mr. Foster and Mr. Hamilton related to Mr. Hamilton's legal representation of Mr. Foster and the White House concerning possible congressional or other investigations. J.A. 5. Mr. Hamilton took notes during the meeting. *Ibid.* Those notes are the subject of the grand jury subpoenas at issue here.

On July 20, 1993, nine days after the Foster Hamilton meeting, police and medical personnel were called to Fort Marcy Park, Virginia. They found Mr. Foster dead with a gun in his hand and a gunshot wound to the head. The United States Park Police conducted an investigation of the death and concluded three weeks later that Mr. Foster had committed suicide by gunshot in Fort Marcy Park (a conclusion confirmed by subsequent investigations).

The events surrounding the Travel Office firings were investigated by the GAO, the Office of Professional Responsibility of the Department of Justice, and the Committee on Government Reform and Oversight of the United States House of Representatives. All three entities produced extensive reports on the matter.

c. On January 3, 1996, after the conclusion of several investigations into the Travel Office firings (and while an investigation by the House of Representatives was ongoing), the White House reported that it had uncovered a memorandum written by David Watkins in the fall of 1993. The White House indicated that a White House attorney discovered the memorandum while searching the stored files of an aide who had worked for Mr. Watkins.

Mr. Watkins' 1993 memorandum suggested that Mrs. Clinton may have played a role in the events leading to the Travel Office firings. It stated: "[T]he First Lady took interest in having the Travel Office situation resolved quickly.... Foster regularly informed me that the First ***5** Lady was concerned and desired action the action desired was the firing of the Travel Office." H.R. Rep. No. 104 849, at 41. The memorandum thus raised questions whether prior testimony of Mr. Watkins (and others) about Mrs. Clinton's role in the Travel Office matter had been truthful.

In March 1996, based in large part on the Watkins memorandum, Attorney General Reno requested the Special Division of the United States Court of Appeals for the District of Columbia Circuit to expand the jurisdiction of the Office of Independent Counsel (OIC) to investigate whether Mr. Watkins or other individuals made false statements, committed perjury, obstructed justice, or committed other crimes during investigations of the Travel Office matter. See

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28 U.S.C. 593(c). The Special Division thereafter granted the OIC jurisdiction to conduct that investigation and all related matters. See 28 U.S.C. 593(b)(3). [2]

2 By way of background: On August 5, 1994, the Special Division, at Attorney General Reno's request, appointed the Independent Counsel to investigate and prosecute crimes "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. *In re Madison Guaranty Savings & Loan Ass'n,* Order at 1 2 (D.C.Cir.Spec.Div. Aug. 5, 1994).
This appointment arose out of a series of events. In October 1993, the Department of Justice received nine criminal referrals from the Resolution Trust Corporation. The criminal referrals listed as subjects James B. McDougal, the former owner of Madison Guaranty Savings & Loan Association in Little Rock; his wife, Susan H. McDougal; and Jim Guy Tucker, who had succeeded President Clinton as Governor of Arkansas and previously had been a Little Rock businessman. The referrals listed the Clintons as witnesses. Mrs. Clinton had represented Madison Guaranty as an attorney at the Rose Law Firm in the mid 1980s. The McDougals and the Clintons had together owned the Whitewater Development Corporation, a real estate development company, from 1978 to December 1992. Also in the fall of 1993, Little Rock businessman and former Judge David L. Hale stated that in 1986 he had discussed with then Governor Clinton a fraudulent loan of $300,000 from Capital Management Services, Mr. Hale's small business investment corporation, to Master Marketing, a fictitious "company owned by Susan McDougal. Portions of that $300,000 subsequently were used for the benefit of the Whitewater Development Corporation.
In December 1993, it was publicly revealed that documents related to the Whitewater corporation had been in the White House office of Mr. Foster at the time of his death and had not been reviewed by Justice Department attorneys who had sought (but not been allowed) to review all of Mr. Foster's documents the day after his death. Mr. Foster had served as attorney for the Clintons for the 1992 transfer of the Clintons' interest in Whitewater to James McDougal. Mr. Foster also was involved in overseeing the preparation of the Clintons' tax returns in April 1993, on which they addressed the Whitewater investment. During the 1992 campaign, Mr. Foster and Webster Hubbell had assisted Mrs. Clinton in answering media inquiries about Mrs. Clinton's legal work, including for Madison.
During the OIC's ensuing investigation of these and other matters, fourteen individuals have been convicted of federal crimes. They include Jim Guy Tucker, James McDougal, Susan McDougal, David Hale, and Webster L. Hubbell, the former Associate Attorney General of the United States and a former law partner of Mrs. Clinton and Mr. Foster.

***6** The OIC thereupon began an intensive investigation of the facts and circumstances with respect to the Travel Office matter. Mr. Foster would have been a significant witness in the investigation: He had talked to Mr. Watkins about the Travel Office prior to the firings, and he was one of only a handful of persons known to have talked with Mrs. Clinton about the matter. If alive, Mr. Foster would have been in a position to provide valuable information, whether inculpatory or exculpatory. In light of Mr. Foster's death, the communications from Mr. Foster to Mr. Hamilton on July 11, 1993, would be important in understanding Mr. Foster's role in the Travel Office events and in understanding the roles of others and thus in determining whether individuals made false statements, committed perjury, obstructed justice, or committed other federal crimes.

***7** 2.a. On December 4, 1995, federal grand jury subpoenas were issued to petitioners for, among other things, Mr. Hamilton's notes of his July 11, 1993, meeting with Mr. Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney-client privilege and work product doctrine. [3]

3 The subpoenas were initially issued during the OIC's grand jury investigation into activities connected to Mr. Foster's death and the aftermath. The OIC subsequently received jurisdiction to investigate the Travel Office matter in March 1996, and the July 11 notes are likewise relevant and important to that aspect of the OIC's grand jury investigation.

On December 16, 1996, the district court (Judge John Garrett Penn) denied enforcement of the subpoena for the July 11 notes, holding without elaboration or explanation that the notes were covered by the attorney-client privilege and the work product doctrine.

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b. The court of appeals (Judge Williams, joined by Judge Wald) reversed and remanded. The court noted that in the vast majority of cases to have addressed the issue particularly decisions concerning a testator's intent in a will dispute courts have held that the attorney-client privilege does not apply after the death of the client. Pet.App. 3a. The court also emphasized that virtually all commentators have "supported some measure of post-death curtailment" of the privilege. *Id.* at 4a (referring to scholars such as McCormick, Wright and Graham, Mueller and Kirkpatrick, and Judge Learned Hand). The court further pointed out that the American Law Institute (ALI), in the 1996 Proposed Final Draft of the Restatement (Third) of the Law Governing Lawyers, concluded that the privilege should not apply after the death of the client. *Id.* at 5a.

Turning to policy, the court stated: "The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally ***8** invoked as an explanation of why the privilege only slightly impairs access to truth." *Id.* at 7a. The court further stated that there would be little if any additional chilling effect caused by curtailing the privilege after death. Criminal liability will have ceased altogether, so the decedent's legal interests could not be harmed in any way by disclosure in federal criminal proceedings after death. *Id.* at 6a 8a.

With respect to the work product issue, the court distinguished factual information contained in an attorney's notes of an interview from the attorney's own evaluations in cases where need has been shown. The court stated that "[o]ur brief review of the documents reveals portions containing factual material ..." *Id.* at 14a.

Judge Tatel dissented on the attorney-client privilege issue.

SUMMARY OF ARGUMENT

The court of appeals, the vast majority of judicial decisions, virtually all leading commentators, and the American Law Institute have properly concluded that the attorney-client privilege should not apply when the client is deceased.

In the courts, the issue has almost always arisen in will-contest disputes among the testator's heirs or devisees. In those cases, courts uniformly have held that the attorney-client privilege does not apply after the death of the client. These testamentary cases reflect a settled policy judgment: The interest in settling estates outweighs any interest in the posthumous confidentiality of attorney-client communications. That reasoning applies with even greater force in a criminal investigation, where the need for relevant evidence is at its apex. Applying the privilege after death in criminal proceedings, but not in will contests, would create an irrational asymmetry in the law.

The client's legal interests are not adversely affected by a rule that the privilege does not apply after death in ***9** criminal proceedings. All possibility of criminal liability has ceased at death. In addition, the decedent's estate cannot be harmed by disclosure of the information in criminal proceedings. Petitioners point extensively to harms to reputation and to other persons. But the flaw in that argument is that the decedent's attorney would disclose the same factual information that the client would have disclosed were he or she alive. An interest in reputation, or in protecting others, does not justify nondisclosure of information before or after death.

On the other hand, application of the privilege after the client's death hinders the truthseeking process far more than application of the privilege while the client is living. The client is no longer available to be asked what he knows. For that reason, as the court of appeals explained, the "costs of protecting communications after death are high." Pet. App. 7a.

Petitioners contend that candid communications would be chilled by a rule that the privilege does not apply after death. That is not true for the client who plans to invoke the Fifth Amendment or testify truthfully. Only the client who otherwise

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is planning to perjure himself would be less candid with his attorney because of a rule that the privilege does not apply after death.

Even assuming that there is a chilling effect, it would be marginal. And marginal chilling effects, the law has established, do not outweigh the grand jury's need for relevant evidence.

ARGUMENT

I. THE ATTORNEY–CLIENT PRIVILEGE DOES NOT APPLY IN FEDERAL CRIMINAL PROCEEDINGS WHEN THE CLIENT IS DECEASED.

A. Privileges are strictly construed, for they are in derogation of the search for truth.

We are not aware of any other reported federal case addressing whether the attorney-client privilege applies in ***10** criminal proceedings when the client is deceased.[4] Analysis thus begins with bedrock principles that guide judicial analysis of privilege claims.

4 This case in no way affects the ethical rules governing attorneys. Those rules restrict an attorney's *voluntary* disclosure of information, including information not covered by the attorney client privilege. See ABA Model Rule of Professional Conduct 1.6.

Rule 501 of the Federal Rules of Evidence provides that "[t]he privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See *Wolfle v. United States,* 291 U.S. 7, 12 (1934) (establishing common-law standard). The Rule is to be "construed ... to the end that the truth may be ascertained and proceedings justly determined." Fed.R.Evid. 102. In light of its truthseeking role, the Court is "disinclined to exercise [its Rule 501] authority expansively." *University of Pennsylvania v. EEOC,* 493 U.S. 182, 189 (1990). To the contrary, "[c]ourts have historically been cautious about privileges." *United States v. Nixon,* 418 U.S. 683, 710 n. 18 (1974). The primary rationale underlying the caution is straight-forward: "[P]rivileges obstruct the search for truth," *Branzburg v. Hayes,* 408 U.S. 665, 690 n. 29 (1972), and "contravene the fundamental principle that the public has a right to every [person's] evidence," *University of Pennsylvania,* 493 U.S. at 189 (quotation omitted).

The principles applied by this Court are consistent with the paramount goal of truthseeking: Privileges "are not lightly created," *Nixon,* 418 U.S. at 710, and "must be strictly construed," *University of Pennsylvania,* 493 U.S. at 189 (quotation omitted).[5] A privilege applies only where it is "necessary to achieve its purpose," *Fisher v. United States,* 425 U.S. 391, 403 (1976), and "promotes ***11** sufficiently important interests to outweigh the need for probative evidence," *Jaffee v. Redmond,* 518 U.S. 1, 9 10 (1996). And "the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." *Branzburg,* 408 U.S. at 682 n. 21 (quotation omitted).[6]

5 The "manifest destiny of evidence law is a progressive lowering of the barriers to truth. C. McCormick, *The Scope of Privilege in the Law of Evidence,* 16 Tex.L.Rev. 447, 469 (1938).

6 See 8 J. Wigmore, *Evidence* § 2290, at 543 (McNaughton rev. 1961) (" T]he judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy.).

Context also counts. This Court has specifically recognized that *criminal* matters pose an especially compelling need for relevant evidence. The "longstanding principle that the public has a right to every [person's] evidence ... is particularly applicable to grand jury proceedings." *Branzburg,* 408 U.S. at 688. The Court has indicated that several privileges do *not* apply in criminal proceedings although they may apply in civil proceedings. *Id.* at 686 701; *Nixon,* 418 U.S. at 712 n. 19;

cf. 1 *McCormick on Evidence* § 104, at 388 (4th ed. 1992) (some States deny physician-patient privilege "in criminal cases generally, or in felony cases, or in cases of homicide"); H.R. 2676, 105th Cong. (1997) (providing for limited accountant-client privilege in "noncriminal proceedings" in federal courts).

Not only do privileges obstruct the search for truth, federal courts lack clear guideposts for deciding whether to recognize one proposed privilege or another. Indeed, determining their relative effects on the truthseeking process is a "stupefying complex task." F. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information,* 1981 Sup.Ct.Rev. 309, 361. For these reasons, this Court has recognized privileges and defined their scope only to the extent established by the common law or in the States and only to the extent that they serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee,* 518 U.S. at 9 ***12** (quotation omitted); see *University of Pennsylvania,* 493 U.S. at 188 195; *Trammel v. United States,* 445 U.S. 40, 47 53 (1980); *United States v. Gillock,* 445 U.S. 360, 366 368 (1980). Beyond this narrow category, "[t]he balancing of conflicting interests of this type is particularly a legislative function." *University of Pennsylvania,* 493 U.S. at 189.

These principles of restraint and deference combine, in practical effect, to create a strong presumption that federal courts should apply a privilege (i) no more broadly than the law (decisional or statutory) has established and (ii) no more broadly than necessary to serve a public good. Petitioners' privilege claim satisfies neither requirement.

B. Virtually all leading commentators agree that the attorney-client privilege should not apply after the death of the client.

The attorney-client privilege, as applied in federal courts, has emerged from the balancing of the public's need for relevant information in legal proceedings against the client's need to communicate with his or her attorney to secure effective legal representation. See *United States v. Zolin,* 491 U.S. 554, 562 (1989); see also *Upjohn Co. v. United States,* 449 U.S. 383, 389 390 (1981) (corporate client). The privilege excludes relevant and reliable information, however, and thus "is not without its costs." *Zolin,* 491 U.S. at 562. [7] As with other exclusionary rules, therefore, the attorney-client privilege is carefully confined and applied only in circumstances where it is "necessary" to serve its purpose. *Fisher,* 425 U.S. at 403.

[7] These costs led Wigmore to state that the privilege is "an obstacle to the investigation of the truth the benefits of which are "all indirect and speculative while the "obstruction is plain and concrete. Wigmore § 2291, at 554. Professor Fischel recently has argued that " t]he legal profession, not clients or society as a whole, is the primary beneficiary of the privilege. D. Fischel, *Lawyers and Confidentiality,* 65 U. Chi. L. Rev. 1, 3 (1998).

***13** Numerous exceptions and qualifications have developed to cabin the privilege's effects. It does not apply, for example, to client communications seeking business or political or personal advice. See *McCormick* § 88, at 322 324. The privilege is overridden when client and attorney become embroiled in a dispute. See S. Stone & R. Taylor, *Testimonial Privileges* § 1.66, at 1 177 to 1 179 (1997). It generally does not apply to attorney fee information. See Restatement § 119 cmt. g. The privilege does not cover communications made in furtherance of a client's crime or fraud. See *Zolin,* 491 U.S. at 562 563. Indeed, ethical rules prohibit an attorney from allowing a client to commit perjury, notwithstanding the breach of attorney-client confidentiality and the correspondingly "grave consequences" that may ensue for the client. ABA Model Rule of Professional Conduct 3.3 & cmt.; see *Nix v. Whiteside,* 475 U.S. 157, 166 176 (1986). [8] In light of these many limitations and exceptions, petitioners' sweeping broadside that a lawyer can and should be able to give his or her client "an *unqualified* assurance of confidentiality," Pet. Br. 11 (emphasis added), reflects a serious misapprehension of existing law. That body of law is richly textured and far more nuanced and sensitive to truthseeking values than the monolithic absolutism championed by petitioners. [9]

[8] In addition, the attorney client privilege, like all common law privileges recognized under Rule 501, is an *ex post* rule of admissibility in federal court proceedings, not a constitutionally mandated *ex ante* guarantee of confidentiality. The scope of

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evidentiary privileges can vary widely among the 50 States (each governed by its own statutory and common law), the federal courts (governed by Rule 501), Congress (governed by its own rules), and state and federal agencies. A communication is not privileged in all fora merely because it is privileged in one forum. A federal commonlaw privilege thus cannot guarantee confidentiality in all fora at all times, no matter how broadly or absolutely it is defined.

9 " P]redictability in the application of the privilege ... is largely lacking in many areas, *McCormick* § 87, at 317; as an ABA publication acknowledges, "the privilege does not have the reach many lawyers believe it has. E. Epstein, *The Attorney Client Privilege and the Work Product Doctrine* 453 (1997).

***14** Accordingly, the precise question at hand is how *broadly* the Court should fashion the attorney-client privilege in particular, whether it should retain its full force in a grand jury investigation after the death of the client. Almost all of the leading commentators who have devoted thoughtful attention to this issue have concluded that the privilege should *not* apply after death, particularly in criminal proceedings where the need for relevant evidence is at its zenith. This virtual consensus among leading commentators provides a persuasive indicator of "reason," see Fed.R.Evid. 501, and of the proper rule in the federal courts. See, *e.g., Trammel,* 445 U.S. at 50 (narrowing scope of spousal privilege relying in part on fact that "[s]cholarly criticism of the *Hawkins* rule has ... continued unabated"); *Hawkins v. United States,* 358 U.S. 74, 81 (1958) (Stewart, J., concurring) (rule "criticized" by scholars, among others, warrants "most careful scrutiny").

We briefly chronicle the foremost examples:

• The American Law Institute, in the 1996 Proposed Final Draft of the Restatement of the Law Governing Lawyers, concludes that the privilege should *not* apply after death. To the contrary, under the ALI's approach, the tribunal should be "empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance.... Permitting such disclosure would do little to inhibit clients from confiding in their lawyers." Restatement (Third) of the Law Governing Lawyers § 127 cmt. d (Proposed Final Draft Mar. 29, 1996). [0]

10 We are informed that the ALl membership has now approved the proposed draft of the Restatement of the Law Governing Lawyers.

• Dean McCormick, on whom this Court and the Advisory Committee on the Rules of Evidence have often relied, states that the privilege should not apply after ***15** death. "[T]o hold that in all cases death terminates the privilege ... could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege." *McCormick* § 94, at 350.

• Professors Mueller and Kirkpatrick argue that the privilege should not survive death in criminal investigations and criminal proceedings. "A rule requiring occasional disclosure in this setting would not seriously undercut the utilitarian basis of the privilege." 2 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 199, at 380 (2d ed. 1994). A contrary rule, they conclude, could lead to "extreme injustice" for example, "if a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences." *Ibid.*

• Professors Wright and Graham likewise maintain that the privilege should not apply after death. They argue that attorney-client communications would not be meaningfully affected, yet "imposing the privilege after the death will often result in a loss of crucial information because the client is no longer available to be asked what he knows." Wright & Graham § 5498, at 484. Wright and Graham pointedly note: "Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy." *Ibid.*

• Professor Wolfram relates McCormick's conclusion that the law should "provide generally that death ends the privilege in all cases." C. Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986). According to Wolfram, if the privilege is to terminate at death in will-contest cases (which it does), logic requires that the privilege terminate at death in all cases.

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• Judge Learned Hand, during ALI debates in 1942, suggested that the privilege should not survive death. He stated that a communicant who dies "can have no more interests except in a remote way" and thus the ALI should consider that the privilege "die altogether with the communicant." 19 ALI Proceedings 143 144 (1942).

***16** • Consistent with overwhelming scholarly authority, the court of appeals majority in this case Judge Wald and Judge Williams concluded that the privilege should not survive death in federal criminal proceedings.

11 As Wright and Graham note, "Wigmore is the only one of the major figures in evidence scholarship who did not favor ending the privilege with the death of the client. § 5498, at 484 485. Wigmore's view as to criminal proceedings is not clear, however. In his fleeting references to the posthumous privilege issue, Wigmore seems to have referred only to the two most prevalent kinds of cases where the issue arises: testamentary cases, where Wigmore says the privilege should not apply after death, § 2314, at 611 616, and cases in which the estate is a party in civil litigation against an outsider, where the information could be used to "the detriment of the estate and where Wigmore says the privilege thus should apply, § 2323, at 630. But the privilege issue also can arise in criminal (and civil) cases after the client's death where the estate is *not* a party in the litigation, and the information is sought from the decedent's attorney as a third party witness. In such cases, the information will not be used to the detriment of the estate. Wigmore does not separately analyze that situation, and it is thus unclear whether he would have concluded that the privilege should apply in those cases. In short, we caution against overreading Wigmore.

C. In the vast majority of cases in which the issue has arisen, courts have not applied the attorney-client privilege after the death of the client.

1. The question whether the privilege applies after the death of the client has arisen most often in will-contest disputes among the testator's heirs or devisees. According to an exhaustive study, roughly 380 of the 400 or so reported cases (95%) fall within this category of "testamentary" cases. See Simon Frankel, *The Attorney Client Privilege, After the Death of the Client,* 6 Geo. J. Legal Ethics 45, 58 n. 65 (1992). [2] In those cases, courts consistently have held that the attorney-client privilege does *not* apply after death of the client. Indeed, this Court ***17** long ago rejected application of the privilege after death in such a case, stating that "in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged." *Glover v. Patten,* 165 U.S. 394, 406 (1897).

12 This survey examined "essentially every case found where the client was dead and the operation of the attorney client privilege was an issue. 6 Geo. J. Legal Ethics at 58 n. 65.

By virtue of the rule established in these testamentary cases, operation of the attorney-client privilege "has in effect been nullified in the class of cases where it would most often be asserted after death." *McCormick* § 94, at 348; see also Wright & Graham § 5498, at 483 484 ("[I]n the one instance in which the issue was most likely to arise where the client had died and information was sought from his surviving attorney about the client's estate courts manipulated the privilege ... so as to make the attorney's testimony available in disputes over succession to the client's property."). The testamentary rule reflects a longstanding policy judgment that the interest in accurately settling estates trumps the client's interest in confidentiality (or even the client's expectation of confidentiality). [3]

13 Inasmuch as testamentary cases represent the vast majority of cases in which the general issue of the posthumous privilege arises, and given the established rule in those cases, petitioners' blanket claim that the "overwhelming majority of decided cases supports the conclusion that the attorney client privilege survives the client's death, Pet. Br. 19, is wrong.

The testamentary rule is important, if not decisive, in assessing the appropriate rule for criminal cases. The public's need for determining whether a crime has been committed (and if so, by whom) warrants at least parity of treatment to that

afforded the interest in resolving will contests with precise accuracy. *If "who gets Blackacre" is sufficient to trump the privilege after the client's death, then questions raised in the criminal process who gets indicted, who gets convicted, who gets punished are surely sufficient to trump the privilege after the client's death.* "[O]ur historic commitment to the rule of ***18** law" is "*nowhere* more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon,* 418 U.S. at 708 709 (quotation omitted) (emphasis added). The longstanding principle that the public has a right to every person's evidence is thus "*particularly applicable* to grand jury proceedings." *Branzburg,* 408 U.S. at 688 (emphasis added). The testamentary rule suggests, *a fortiorari,* that a comparable rule should govern in federal criminal proceedings.

The testamentary rule further illuminates the issue at hand, inasmuch as it requires disclosure of sensitive and confidential communications to one's attorney about family members, friends, and associates. Those communications may reveal why particular individuals received specific bequests from the testator's estate and why others did not. Courts have recognized that "[e]state planning is an extremely personal and private endeavor and may be based on considerations one would prefer never to reveal." *Hitt v. Stephens,* 675 N.E.2d 275, 279 (Ill.App.1997). The court of appeals noted that "a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed." Pet. App. 9a. In *Glover,* this Court identified a situation where the attorney "might testify as to what was said by the testator about the character of the children and his relations to their mother" exquisitely private and sensitive communications, yet required to be disclosed pursuant to the testamentary rule. 165 U.S. at 408. As a general matter, therefore, the communications disclosed by operation of the testamentary rule likely are at least as private as the communications that might be disclosed in criminal investigations. [4]

14 As a result, as one commentator perceptively has stated, the will contest situation is "the one occasion *above all others* when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosures can be made after the client's death. Wolfram § 6.3.4, at 256 (emphasis added). If clients ever were to be chilled by the thought of post death disclosure, it would occur when "the disparaging words they uttered about their heirs to their attorneys, but which they carefully excluded from their last wills, would nonetheless be revealed to all during probate hearings. B. Hood, *The Attorney Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client,* 7 Geo. J. Legal Ethics 741, 767 n. 156 (1994).

***19** The testamentary rule thus applies even though disclosure of the decedent's attorney-client communications may adversely affect (i) the reputational interests of the decedent and (ii) the reputational (or legal) interests of persons whom the decedent cares about.

Petitioners strive mightily to avoid the import of the testamentary rule. They contend that clients intend that their attorney-client communications be disclosed. "[I]t is fair to presume," petitioners opine, that a client "would have wanted his or her testamentary intent fulfilled, *even at the cost of an embarrassing disclosure.*" Pet. Br. 28 (emphasis added). But as the court of appeals rightly concluded, the testamentary rule does not "track" this notion of intent. Pet. App. 9a. It seems just as likely that some testators intend the sometimes elaborately memorialized documents to guide post-mortem disputes. Some clients might well conclude that settling their estates with precise accuracy is scarcely worth the cost of "an embarrassing disclosure"; others may think that accuracy is the paramount virtue worth whatever reputational cost is wrought. But that is ultimately neither here nor there: Courts compel disclosure in either event; indeed, they compel disclosure even if the personal representative opposes disclosure. Restatement § 131 cmt. b.

What is more, if it is "fair to presume that the client would have wanted his or her testamentary intent fulfilled, even at the cost of an embarrassing disclosure," Pet. Br. 28, then it is also "fair to presume" that the client would have wanted to provide relevant information to the grand jury. After all, the "sacrifice" caused by providing information to the grand jury is "a part of the necessary contribution ***20** of the individual to the welfare of the public," *United States v. Dionisio,* 410 U.S. 1, 10 (1973) (quotation omitted), and has "long been recognized as a basic obligation that every citizen owes his Government," *United States v. Calandra,* 414 U.S. 338, 345 (1974). [5] In a criminal investigation, the client with

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relevant information would testify truthfully before the grand jury and tell all he knows. [6] After death, the attorney would simply disclose the factual information that the client himself would have disclosed were he alive. [7]

15 Even on the facts here, as Judge Williams pointedly noted at oral argument, Tr. 29 30, it is unclear why petitioners assume that Mr. Foster would have wanted the truth about the Travel Office to be concealed, or why the law should credit such an intent, in any event. The interest in truth is especially strong when the underlying events concern public business.

16 If a client asserted the Fifth Amendment privilege, he could be granted immunity and required to testify truthfully. See 18 U.S.C. 6002, 6003.

17 By contrast, the testator is not required to testify and disclose the reasons underlying his intended property distribution. In a will contest, the attorney, in relaying his client's statements and intent, discloses what otherwise would *not* have been disclosed. That further demonstrates that the intrusion caused by the testamentary rule *exceeds* that caused by terminating the privilege at death in criminal investigations.

In all events, regardless of the shorthand employed, [8] the testamentary rule reflects a settled policy judgment that the interest in accurately settling estates overrides any interest in posthumous confidentiality of attorney-client communications. The rule petitioners propose that the privilege applies, in perpetuity, in criminal proceedings after the client's death would create a dramatic and irrational inconsistency with the rule that the privilege is ***21** inapplicable in will-contest cases after the client's death. Neither reason nor experience justifies such a jurisprudential oddity.

18 Some have suggested that the privilege does not apply in testamentary cases because the identity of the privilege holder is in dispute during the will contest. Most codes now provide that the executor or administrator, not an heir, holds the privilege in civil cases where the estate is a party; this theory thus is inaccurate.

2. Outside the testamentary context, cases actually *deciding* the issue of a posthumous attorney-client privilege are quite rare. A comprehensive survey found only about 20 such reported cases. See 6 Geo. J. Legal Ethics at 58 n. 65. It is even more rare to unearth any legal analysis of the issue: "Rarely do courts elaborate at all on why the rule is or should be so. An exhaustive examination of the cases ... found only a few judicial opinions offering any extensive discussion of whether or not the privilege should outlive the client." *Id.* at 57 & n. 63. As the court of appeals pointed out, "such cases as do actually apply it give little revelation of whatever reasoning may have explained the outcome." Pet. App. 3a. "Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy." Wright & Graham § 5498, at 484.

Civil cases outside the testamentary context fall into two categories. In the first, the estate is *not* a party to the litigation; instead, one of the parties to a lawsuit seeks information from the decedent's attorney. In the second, the estate is a party in litigation, and the opposing party seeks information from the decedent's attorney.

As to the former category, we are aware of only *one* decision that sets forth any analysis. See *Cohen v. Jenkintown Cab Co.,* 357 A.2d 689 (Pa.Super.Ct.1976). There, the court concluded that the privilege did not survive death. The *Cohen* court pointed out that (i) the estate was not involved in the suit, (ii) the decedent was not subject to liability, and (iii) the decedent's statements to his attorney could be quite important in the litigation. *Id.* at 692 694. [9]

19 Petitioners deride the decision as that of a "mid level state appellate court, Pet. Br. 20, but the case contains far more analysis (which is to say, it contains analysis) than almost all of the other cases discussing the question whether the attorney client privilege applies after death.

***22** In contrast, when the estate *is* a party in a (non-will-contest) civil lawsuit such as an alleged tort or breach of contract by the decedent different interests are at stake. When the estate is a party to non-testamentary civil litigation,

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the estate's financial interests are at stake; the estate's worth will vary with the damages awarded for or against it. Some courts have applied the privilege in this setting so that the estate's financial interests cannot be adversely affected by the party-opponent's use of the decedent's attorney-client communications. This situation differs substantially, however, from civil cases in which the estate is not a party (and where the estate's financial interests are not at stake) and from criminal cases (where the estate's financial interests are not at stake and the need for relevant evidence is at its greatest).

This Court in *Glover* stated that the attorney-client communications "*might* be privileged if offered by third persons to establish claims *against an estate.*" 165 U.S. at 406 (emphases added). The Court's language conveys doubt whether the privilege applies after death even when the estate is a party, and it indicates that cases where the estate is not a party present even less of a reason to apply the privilege.

3. We turn now from the civil to the criminal arena. In that context, five reported state supreme court cases and no federal cases have decided the issue. [20] In two cases (involving husbands who had allegedly murdered their wives), the courts held that the privilege did not ***23** exclude communications the wives had made to attorneys before the murders. See *State v. Gause,* 458 P.2d 830 (Ariz.1971), *vacated on other grounds,* 409 U.S. 815 (1972); *State v. Kump,* 301 P.2d 808, 815 (Wyo.1956) ("We can conceive of no public policy which would exclude the communications such as are involved in this case, if otherwise admissible."). In the three remaining cases, where the decedent was a suspect or witness who possessed relevant information, the courts held (over dissents in two cases) that the privilege did apply after death. See *In re John Doe Grand Jury Investigation,* 562 N.E.2d 69 (Mass.1990); *State v. Macumber,* 544 P.2d 1084 (Ariz.1976); *State v. Doster,* 284 S.E.2d 218 (S.C. 1981); cf. *In re John Doe Grand Jury Investigation,* 562 N.E.2d at 72 (Nolan, J., dissenting) (privilege should not apply "where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling"); *Macumber,* 489 P.2d at 1088 (Holohan, J., joined by Cameron, C.J., specially concurring).

20 In three decisions by lower state courts, defendants sought information from the attorney of a deceased client. The courts upheld the privilege claims. See *People v. Pena,* 198 Cal. Rptr. 819, 828 829 (Cal.App.1984) (manslaughter);*People v. Modzelewski,* 611 N.Y.S.2d 22, 22 23 (N.Y.App.Div.1994) (assault); *Cooper v. State,* 661 P.2d 905, 907 (Okla.Crim.App.1983) (murder).

Those cases, in our view, illustrate the profound problems with a privilege that applies after death in criminal proceedings, and thus with petitioners' theory. Suppose, for example, that a crime has been committed and that a now-deceased witness had previously communicated factual information to an attorney that would exculpate the defendant. Under petitioners' theory, that information would not be subject to compelled disclosure notwithstanding that the defendant might be wrongly indicted or convicted as a result.

These were the facts in *State v. Macumber,* the 3 2 decision of the Supreme Court of Arizona holding that the privilege continued to apply after death. The upshot was to expose the defendant to a possible life sentence for a crime that he theoretically may not have committed. This manifest injustice led the American Law Institute to reject *Macumber* as an example of the attorney-client privilege. Restatement § 132 reporter's note (*Macumber* illustration ***24** was rejected by a vote of 164 to 65). Yet the result in *Macumber* is precisely where petitioners' theory would lead.

The now-deceased witness might, on the other hand, have furnished his attorney with information that could incriminate a still-living suspect. That situation, likewise, implicates a substantial societal interest. "[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v. Collins,* 506 U.S. 390, 398 (1993). The government has a "powerful and legitimate interest in punishing the guilty." *Id.* at 421 (O'Connor, J., concurring); see also *Stone v. Powell,* 428 U.S. 465, 500 (1976) (Burger, C.J., concurring) ("The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade."). Not only does the public have an interest in seeing the criminal law vindicated, but so, too, do the victims of a crime. See *Payne v. Tennessee,* 501 U.S. 808, 825 (1991). Petitioners' approach, however, would allow even "a murderer ...

still at large and likely to strike again" to evade justice. *In re John Doe Grand Jury Investigation,* 562 N.E.2d at 73 (Nolan, J., dissenting).

The rule we seek thus is neutral between the defendant and the prosecutor in seeking evidence from a third party. It ensures that more rather than less, whether exculpatory or inculpatory, will be presented to the factfinder. And that is the rightful goal of the prosecutor, see *Brady v. Maryland,* 373 U.S. 83, 87 (1963), and the courts, see *Nixon,* 418 U.S. at 709.

Realizing that their theory leads to manifestly unjust results for criminal defendants, petitioners offer a possible *ad hoc* exception for criminal defendants. They then assert *ipse dixit* that "[t]o allow a prosecutor to break the privilege on the ground that a grand jury's constitutional right to investigate is on a par with possible constitutional ***25** rights of a criminal defendant would be a radical, problematical step fraught with unforeseen consequences." Pet. Br. 29. With all respect, that statement is unintelligible. This Court has stated: "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed *either by the prosecution or by the defense." Nixon,* 418 U.S. at 709 (emphasis added). [2] And we are not aware of (and petitioners do not reference) a third-party witness' common-law privilege that applies against the prosecution, but not against the defense. [22]

21 The Compulsory Process Clause ensures parity between prosecutor and defendant in overriding the privileges of a third party witness; it does not give the defendant a greater ability to do so than the prosecutor. See A. Amar, *Sixth Amendment First Principles,* 84 Geo. L.J. 641, 699 700 (1996).

22 Indeed, petitioners' *ad hoc* suggestion of a possible distinction between the defendant and prosecution contravenes settled practice when a third party witness asserts the Fifth Amendment privilege against compelled self incrimination. In that situation, the prosecutor can compel the witness to testify through a grant of immunity. See *United States v. Heldt,* 668 F.2d 1238, 1282 1283 (D.C.Cir.1981). The prosecutor thus has a greater ability to override a third party witness' privilege than does the defendant.
Petitioners also imply that *Davis v. Alaska,* 415 U.S. 308 (1974), supports a distinction between the abilities of the grand jury and the defendant to override a third party's common law privilege claim. That Confrontation Clause case is not on point. It addressed a state rule that impermissibly limited the scope of cross examination.

In any event, no basis exists for granting a criminal defendant greater power than the *grand jury* to override a witness' common-law privilege. The text of the Fifth Amendment reveals that the grand jury is a constitutionally mandated protection against an unfounded prosecution. And this Court has emphasized the grand jury's dual role: "Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed *and the protection of citizens against unfounded criminal prosecutions.*" ***26** *Calandra,* 414 U.S. at 343 (emphasis added); see *Wood v. Georgia,* 370 U.S. 375, 390 (1962) (grand jury is "primary security to the innocent against hasty, malicious and oppressive" prosecution). The "mission is to *clear the innocent,* no less than to bring to trial those who may be guilty." *Dionisio,* 410 U.S. at 16 17 (emphasis added).

Because the grand jury's task "is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Branzburg,* 408 U.S. at 688. The grand jury as much as any party therefore has the constitutional right to every person's evidence. If a defendant could override a third-party witness' common-law privilege at trial, the grand jury can do so now.

The practical implications of petitioners' apparent attempt to distinguish the grand jury from a defendant further expose the flaws of their theory. Petitioners state that their notes can be withheld as a matter of law from the grand jury even if they might exculpate some individual. But if the grand jury indicts the individual, then that defendant might subpoena petitioners' notes, which could be exculpatory. Not to put too fine a point on it, petitioners' theory could mean that this grand jury will indict one or more individuals who later will be exonerated with the help of petitioners' notes. That does not reflect "reason."

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In short, petitioners' suggestion that "[t]he Court can decide the present matter without reaching the different issue of a defendant's possible constitutional right to privileged material," Pet. Br. 29, is fanciful. To hold in petitioners' favor is a decision that the perpetual attorney-client privilege for the deceased client's attorney overrides the rights of the grand jury, the defendant, *and* the prosecutor to obtain evidence no matter how inculpatory or exculpatory the information might be. If the result in *Macumber* (whereby a criminal defendant, and thus also a grand jury, cannot obtain the evidence of an attorney for ***27** a deceased client) represents the correct privilege rule for the federal courts, petitioners should prevail. If the result in *Macumber* does not represent the correct rule for federal courts, petitioners must produce their notes.

4. We turn next to the various rules and codes including state codes, the Model Code of Evidence, the Uniform Rules, and Proposed Federal Rule 503 to determine what light they might shed on the issue. See, *e.g., Trammel,* 445 U.S. at 48 49.

As a prelude, it is important to note that the various interests at stake do not terminate simultaneously after death. The *financial* interests of the estate terminate when the estate is closed. A privilege rule designed to protect the financial interests of the estate would apply in the period until the estate is closed.

The reputational interests of the decedent and the legal interests of the decedent's friends or associates, by contrast, do not expire when the estate is closed; to the contrary, such interests continue indefinitely. Thus, a privilege rule designed to protect those interests would apply indefininitely.

While "almost no attorney-client privilege provision speaks directly to the issue of privilege after the client's death," 6 Geo. J. Legal Ethics at 55 n. 52, the rules generally provide that the attorney-client privilege ends *at death* in will-contest cases. Many (including the Model Code, Uniform Rules, and Proposed Federal Rule) also include a generic provision to the effect that the privilege belongs to the "personal representative of a deceased client," who is the executor or administrator of the decedent's estate. See Restatement § 127 reporter's note ("In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client[,] either an executor or administrator."). [23]

23 The following provisions set forth the testamentary rule that the privilege does not apply after death: Proposed Fed. R. Evid. 503(d)(2); ALI Model Code of Evid. R. 213(2)(a) (1942); Unif. R. Evid. 26(2)(b) (1953); Unif. R. Evid. 502(d)(2) (1974); Ala. R. Evid. 502(d)(2); Ark. R. Evid. 502(d)(2); Cal. Evid. Code § 957; Del. R. Evid. 502(d)(2); Fla. Stat. Ann. § 90.502(4)(b); Haw. R. Evid. 503(d)(3); Idaho R. Evid. 502(d)(2); Kan. Stat. Ann. § 60 426(b); Ky. R. Evid. 503(d)(2); La. Code Evid. Ann. art. 506(C)(2); Me. R. Evid. 502(d)(2); Neb. Rev. Stat. § 27 503(4)(b); N.H. R. Evid. 502(d)(2); N.J. Stat. Ann. § 2A:84A 20(2); N.M. R. Evid. 11 503(D)(2); N.D. R. Evid. 502(d)(2); Okla. Stat. Ann. tit. 12 § 2502(D)(2); Or. R. Evid. 503(4)(b); Tex. R. Evid. 503(d)(2); Utah R. Evid. 504(d)(2); Vt. R. Evid. 502(d)(2); Wis. Stat. Ann. § 905.03(4)(b).
The following rules provide for the "personal representative of the deceased to hold the privilege: Proposed Fed. R. Evid. 503(c); ALI Model Code of Evid. R. 209(c)(i) (1942); Unif. R. Evid. 26(1) (1953); Unif. R. Evid. 502(c) (1974); Ala. R. Evid. 502(c); Ark. R. Evid. 502(c); Cal. Evid. Code § 953(c); Del. R. Evid. 502(c); Fla. Stat. Ann. § 90.502(3)(c); Haw. R. Evid. 503(c); Idaho R. Evid. 502(c); Kan. Stat. Ann. § 60 426(a); Ky. R. Evid. 503(c); Me. R. Evid. 502(c); Miss. Code Ann. § 13 1 21(1); Neb. Rev. Stat. § 27 503(3); Nev. Stat. Rev. § 49 105(1); N.H. R. Evid. 502(c); N.J. Stat. Ann. § 2A:84A 20(1); N.M. R. Evid. 11 503(C); N.D. R. Evid. 502(c); Okla. Stat. Ann. tit. 12 § 2502(C); Or. R. Evid. 503(3); S.D. R. Evid. 502(c); Tex. R. Evid. 503(c); Utah R. Evid. 504(c); Vt. R. Evid. 502(c); Wis. Stat. Ann. § 905.03(3); Wyo. Stat. § 1 43 103(b).

***28** The executor or administrator exists, however, only until the estate is closed. After that, then, no holder of the privilege exists, and the privilege has terminated. The rules thus suggest that the privilege cannot be asserted after the estate is wound up. [24] As the court of appeals ***29** explained, "[v]esting the privilege in the personal representative is plainly consistent with its terminating at the winding up of the estate, when its function of protecting the decedent's transmission of his or her property to the intended beneficiaries, free from claims based on statements to counsel, has run its course." Pet. App. 4a n. 2. The intent of these rules thus is not to protect the reputational interests of the client or

the legal or reputational interests of others, all of which outlast the estate. Rather, the intent is to protect the financial interests of the estate itself. [25]

24 The history behind this language confirms that the "personal representative provision was an intentional limitation on the duration of the privilege:
It was the view of the reforming scholars that shaped the provision in the 1942] Model Code of Evidence that made "the personal representative of the deceased client the holder of the privilege after the death of the client, thus cutting off the privilege when the estate was wound up.... *T]he attempts by traditionalists to extend the life of the privilege beyond the winding up of the estate through amendments that would have made the privilege pass to the heir or devisee or have given the judge discretion to invoke the privilege when there was no longer a holder in existence were all defeated.* It seems reasonable to suppose that the use of similar language in the Uniform Rules was intended to have a similar effect.... The writers apparently agree that the Rejected Federal Rule 503] intends to embrace the Model Code California view of the phrase "personal representative as a limitation on the duration of the privilege....
Wright & Graham § 5498, at 485 486 (emphasis added).

25 In the words of the comment accompanying the California rule, "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged. Cal. Evid. Code § 954 cmt. Proposed Federal Rule 503(c) followed the California rule. See advisory committee's note. The import of the Proposed Federal Rule was straightforward: " W]hen the client has died and his personal affairs have been settled, the need for the privilege has diminished to the extent that it is no longer justified. Comment, *Federal Rules of Evidence and the Law of Privileges,* 15 Wayne L. Rev. 1287, 1315 (1969).

Disclosure of attorney-client communications in *criminal* cases (where the estate is not a party) would not affect the financial interests of the estate, however. Rather, the disclosure in criminal proceedings whether before or after the estate is wound up would affect only the reputational interests of the decedent and the legal and reputational interests of others. But as we have seen, these privilege rules were not intended to protect the reputational interests of the client or the legal or reputational ***30** interests of others. And if that is so, then the privilege should not apply after death in criminal proceedings. [26]

26 Petitioners do not suggest that the winding up of the estate is significant to the proper privilege rule in *criminal* procedings and we agree. For criminal proceedings, the privilege either must end at death (as we argue) or extend such that it can be asserted indefinitely (as petitioners argue).

To be sure, the various rules do not speak directly to criminal proceedings. Nor is there helpful case law discussion regarding the import of the "personal representative" language to the issue. But the task is to divine whatever guidance we can from the rules (and their history) as one of the mix of considerations that guide resolution of this case. Here, the rules support the conclusion that the privilege does not apply after death in federal criminal proceedings.

And when the rules are analyzed together with the vast majority of cases, a broader theme emerges. Attorney-client communications are not privileged after the death of the client with the possible exception that communications "might be privileged if offered by third persons to establish claims against an estate," or vice versa. *Glover,* 165 U.S. at 406. The upshot is this: The privilege should not apply after death in criminal cases.

D. The policies of the attorney-client privilege are not served, and indeed are contravened, by applying the privilege in federal criminal proceedings after the death of the client.

Notwithstanding (i) the Restatement, (ii) the views of scholars and commentators, (iii) the force of the case law, (iv) the injustices petitioners' approach would inevitably produce in criminal proceedings, and (v) the principles underlying the various privilege rules, petitioners rest much of their argument on a purported "chilling effect" namely, that clients

would be less willing to disclose truthful information to an attorney without a posthumous ***31** attorney-client privilege for federal criminal proceedings. For several reasons, the argument fails. As we will now explain, the rule that the privilege does not apply after death in criminal proceedings would not chill *any* appropriate attorney-client communications. Even if there were some marginal chilling effect, it is insufficient to frustrate the grand jury's imperative need for information.

1. The attorney-client privilege, to the extent it existed in England from the 1500s through the 1700s, was part of the broader "code of a gentleman" that prevented attorneys as well as other "gentlemen" from breaching anything told to them in confidence. Restatement § 118 cmt. c; 3 *Weinstein's Federal Evidence* § 503.03[1], at 503 11 (2d ed. 1998); D. Fischel, *Lawyers and Confidentiality,* 65 U.Chi.L.Rev. 1, 3 4 (1998). An attorney thus was a kind of alter ego of the client, such that if the client did not testify, then neither could the attorney. [27] This was a rule "congenial with the law, which prevailed in England until the mid 19th century, that made parties to litigation themselves incompetent to testify, whether called as witnesses in their own behalf or by their adversaries." Restatement § 118 cmt. c. [28]

27 Some older American cases exhibit rhetorical excesses a "lawyer's tongue is tied that are relics of the days when the privilege was justified by the permanent oath of a gentleman.

28 For that reason, "the historical record is not authority for a broadly stated rule of attorney client privilege. G. Hazard, *An Historical Perspective on the Attorney Client Privilege,* 66 Cal. L. Rev. 1061, 1070 (1978).

In this country, the privilege has never been justified by any such social convention. Indeed, by the last quarter of the 1700s, the "code of a gentleman" rationale had been repudiated, as "the need of the ascertainment of truth for the ends of justice loomed larger than the pledge of secrecy." *McCormick* § 87, at 314. This Court thus has recognized that "the mere fact that a communication was made in express confidence, or in the implied confidence ***32** of a confidential relation, does not create a privilege." *Branzburg,* 408 U.S. at 682 n. 21.

The modern rationale for the attorney-client privilege is that confidentiality facilitates an individual's ability to obtain effective legal advice and services. See *Zolin,* 491 U.S. at 562; *Upjohn,* 449 U.S. at 389; *Fisher,* 425 U.S. at 403. This conception of the privilege stems from several related assumptions. Individuals need lawyers to determine whether their conduct would or did violate legal norms, and how to respond to the legal process. In addition, the client needs to disclose various facts to the lawyer in order for the client to receive the lawyer's best assessment of the legal ramifications of his actions. *Zolin,* 491 U.S. at 562. The final assumption-which is "controversial" is that clients would be unwilling to fully disclose facts if the lawyer could be required to testify in their cases. Restatement § 118 cmt. c. The theory is that the client "has in contemplation the possible official inquiry, and he will not make revelations that may be used to his detriment." E. Morgan, *Foreword to Model Code of Evidence* 26 (ALI 1942). See also M. Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 Cal.L.Rev. 487, 490 (1928) (privilege protects against clients' "fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties"). [29]

29 Many scholars have questioned whether this assumption is accurate outside the context of those cases in which the client subsequently asserts the Fifth Amendment privilege against compelled self incrimination. Indeed, the leading empirical study of the privilege concluded that lawyers are more likely than non lawyers to believe that the privilege encourages client disclosures. That study concluded that a substantial majority of laypersons would continue to use lawyers even if secrecy were limited. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine,* 71 Yale L.J. 1226, 1232 (1962).

***33** . In a particular legal proceeding in which the client becomes a witness, the client will do one of two things: (i) rest on the Fifth Amendment privilege against compelled self-incrimination, or (i) testify. The attorney-client privilege serves somewhat different purposes in the two situations.

For the client who invokes the Fifth Amendment, the attorney-client privilege stands as a corollary to the privilege against compelled self-incrimination. *Weinstein's Federal Evidence* § 5.03.03[1], at 503 12 (attorney-client privilege "is closely related to the individual's right to immunity from self-incrimination under the Fifth Amendment"). That is to say, the client needs to disclose facts to his attorney to obtain the attorney's advice about whether to interpose the Fifth Amendment privilege. Effective professional consultation could scarcely occur if the attorney could be required to turn around and testify against the non-testifying client. See *Fisher,* 425 U.S. at 403 (recognizing that client would be reluctant to disclose "if the client knows that damaging information could *more readily* be obtained from the attorney following disclosure than from himself" that is, in those situations where the client asserts the Fifth Amendment) (emphasis added). For this reason, supporters and critics alike generally acknowledge the importance of the attorney-client privilege in cases where the client also asserts the Fifth Amendment privilege. [30]

30 *See, e.g.,* Morgan, *Foreword,* at 27 ("In situations where the privilege against self incrimination is involved, the retention of the privilege is justified.); Wright & Graham § 5472, at 95 ("combined effect of the Sixth Amendment right of counsel and the Fifth Amendment privilege against self incrimination is sometimes thought to provide a constitutional basis for the attorney client privilege); Wigmore § 2291, at 552 (attorney client privilege in case where client asserts privilege against self incrimination protects against "some of the same evils that "constitute the reasons for forbidding compulsory self incrimination); Radin, 16 Cal. L. Rev. at 490 (justification for attorney client privilege is "part of the public policy against self incrimination).

***34** Those clients who do not invoke the Fifth Amendment privilege fall into two categories: clients who will testify truthfully under oath, and those who will not.

The attorney-client privilege would be of enormous benefit to the client who contemplated perjury because he could learn from his attorney the legal consequences of his actions and testimony, and then change (or mold) his testimony in an attempt to evade those consequences. That is an unhappy byproduct of the privilege, but it is *not* a justification for the privilege. See *Brogan v. United States,* 118 S. Ct. 805, 810 (1998) (law does not confer "a privilege to lie"); *Nix v. Whiteside,* 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely."). The law manifestly is not designed to benefit the client who will perjure himself. See *United States v. Mandujano,* 425 U.S. 564, 576 (1976) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings."). "When a client consults a lawyer intending to violate elemental legal obligations, there is less social interest in protecting the communication. Correlatively, there is a public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends." Restatement § 132 cmt. b. Therefore, just as "*Miranda* cannot be perverted into a license to use perjury," *Oregon v. Hass,* 420 U.S. 714, 721 (1975) (quotation omitted), the attorney-client privilege cannot be perverted into an aider and abettor of perjury.

Indeed, the courts and the bar organizations, including the ABA, have taken steps to prevent such client wrongdoing. Longstanding ethical rules, of which this Court spoke approvingly in *Nix v. Whiteside,* require that an attorney take action to prevent a client from testifying falsely even though the upshot will be to breach the confidentiality of attorney-client communications and (possibly) lead to "grave consequences" for the client. See ***35** ABA Model Rule of Professional Conduct 3.3 cmt. [3] The crime-fraud exception likewise is triggered when a client communicates to his attorney in order to further the future crime of perjury. See *Clark v. United States,* 289 U.S. 1, 15 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."); A. Amar, *Sixth Amendment First Principles,* 84 Geo. L.J. 641, 698 699 (1996) ("The Sixth Amendment gives the accused a right to show he did not engage in 'infamous' conduct, not a right to perpetrate infamous conduct....").

31 This duty distinguishes attorneys from other professionals who receive evidentiary privileges, yet no equivalent duty.

The client who will testify truthfully, on the other hand, will simply tell her attorney the same *facts* that she will disclose under oath. See *Upjohn,* 449 U.S. at 395 ("[T]he protection of the privilege extends only to communications and not

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to facts.") (quotation omitted). [32] For such a client, the lack of a privilege would cause no meaningful "chilling effect" on the *truthfulness* of communications to her attorney because the truth would "be revealed anyway ... from the client directly in discovery or testimony." Fischel, 65 U. Chi. L. Rev. at 26; cf. *Brogan,* 118 S.Ct. at 810 ("the honest and contrite guilty person will not regard ... the blatant lie as an available option" when she chooses to testify).

32 "Whether the client be a plaintiff or a defendant or a mere witness, he is subject to compulsory process and may be required to disclose at the trial or hearing every pertinent fact within his knowledge, under the sanction of an oath or its equivalent that obliges him to tell the whole truth. If he told his lawyer the truth, he must now tell the same thing from the witness box. Morgan, *Foreword,* at 26.

3. These conclusions about how the privilege interacts with the behavior of clients raise an important question: Why does federal law recognize the attorney-client privilege in cases in which the client testifies? The answer is twofold.

***36** First, the privilege rests on an assumption that the attorney's testimony would be superfluous because the client himself "can be freely interrogated and called to the stand by the opponent and made to disclose [o]n oath all that he knows." Wigmore § 2292, at 554. Thus, "the disclosure of his admissions made to his attorney would add little to the proof." *Ibid.*

This Court pointed to that critical fact in explaining the logic and rationale of the attorney-client privilege in *Upjohn:* "Here the Government was free to question the employees who communicated" with the company attorneys, and that "puts the [Government] in no worse position" in obtaining the facts. 449 U.S. at 396, 395. [33] The court of appeals correctly summarized the relevant principle: The client's "availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth." Pet. App. 7a.

33 See also *Hickman v. Taylor,* 329 U.S. 495, 518 (1947) (Jackson, J., concurring) ("Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself.). Professors Wright and Graham have noted the privilege's proponents "argue that its costs are minimal.... T]he client ... must still testify to his knowledge of the facts. Wright & Graham § 5472, at 85.

To be sure, there is a lurking danger that the client will testify falsely and in a manner inconsistent with what he told his attorney. But the client is under a legal obligation, enforced by stringent penalties, to testify truthfully. See *Mandujano,* 425 U.S. at 576; 18 U.S.C. 1001, 1621, 1623. That obligation is reinforced by the rigors of cross-examination. And it is cemented by the attorney's equally solemn duty to prevent perjury. See ABA Model Rule of Professional Conduct 3.3. *So the attorney-client privilege in instances where the client testifies operates on the assumption that the client will testify truthfully, which logically eliminates any need for attorney testimony.* See *Upjohn,* 449 U.S. at 395 (privilege "puts the adversary in no worse position" because it "does not protect disclosure ***37** of the underlying facts by those who communicated with the attorney").

Second, the attorney's testimony can easily generate a sideshow focused on purported discrepancies between the attorney's testimony and the client's testimony. See *Hickman v. Taylor,* 329 U.S. 495, 517 (1947) (Jackson, J., concurring) ("Whenever the testimony of the witness would differ from the 'exact' statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness."). If attorney and client both testify, "[o]pposing counsel could create a false impression of the circumstances in a great many instances.... [A] lawyer skilled in histrionics could make a field day of it." J. Gardner, *A Re Evaluation of the Attorney Client Privilege,* 8 Vill. L. Rev. 279, 310 (1963). Such diversions, if successful, could easily detract from, rather than contribute to, the truthseeking function. And the diversions could perhaps even cause the client to lose the case (or some future case). [34] The privilege thus precludes the "abusive litigation practice" of calling an opposing lawyer as a witness. Restatement § 118 cmt. c.

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34 The rationales for the attorney client privilege in cases in which the client testifies substantially overlap with the rationales for the attorney work product doctrine. That should not be surprising, given that the two doctrines stem from the same common law source and often apply to the same documents. See Note, *Attorney Client Privilege and Work Product Protection in a Utilitarian World: An Argument for Recomparison,* 108 Harv. L. Rev. 1697, 1700 (1995); Wright & Graham § 5472, at 94 ("the attorney client privilege and the work product doctrine have had something of a symbiotic historical relationship).

4. As suggested by the virtually unanimous position of the ALl, the commentators, the case law, and the rulemakers, these justifications for the attorney-client privilege evaporate when the client is deceased, particularly in criminal proceedings.

First, the possibility of criminal liability ceases at death. The privilege is no longer necessary after the death of the ***38** client as a corollary to the privilege against compelled self-incrimination. [35]

35 This may distinguish the deceased witness from the witness who is simply unavailable. With respect to the unavailable witness who is not deceased, the attorney's testimony may contribute to his criminal liability in some future case, notwithstanding that the witness might have asserted the Fifth Amendment had he been available to testify in the underlying case.

Second, the deceased client obviously will not testify. Thus, the myriad problems that can arise when both attorney and client testify in the same case are absent.

Third, the client is not available to testify directly. Application of the privilege after death thus causes an enormous loss of evidence far more than is caused by application of the privilege before death. [36] "[I]mposing the privilege after the death will often result in a loss of crucial information because the client is no longer available to be asked what he knows." Wright & Graham § 5498, at 484. In other words, application of the privilege after death of the client "in effect gives *an expanded scope* to the privilege." Wolfram § 6.3.4, at 256 (emphasis added). The court of appeals emphasized this critical fact, noting that the "costs of protecting communications after death are high." Pet. App. 7a.

36 Some living clients may assert the Fifth Amendment privilege, but such witnesses not uncommonly can be granted immunity if they are not prosecuted. See 18 U.S.C. 6002, 6003. If the witness is granted immunity, " t]he immunity ... does not endow the person who testifies with a license to commit perjury. *Mandujano,* 425 U.S. at 578 (quotation omitted). Because the witness will testify, the attorney's testimony is considered unnecessary. If the witness is not granted immunity, then the attorney client privilege is necessary to protect the privilege against compelled self incrimination.

The only real retort is one that petitioners understandably do not *explicitly* make: The living client might perjure himself if he were alive; requiring the attorney to testify after the client's death thus discloses different information ***39** than the client would have disclosed were he alive; therefore, clients who want to preserve the option to commit perjury are "chilled" from telling their attorneys the truth because of the fear that the truth might come out if the attorney is called to testify after the client's death.

It would be unprecedented and unwise to apply an expanded privilege after death based on the possibility that the client, if alive, might have chosen to perjure himself in violation of federal law. Yet that is what petitioners' submission implicitly seeks from this Court. Indeed, petitioners' entire theory is acrid with the odor of presumed perjury perjury that the client might have committed had he been alive. The Court need not "write into our law this species of compassion inflation." *Brogan,* 118 S.Ct. at 810.

In the end, the rule that the privilege does not apply after death in criminal proceedings should cause *no* chilling effect whatsoever on *appropriate* attorney-client communications that is, on clients who intend to testify truthfully or assert the Fifth Amendment.

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5. Even if we were to assume, however, that (i) the rule we seek could have some chilling effect on clients who would assert the Fifth Amendment or testify truthfully, *or* (i) the courts should be concerned about a chilling effect on those who would commit perjury, petitioners' chilling effect argument is still unavailing for several independent reasons. Any possible chilling effect would be extraordinarily marginal; and marginal chilling effects on protected relationships are insufficient, the law has clearly established, to justify an intrusion on the grand jury's need for relevant evidence.

At the outset, petitioners' argument based on chilling effect assumes that clients know the details of the relevant confidentiality and privilege rules when they speak to lawyers. The minimal available evidence suggests that the ***40** assumption is inaccurate. "The privilege has intricate and unexpected limitations of which we may be certain almost no client has ever been warned." Marvin Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege,* 54 Colo. L. Rev. 51, 59 (1982). Indeed, the "most striking revelation" of a study conducted in the late 1980s was that "lawyers overwhelmingly do not tell clients of confidentiality rules." F. Zacharias, *Rethinking Confidentiality,* 74 Iowa L. Rev. 351, 382 (1989). [37]

37 Informing clients that the privilege terminates at death would sound like a *Miranda* warning, petitioners say. Pet. Br. 12. Petitioners' rhetoric is familiar. The "*Miranda* warning hypothetical has regularly been invoked by those who oppose *existing* legal and ethical precepts requiring lawyers to prevent client perjury. See M. Freedman, *Lawyer Client Confidences: The Model Rules Radical Assault on Tradition,* 68 A.B.A. J. 428, 431 (1982). The rhetoric conjures up an image of the lawyer as alter ego of the client first and officer of the court a distant second that was rejected by this Court in *Nix v. Whiteside.*

Second, assuming full client knowledge, analysis of a rule's possible effect on candid client communications must consider (i) the likely frequency of disclosure; (ii) the fora in which the information would be disclosed; and (iii) the additional information that would be disclosed by virtue of the rule in question.

Disclosure of attorney-client communications after the death of the client in federal criminal investigations is likely to be quite infrequent. This is the first reported federal case, and there are only a handful of reported state criminal cases. In addition, information sought from an attorney must be relevant. See Fed. R. Crim. P. 17(c). [38]

38 For example, as the court of appeals concluded, the district court on remand may review the notes and determine which parts of petitioners' notes are relevant to the grand jury's Travel Office investigation.

The attorney's information is disclosed to a grand jury that, by law, operates in secret. See ***41** Fed. R. Crim. P. 6(e). "[T]he characteristic secrecy of grand jury proceedings is a further protection against the undue invasion" of an important relationship. *Branzburg,* 408 U.S. at 700. [39] To be sure, public criminal trials can develop out of grand jury investigations. At trial, however, only relevant *and* admissible statements are disclosed and hearsay rules will limit the chance of admissibility. Cf. Fed.R.Evid. 804(b). [40]

39 Also, the lack of an evidentiary privilege does *not* mean that attorneys are free to voluntarily disclose client information to the public. See ABA Model Rule of Professional Conduct 1.6.

40 The court of appeals stated that attorney client communications of the deceased client will be produced in criminal proceedings if their "relative importance is substantial. Pet. App. 10a. In the grand jury context, that formulation, which the court of appeals found "plainly met here, *id.* at 11a, is equivalent to relevance: Relative importance is a constantly shifting concept (sometimes on a daily basis) in a grand jury investigation. "It is only after the grand jury has examined the evidence that such a determination can be made. *Branzburg,* 408 U.S. at 701 702; see also *United States v. R. Enterprises, Inc.,* 498 U.S. 292, 297 (1991).
The court of appeals predicted that when there is an "abundance of disinterested witnesses with unimpaired opportunities to perceive an unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality. Pet. App.

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10a. That is accurate in the trial setting. In the grand jury context, as this Court emphasized in *Branzburg,* the government cannot and thus need not show that the subpoena recipients "possess relevant information not available from other sources because this determination can be made only after a "thorough and extensive investigation. 408 U.S. at 701.

The factual information disclosed by the attorney will simply be the same information that the client, if alive, would have disclosed himself. As noted above, that fact logically eliminates any chilling effect. And the client will be deceased when the attorney discloses the client's information, a fact that alleviates the most direct harm (*i.e.,* liability) that the client could foresee while talking to his or her attorney.

***42** Third, the law has established several rules relating to the attorney-client relationship that pose *serious* risks to the confidentiality of attorney-client communications. Therefore, even assuming a marginal effect on client communications by a rule that the privilege does not apply after death in criminal proceedings, that effect would pale by comparison to the effect caused by these settled rules.

One is the rule that the attorney cannot assist or even tolerate client perjury. Model Rule of Professional Conduct 3.3(a)(4) states: "A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."[4] In *Nix v. Whiteside,* this Court emphasized that there is "no breach of professional duty in [an attorney's] admonition to [his client] that he would disclose [the client's] perjury to the court .... No system of justice worthy of the name can tolerate a lesser standard." 475 U.S. at 174. In light of Model Rule 3.3 (and its local versions), a client talking to his attorney should know that the law and his attorney will prevent him from dishonestly altering his story when he later testifies.[42]

41 Comments to Model Rule 3.3 state:
Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.... Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.

42 There is anecdotal evidence that lawyers do *not* seek the full factual picture from their clients so as not to trigger their ethical responsibilities. This technique is followed "in order to avoid being compromised in deciding whether to put the client] on the witness stand. S. Gillers, *Regulation of Lawyers* 390 (4th ed. 1995). Moreover, clients often lie to their lawyers. "How much clients lie to lawyers ... is a regular topic, the consensus suggesting a lot. Marvin Frankel, *Clients Perjury and Lawyers Options,* 1 J. Inst. for Study of Legal Ethics 25, 35 (1996).
These two facts illustrate the *enormous* chilling effect caused by existing ethics rules.

***43** The attorney's actual or threatened disclosure of attorney-client communications in order to prevent perjury can produce "grave consequences" for the client. Such consequences are *far more direct and far more severe* than the possibility of harm to one's reputation and one's associates caused by *posthumous* disclosure of attorney-client communications in a criminal investigation.

The other relevant factor, as explained above, is the testamentary rule. Even assuming that clients would be marginally chilled by the prospect of a posthumous disclosure of attorney-client communications in a criminal investigation, the testamentary rule poses at least as great a chilling effect on attorney-client communications yet the law has required disclosure in such cases. Cf. *University of Pennsylvania,* 493 U.S. at 201 (rejecting chilling-effect argument in peer review case by comparing it to chilling effect in reporter's source privilege case, which the Court had already rejected).

In sum, even assuming that some marginal chilling effect is caused by terminating the privilege at death, that effect is outweighed by the imperative need for relevant evidence exacerbated by the deceased client's unavailability. See *Branzburg,* 408 U.S. at 695 ("we cannot accept the argument that the public interest in possible future news about crime

from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants").

E. A client's desire to protect his reputation or to protect others does not itself justify nondisclosure of information either before or after death.

Petitioners expend considerable energy and rhetoric proving the unremarkable proposition that individuals care ***44** about their reputations, and that at least some persons also care about their posthumous legacy. Petitioners note, in addition, that clients care about their loved ones, friends, and associates. We agree. But these truisms fail to advance petitioners' argument.

When living, the client cannot refuse to disclose information on the ground that it might harm his reputation. The Fifth Amendment applies only to testimony that would be self-*incriminating. Calandra,* 414 U.S. at 353. ("[A] witness has no right of privacy before the grand jury."). [43] Nor can the client refuse to disclose information on the ground that it might be incriminating or damaging to others. *Mandujano,* 425 U.S. at 572 ("The privilege cannot ... be asserted by a witness to protect others from possible criminal prosecution."). The individual must disclose all relevant information and must do so truthfully. See 18 U.S.C. 1001, 1621, 1623.

43 Posthumous reputation is generally *less* protected by the libel and defamation laws than reputation of a living person. See *Robertson v. Wegmann,* 436 U.S. 584, 591 n. 6 (1978) ("action for defamation abates on the plaintiff's death in the vast majority of States).

After death, the attorney's testimony in some cases might conceivably affect the decedent's posthumous reputation (positively or negatively) or the decedent's associates (positively or negatively). But *the information is the same factual information that the client himself would have been legally required to disclose if he were alive.* Such information is disclosed *not* because of the client's death, but because the client's information has been sought in a criminal investigation or trial. The client's death means only that the attorney, rather than the client himself, will provide the information. Petitioners' rule, by contrast, would mean that important information the client possesses would be disclosed if the client is alive, but concealed from the grand jury if the client is deceased. That would result in the anomaly that the protection of ***45** the client's reputation and the client's associates would be greater after the client's death. [44]

44 " I]f the attorney client privilege were intended to vindicate a regime of privacy, one would be inclined to extend a similar protection to all other arguably private relationships. Friends and lovers, for example, are surely at least as intimate in their interactions as an attorney and his client. Yet a protection of such great scope would swallow up much of the law of evidence. Note, *The Attorney Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,* 91 Harv.L.Rev. 464, 483 (1977).

F. The rule that the privilege does not apply after death in federal criminal proceedings is not discriminatory.

Petitioners argue that "people in the final stages of life frequently feel a particular need to speak with an attorney to put their own affairs in order or to resolve family or business problems." Pet. Br. 19. But the most likely issue about which a dying client might consult his attorney to "order his affairs" is his will and the disposition of his property. *Yet that is the precise circumstance where this Court and courts throughout the country have consistently concluded that the privilege does not survive death.* See Wright & Graham § 5498, at 484 n. 13 ("The common instance of concern for posthumous regard is the client who is writing a will or otherwise providing for the devolution of his property."). [45]

45 In petitioners' featured hypothetical, a client consults an attorney to seek legal advice about matters that threaten his friends, associates, and family. Pet. Br. 7. But that scenario does not appear even to meet the threshold elements of the privilege. " T]he privilege will not arise if the person claiming it sought the interview with or retained the attorney to enable the attorney to advise or assist someone else. M. Larkin, *Federal Testimonial Privileges* § 2.02, at 2 17 (1998).

And again, the relevant event for disclosure is not the fact of death, but the fact that the client's information is sought in a criminal proceeding. If an individual consults an attorney and the client's information is later sought in ***46** a criminal proceeding, the client must testify truthfully; if he is deceased, his attorney will simply disclose the same information that the client would have disclosed.

II. THE WORK PRODUCT DOCTRINE DOES NOT PROTECT PETITIONERS' NOTES.

As we contended in the court of appeals, and do so again in this Court, either of two alternative arguments each related to the fact that Mr. Foster is deceased resolves the work product issue readily and narrowly.

A. The work product doctrine has not been applied to protect work prepared by an attorney for a client who now is deceased and no longer can be a party in litigation.

Our initial work product argument essentially duplicates our attorney-client privilege argument. It would be contrary to settled work product principles, not to mention illogical, to apply the work product doctrine on behalf of a deceased client. [46]

46 Thus, if we prevail on the attorney client issue, we should prevail on the work product issue.

The theory of the work product doctrine explicit in Civil Rule 26(b)(3) and assumed to apply to grand jury proceedings by inference from *United States v. Nobles,* 422 U.S. 225, 238 (1975) demonstrates that the doctrine cannot be asserted to protect work done by an attorney for a client who is now deceased. As initially conceived and applied, the work product doctrine applied *only* in the litigation for which the work was performed. The question later raised was whether the work product doctrine should apply to documents that were prepared by the client's attorney in anticipation of some *other* litigation. See Note, *The Work Product Doctrine,* 68 CornellL.Rev. 760, 855 861 (1983). This Court effectively resolved the question in *FTC v. Grolier, Inc.,* 462 U.S. 19, 25 26 (1983), suggesting that the doctrine should be ***47** so extended. It would be unfair to penalize a party in litigation by requiring it to produce work its attorneys had produced for other litigation. In particular, litigants "who face litigation of a commonly recurring type ... have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." *Id.* at 31 (Brennan, J., concurring).

But the rationale for extending the work product doctrine in *Grolier* does not extend so far as to cover work prepared for a client who no longer will be involved in litigation *at all.* Therefore, because all possibility of criminal litigation ceases with the client's death, the purposes of the work product doctrine could not conceivably be served in any way by applying it to an attorney's work for a client who is now deceased. [47] The doctrine has not been extended so far and should not be extended so far here.

47 The work product doctrine protects the interests of the client. To do so, the doctrine applies to legal work performed for the client. "From its inception, ... the courts have stressed that the work product] privilege is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself. *Moody v. IRS,* 654 F.2d 795, 800 (D.C.Cir.1981) (quotation omitted).

B. Alternatively, because Mr. Foster is deceased and thus unavailable for questioning, the OIC has demonstrated sufficient need for petitioners' notes.

For purposes of our alternative work product argument, the key fact is that the witness (Mr. Foster) interviewed by Mr. Hamilton is now deceased. In such circumstances, the settled rule is that the grand jury can obtain an attorney's notes of the interview to the extent they reflect or relate a witness' statements or recollections and the contextual questions asked.

Opinion work product (the mental impressions, conclusions, opinions, or legal theories of an attorney) receives ***48** a very high level of work product protection. See Fed.R.Civ.P. 26(b)(3). Fact or ordinary work product (such as a witness' transcribed, recorded, or signed statement) is subject to disclosure upon a showing of need when, for example, the witness is now deceased or otherwise unavailable for questioning. See Fed.R.Civ.P. 26(b)(3) advisory committee's note; *Hickman,* 329 U.S. at 511 ("[P]roduction might be justified where the witnesses are no longer available....").

Here, we are concerned not with a transcribed or recorded interview or signed statement, but with attorney notes of a witness interview. Petitioners suggest that *no* portions of an attorney's notes, even the factual elements of a witness interview, can ever be produced, even upon a showing of witness unavailability. Pet. Br. 33 & n. 37. In petitioners' view, attorney notes are inviolable under all circumstances. That is clearly wrong.

Courts have not treated attorneys' memoranda or notes of witness interviews in an all-or-nothing manner, as entirely fact work product or entirely opinion work product. Instead, the factual portions of the attorney notes such as those recording or reflecting what the witness said and the contextual questions asked must be produced upon a showing of need (for example, an unavailable witness).

It is established that "a showing that a witness is deceased is usually sufficient to require the production of work-product materials." E. Epstein, *The Attorney Client Privilege and the Work Product Doctrine* 354 (1997). Two federal courts of appeals have addressed this situation and followed this common-sense rule. See *In re John Doe Corp.,* 675 F.2d 482, 492 493 (2d Cir.1982); *In re Grand Jury Investigation,* 599 F.2d 1224, 1232 (3d Cir.1979). See also Restatement § 138 cmt. c. [48] Petitioners' argument to the contrary is unsupported by law or policy.

48 The Second Circuit noted that one of the employees had a "hazy memory and other potential witnesses had invoked the privilege against self incrimination, so the government had "met its burden of showing a substantial need. 675 F.2d at 492 n. 10 & 493. The court permitted discovery of the attorney's notes because " w] hat is sought is what Employees A and B said, not the attorney's evaluation of potential liability or thoughts as to use at trial. *Id.* at 492. The Third Circuit reached the same conclusion in considering an attorney's memoranda of an interview of a deceased witness. The court found that the grand jury could obtain the attorney's memoranda, in redacted form, because the memoranda were relevant and the government was unable to secure the information from the deceased client directly. 599 F.2d at 1231 1232.

***49 CONCLUSION**

The judgment of the court of appeals should be affirmed and the case remanded with directions that an order be entered requiring the district court to compel petitioners to produce forthwith the relevant portions of the July 11, 1993, notes.

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SWIDLER & BERLIN AND JAMES HAMILTON,

Petitioners v. UNITED STATES

CASE NO: 97-1192

PLACE: Washington, D.C.

DATE: Monday, June 8, 1998

PAGES: 1-54

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IN THE SUPREME COURT OF THE UNITED STATES

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SWIDLER & BERLIN AND :

JAMES HAMILTON, :

Petitioners :

v. : No. 97-1192

UNITED STATES :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, June 8, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:38 a.m.

APPEARANCES:

JAMES HAMILTON, ESQ., Washington, D.C.; on behalf of the Petitioners.

BRETT M. KAVANAUGH, ESQ., Associate Counsel, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:38 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 97-1192, Swidler & Berlin and James Hamilton v. the United States.

Mr. Hamilton.

ORAL ARGUMENT OF JAMES HAMILTON

ON BEHALF OF THE PETITIONERS

MR. HAMILTON: Mr. Chief Justice, and may it please the Court:

On Sunday, July 11, 1993, at 10:00 a.m. in the morning, Vince Foster came to my home to consult me as a lawyer in the Travel Office matter, which was then the matter of intense public controversy.

We spoke alone for 2 hours, during which time I took three pages of notes, which are the subject of this litigation here today.

Before we began, Mr. Foster asked me if the conversation was privileged and, without hesitation, I said that it was. It is not disputed that my notes would be privileged had Mr. Foster not taken his own life 9 days later in Fort Marcy Park, Virginia.

Mr. Chief Justice, I wish to make five major points this morning which I would like to summarize briefly at the outset. First, any balancing test or

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ruling that leaves the existence of the attorney-client privilege after death in doubt would have a significant chilling effect on client candor, particularly as to those who expect to die soon, because people do care about their reputations and the fate of family and friends after death.

Secondly, Independent Counsel's central contention that only the perjurer would be chilled if the privilege does not survive but not the truthful client, or the client intending to invoke his Fifth Amendment privilege, is contrary to reason and experience and is unsupported by any decision of this Court.

Third, the conclusion that the privilege should survive in civil cases but not in criminal cases is illogical and unworkable and is supported by no case, no statute, or no commentator.

Fourth, all the pertinent State statutes recognize and virtually all of the nontestator cases hold that the privilege survives death, and the testator cases generally recognize that they apply an exception to the general rule that is intended to effectuate the testator's intent.

QUESTION: It's an exception that pretty much swallows up the rule though, isn't it?

MR. HAMILTON: Well --

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QUESTION: I mean, like 95 percent of the cases involve the exception to the rule.

MR. HAMILTON: Justice Scalia, that is correct, but they apply to a very specific situation, when there is a will contest, where there is a question about the testator's intent.

QUESTION: It's very specific, but it also happens to be the situation that is most likely to arise with respect to privilege as to a decedent.

MR. HAMILTON: Justice Souter --

QUESTION: It's precisely the situation most likely to arise.

MR. HAMILTON: Justice Scalia, it is certainly the situation that has arisen most in the past. I would suggest, though, that if the court's opinion below is upheld, the situation will arise much more in the criminal context.

QUESTION: How many cases upholding the privilege uphold it, uphold it against either a demand by a prosecutor in the -- in a criminal case, or a grand jury request?

MR. HAMILTON: There are only two cases that I know of. One is the case here. The other is the case in Massachusetts, the case -- the case involved a John Doe, as it is styled.

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QUESTION: Counsel, I recognize that the time frame for your briefing was compressed, but I think there may be at least a misimpression left by your footnote 22 at page 21 and it bears, too, on Judge Tatel's discussion and it bears, too, on your opening remarks that the States say the privilege does not survive.

In California, at least, and that's one of the States you cite in the footnote, the privilege does expire when the estate's closed, and that's been so for 35 years, and I have not found anything in the literature indicating that in California this has caused, number 1, any lack -- any diminishment in the number of lawyers, or in their effectiveness in representing their clients.

And so I think it's a very important distinction to say that the privilege can be exercised pending the administration of the estate, and then it closes, and if the other States, or some of them, are like California, that is, it seems to me, a very significant indication that experience has shown that this is not a problem.

MR. HAMILTON: Justice Kennedy, I believe that California is the only jurisdiction that has that specific reservation or provision --

QUESTION: Have other States addressed the problem? Can you say that the other States specifically do not?

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MR. HAMILTON: Our study of the State statutes find that they do not.

I would also point out that there are a number of States --

QUESTION: That they do not address the point.

MR. HAMILTON: That they -- well, that they do not specifically address the point.

QUESTION: Well, and if the administrator of the estate is designated as the one to exercise the privilege, then that means the lawyer alone would not be able to exercise it, so it seems to me you can infer that it expires.

MR. HAMILTON: Justice Kennedy, in a number of States, close to 20 States, the State provisions apply, or say that the lawyer also can assert the privilege, not just the personal representative but the lawyer also and, of course, that indicates that the survival of the privilege has nothing to do with the winding up of the estate.

QUESTION: But if I'm correct about California, you would agree that that is relevant in considering whether or not experience shows that this causes a problem.

MR. HAMILTON: I will agree that it is a relevant factor.

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I should point out that there is a California case, the Pena case that we cite in our brief, where this particular statute was applied in a criminal case, not just in a civil case relating to the administration of the estate.

QUESTION: Was that post the 1965 California amendment, do you know?

MR. HAMILTON: I believe it was, but I'll have to check the date of the case --

QUESTION: All right. I'll check that.

Well, in any event, in your brief and in a number of the amicus briefs it's stated that what the Independent Counsel is requesting here is very sweeping and unprecedented, but we have at least California, we have Pennsylvania, we have the ALI, which speaks for lawyers, we have all of the commentators except Wigmore, I think, and we have, as Justice Scalia points out, the privilege that in any event is inapplicable when estates and property are concerned.

It's inapplicable if there's an ongoing scheme that the attorney is consulted for in order to continue. It's inapplicable as to fees, inapplicable as to clients who dispute what the attorney told them and that the clients then are in dispute and, also, the privilege that we're talking about here is one only as to compelled

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testimony. The attorney's ethical duty to remain silent continues.

And so it seems to me that this not the sweeping change that the amicus briefs and that you indicate.

MR. HAMILTON: Well, there certainly are some exceptions that you have mentioned, but so far, with the exception of this case and the one case in Pennsylvania, there has been no case that has found that in a nontestamentary situation that the privilege expires when the client dies, and I would suggest, as I suggested to Justice Scalia, that if this Court upholds the lower court decision we will have many, many more cases that will raise this particular issue.

QUESTION: It hasn't happened in California for 35 years.

MR. HAMILTON: But if the Supreme Court of the United States announces that the privilege expires upon death, I think that we will find many, many more cases raising this particular issue.

QUESTION: May I ask if the California statute has been construed by the California supreme court?

MR. HAMILTON: By the California supreme court? It was construed by a California court of appeals in 1984. It was applied in a criminal case to bar the testimony of an attorney.

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QUESTION: It barred the testimony --

MR. HAMILTON: Yes.

QUESTION: -- in a case construing the statute?

MR. HAMILTON: Yes.

QUESTION: Judge Williams did say further, in some States the privilege does not survive the winding up of an estate, and cited California for that proposition. I know it isn't part of this record, Mr. Hamilton, but is the Foster estate wound up?

MR. HAMILTON: The Foster estate is not wound up.

QUESTION: But the period of claims is 3 months, the period for filing claims against the estate is 3 months in Arkansas?

MR. HAMILTON: I believe that is correct. As far as I know, no claims have been filed against the Estate, but it's not been finally wound up.

QUESTION: But if this were California you would be able to assert the privilege, is that right?

I mean, assuming that you read the California words, Personal Representative, to mean someone who ceases to exist when the estate closes, which I don't know whether that's true or not, but assuming that that is true, because here the estate isn't closed, it would be proper to assert the privilege, even under California's --

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MR. HAMILTON: I -- if the question is whether the attorney is the Personal Representative, I don't believe the statutes have been interpreted that way, Justice Breyer.

QUESTION: No, it says in California that if there is -- you can't claim the privilege if there is no holder of the privilege in existence, and the holder of the privilege is defined as a Personal Representative of the client, so if you were to construe that as saying the privilege dies after the estate's closed, still you'd be able to assert it here because the estate hasn't closed.

MR. HAMILTON: That's correct.

QUESTION: Mr. Hamilton --

QUESTION: Well, unless only the holder can assert it. Is it clear under California law that someone other than the holder of the privilege can assert the privilege?

MR. HAMILTON: Well, under California law the Personal Representative is the one who can assert the privilege.

QUESTION: And no one else.

MR. HAMILTON: I don't believe anyone else --

QUESTION: No, no, that's --

QUESTION: So you could not assert it under

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California law, then.

MR. HAMILTON: The attorney is not -- under California law the attorney is not given the right to assert the privilege.

QUESTION: I'm not -- are you sure? I have this now in front of me. I'm reading it quickly, but it says the lawyer who received or made the communication subject to the privilege shall claim the privilege, in -- do you know that -- that's section 955. It seems to give a -- I don't know how much you've looked at the --

MR. HAMILTON: At the California law.

QUESTION: Yes, so I'm not certain that the lawyer couldn't assert it.

MR. HAMILTON: Well, certainly -- certainly, Justice Breyer, in many States the lawyer can assert the privilege.

QUESTION: Mr. Hamilton, you take the position that there can be no compelled testimony by someone in your circumstances even if the information would be essential to show that a third person was not guilty of a crime, such as in the Macumber case in Arizona.

You say even in those circumstances there's no way to get at the information. Is that right?

MR. HAMILTON: Justice O'Connor, what we said was this, that in a situation where a defendant's rights

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are at issue and where denying a defendant access to certain information might unconstitutionally arbitrarily and disproportionately infringe upon his or her right to weigh the evidence, perhaps the Court in that situation --

QUESTION: Well, we don't even know that unless the material can be reviewed, do we?

MR. HAMILTON: Well, that is correct. That is correct. You don't know that.

QUESTION: And you don't oppose reviewing it if a defendant in some other case needs the information, or says he needs it?

MR. HAMILTON: If there was some demonstration that evidence in the hands of an attorney would be crucial to a defendant's right in this situation I would not oppose in camera review.

QUESTION: So you make an exception for criminal cases.

MR. HAMILTON: I would make an --

QUESTION: There goes your absolute rule that you can't draw a distinction between civil and criminal. You're willing to make a distinction between criminal to that extent.

MR. HAMILTON: Justice Scalia, in the case of a situation where a defendant's rights may be at issue, then I think that --

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QUESTION: But that's still a criminal case.

MR. HAMILTON: That is still -- that is still a criminal case.

QUESTION: Let's put it in the context, why just the defendant's rights? I mean, let's put it in the context of your client and, as you know, there are conspiracy theorists who believe that his death was not a suicide but in fact was murder.

You acknowledge that if his evidence was necessary to prove that it was not his wife who committed the murder, that that indeed might be able to come in, but what if his evidence was necessary to prove that somebody else committed the murder? Then you would not let it come in for that purpose?

MR. HAMILTON: In that circum --

QUESTION: Even if it was necessary to show who killed the --

MR. HAMILTON: In that circumstance I would not, and let me tell the Court why. I --

QUESTION: It seems to me quite disproportionate. I mean, courts like to get to the truth, and it seems to me that in that situation I can't see what interest is being preserved.

MR. HAMILTON: Justice Scalia, courts do like to get to the truth, but this Court has said that a privilege

like the attorney-client privilege is of transcendent importance. It is important so clients will go to their lawyers and talk to their lawyers with candor. That's central for the lawyer, for the client, but also for the administration of justice.

Now, if we have a rule that allows the privilege to be broken whenever a prosecutor or a grand jury feels that he or it needs the information to pursue who committed a crime, then the privilege will be of little value.

Obviously, here, we have a balancing, if you will, of interest, the interest in having lawyers speak to their clients with candor and the interest of getting to the truth, but all of the privileges that we have recognize that to some degree, to some degree they will inhibit the search for information.

QUESTION: But virtually all the other privileges we have have somebody else around who can say, well, in this circumstance I'm going to let it go. The attorney-client privilege, when the client is still alive he can say, okay, you know, in the interests of justice this ought to come out.

But what's extraordinary here is, you're saying there is nobody -- no matter how severe the public interest is on the other side, there is nobody who can

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say, enough is enough, in these circumstances the information ought to come out.

Even if you yourself thought that the information was really crucial to you, you would have to say, nobody can let it out. That's extraordinary.

MR. HAMILTON: Justice Scalia, in this particular situation I do believe the Personal Representative of Mr. Foster's estate could waive the privilege.

QUESTION: Is the doctor-patient privilege different in that respect, on death?

MR. HAMILTON: In terms of -- in terms of who can waive it?

QUESTION: Yes.

MR. HAMILTON: I would think -- Justice Ginsburg, we have not briefed that particular issue but I would think that in that circumstance also the Personal Representative of the estate could waive.

QUESTION: But you --

QUESTION: Is there authority for either of those propositions, that the Personal Representative of the estate could waive either the physician-patient privilege or the lawyer-client privilege, or is this just kind of speculation on your part?

MR. HAMILTON: There certainly is authority for

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the proposition that the Personal Executive can waive the attorney-client privilege.

QUESTION: Authority by virtue of statute.

MR. HAMILTON: And in other --

QUESTION: And in a few other States.

MR. HAMILTON: And in other --

QUESTION: By virtute of statute.

MR. HAMILTON: And in other jurisdictions, too.

QUESTION: By virtue of statute.

MR. HAMILTON: Yes. Yes.

QUESTION: Wouldn't you suppose, though, that the extent of the waiver would be limited by the extent of the Personal Representative's authority, which I guess I have always assumed is essentially authority over property, so that if we're concerned about reputational protection absent a statute, I would suppose the Personal Representative could not waive it.

MR. HAMILTON: Well, the cases are not very specific on that, but there is at least some implication that the Personal Representative could waive in other situations. For example, let me speak about the Macumber case, because I think that is an example of how the courts, even in affirming the privilege, have found a way to do justice.

In that case, on remand the Personal

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Representative of the deceased's estate did waive the privilege, and so the attorney's testimony was available to the court.

And it so happened in that situation that the court decided that the testimony was untrustworthy for a number of reasons, and it was not admitted into evidence, but there --

QUESTION: But that came at the initiative of the attorneys, did it not? I mean, if they had -- they had this confidence that had been made to them, but the defendant never would have found out about it had it not been for the attorneys for the other client.

MR. HAMILTON: Well, in that situation the attorneys did seek guidance from the bar to see what they could do, so I think it is fair to say that the attorneys had something to do with --

QUESTION: Your typical defendant in a criminal case is simply -- in a lot of -- they're simply not going to know of the existence of this evidence, so -- if the privilege obtains, and that presumably is -- if the privilege does obtain, that's the way it ought to be.

MR. HAMILTON: Well, they may or they may not. I mean, we don't know what a deceased person has told some third party, so it's hard to speculate as to what someone might know, Mr. Chief Justice.

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QUESTION: Mr. Hamilton, you said you had five points, and you got out four, so we'd like to hear what the fifth one was.

MR. HAMILTON: The fifth one was this, Justice Ginsburg. As to work product, the court of appeals' notion that even seasoned attorneys do not exercise any professional judgment in taking notes during an initial client interview is contrary to reason and experience, it's without case support, and it is contrary to the facts of this particular case.

I would like to go back to my point that persons will not talk with a lawyer with candor if they know that, when they die, what they say can be discovered by a prosecutor. Over and over and over again this Court has said that the purpose of the privilege is to encourage clients to talk to their lawyers in a candid fashion.

QUESTION: I think this is very important and I want to pursue it with you a little, but as you begin, I'm thinking back to the errors on a case, the Macumber case. You indicate that one of the situations where the confidence might be disclosable is when the client confesses a crime and then someone else is charged with the crime after the death.

So that's the instance where the confidentiality is most important in -- to encouraging the disclosure, and

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yet we have -- you admitted the possibility, in any event, that it would be discoverable.

MR. HAMILTON: In the extreme situation where a defendant's rights would be unconstitutionally, arbitrarily and disproportionately infringed upon, a court might find an exception.

QUESTION: And the paradigm example of that is when the client confesses the crime to the attorney.

MR. HAMILTON: That is the paradigm example but, Justice Kennedy, that is not this case. Here, we have a prosecutor and a grand jury seeking, not specific information about -- that's exonerating, but seeking all relevant information.

QUESTION: Agreed.

MR. HAMILTON: And not to exonerate anyone, but to see whether prosecution is a possibility.

As I was saying, the candor rationale has been announced by this Court in Upjohn, Jaffee, Fisher, Zolin, Trammel, and other cases.

QUESTION: What do you -- what's the classic instance in which the attorney really should know something in order to help the client, but that the attorney would not hear this? The client would be silent if the Independent Counsel's position prevailed. What's the classic example, do you think?

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MR. HAMILTON: Well, I think --

QUESTION: It can't be confession of the crime, can't be property.

MR. HAMILTON: I think you can think of many hypotheticals where a client might be disinclined to reveal something to an attorney if the client knew that after death it might be revealed to the prosecutor.

I mean, in this situation an attorney would have to say, well, I would like for you to tell me the facts, but don't tell me what's really bad, what's really bad, because if you die I may have to reveal this to a prosecutor.

So I think you can come up with many hypotheticals where a client might not want to reveal some facts to the attorney.

Let me just give you a specific one that I used in the court of appeals. What if we have a father who is dying, and he wants to consult a lawyer about the criminal drug problems of his child. Now, in this circumstance the dying father will know that as soon as he passes away some prosecutor might be able to get to the information that he has imparted to his lawyer and, in that circumstance, I think that candor would be chilled, because the father is not going to want to say things --

QUESTION: Why does the father have to do that?

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Can't he just say, I want a spendthrift trust for my son, my son has got some problems. That's all he needs to say.

MR. HAMILTON: Well, he may not --

QUESTION: Because you're presuming that there's something that's very necessary for the attorney to know that the client won't be able to tell, and I don't see that in that hypothetical.

MR. HAMILTON: Justice Kennedy, the father may not come to the lawyer about some estate problem, may not come to the lawyer to set up a trust. The father may come to the lawyer to consult about the criminal problems of his son, because he is concerned about him and he needs advice as to how these matters should be handled.

QUESTION: Certainly many lawyers are kind of family confidantes, as well as just advisors on purely legal matters, I suspect.

MR. HAMILTON: Well, that, of course, is true. The privilege applies when legal advice is sought.

QUESTION: But a person may -- might go to a lawyer and -- with respect to your -- the drug, criminal drug problems of the son and say, you know, I really don't know what to do about it. He wouldn't necessarily have in mind a particular testamentary disposition. He probably wants the lawyer to tell him what he might do about it.

MR. HAMILTON: Well, he may seek the lawyer's

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advice about this criminal issue, that is certainly right. People who are near death do not always consult lawyers about estate issues.

QUESTION: If I consult you about somebody else's criminal problem, is that privileged?

MR. HAMILTON: If you -- if you consult me and you're asking my advice particularly as to a matter that may affect you in some way, yes, it is privileged.

QUESTION: Well, I'm asking, you know, can my son be prosecuted. I mean, there's nothing --

MR. HAMILTON: If --

QUESTION: Or, can my brother be prosecuted.

MR. HAMILTON: If --

QUESTION: Can my third cousin be prosecuted? Would that be --

QUESTION: What if he's asking, should I make an insurance claim on behalf of my son, who has this problem? He might not necessarily be asking about whether the man committed a crime, but whether it would be wise to make a claim knowing these background facts.

There are a lot of different things, other than crimes, that lawyers consult -- are consulted about.

MR. HAMILTON: Well, that is certainly true. That is certainly true, and if I am consulted by a person who wants my legal advice, even though it involves issues

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concerning other people, that type of conversation, Justice Stevens, is privileged.

Now, if the situation is only, will you help me get a lawyer for my son, that would not necessarily be -- I think that would not be privileged, but certainly you can consult about the legal issues of others. You can consult with an attorney. You can ask the attorney to advise you, and that certainly has happened in my own practice.

Mr. Chief Justice, I would like to reserve some time for rebuttal.

QUESTION: Very well, Mr. Hamilton.

Mr. Kavanaugh, we'll hear from you.

ORAL ARGUMENT OF BRETT M. KAVANAUGH

ON BEHALF OF THE RESPONDENT

MR. KAVANAUGH: Thank you, Mr. Chief Justice, and may it please the Court:

In light of what petitioner has stated, let me state at the outset there can be no mistake about the pernicious consequences of petitioner's theory, taken to its logical extreme. By permanently walling off a critical category of evidence from the criminal process, petitioners' theory will lead to extreme injustice. Not our words, the words of Mueller & Kirkpatrick. That will mean that innocent people --

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QUESTION: Who are Mueller & Kirkpatrick?

MR. KAVANAUGH: They are two commentators on the law of evidence.

QUESTION: Oh.

MR. KAVANAUGH: That will mean that --

(Laughter.)

QUESTION: They're not quite as well known as Professor Wigmore and the like.

MR. KAVANAUGH: That will mean that innocent people will be wrongly convicted and guilty people will be wrongly exonerated, each of which implicates a substantial societal interest. The case of State v. Macumber is exemplary of that point.

QUESTION: Mr. Kavanaugh, we've been just told by Mr. Hamilton that he wouldn't take it to that extreme, where it's a question of a defendant who was convicted -- who's charged with a crime, and the information was that some other person had done that and the lawyer knew that.

He did not press his case to that extreme, so I think it would be useful if you curtailed your argument to the one that Mr. Hamilton is making on behalf of the privilege.

MR. KAVANAUGH: If that's true that he's not pressing it to the logical extreme, that undercuts entirely his chilling effect argument, because the person

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consulting his attorney before death will not have the expectation of confidentiality on which their entire theory is premised.

QUESTION: No, you're only leaving out the case where he's confessing to a crime, and there are a lot of consultations between lawyers and clients where the client does not confess to a crime.

MR. KAVANAUGH: That's right, Justice Stevens, but the most likely issue about which a client might consult an attorney in which the communications might be sought after death are testamentary cases, and in that circumstance the law has long established -- over a century in this Court -- that the privilege does not survive death, notwithstanding, notwithstanding the embarrassment and the harm to reputation that can ensue from disclosure --

QUESTION: Yes, but the assumption -- no, go ahead.

QUESTION: Why do you accept the qualification that your argument only goes to when there's an admission to a crime? Wouldn't your argument also go to the situation where there's an admission that somebody else did the crime?

MR. KAVANAUGH: Well, in that --

QUESTION: My son did the crime. My third

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cousin did the crime. Wouldn't that also open up, if you accept the qualification, the consultation to intrusion?

MR. KAVANAUGH: Yes, Justice Scalia.

QUESTION: Well, my point is, there are a of consultations where nobody committed a crime.

MR. KAVANAUGH: That's right.

QUESTION: You can't assume all consultations between client and lawyer involve criminal behavior. Generally, we presume people are innocent unless somebody proves otherwise.

MR. KAVANAUGH: But most likely consultation, again, will be in the testamentary context, and there the law has long established that the privilege --

QUESTION: How do we know that's the most likely consultation between lawyer and client? Clients talk to lawyers about a host of problems, not just testamentary dispositions.

MR. KAVANAUGH: The most likely situation in which the communications would be sought after death, experience tells us, are testamentary cases. In fact, it is --

QUESTION: And maybe one reason for that is, it has generally been assumed, as the literature is unanimous on it, that these conversations are privileged.

MR. KAVANAUGH: We don't know --

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QUESTION: That is the background assumption, on the cases you describe all say they are exceptions from the general rule.

MR. KAVANAUGH: Exceptions from the general rule of attorney-client privilege. It's not exceptions from a general rule about what happens to the privilege after death, the most prevalent rule after death. The only thing we know that is settled with respect to posthumous privilege is that the privilege does not apply in the vast majority of cases in which it's raised, namely, testamentary cases.

QUESTION: No, but does that prove very much for your side, because the theory of the testamentary exception is that the client would, in fact, want the lawyer to talk for the purpose of implementing whatever the client's intent was.

The assumption seems to be that there's a point to which the client wants to go. That was the object of the will or the trust, or what-not, and so in fact the theory behind that exception is really that the client authorizes it.

You're arguing for the converse case, in which we assume the client would not, so what does that prove?

MR. KAVANAUGH: Two points in response, Justice Souter. First, as Judge Williams and Judge Wald stated in

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the court of appeals opinion, that rationale for the testamentary exception simply does not work. We don't know whether, in intending for a particular property distribution, the testator intended that his or her attorney-client communications also be disclosed to fulfill that property intent, so --

QUESTION: Well, we may not in the sense that in this case there is in fact a statement that can be attributed to the client saying, I want you to talk or I don't want you to talk, but it seems to me there is a reasonable argument that the client wants the object of his testamentary intent to be served and if in order to serve it, it is necessary to disclose something, it's reasonable to suppose the client would want the disclosure.

I think that's as far as the theory goes.

MR. KAVANAUGH: Well, it may be reasonable to suppose but most believe that that's the one situation above all others where clients would be chilled to nondisclosure by the possibility of posthumous disclosure of the attorney-client communications, and if we're going to presume intent in that context, why do we not also presume intent in this context: presume that a person near death would want to fulfill what this Court has called his basic obligation as a citizen to provide

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information to the grand jury?

And even on the facts of this case --

QUESTION: Because there are a great many people who know they have that obligation, or at least that there is a general theory that they have that obligation, but they do not, in fact, want to fulfill it.

I mean, we're being realistic, I think.

MR. KAVANAUGH: Well, it's again what we should presume someone's intent to be, and if we presume it in the testamentary context, even though it's going to be embarrassing information about one's family members, it could cause great harm --

QUESTION: Well, if I may interrupt you, I think it's the difference between a presumption of fact and a presumption of law.

I mean, in the testamentary case, we figure in fact the fellow wants to accomplish something. If we're going to presume it in this case, I think it probably would have to be a presumption of law quite divorced from any specific actual intent on the part of the client because we know that if embarrassment would in fact result to the client's reputation, to living individuals, probably the client would not want that disclosed.

MR. KAVANAUGH: Well, again, I guess we just have a disagreement about what people would want done in

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the testamentary context as well, but --

QUESTION: May I ask you a different question, which hasn't specifically come up, I think. Who has the burden of persuasion here? Do you have it?

MR. KAVANAUGH: This Court has stated repeatedly that privileges obstruct the search for truth and thus must be strictly construed, so to the extent there's a burden with respect to a legal issue, we would suppose that the burden would be on petitioners to establish what they want here, which is --

QUESTION: What if we -- if we assume -- and I realize that you dispute this, but if we assume, in fact, the understanding of the profession has been, at least for a very long time, that there is a privilege as broad as Mr. Hamilton argues for, so that we start with a privilege which has been established, then I suppose the burden would be upon you, in fact, to justify a curtailment.

MR. KAVANAUGH: Well, in the -- the testamentary exception did not exist forever, either. That was an exception that was developed over time, and this Court recognized it in Glover v. Patten.

With respect to exceptions to an absolute privilege, we stili think, when the societal interests are balanced, the burden is on the privilege proponent to establish that the need for confidentiality outweighs the

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need for relevant information.

QUESTION: Mr. Kavanaugh, you're confining your argument to the -- to a criminal case?

MR. KAVANAUGH: That's correct, Mr. Chief Justice.

QUESTION: Now, when you say a criminal case, do you mean a case where the statement made by the client to the attorney has perhaps some earmarks of a declaration against penal interest, or is it just any statement made by the client towards the attorney which might be admissible or useful to a criminal investigation?

MR. KAVANAUGH: It's the latter, Mr. Chief Justice.

QUESTION: In that context your brief, I think at about page 8, indicates, well, there's no danger to the client of criminal liability once -- after his death, but there is substantial danger of civil liability.

If X confesses to the attorney that he's engaged in a pattern of fraud that's criminal, and that comes out, that would subject his estate to a civil liability by the injured persons.

MR. KAVANAUGH: The rule we seek in this case leaves open one of two possibilities in a civil case in which the estate is a party. Either in that future case the court or the Federal courts could end the privilege at

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death, or they could end it when the estate is wound up.

In your earlier questions, Justice Kennedy, about the estate being wound up, that rule shows that the rationale behind winding it up on the estate, ending the privilege when the estate winds up, means that interests and reputation, and interests and protecting others, are not what justifies the privilege after death.

It is simply to protect the financial interests of the estate and, thus, those codes which have been in the proposed Federal rule and the Model Code of Evidence, the rationale for those codes, limitation and duration and scope, support our position when that rationale is translated to the criminal --

QUESTION: I think that perhaps understates the -- one reason which I think is generally agreed to, that the client must feel free to tell the lawyer, you know, the truth, the whole truth, et cetera, so that the lawyer will be able to give him good legal advice, and it seems to me when you narrow the rationale the way you do, perhaps you overlook some of that.

MR. KAVANAUGH: Well, we think the attorney-client privilege, as it is developed over time, represents not a single policy. Petitioners cherry-pick out the one policy of encouraging client candor, but it represents a balancing, a mix of considerations and policies that have

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led to different rules in different contexts, such as the crime-fraud exception, such as the exception for testamentary cases.

QUESTION: Mr. --

QUESTION: Well, in the case of the drug-user son, the hypothetical we were discussing, it seems to me there is some merit to that argument. Attorneys, especially in practices where they advise families, often have this kind of question. What shall I do with X in my family who's an alcoholic, or a drug user?

Attorneys engage in not just retrospective analysis of what happened. They try to give guidance for the future, and it seems to me that the profession might be a little poorer for the restriction you ask us to adopt.

MR. KAVANAUGH: The American Law Institute, which does represent the interest of judges and lawyers, and has been followed by this Court in many different bodies of law, has concluded, in agreement with our position, that the privilege should end after death. In the hypothetical --

QUESTION: Well, Mr. Kavanaugh, that position is not really supported by much of any case law that I can find. I mean, that's a position they take in the explanation, but it does not appear to have a lot of

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support.

And while I have you interrupted, how do you characterize the holding of the majority of the panel below that we're reviewing? They seem to adopt some sort of balancing test as applied to a specific case to see whether testimony should be -- whether the privilege should be breached and the testimony compelled.

MR. KAVANAUGH: The --

QUESTION: Is that how you understand the holding?

MR. KAVANAUGH: The court of appeals did require that the information be, quote, of relative importance, a standard that they said was plainly met in this case.

QUESTION: But it seemed to be some kind of a balancing test applied case by case. Do you support that approach? Is that the rule you suggest that we should apply?

MR. KAVANAUGH: We support that approach, but we also pointed out in our brief that it may be somewhat inconsistent with what this Court has done in cases such as Branzburg, where --

QUESTION: Yes, I think it is. This Court has rejected a sort of balancing approach.

MR. KAVANAUGH: In many cases it has, and that's why we pointed out in our brief that in cases such as

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Branzburg and University of Pennsylvania within the context of grand jury proceedings the need has already been established. There's no necessity for further balancing once you're within that narrow, limited context.

QUESTION: Mr. --

QUESTION: Well, it sounds like you're not arguing for affirmance of the test articulated by the panel below, but you didn't cross-petition.

MR. KAVANAUGH: We're arguing for affirmance of the judgment and we pointed out an alternative legal standard in support of the judgment below. We are not seeking to enlarge the judgment in any way, Justice O'Connor.

QUESTION: What was the judgment below? Was it that the district court consider the matter and come to a determination, or was it that the material had to be provided?

MR. KAVANAUGH: It reversed and remanded without specific directions as to what was going to happen on remand. Presumably -- we don't know whether all the notes even concern the Travel Office matter, since we haven't seen the notes, and there may be parts of it that aren't even relevant to our investigation.

QUESTION: Well, did it tell the district court to apply the weighing test that it enunciated?

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MR. KAVANAUGH: It simply said, reversed and remanded for further proceedings consistent with this opinion, so --

QUESTION: Well, wouldn't one think that further proceedings consistent with this opinion would be to apply the weighing test that the court announced?

MR. KAVANAUGH: We don't think so, because the court said the standard was plainly met here, and it was talking about --

QUESTION: Where -- can you point out the portion of the opinion, because that's blurry in my mind. I don't remember the court of appeals having resolved the issue for the district court.

MR. KAVANAUGH: On page 11a of the petition appendix, where the proponent has offered facts supporting a --

QUESTION: Whereabouts on page 11a are you reading from?

MR. KAVANAUGH: The beginning of the first full paragraph, where the proponent has offered facts supporting a good faith reasonable belief that the materials may qualify for the exception, a standard plainly met here by the Independent Counsel, and the preceding paragraph --

QUESTION: But what does it say after that? It

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says, the district court should, in its sound discretion, examine the communications to see whether they in fact do. That's hardly instructing the district court, go ahead and order the disclosure of this material. It says, examine the communications.

MR. KAVANAUGH: Well, we think the communications have to be examined to determine whether they're relevant to our investigation. There may be portions of the notes, again, that have nothing to do with the Travel Office and may be extraneous materials, and that's why the district court in the first instance has to look at it.

QUESTION: And then the court goes on to say, to the extent that the court finds an interest in confidentiality -- the district court -- it can take steps to limit access, et cetera, so it's hardly an instruction to the district court to go ahead and order the divulgence of these notes.

May I ask you a question in that line. Could you, if Foster were alive, say -- subpoena him as a witness before the grand jury and say, tell us what you told your lawyer?

MR. KAVANAUGH: No. We could say, tell us everything you know about the Travel Office matter, which is the same information that he told -- presumably told

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Mr. Hamilton.

All we seek in this case -- the grand jury seeks no windfall. It seeks to be -- the same information to which it would have been entitled were Mr. Foster alive.

QUESTION: But you would not have been entitled to these notes if the client were alive, so it's his death that establishes your qualification for something you could not have gotten. I thought your main argument was, this is a backup for the client, we could have had the client were he only alive, but now what you're really urging is something you never could have gotten when the client was alive. You could have gotten the client's testimony.

Do you think you could ask the lawyer, tell us what Foster told you, instead of looking for his notes?

MR. KAVANAUGH: If he were alive?

QUESTION: No. Foster --

MR. KAVANAUGH: In the current situation?

QUESTION: Yes. You're saying --

MR. KAVANAUGH: Yes.

QUESTION: -- you have a right to his notes. Do you also have a right to the lawyer's testimony?

MR. KAVANAUGH: Absolutely, Justice Ginsburg.

QUESTION: And is it up to you interchangeably, or do you have to do one before the other?

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MR. KAVANAUGH: The orderly process of a grand jury, you usually seek someone's documents and then question them about those documents.

QUESTION: How --

QUESTION: But even on the work product side of it, if you have access to the lawyer's testimony, why do you need the notes?

MR. KAVANAUGH: Because the notes may help to show what was discussed in the conversations between Mr. Foster and Mr. Hamilton and refresh Mr. Hamilton's recollection.

QUESTION: Well, he can use them to refresh his recollection.

But I thought, now turning to the work product side of it, that a statement that's not the witness' verbatim statement, that is the most closely guarded kind of work product, a lawyer's notes as distinguished from his verbatim transcript of the witness' testimony.

MR. KAVANAUGH: The settled case law in the lower courts, Justice Ginsburg, is in situations where the witness who communicated with the lawyer is unavailable, then those portions of the notes that at least reflect the factual statements of the witness and surrounding information must be disclosed, even when the client, the witness is still alive.

QUESTION: But you have to make a substantial showing under the rule, don't you, and for those perhaps under Upjohn you have to make even more of a showing.

What showing did you make in this case as to the work product?

MR. KAVANAUGH: The showing that has to be made, Mr. Chief Justice, is a showing that the witness in question is no longer available for questioning, as the Second and Third Circuit stated, and that is what the showing is, and that's been a traditional showing in the lower courts and is approved in the Restatement, that suggest that the notes must be produced in that circumstance.

QUESTION: That itself is a substantial showing that the witness is no longer available?

MR. KAVANAUGH: That's correct, Mr. Chief Justice, and those opinions have -- and the Restatement follow what Upjohn stated on that point.

In Upjohn, of course, and this goes to the attorney-client privilege point that Justice Ginsburg raised, a fundamental pillar on which the attorney-client privilege rests, a pillar that this Court emphasized in Upjohn, is that the client can be questioned directly about the underlying events, and that's simply not true after death, and that's what fundamentally alters the

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privilege analysis in this case. The client --

QUESTION: Well, you can't question a person after his death -- sorry. You can't question the person before his death about a matter that's privileged, can you?

MR. KAVANAUGH: No, but the same information --

QUESTION: Well, how do you know that he didn't talk to the lawyer about privileged matters, matters that were the subject of some other privilege? How do you know that? You haven't seen the notes.

MR. KAVANAUGH: We don't know what's in the notes, correct.

QUESTION: All right. So is it your rule that what's supposed to happen is that after a person dies the judge is supposed to go through the notes that his lawyer has to see if they're subject to some other privilege or not, and some materials would survive the death and others wouldn't survive the death? Is that basically it?

MR. KAVANAUGH: Well --

QUESTION: I mean, some conversations with lawyers would survive death as privileged.

MR. KAVANAUGH: Ordinarily --

QUESTION: Others would not.

MR. KAVANAUGH: Ordinarily when you disclose information to your attorney, if the attorney-client

privilege doesn't apply -- for example, in a crime-fraud situation you couldn't come in and say, oh, some other privilege applies.

QUESTION: Why not? You might have told the attorney what you told your wife, or what your wife told you, or what you told your psychiatrist, or what the psychiatrist told you, or any other dozens of privileges that could apply.

So if you're saying, I guess, that those still would apply, even though they'd normally be waived when you talk to somebody about them, you're asking the judge to start picking and choosing among them, is there any common law support, or do you find in the last 30 years, even in California, any instance -- I guess you did a handful, six or something.

But I mean, you looked at hundreds of cases. Did you find instances where either in civil or criminal proceedings, in California or anywhere else, somebody did breach this privilege, other than the testamentary context?

MR. KAVANAUGH: Well, the case in Pennsylvania --

QUESTION: I'm not saying, necessarily, cases. I mean, is it the practice in California that prosecutors or civil litigants routinely obtain material on discovery

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from a lawyer of a person who's died after the closing of the estate?

MR. KAVANAUGH: Well, again, there is a distinction between civil cases in which the estate is a party and other civil cases. You're question goes to the unusual nature of the facts presented in this proceeding and in cases such as the Charles Stewart case or the Macumber case.

QUESTION: No, I'm asking you basically -- you've done a lot of excellent research, and I'm saying in the course of that research, either through conversations or otherwise, have you found it to be a practice in California, which has had this evidence code for 30 years, have you found that it is the practice, have you found an instance, either in cases or outside of cases, where lawyers routinely or otherwise, in civil or criminal proceedings other than the testamentary context, breached the lawyer-client privilege?

MR. KAVANAUGH: It's simply silent on that point, Justice Breyer. We have not found instances. A lot of this will come up, of course, in the criminal context in the context of secret grand jury proceedings in a --

QUESTION: If not it perhaps shows that criminal prosecutions are very responsible, that criminal

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prosecutors are very responsible and don't abuse the privilege that California apparently gives them.

MR. KAVANAUGH: I think it might show that the kind of situation -- that's true, and also shows that the kind of situation we have here, as the facts and the statement of facts indicate, are rarely going to arise.

QUESTION: Another thing it shows is the woeful dearth of any empirical research in the legal profession, because the kind of questions that Justice Breyer and some of the rest of us asked, you know, if lawyers were polled as to how they treated client confidences, and people asked prosecutors, we would have a much better idea of how to decide this case than, you know, AB writes a law review article and says, here's what I think.

MR. KAVANAUGH: I couldn't agree more, Mr. Chief Justice, and the empirical question, even as to the attorney-client privilege for living clients outside the context where the client asserts the Fifth Amendment, there is very little empirical support behind --

QUESTION: Well, of course, this is against a background in which the attorney has the unceasing ethical obligation not to discuss the confidential communications. We're talking only about compelled testimony.

MR. KAVANAUGH: That's exactly right, and that's important, Justice --

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QUESTION: But even there, I'm a little concerned. Suppose that there is a multidefendant crime, and there are five lawyers representing five different defendants.

Defendant number 1 dies. Under your view I guess the prosecution could compel the attorney for the now-deceased defendant to disclose all of the information, which it seems to me might among other things put the attorney for the deceased clients in great danger.

(Laughter.)

MR. KAVANAUGH: That's right, and actually, Justice Kennedy, your question is a problem in the law notwithstanding dying clients.

QUESTION: Why is it a problem? I mean, death has sort of given one of the five defendants absolute immunity --

MR. KAVANAUGH: That was my --

QUESTION: -- which the State could have given anyway, right?

MR. KAVANAUGH: That's absolutely right.

QUESTION: It was given in a more extreme fashion, so to speak.

MR. KAVANAUGH: That's right, Justice Scalia, and, in fact, what I was going to say is, the law has a --

QUESTION: But Mr. Kavanaugh, in that case it's

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the defendant who would have the worry, not the defendant's lawyer.

MR. KAVANAUGH: Well, the law has experience with the situation Justice Kennedy raises, not with someone dying but someone pleading or being granted immunity, and there are complications.

QUESTION: Right, and he may have to worry about it, but his lawyer doesn't have to worry about it.

MR. KAVANAUGH: Well, I think Justice Kennedy was positing a situation in an organized crime type of case where the lawyer would be in danger if the client --

QUESTION: Because the lawyer is the source --

QUESTION: Well, I am.

QUESTION: -- of the information.

QUESTION: I am. What's the answer to it?

MR. KAVANAUGH: Well, the answer --

QUESTION: I --

MR. KAVANAUGH: -- in that case is that the attorney must disclose the communications and there can be conflict problems if there was a joint defense arrangement whereby everyone was meeting in the same room.

QUESTION: Mr. Kavanaugh, you say that the attorney must disclose the communications. This goes to your basic theory. I'd just like to know, are you urging us to decide what the law now is, or are you asking us to

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change the law?

MR. KAVANAUGH: We think the law is -- in Federal courts there is no law, and so I guess it's both. We don't know whether --

QUESTION: You want us both to say what the law now is and change it.

(Laughter.)

MR. KAVANAUGH: We don't know what the law -- we don't know what the law is, Justice Stevens.

QUESTION: But you're not urging that the law be what the D.C. Circuit -- as I understand your position, you say, we think that death ends it, period. The D.C. Circuit said there's some kind of balancing.

Do I understand you correctly to say, we think the D.C. Circuit was wrong, but we'll take that as second best, so that your position is, death ends the privilege?

MR. KAVANAUGH: We don't think the D.C. Circuit was wrong. We do think the D.C. Circuit's articulation of the phrase, relative importance, has some inconsistency with what this Court has stated in cases such as Branzburg --

QUESTION: Well, what is your first position, then? Is your first position is, death ends it, or is it -- is it --

MR. KAVANAUGH: That is our first position. Our

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second position, alternative positions is that relative importance is a standard that we would be happy with, but again, we --

QUESTION: And is that the ALI standard? I think earlier you said the ALI agrees with you. I thought the ALI position was, there's some kind of balance. How --

MR. KAVANAUGH: It's some kind of vague balancing.

As to Pennsylvania --

QUESTION: You're hold -- your position is that it ends for both civil and criminal -- no, only for criminal?

MR. KAVANAUGH: Correct.

QUESTION: All right. If it's only for criminal, then who -- which group of States -- I guess the answer's none, but which group of commentators or law reformers or whatever have advocated that the rule apply -- terminate only in criminal but not civil cases?

MR. KAVANAUGH: Well, with hesitation at raising their names again, Mueller & Kirkpatrick do suggest that --

(Laughter.)

QUESTION: The ALI -- the ALI does not, is that --

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MR. KAVANAUGH: Yes.

QUESTION: Right.

MR. KAVANAUGH: That's correct. I want to make one point about --

QUESTION: Yes.

MR. KAVANAUGH: -- Pennsylvania.

For 22 years, Justice Kennedy, there's been experience in Pennsylvania after Cohen v. Jenkintown Cab. It's a big State with a lot of lawyers, and there's no evidence, even with petitioners and their amici and their vast resources, of any chilling going on in the Commonwealth of Pennsylvania based on the experience --

QUESTION: Do you have the -- what I'm quite curious about is, of course, the California Code and maybe Pennsylvania, I don't know, are maybe a little ambiguous as to whether it ends at death, as I read it through here, so an explanation to the dearth of cases may be that all clients basically think they're privileged. Lawyers think they're privileged. Everybody thinks they're privileged, so they don't try to get it.

Now, is there any reason you have for thinking what I just said is wrong?

MR. KAVANAUGH: I don't think many people have thought about this issue, Justice Breyer, it comes up so rarely, and that would be my --

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QUESTION: Well, is the reason that it comes up rarely, because California lawyers, throughout the country lawyers, clients throughout the country go in to a lawyer and they think, I'm safe. They all think that's the rule, so they don't try to get it. Is that the reason why there is a dearth?

MR. KAVANAUGH: The reason that there is a dearth is the factual situation rarely comes up, we think, and clients know when they talk to their lawyers, I'm going to have to disclose these facts when I'm called to testify anyway, so that kind of chilling is far greater than anything we propose here.

QUESTION: Thank you --

MR. KAVANAUGH: I thank the Court.

QUESTION: Thank you, Mr. Kavanaugh.

Mr. Hamilton, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JAMES HAMILTON

ON BEHALF OF THE PETITIONER

MR. HAMILTON: Mr. Chief Justice, I want to come back to the work product issue, because I believe Mr. Kavanaugh has misstated the law in that -- in that area.

I believe that the Upjohn case, the Hickman case demonstrate that the type of notes that I took are protected by the work product. Upjohn says that notes that embody what the lawyer saw fit to write down enjoy

special protection, not an ordinary protection, but special protection. This is found at 449 U.S. at 399.

QUESTION: Don't these cases usually come up in the context where somebody would want to use -- where insight into the lawyer's thinking would be useful in litigation against the lawyer's client?

I mean, is it -- what is the purpose of the work product privilege? Is it some copyright benefit that the lawyer has in the particular, unusual way that his lawyer's mind works --

(Laughter.)

QUESTION: -- even in future cases that have nothing to do with this client, or with this litigation?

MR. HAMILTON: The work product privilege is intended to protect the adversary system. It is intended to let lawyers work in a certain sphere without interference.

QUESTION: Sure, so that your opponent can't see behind your thinking, your strategizing in this particular case.

MR. HAMILTON: That's --

QUESTION: But when the case is all gone, when there's no case left at all, is there something sacrosanct about the way this lawyer's mind was working --

MR. HAMILTON: Well --

QUESTION: -- in a long gone case that has no future implications?

MR. HAMILTON: I think this Court, in the Grolyer case, has said that the work product privilege extends even after the litigation involved has concluded, but the purpose is to protect the lawyer's thought processes, his methods of working. This protection --

QUESTION: So it is sort of a copyright. It's an intellectual property thing, right? Is that what it is?

MR. HAMILTON: I have not read any opinion, Justice Scalia, that describes it that way, but there are opinions, including the Moody case that Mr. Kavanaugh cites, that say that the work product privilege belongs to the lawyer as well as to the client, because the cases recognize that the lawyer has an interest to protect and the lawyer can assert that work product privilege even though the client does not.

QUESTION: What is that interest that he has to protect?

MR. HAMILTON: It is --

QUESTION: When there's -- this litigation is all gone, it's not usable in any other litigation, what is the interest that the lawyer has to protect?

MR. HAMILTON: It is protecting his thought

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processes, his methods of operation. It allows him to prepare his cases in a certain amount of privacy, knowing that his adversaries will not have access to his work product.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hamilton. The case is submitted.

(Whereupon, at 11:38 a.m., the case in the above-entitled matter was submitted.)

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SWIDLER & BERLIN AND JAMES HAMILTON, Petitioners v. UNITED STATES
CASE NO: 97-1192

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IN THE

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM JEFFERSON CLINTON
and THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Nixon*, 418 U.S. 683, 712-13 (1974), this Court held that the constitutionally based executive privilege for presidential communications "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." In addition, section 535(b) of title 28 requires that all Executive Branch officials expeditiously provide federal law enforcement authorities "[a]ny information" relating to possible federal criminal violations.

The questions presented are as follows:

1. Whether, in light of *Nixon*, executive privilege asserted by Counsel for the Office of the President authorizes President Clinton to prevent White House officials from testifying before a federal grand jury investigating possible federal crimes committed in connection with a private federal civil case.

2. Whether, in light of *Nixon* and § 535(b), a common-law governmental attorney-client or work product privilege authorizes President Clinton to prevent White House officials from testifying before a federal grand jury investigating possible federal crimes committed in connection with a private federal civil case.

3. [REDACTED].

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

(i) the United States of America, represented in this criminal investigation by the Office of Independent Counsel In re Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a)(9);

(ii) the Office of the President of the United States, which has asserted executive privilege, governmental attorney-client privilege, and governmental work product protection; and

(iii) William Jefferson Clinton, who has asserted [REDACTED].

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REDACTED

No. 97-1924

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UNITED STATES OF AMERICA, PETITIONER

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WILLIAM JEFFERSON CLINTON
and THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The United States of America, by Kenneth W. Starr, Independent Counsel, *see* 28 U.S.C. § 594(a)(9), petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit. *See* Sup. Ct. R. 11; 28 U.S.C. §§ 1254(1), 2101(e).

OPINIONS BELOW

The district court's opinion and order entered May 4, 1998, granting the United States' motions to compel Bruce Lindsey and Sidney Blumenthal to testify (Pet. App. 1a, 34a), is not yet officially reported. The district court's opinion and order of May 26, 1998, granting in part and denying in part the motion for reconsideration by the President in his official capacity, is also not yet officially reported.

JURISDICTION

The order of the district court was entered on May 4, 1998, in *In re Grand Jury Proceedings* (D.D.C. Misc. Nos. 98-095, 98-096, and 98-097 (NHJ)). On May 11, 1998, the Office of the President filed motions for reconsideration of the district court's May 4, 1998, order as it applied to Messrs. Lindsey and Blumenthal. On May 13, 1998, William Jefferson Clinton and the Office of the President filed notices of appeal in Misc. Nos. 98-095 and 98-096. That same day, the certified record from the district court was docketed in the United States Court of Appeals for the District of Columbia Circuit (Nos. 98-3060, 98-3061, and 98-3062). On May 26, 1998, the district court denied the motions for reconsideration. On May 27, 1998, the court of appeals issued an order returning the consolidated appeals to the active docket. Pet. App. 37a. The jurisdiction of this Court to review the instant case, which is now pending in the court of appeals, *see Gay v. Ruff*, 292 U.S. 25, 30 (1934), is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

STATUTE AND RULES INVOLVED

The relevant portions of 28 U.S.C. § 535(b), Fed. R. Evid. 501, and Fed. R. Civ. P. 26(b)(3) are reproduced in the appendix.

STATEMENT

1. The district court granted motions filed by the United States, represented by the Office of the Independent Counsel ("OIC"), *see* 28 U.S.C. § 594(a)(9), seeking to compel the testimony of presidential aides Bruce Lindsey and Sidney Blumenthal before a federal grand jury sitting in the District of Columbia. The grand jury is investigating

> to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law other than a Class B or Class C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*.

In re: Madison Guaranty Savings & Loan Association (D.C. Cir. Spec. Div. Jan. 16, 1998).

Monica Lewinsky is a former White House intern and employee of the White House's Office of Legislative Affairs. On December 5, 1997, President Clinton received notice that Monica Lewinsky's name was on a list of witnesses to be called by Paula Jones in the *Jones v. Clinton* litigation. On December 19, 1997, Ms. Lewinsky was served with a subpoena requiring her to testify at a deposition in the *Jones* case and to produce certain documents and other objects relating to contacts between her and President Clinton. On January 7, 1998, Ms. Lewinsky signed an affidavit representing under penalty of perjury that she had not had a sexual relationship with President Clinton.

2. On January 12, 1998, this Office received allegations relating to Ms. Lewinsky and the *Jones* case. The substance of these allegations was (i) that Ms. Lewinsky had had a sexual relationship with President Clinton; (ii) that a friend of the President had advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury in connection with that case.

These allegations related to the OIC's investigative jurisdiction in two ways. First, Linda Tripp has been a witness in several matters already within the OIC's jurisdiction, including the investigation into the death of Deputy White House Counsel Vincent W. Foster, Jr., the

handling of documents from Mr. Foster's office, and White House Travel Office matters. Second, the OIC was investigating — and continues to investigate — a number of large consulting payments made to Webster Hubbell, a witness in other matters within the OIC's jurisdiction. Some of those payments were arranged with the aid of an individual who helped Ms. Lewinsky obtain a job at a company that had also offered Mr. Hubbell a lucrative consulting contract.

After gathering preliminary evidence, the OIC reported to officials of the Department of Justice on January 15, 1998, and made the evidence available to them. On the following day, the Attorney General petitioned the Special Division, on an expedited basis, to expand the OIC's jurisdiction. At the Attorney General's request, the Special Division conferred jurisdiction on the OIC to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law . . . ." On January 17, 1998, President Clinton was deposed in connection with the *Jones* case, and was asked a number of specific questions about his relationship with Monica Lewinsky.

3. The Special Division's jurisdictional grant authorizes the Independent Counsel to investigate whether federal crimes may have been committed by Monica Lewinsky "or others" in connection with the *Jones* litigation. Pet. App. 11a. The testimony that the grand jury seeks from Messrs. Lindsey and Blumenthal "is likely to shed light on" this inquiry. *Id.* More specifically, as the district court explained,

> If there were instructions from the President to obstruct justice or efforts to suborn perjury, such actions likely took the form of conversations involving the President's closest advisors, including Lindsey and Blumenthal. Additionally, if the President disclosed to a senior adviser that he committed perjury, suborned perjury, or obstructed justice, such a disclosure is not only unlikely to be recorded on paper, but it also would constitute some of the most relevant and important evidence to the grand jury investigation.

Id.

4. a. On February 18, February 19, and March 12, 1998, Bruce Lindsey, Assistant to the President and Deputy Counsel, appeared before the grand jury in Washington, D.C. to testify. Mr. Lindsey asserted executive privilege (both in the form of a presidential communications privilege and a deliberative process privilege), governmental attorney-client privilege, governmental work product protection, [REDACTED] in refusing to answer a number of questions regarding Monica Lewinsky, the civil case *Jones v. Clinton*, and the Independent Counsel's investigation.

b. [REDACTED] asserted executive privilege in refusing to answer a number of questions that sought the substance of conversations regarding Monica Lewinsky, the civil case *Jones v. Clinton*, and the Independent Counsel's investigation.

c. On February 26, 1998, Sidney Blumenthal, Assistant to the President, appeared before the grand jury to testify. Mr. Blumenthal asserted executive privilege in refusing to answer a number of questions regarding Monica Lewinsky, the civil case *Jones v. Clinton*, and the Independent Counsel's investigation.

5. On March 6, 1998, the United States moved the district court to compel Bruce Lindsey (No. 98-095), Sidney Blumenthal (No. 98-096), and [REDACTED] (No. 98-097) to testify before the grand jury regarding the matters as to which they had asserted privileges. In addition to the individual grand jury witnesses, both the President in his personal capacity and the Office of the President opposed the United States' motions. Closed hearings on the motions were held before the district court on March 20 and 24, 1998.

6. In its opinion and order entered May 4, 1998, the district court granted the motions to compel Bruce Lindsey and Sidney Blumenthal to testify before the grand jury.[1]

The district court began its executive privilege analysis by examining the nature of the testimony at issue. Finding that the conversations of Messrs. Lindsey and Blumenthal about the Lewinsky and *Jones* matters could be related at least in part to the President's official decisionmaking, the Court concluded that the subpoenaed testimony must be treated as presumptively privileged. Pet. App. 2a-3a (citing *Nixon*, 418 U.S. at 713).

The court went on to discuss the scope of the privilege for presidential communications, relying on *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997), for the proposition that the President need not personally participate in a communication among his advisers in order for the communication to be privileged. Applying this principle, the court concluded that, although the conversations at issue between Mr. Blumenthal and First Lady Hillary Rodham Clinton are within the privilege, those between Mr. Lindsey and a private individual are not. Pet. App. 6a-8a.

Relying on *United States v. Nixon*, 418 U.S. 683, and *In re Sealed Case*, 121 F.3d at 754, the district court next determined that "[t]he presumption of privilege may be rebutted by a sufficient showing of need by the Independent Counsel." Pet. App. 8a. This showing, the district court held, could be met by specifically demonstrating "'first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere.'" *Id.* at 9a (quoting *In re Sealed Case*, 121 F.3d at 754). The district court recognized that the first requirement "will not typically have much impact because Federal Rule of Criminal Procedure 17(c) already limits a subpoena to relevant information." *Id.* As to the second, the district court quoted the D.C. Circuit's conclusion that the standard will be "easily" satisfied when "an immediate White House advisor is being investigated for criminal behavior." *Id.* (quoting *In re Sealed Case*, 121 F.3d at 755). Applying this standard to the United States' *in camera* need submission, the court determined that executive privilege did not justify nondisclosure in this case, and that the United States' motion to compel would therefore be granted with respect to Messrs. Lindsey and Blumenthal. *Id.* at 10a-12a.

[1] In light of the Office of the President's representation that [REDACTED] would not assert executive or governmental attorney-client privilege in any future questioning before the grand jury, the Court denied the motion to compel [REDACTED] to testify as moot.

[REDACTED]

The district court then considered the President's claims of governmental attorney-client privilege with respect to Mr. Lindsey. Drawing on reasoning from both the majority opinion and the dissent in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 926-27 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997), the district court concluded that any governmental attorney-client privilege must yield when a showing sufficient to meet the executive privilege standard had been made. Pet. App. 27a. In light of the United States' *in camera* need submission, the Court determined that this standard had been met. *Id.* at 27a-31a.

Finally, the district court held that the governmental work product doctrine did not apply to interviews with grand jury witnesses or their counsel conducted by Mr. Lindsey, because such interviews were not conducted in anticipation of litigation involving the Office of the President. *Id.* at 31a-33a.

7. On May 11, 1998, the Office of the President filed motions for reconsideration of the district court's May 4, 1998, order as it applied to Messrs. Lindsey and Blumenthal. On May 13, 1998, while the motions for reconsideration were still pending, William Jefferson Clinton and the Office of the President filed notices of appeal in Misc. Nos. 98-095 and 98-096. On May 14, the United States filed a corresponding

motion in the D.C. Circuit to dismiss these appeals for lack of appellate jurisdiction. On May 21, the D.C. Circuit entered an order consolidating the appeals, and directing that they "be held in abeyance pending the district court's disposition of the motions for reconsideration pending before it in the underlying cases." Pet. App. 35a-36a. On May 26, 1998, the district court entered an order granting in part and denying in part the motions for reconsideration. On May 27, 1998, the D.C. Circuit entered an order dismissing the United States' motion to dismiss as moot and ordering that the consolidated appeals be returned to the active docket. *Id.* at 37a. The United States now seeks certiorari before judgment.

REASONS FOR GRANTING THE WRIT

1. This case is of high moment. It is strongly in the Nation's interest that the case be resolved quickly so that the grand jury's investigation can move forward at the earliest practicable date. If the decision below were to proceed through the normal processes of appellate review, important portions of this investigation would be substantially delayed. The need for expedition of this aspect of the United States' investigation has been widely acknowledged, including by respondents.

This case presents a direct challenge by the Office of the President to the ability of a federal grand jury to obtain relevant evidence of possible criminal activity by Executive Branch officials. In cases presenting issues of similar significance, this Court has granted a writ of certiorari before final judgment in the court of appeals "because of the public importance of the issues presented and the need for their prompt resolution." *United States v. Nixon*, 418 U.S. 683, 687 (1974); *see, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947); *see also* Sup. Ct. R. 11.

Immediate consideration by this Court would not sacrifice any benefits of intermediate appellate review. The Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Eighth Circuit have heretofore considered and ruled on the main legal issues presented for review. *See In re Sealed Case*, 121 F.3d 729; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910. In addition, the district court's opinion thoroughly analyzes the relevant issues.

2. The principal legal issues in this case are resolved either directly or by necessary inference from this Court's decision in *United States v. Nixon*. But the President disagrees. As with *Nixon*, therefore, this case is exceedingly important.

In particular, because the President has invoked executive privilege to prevent Messrs. Lindsey and Blumenthal from testifying, this litigation involves fundamental constitutional issues arising out of the doctrine of separation of powers. The invocation of executive and other privileges in this context also presents a question of overriding concern to the full and impartial administration of justice: the circumstances under which the Executive Branch may withhold information from a federal grand jury investigating allegations of misconduct against the President, other Executive Branch officials, and various private individuals.

3. In *United States v. Nixon*, this Court held that the applicability of executive privilege turns on the nature of the proceeding and the substance of the information sought. 418 U.S. at 703-16. "Absent a claim of need to protect military, diplomatic, or sensitive national security secrets," the President's "generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 706, 713. Thus, in a criminal investigation, executive privilege simply does not justify withholding of information outside the realm

of documents or communications that implicate military, diplomatic, or sensitive national security secrets.

The Office of the President has previously argued that, notwithstanding *Nixon*, the prosecutor and grand jury cannot obtain relevant information from the Office of the President without demonstrating a critical need for the information. The standard proposed by the Office of the President is flatly inconsistent with the decision in *Nixon*. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 919 n.9 (8th Cir. 1997); *United States v. North*, 910 F.2d 843, 951-92 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part); *cf. In re Sealed Case*, 121 F.3d at 754-62 (rejecting standard that information be "critical to an accurate judicial determination," but adopting heightened standard of relevance for grand jury investigation of non-White House officials). In any event, any standard of heightened relevance is abundantly satisfied on the facts of this case, as the district court correctly concluded. *See* Pet. App. 10a-12a.

The executive privilege claim in this case also fails at a more basic and threshold point. Under *Nixon*, executive privilege applies only to conduct and communications made in furtherance of a President's Article II duties. *See Nixon*, 418 U.S. at 705-06. Executive privilege is, by its nature, a *governmental* privilege that stems from the President's powers under Article II. It cannot and should not be asserted to deny the grand jury evidence of communications about *private* conduct, particularly in the absence of a showing that the communications about *private* conduct were in furtherance of a specified Article II function. *See Clinton v. Jones*, 117 S. Ct. 1636, 1639-44 (1997). The communications at issue in this case — discussions relating to or arising out of a private civil case involving the President in his personal capacity — fall outside that ambit.

4. The Office of the President also has advanced claims of governmental attorney-client and work product privilege. The Office of President contends that it can assert such privileges against a federal grand jury to the same extent

as a corporation. No constitutional provision, statute, rule, regulation, or case supports that bold assertion. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (rejecting argument); Pet. App. 18a-26a (same). But the Office of the President has refused to acquiesce, persisting month after month in resisting grand jury subpoenas on this basis.

These common-law privilege claims are flawed for at least two reasons. First, Congress has spoken. Section 535(b) of title 28 requires that "[a]ny information, allegation, or complaint received in a department or agency of the executive branch" be "expeditiously reported" to the Attorney General or other designated official. Section 535(b) trumps any common-law privilege asserted under Rule 501. *See* Fed. R. Evid. 501 (federal courts do not have authority to recognize common-law privileges that would be inconsistent with federal statutes). Second, even apart from § 535(b), this Court's decision in *Nixon* contravenes any governmental attorney-client privilege in federal grand jury proceedings. In *Nixon*, the executive privilege for presidential communications — a privilege that is constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708 — was overcome by the need for relevant evidence in criminal proceedings. It is untenable to say that communications that fall within the executive privilege are *less* worthy of protection in criminal proceedings than are communications between a government employee and government attorney. The district court correctly concluded that a governmental attorney-client or work product privilege can be no broader than executive privilege. [FOOTNOTE REDACTED]

5. [REDACTED].

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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May 28, 1998

1998 WL 34112660 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

UNITED STATES OF AMERICA, Petitioner,

v.

William Jefferson CLINTON and the Office of the President of the United States, Respondents.

No. 97-1924.
October Term, 1997.
June 2, 1998.

On Petition for a Writ of Certiorari Before Judgment to the
United States Court of Appeals for the District of Columbia Circuit

Reply Brief in Support of Petitioner

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***1** After months of litigation, the President has recognized that, in light of *United States v. Nixon,* 418 U.S. 683 (1974), his claim of executive privilege for presidential communications cannot prevail. He thus has withdrawn the argument that he can withhold relevant information from the federal grand jury on that basis. The question, then, is whether this case ***2** continues to warrant this Court's review before judgment in the Court of Appeals. The answer is yes.

Footnotes

1. The critical fact justifying this Court's review -- and review before judgment in the Court of Appeals -- still remains: By asserting a purported privilege for governmental attorney-client communications, the President of the United States has directly challenged the ability of the federal grand jury to obtain evidence of possible criminal acts by the President and others. This is, save for *Nixon,* without parallel in the history of the Republic.

Because the President himself (among others) is under criminal investigation, the grand jury, this Office, the President, the Congress, and the Nation have a compelling interest that the matter be resolved quickly and definitively. More months of protracted litigation are inimical to the Nation's well-being. The facts are needed, and they are needed now.

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This is not our view alone. To the contrary, the President himself stated in January of this year that the American people are entitled to more rather than less, sooner rather than later. That is still true. We will be blunt: The Nation has a compelling interest that this criminal investigation of the President of the United States conclude as quickly as possible -- that indictments be brought, possible reports for impeachment proceedings issued, and non-prosecution decisions announced. This Court's immediate review would powerfully serve that vital goal.

The President's response treats this as a matter-of-fact investigation. But the unhappy fact is that, at the determination of the Attorney General herself, a President is under serious criminal investigation. That unfortunate circumstance is a rare occurrence in our Nation's history. A President who invokes *governmental* privileges that have the effect of thwarting such an investigation is even rarer. (Only two of forty-two Presidents have seen fit to do so.) And ***3** issues involving the President that arise during the course of such an investigation are necessarily vital to the functioning of the Executive Branch and to the people as a whole. In particular, few issues more directly implicate the rule of law than a President using, or appearing to use, newly asserted *governmental* privileges that serve, at least in part, to protect the *personal* interests of the President himself (and his close associates). *Cf. Clinton v. Jones,* 117 S. Ct. 1636 (1997).

2. We fully appreciate the weighty, prudential concerns that this Court's scarce resources not be expended on ordinary or unimportant legal issues, no matter how important the factual settings in which they arise. The precise question for this Court's evaluation, therefore, is whether the issue of a governmental attorney-client or work product privilege in federal criminal proceedings is the kind of legal issue that warrants this Court's review.

On that question, the President himself has spoken. Last year, he petitioned this Court for review of a decision from the United States Court of Appeals for the Eighth Circuit, *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910 (8th Cir.), *cert. denied,* 117 S.Ct. 2482 (1997), rejecting these exact privileges in criminal proceedings. The President himself told this Court:

• "These rulings are important enough to require *prompt* review by this Court." Reply Br. for Pet'r 1, *Office of the President v. Office of Independent Counsel,* No. 96-1783 (emphasis added).

• "The Eighth Circuit has issued an extraordinary and unprecedented decision that will substantially impair the ability of the Office of the President (and other federal agencies) to secure sound legal advice ...." Pet. for Writ of Cert. 9, *Office of the President v. Office of Independent Counsel,* No. 96-1783.

***4** • The Eighth Circuit's ruling (with which the district court here has largely agreed) is "indefensible" and would cause "grave consequences for the government." *Id.* at 11, 10.

• "[T]he Eighth Circuit's ruling shapes the decisionmaking of every official and every lawyer in the White House during every working day." Reply Br. for Pet'r 1, *Office of the President v. Office of Independent Counsel,* No. 96-1783.

• "These are now very real questions in the daily business of the White House. So long as they go unanswered, the resulting uncertainty will inevitably constrain the layman's willingness to seek legal advice ...." *Id.* at 2.

• "[T]he need for review is far greater here, [than in *Clinton v. Jones*] because substantial reliance interests are at stake.... [P]rompt and definitive explanation of the nature of the new rules is essential." *Id.* at 4.

• "[T]he majority's restrictions on the scope of the work product protection ... would have dramatic practical consequences...." *Id.* at 5.

Nor was the President alone in his views. The President's petition for certiorari was supported by the Department of Justice in a carefully framed amicus submission. It was supported by several amicus briefs from law professors, joined

by several former White House Counsel.[2] The President's current view to the contrary oddly contradicts not ***5** only his petition last year, but a motion filed by the President only a few weeks ago. At that time, in seeking to expedite the matter in the Court of Appeals, the President stated that the district court's order "has *continuing* adverse effects on the ability of White House Counsel and other senior advisors to advise the President and the White House." Appellant's Emergency Mot. to Expedite Consideration of Appeal, and for Expedited Briefing Schedule 2, *In re: Sealed Case,* Nos. 98-3060 & 98-3061 (emphasis added).

[1] The President's strategic use and later withdrawal of executive privilege is by no means novel. In 1996 the President asserted executive privilege in response to grand jury subpoenas issued in the Eastern District of Arkansas. After this Office fully briefed the issue in the district court, the President abandoned the claim. *See In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 913 14 (8th Cir.), *cert. denied,* 117 S. Ct. 2482 (1997). In this case, the President has done precisely the same thing after requiring substantial effort by the district court and filing a notice of appeal on that issue in the Court of Appeals. The President now says that he would not even have raised an executive privilege argument in the Court of Appeals. Br. for Resp't White House in Opp'n 1 2. That is inaccurate. The President filed a notice of appeal with respect to the testimony of Sidney Blumenthal, and the only privilege asserted as to Mr. Blumenthal was executive privilege.

3. To be sure, we opposed the President's petition in *Office of the President v. Office of Independent Counsel.* We believed then -- and believe now -- that the legal issue, while important, is straightforward. In our view, the issue is controlled by, *inter alia,* this Court's decision in *Nixon* and by 28 U.S.C. § 535(b). *See* Pet. for Writ of Cert. 13-14. But our decision to oppose certiorari was based on our belief that this Court's review would delay the investigation -- a factor that now counsels in favor of prompt review. We also believed that the Eighth Circuit's well-reasoned decision, coupled with a denial of certiorari by this Court, would persuade the President to recede from his invocation of governmental attorney-client privilege in this investigation.

Our belief was mistaken. The President has chosen to assert the privilege again. Indeed, the President's vision of governmental attorney-client privilege has, if anything, expanded since this Court's denial of certiorari. Only a definitive decision from this Court will bring an end to such contrived privilege assertions.

4. The issues are fully developed for review by this Court, as the President and the Department of Justice suggested a year ago in urging this Court to grant certiorari. The Eighth Circuit last year issued a lengthy opinion analyzing the issues, *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d at 913-26; Judge Kopf issued a separate opinion that, while also rejecting the White House's view, ***6** thoroughly analyzed the competing considerations, *id.* at 926-40 (Kopf, J., dissenting). In this case, Judge Johnson carefully considered these questions in her opinion in the district court. In sum, this Court, if it chooses to address the issue now, will have the benefit of three careful and lengthy opinions from lower courts and the full submissions of the President, the Department of Justice, and this Office.

5. This Court's review of this case would correspond to review of another case as to which we today have filed a petition for certiorari before judgment. In that case, the United States Secret Service has asked the federal courts to create a privilege to prevent Secret Service agents and officers from testifying before the grand jury. That novel claim was rejected by the district court, in part on the basis of 28 U.S.C. § 535(b). Section 535(b) imposes an affirmative duty on Executive Branch personnel to report "any information" regarding criminal activity by government officers and employees to the appropriate supervisor, normally the Attorney General. To the extent that Section 535(b) disposes of purported *common-law* governmental privileges asserted against a federal grand jury, this case and the Secret Service case go hand-in-hand.

6.B3[REDACTED].

7. The President argues that, unlike in *Nixon,* there are no impeachment proceedings under way. Br. for Resp't White House in Opp'n 10. The leadership of the House of Representatives has indicated that it awaits a report from this Office before it will consider whether to hold impeachment proceedings. For its part, the White House has stated that the specter

of such proceedings substantially impacts the orderly administration of the Executive Branch. *See* Decl. of Charles F.C. Ruff ¶ 18, *In re Grand Jury Proceedings,* Misc. Action Nos. 98-095, 98-096, 98-097 (D.D.C. May 4, 1998). In this regard, the Court may wish to consider the need submissions presented to the district court. The evidence contained therein ***7** demonstrates the importance of Mr. Lindsey's testimony to the investigation and to the weighty statutory responsibility imposed on this Office.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

2 The President states that the issue here differs because the communications involve the President and his White House advisors. *See* Br. for Resp't White House in Opp'n 10. But the precise legal question presented a year ago was just that question. *The President has never argued that the attorney client privilege is more protective when it involves presidential communications; indeed, the President argued to the contrary a year ago.*

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1998 WL 35240369 (C.A.D.C.) (Appellate Brief)
United States Court of Appeals, District of Columbia Circuit.

In re: SEALED CASE.

Nos. 98-3060, 98-3062, 98-3072.
January 26, 1998.

Appeal from the United States District Court for the District of Columbia

Brief of Appellee United States

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GLOSSARY

DOJ	Department of Justice
EOP	Executive Office of the President

FOIA	Freedom of Information Act
JA	Joint Appendix
OIC	Office of the Independent Counsel
OLC	Office of Legal Counsel
WH	White House

***1** STATEMENT OF THE CASE

Pursuant to jurisdiction granted by the Special Division of this Court at the application of Attorney General Reno, the OIC is conducting a federal grand jury investigation into whether President William J. Clinton, Monica S. Lewinsky, or others committed federal crimes. The possible crimes under investigation include perjury, subornation of perjury, obstruction of justice, and intimidation of witnesses in connection with the private civil case *Jones v. Clinton.*

On [ ], Bruce Lindsey, Assistant to the President and Deputy Counsel, appeared before the grand jury. As the district court (Johnson, C.J.) explained, Mr. Lindsey's testimony could be quite important to ***2** the grand jury's investigation:

If there were instructions from the President to obstruct justice or efforts to suborn perjury, such actions likely took the form of conversations involving the President's closest advisors, including Lindsey and Blumenthal. Additionally, if the President disclosed to a senior adviser that he committed perjury, suborned perjury, or obstructed justice, such a disclosure is not only unlikely to be recorded on paper, but it also would constitute some of the most relevant and important evidence to the grand jury investigation.

JA 164.

Mr. Lindsey refused to answer a number of questions regarding Monica Lewinsky and *Jones v. Clinton.* He asserted [ ] privileges: presidential communications privilege, deliberative process privilege, governmental attorney-client privilege, governmental work product protection, [ ]. On March 6, 1998, the United States filed a motion to compel Mr. Lindsey's testimony. [ ] the Office of the President [ ] opposed the United States' motion.

The district court granted the OIC's motion to compel. Relying on *United States v. Nixon,* 418 U.S. 683, 713 (1974), and *In re Sealed Case,* 121 F.3d 729, 754 (D.C. Cir. 1997), the district court determined that the presidential communications privilege was overcome by the need for relevant evidence in a grand jury proceeding, as established by the OIC's *in camera* submission. JA 160-65. The district court concluded that governmental attorney-client and work product privileges similarly were overcome by the grand jury's need for evidence.

***3** JA 197-200. [ ]

The Office of the President [ ] have maintained an appeal with respect to [ ] privilege claims: government attorney-client privilege, government work product protection, [ ].

SUMMARY OF ARGUMENT

The primary question presented is whether a government agency (the White House) can maintain attorney-client and work product protections against a federal grand jury to the same extent that a corporation can. The White House argues

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that the answer is yes, that it is no different from a corporation for purposes of the attorney-client and work product privileges. The White House's argument is flawed for four major reasons.

First, application of governmental attorney-client and work product privileges in criminal proceedings is neither rooted in history nor established by contemporary practice. Indeed, no case, statute, rule, or opinion *ever* has held that a federal government agency can maintain the ordinary common-law attorney-client and work product privileges in federal criminal proceedings.

Second, the Supreme Court's decision in *United States v. Nixon,* 418 U.S. 683 (1974), and this Court's decision in *In re* ***4** *Sealed Case,* 121 F.3d 729 (D.C. Cir. 1997), hold that even the *constitutionally* based executive privilege for presidential communications -- which is "fundamental to the operation of Government" -- can be overcome by the need for relevant evidence in criminal proceedings. *Common-law* governmental attorney-client and work product privileges are neither as important nor as historically rooted as the presidential communications privilege. Therefore, these privileges similarly must yield to the grand jury's need for relevant evidence.

Third, the White House's argument flouts the statute (28 U.S.C. § 535) requiring federal employees to report information involving potential crimes by Executive officials to the appropriate law enforcement officials. This duty applies to government attorneys and precludes application of a contrary common-law privilege by the courts.

Fourth, as both the Eighth Circuit and Chief Judge Johnson concluded, the White House's position fails at a fundamental policy level. The " 'strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served' " by recognition of the asserted privileges in criminal proceedings. JA 193 (quoting *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 921 (8th Cir.), *cert. denied,* 117 S. Ct. 2482 (1997)).

If the White House's absolute position is rejected, there also is no basis in law or policy to apply a heightened relevance standard. A number of Supreme Court privilege cases reject such ***5** *ad hoc* tests, particularly in the grand jury setting.

Even were the Court to assume *arguendo* that a test similar to that adopted in *Sealed Case* for presidential communications should apply to government attorney information, the judgment in this case should be affirmed. Chief Judge Johnson painstakingly applied the *Sealed Case* standard here. Indeed, she gave the White House greater deference than *Sealed Case* warrants. For in this case, unlike in the Espy matter, "an immediate White House [official] is being investigated for criminal behavior." 121 F.3d at 755.

ARGUMENT

I. GOVERNMENT ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES DO NOT JUSTIFY WITHHOLDING RELEVANT INFORMATION FROM A FEDERAL GRAND JURY.

The White House seeks application of the governmental attorney-client and work product doctrines in federal grand jury proceedings as if the White House were a corporation. That argument is sufficiently unmoored from history, law, precedent, and policy that Attorney General Reno, Solicitor General Waxman, and Assistant Attorney General Hunger -- political appointees of the President -- have taken the extraordinary step of filing an amicus brief contrary to the White House's legal position. – The ***6** Attorney General's refutation of the legal argument made by the White House (that is, by the President in his official capacity) speaks volumes about the far-fetched nature of the White House's submission.

The Attorney General, the Solicitor General, and the Assistant Attorney General are not alone. All four federal judges who have decided this issue (Judges Bowman, Wollman, Kopf, and Johnson) have rejected the White House's argument. Indeed, Judges Bowman, Wollman, and Johnson have stated in no uncertain terms that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal

investigation would represent a gross misuse of public assets." *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 921 (8th Cir. 1997), *cert. denied,* 117 S. Ct. 2482 (1997); JA 193 (same). Judge Kopf added that the White House operates "at [its] peril" in using official lawyers to conceal evidence of possible federal crimes. 112 F.3d at 927.[2]

This unanimity in rejecting the White House's absolute privilege claims is not surprising. The Supreme Court's decision in *United States v. Nixon,* 418 U.S. 683 (1974), the requirements of 28 U.S.C. § 535, the lessons of history, and the interests of sound public policy all point decisively against the White ***7** House's novel privilege arguments.

And this is far from an academic issue. The court need not reach far into the past to see how the White House's position might have gravely affected American history. Had President Nixon or President Reagan asserted these common-law privileges in court (and had the courts recognized them in the manner that the White House seeks), the course of the Watergate and Iran-Contra investigations would have been quite different. Many government attorneys provided critical information during those criminal investigations -- Dean, Buzhardt, Petersen, Sofaer, Wallison, Meese, Cooper, to name a few. The testimony of government attorneys revealed that some government officials, including a President, were criminal wrongdoers. It also helped to establish that others were not.

The current White House position, by contrast, is that the testimony of government attorneys can be withheld from the federal criminal process. *Cf. The Haldeman Diaries* 613 (entry for March 27, 1973: Dean "should take all the privileges he can handle"). The White House's argument is wrong as a matter of law, inaccurate as a matter of history, and misguided as a matter of policy.

A. The ordinary attorney-client and work product privileges have not been applied to government entities in federal criminal proceedings.

Except as provided by the Constitution or by Congress, "the privilege of a witness, person, government, State, or political subdivision thereof" in federal grand jury proceedings "shall be ***8** governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. Because privileges obstruct the search for truth, federal courts exercise this common-law authority with caution. *University of Pennsylvania v. EEOC,* 493 U.S. 182, 189 (1990). Privileges are not lightly created, and they must be strictly construed. *Nixon,* 418 U.S. at 710.

To remain faithful to those principles of judicial restraint, the Supreme Court has recognized privileges or applications thereof when they are (i) historically rooted or well-established in the States and (ii) justified by a "public good." *Jaffee v. Redmond,* 518 U.S. 1, 9 (1996); *see University of Pennsylvania,* 493 U.S. at 195. The varied sources that guide federal courts in resolving Rule 501 cases convincingly demonstrate that application of common-law government attorney-client and work product privileges in federal criminal proceedings is unwarranted.

First, given the Supreme Court's emphasis that a common-law privilege claim be rooted in law, we begin with a salient point: To our knowledge, no case, no statute, no rule, no agency opinion -- *ever* -- has concluded that a department or agency of the United States (or any state or local governmental entity) can maintain common-law attorney-client and work product privileges in federal grand jury or criminal trial proceedings.

Second, the practice in past federal criminal investigations ***9** is illuminating. In the Watergate investigation, numerous government lawyers testified at length about conversations with the President and other White House employees. Extensive testimony by government attorneys also occurred during the Iran-Contra investigation. White House Counsel Peter Wallison produced his diary about relevant events, including the preparation of President Reagan for his Tower Commission interview -- a situation far more sensitive than this case because it involved both Presidential communications and foreign affairs. *See* 1 Final Report of the Independent Counsel for Iran/Contra Matters 44, 470 n.137, 517, 520 (1993). State Department attorneys, including Legal Adviser Abraham Sofaer, testified about their

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preparation of Secretary of State Shultz for congressional testimony. *Id.* at 346-48, 366-68. Attorneys who conducted an internal factual review at the direction of the President testified about it and produced their notes, *id.* at 536 & nn.116 & 117, 537, and some, including Mr. Meese, testified at 3 the trial of Oliver North, *id.* at 113.

In this investigation, moreover, the White House and other Executive Branch agencies have produced reams of materials that, according to the White House's assertion, would have been protected by attorney-client privilege. *See* Br. for Federal Resp't in Opp'n 3, *Office of the President v. Office of Independent Counsel,* No. 96-1783, *cert. denied,* 117 S. Ct. 2482 (1997).

The Justice Department in its amicus brief has confirmed ***10** that the internal practice within the Executive Branch has yielded the same result. According to the Department, it is the "rare" case where relevant information is withheld from a federal criminal investigation on the basis of some government attorney-client or work product principle. DOJ Br. 3-4. Indeed, the Department has not identified a single instance in the history of the Republic in which an Attorney General has authorized an agency to withhold important factual information from a federal criminal investigation on the sole ground that a government attorney representing governmental interests possessed the information.

Consistent practice, coupled with the absence of *any* authority supporting the White House, refutes the White House's argument that a governmental attorney-client or work product privilege has traditionally been understood to justify withholding relevant information from the federal criminal process. *See Bankamerica Corp. v. United States,* 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims ... strongly suggests that it did not read the statute as granting such power.").

Third, some States have recognized distinct government attorney-client and work product privileges in *civil* proceedings in which the government is opposed to a private party, although "[c]ourts often express apprehension at the pernicious potential of the privilege in the government context." Larkin, *Federal* ***11** *Testimonial Privileges* § 2.05, at 2-96 n.137 (1998).[3] But that body of civil case law, which in federal courts is quite limited outside the FOIA setting,[4] does not advance the White House's position at all. The Supreme Court has indicated that *governmental* privileges can carry greater weight in civil proceedings than in criminal proceedings. *Nixon,* 418 U.S. at 712 n.19; *see also* 3 *Weinstein's Federal Evidence* § 501.10[4] [b], at 501-18 (1998) ("In a criminal case, the need for relevant evidence will weigh much more heavily on the scales than in a civil case."). And we are not aware of any federal statute, rule, or case, or any state statute, rule, or case (with one ***12** possible exception[5]) approving the assertion of a governmental attorney-client privilege against the government in a criminal or grand jury proceeding.[6]

Fourth, some congressional committees have rejected application of a governmental attorney-client privilege in *congressional* proceedings under the governing congressional rules of procedure. One committee discounted the precedents cited by White House, noting that they were cases "in the context of either civil litigation, or a FOIA action, against a private party." S. Rep. No. 104-191, 1995 WL 767864, at 13 (1995).[7]

***13** *Fifth,* leading commentators and the American Law Institute have recognized the important distinctions between a government agency and a corporation for purposes of privilege analysis. *See* Wright & Graham § 5475, at 125 ("number of considerations" militate against "expansion of privilege to all governmental entities"); *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("[w]here the entity in question is governmental ... significantly different considerations appear"). The ALI's Restatement provides: "More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (Proposed Final Draft No. 1).

Finally, this Court's decision in *Sealed Case* exposes the dearth of authority for federal governmental attorney-client and work product privileges in criminal proceedings. The Court ***14** documented the "variety of privileges" that executive

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officials have claimed "to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of the government." 121 F.3d at 736-37; *see also id.* at 735 n.2. Nowhere in the Court's catalogue of privileges was there a mention of a governmental attorney-client or work product privilege, an omission that highlights the lack of historical or contemporary support for the White House's privilege claims.

In sum, there is no historical or contemporary support for the White House's privilege argument. That fact alone resolves the case under traditional Supreme Court privilege analysis. *See University of Pennsylvania,* 493 U.S. at 195 (rejecting academic peer review privilege that lacked historical or statutory basis).

B. Application of government attorney-client and work product privileges in federal criminal proceedings would contravene *United States v. Nixon* and this Court's decision in *Sealed Case.*

The flaw in the White House's position is not simply the lack of authority supporting it. There is a deeper problem. The White House's argument is inconsistent with the Supreme Court's decision in *United States v. Nixon* and this Court's decision in *Sealed Case,* 121 F.3d 729. Those cases establish that the *constitutional* privilege for presidential communications yields to the needs of the criminal justice process. The privileges asserted here, however, are *common-law* governmental privileges that are neither as important nor as historically rooted as the ***15** presidential communications privilege. As a result, these common-law government attorney privileges must similarly yield to the need for relevant evidence in criminal proceedings. *Cf. Sealed Case,* 121 F.3d at 745 (standard to overcome *common-law* privilege for deliberative processes must be less stringent than standard to overcome *constitutional* privilege for presidential communications).

In *Nixon,* the Supreme Court recognized, based on Article II of the Constitution, a "presumptive privilege for Presidential communications." 418 U.S. at 708. The privilege derives from the Constitution and from the "valid need for protection of communications between high Government officials and those who advise and assist them," the "importance" of which "is too plain to require further discussion." *Id.* at 705. The privilege is "*fundamental to the operation of Government* and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708 (emphasis added). The President's interest is "weighty" and "entitled to great respect." *Id.* at 712.

Because the subpoenaed tapes did not reveal military or diplomatic secrets, the Court determined that President Nixon possessed only a "generalized interest in confidentiality." *Id.* at 710-11. The Court then stated:

> A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice.... We conclude that when the ground for asserting privilege as to subpoenaed ***16** materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.

Id. at 712-13.

The Court reached that decision notwithstanding the "chilling effect" the decision might have on future presidential communications. As the Court subsequently stated, in *Nixon* "the *genuine risk* of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding." *United States v. Gillock,* 445 U.S. 360, 373 (1980) (emphasis added) (describing *Nixon*).

Last year, in *Sealed Case,* this Court reiterated that the privilege for presidential communications is justified by the "need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge." 121 F.3d at 750. The upshot of *Nixon* and *Sealed Case* is clear: Any *common-law* governmental attorney-client or work product protection is outweighed by the need for relevant evidence in criminal proceedings -- unless the common-law governmental attorney-client and work product privileges somehow are more "fundamental to the operation of Government" and entitled to "greater respect" than the presidential communications privilege. Such a conclusion is untenable. The government attorney-client and work product privileges are not of constitutional dimension. They are not ***17** historically rooted. They have not been applied in the federal criminal context, and the Justice Department states that they have been rarely applied even within the Executive Branch. The privileges, in short, are in no way *more* "fundamental to the operation of Government" or "entitled to greater respect" than the presidential communications privilege.

All four judges to decide the issue presented here have found *Nixon* of considerable importance. "*Nixon* is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." *Grand Jury,* 112 F.3d at 919. Judge Kopf agreed: "*Nixon* requires us to conclude that the President's need for confidentiality, expressed here by the attorney-client privilege, is overshadowed by the grand jury's general need for evidence of the truth." *Id.* at 926-27. So, too, Chief Judge Johnson recognized the primacy of *Nixon* and *Sealed Case.* JA 181-94. Yet notwithstanding the centrality of *Nixon,* the White House managed to file a 40-page brief without even citing the case.

In the end, the analysis of *Nixon* (and *Sealed Case*) generates a single fundamental question that the White House has been unable to answer for two years: How, as a matter of federal common law, can communications between a President and his closest advisors (subject to a deeply rooted constitutional privilege "fundamental to the operation of government") be deemed *less* worthy of protection in criminal proceedings than ***18** communications between *any* government employee and government attorney (as to which there is neither historical nor contemporary support for a privilege)?

C. Application of government attorney-client and work product privileges in federal criminal proceedings would flout Section 535(b) of Title 28.

Even apart from the dearth of historical or contemporary support for the White House's argument, and even apart from *Nixon* and *Sealed Case,* the White House's privilege claim fails. Rule 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted ... in the light of reason and experience" except, *inter alia,* as "*provided by Act of Congress.*"

1. Section 535(b) of Title 28 imposes a specific statutory obligation on Executive Branch employees that is irreconcilable with the White House's common-law privilege claim. That statute provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency ....

28 U.S.C. § 535(b).[8]

***19** In this case, the question posed by Section 535 is whether federal government attorneys representing governmental interests have a duty of disclosure to the independent counsel. The answer is yes. Labeling the statute "significant," the Eighth Circuit stated that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. *Grand Jury,* 112 F.3d at 920. Chief Judge Johnson agreed, stating: "White House attorneys, like

all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees to the Attorney General. Unlike a private attorney representing a corporation, when a White House attorney learns that a White House employee has engaged in criminal conduct, he must report such conduct." JA 191 (citations omitted).

Section 535 admits of no distinction between information obtained by government attorneys and that obtained by other government employees. *Cf.* *Int'l Longshoreman's Ass'n v. Allied Int'l, Inc.,* 456 U.S. 212, 225 (1982) ("In the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision."). Congress' inclusion of a specific exception for "class[es] of information" as to which the Attorney General "directs otherwise," ***20** 28 U.S.C. § 535(b) (2), confirms that the statute means what it says and says what it means -- and that no further exceptions for government attorneys should be *judicially* inferred or created. *Cf.* *United States v. Smith,* 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception").

Furthermore, the House Committee Report accompanying Section 535 states that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning *any alleged irregularities* on the part of officers and employees of the Government." H.R. Rep. No. 83-2622 (1954) (emphasis added). The report emphasizes that "[i]f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have *complete cooperation* from the department or agency concerned." *Id.* (emphasis added). The Department of Justice urged "the prompt enactment of the measure, for such legislation will emphasize the *congressional intent* that the chief law-enforcement officer of the Government is to have *free access to all units thereof* for the purpose of ferreting out personnel criminally violating their trusts and oaths of office." *Id.* (emphasis added). There is no suggestion in the legislative materials that government attorneys are exempt from these important principles of disclosure, "free access," and "complete cooperation."

In addition, it has been understood *within the Executive* ***21** *Branch* that government *attorneys* are subject to Section 535. For example, Lloyd N. Cutler, who has served as White House Counsel in two Administrations, stated that there is a government "rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute." Cutler, *The Role of the Counsel to the President of the United States,* in 35 Record of the Association of the Bar of the City of New York, No. 8, at 470, 472 (1980) (emphasis added). Mr. Cutler further remarked that "[w]hen you hear of a charge and you talk to someone in the White House .. about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.' " *Id.*

Former Solicitor General Bork stated that when he was asked during Watergate if he would be interested in becoming a White House Counsel, he replied that "a government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I'll have to turn it over. I won't be able to sit on it like a private defense attorney." *A Conversation with Robert Bork,* 6 D.C. Bar Rep., No. 3, at 9 (Dec. 1997-Jan. 1998).

In addition, federal regulations recognize that Section 535 contains no exception for government attorneys. For example, each agency must have a "designated agency ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. § 2635.107 (1997). The regulations state: "Disclosures ***22** made by an employee to an agency ethics official *are not protected by an attorney-client privilege.* An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." *Id.* (emphasis added).

The Office of Legal Counsel (OLC) also has recognized the import of Section 535. It has stated, in the context of a proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation," which often will be conducted by government attorneys, "will be referred directly to the Department of Justice, *as is required by 28 U.S.C. § 535.*" 6 Op. OLC 626, 627 (1982) (emphasis added).

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Indeed, the White House itself has previously acknowledged its disclosure obligations. The 1993 White House report on the Travel Office episode stated that "[i]f there is a reasonable suspicion of a crime ... about which White House personnel *may have* knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." White House Travel Office Management Review 23 (1993). There is no inkling of an exception for White House attorneys.

2. Section 535(b) thus is clear: The chief law-enforcement officer (here, within his limited jurisdiction, the independent counsel) is to receive "complete cooperation" and "free access" to all units of the Executive Branch, unless some overriding ***23** constitutional privilege applies.

Statutes such as Section 535 that set forth a right of access or disclosure preclude judicial recognition of a contrary *common-law* privilege. In *University of Pennsylvania,* for example, Title VII authorized government access to information relevant to a discrimination charge. The Court rejected a peer-review privilege claim, stating that the Title VII provisions "[o]n their face ... do not carve out any special privilege relating to peer review materials." 493 U.S. at 191.

Similarly, in *United States v. Arthur Young & Co.,* 465 U.S. 805, 812 (1984), Section 7602 of Title 26 granted the IRS a right of access to an accountant's papers. The Court rejected an accountant's work-product claim, stating that "the very language of § 7602 reflects ... a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry.... If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, not this Court, to make." *Id.* at 816-17.

Arthur Young and *University of Pennsylvania,* when combined with Section 535's text and history, flatly refute the White House's *common-law* privilege claims.

3. In attempting to avoid the import of Section 535 during the history of litigation in this investigation, the White House has advanced a series of unpersuasive arguments.

First, the White House has argued that Section 535 was enacted following a dispute among various federal agencies ***24** regarding investigative jurisdiction. But "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan v. United States,* 118 S. Ct. 805, 809 (1998).

Second, the White House has cited several unpublished OLC memoranda and argued that they recognize a governmental attorney-client exception under Section 535(b)(2). But the White House seriously misinterprets these documents -- as the Eighth Circuit correctly concluded a year ago when presented with this same argument. *See Grand Jury,* 112 F.3d at 921 n.10.

To summarize the OLC memoranda briefly: Pursuant to her authority under Section 535(b)(2) and a specific regulation (28 C.F.R. § 50.15), the Attorney General has authorized an exception to Section 535(b) for information obtained by government attorneys who represent employees in their *personal* capacities -- for example, in civil suits alleging *Bivens* violations. The OLC memoranda cited by the White House address only this exception for these *personal* representations. [9]

In this litigation, the White House has attempted to blur the critical line between representation of the personal interests of a government employee and representation of the governmental interests of a government agency. That difference is vital and well-understood within the Executive Branch. *See, e.g.,* 4B Op. OLC 749, 751 (1980) (distinguishing between ***25** representation of personal interests and governmental interests). It is hardly surprising, therefore, that the OLC has never adopted the proposition attributed to it here -- that a publicly paid lawyer, representing governmental interests

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of the government and sworn to uphold the Constitution, should shield evidence of crime based on common-law government attorney-client and work product privileges. [10]

Third, the Justice Department has suggested that the Attorney General retains authority under Section 535(b)(2) to "direct otherwise" as to a particular class of information -- and that the courts thus should recognize a privilege for Executive Branch information equivalent to the Attorney General's power to withhold information under Section 535(b)(2). DOJ Br. 21-22. This creative suggestion also misses the mark.

The Department intimates that the OIC is claiming to represent both the prosecutorial and non-prosecutorial interests of the United States. Not so. The Attorney General still possesses the inherent constitutional and explicit statutory authority under Section 535(b) to order an independent counsel to withdraw a particular subpoena to an Executive agency. And she ***26** can dismiss an independent counsel if an independent counsel refuses to follow a direct order of the Attorney General made pursuant to that statute. But an Attorney General must accept the constitutional and statutory (and political) *responsibility* if she is to exercise her constitutional and statutory *authority.* She cannot rely on the courts to apply a *common-law* privilege in the face of a clear statutory disclosure obligation intended to grant the independent counsel "free access" and "complete cooperation."

Fourth, given the obvious frailty of the preceding three arguments, the White House -- after some two years of litigating the question in various courts -- has now decided that the Executive Office of the President (EOP) is not subject to Section 535 *at all.* This argument was not raised in the district court and thus is waived. *See Bazuaye v. United States,* 83 F.3d 482, 486 (D.C. Cir. 1996).

In any event, this newly minted argument fares no better than the earlier ones. The EOP falls within the plain language of Section 451 of title 28, which broadly defines the relevant term "agency" for purposes of Section 535. — We are aware of no ***27** authority suggesting that the EOP is something other than an "agency of the executive branch" for purposes of Section 535. And there is substantial authority indicating that it is an agency. [12]

Nor does the White House have any policy reason to read the statute in this crabbed manner; indeed, in its brief in the Supreme Court last year, the White House affirmatively stated that it "embraces the principles embodied in Section 535(b)." Reply Br. for Office of the President, No. 96-1783, at 7. The White House at that time agreed that "the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of a crime." Id. [13]

In sum, Section 535(b) of Title 28 imposes a specific statutory disclosure obligation on Executive Branch employees and is designed to ensure that the chief federal law-enforcement ***28** officer for a particular matter receives "complete cooperation" and "free access" to Executive Branch agencies. The statute is irreconcilable with the White House's *common-law* privilege claim.

D. Application of government attorney-client and work product privileges in federal criminal proceedings would contravene public policy and constitute a "gross misuse of public assets."

Even if the White House's proposed privilege application were (i) rooted in historical or contemporary law, (ii) not precluded by precedent, and (iii) not precluded by statute, the White House still would have to demonstrate that it serves a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee,* 518 U.S. at 9. But the relevant policy considerations point decisively against the White House's submission.

1. Under the White House's theory, a government official (including a President) could tell a White House or other agency attorney that he shredded subpoenaed documents or paid off a potential witness or erased a subpoenaed tape or concealed subpoenaed records. An agency employee could tell an agency attorney that she had falsified his financial

disclosure form or embezzled money from the agency. A prison guard might admit to an agency attorney that he beat a prisoner. We do not think it is remotely plausible to say that non-disclosure in such circumstances is justified by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

***29** As the Eighth Circuit and Chief Judge Johnson concluded, the White House's position would contravene "the strong public interest in honest government" and "would represent a gross misuse of public assets." JA 193. Contrary to the White House's dismissive rhetoric, those judges were *not* blazing new trails. Judge Weinstein stated over 30 years ago: "If there is wrongdoing in government, it must be exposed.... His duty to the people, the law, and his own conscience requires disclosure." Weinstein, *Some Ethical and Political Problems of a Government Attorney,* 18 Maine L. Rev. 155, 160 (1966).

2. The White House responds to all of this law, history, and policy by insisting that the attorney-client and work product privileges must apply to governments to the same extent they apply to individuals and corporations. Even in a legal vacuum devoid of other sources of law, the White House's argument fails because it presupposes that there are *no* relevant differences between public and private entities. That is manifestly not so.

To begin with, the government has a dramatically different relationship to the criminal process than does a corporation. The most obvious -- but perhaps most important -- difference is that a corporation can be indicted, but a government entity cannot. That means that the White House as an institution (or the President in his official capacity) will never be a defendant adverse to the United States in a criminal case. *See* *Grand Jury,* 112 F.3d at 920.

In addition, a private entity's recognized interests in ***30** confidentiality are far greater than those of a government entity: "[U]nlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business." *See* Restatement § 124 cmt. b.

In like manner, the Supreme Court has emphasized the critical difference between public and private responsibilities for the law of privileges. In declining to apply a work-product privilege to an accountant's workpapers, the Court emphasized:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light.... [T]he independent auditor assumes a *public* responsibility .... This "public watchdog" function demands that the accountant maintain total independence from the client at all times and *requires complete fidelity to the public trust.* To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

Arthur Young, 465 U.S. at 817-18 (emphases added). The language applies here as well: Government attorneys, *far more than accountants of corporations,* owe a public duty inconsistent with application of governmental attorney-client and work product privileges in federal criminal proceedings.

The White House's desire for a broad blackout of information also conflicts with principles upon which the Nation was founded. As this Court stated last year, "[t]he very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is ***31** simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance." *Sealed Case,* 121 F.3d at 749. "And openness in government" -- particularly when there is some indication that White House officials may have committed crimes -- "has always been thought crucial to ensuring that the people remain in control of their government." *Id.*

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Finally, even if the Court were to accept the threshold validity of the White House's corporate analogy, *it still does not support the White House's conclusion.* If corporate shareholders bring a lawsuit alleging misconduct on the part of corporate managers, the attorney-client privilege may be overcome to compel the testimony of the corporation's attorneys. *See* *Garner v. Wolfinbarger,* 430 F.2d 1093, 1103-04 (5th Cir. 1970) (no absolute corporate attorney-client privilege in the context of a shareholder derivative suit); *see also* Restatement § 134B reporter's note (approving *Garner* principle and stating that it has been "widely followed," including in areas "beyond shareholder suits"). "Although the *Garner* rule does increase uncertainty to some extent, the risk is not great for organizations attempting to comply with the law in good faith." Restatement § 134B reporter's note. The *Garner* principle, applied to the government context, is straightforward: A federal government agency cannot rely on a common-law attorney-client privilege to thwart the United States' right to information any more than a corporation can do so to frustrate its shareholders' ***32** right to information.

3. The White House nonetheless contends that a privilege is necessary because government attorneys must be able to obtain facts to perform their functions -- providing advice as to privileges, gathering and producing documents, making personnel decisions, rendering public statements, and the like. But the interest in *gathering* facts to perform those functions in no way requires the further step of *concealing* facts from a federal grand jury if the facts are (or become) relevant to a federal criminal investigation.

The White House responds, however, that there might otherwise be a chilling effect on government attorneys and employees. WH Br. 7. This chilling-effect contention crumbles upon close examination.

As has *always* been true, government employees and government lawyers understand that they do not control the ultimate assertion of any privilege in any forum. Accordingly, the government attorney and employee can have *no* assurance that their communications or work product will remain confidential if called for in federal criminal proceedings. Thus, government attorneys and employees necessarily know that their communications and work may well be disclosed if relevant to a federal criminal investigation, regardless of the privilege rule. [4]

***33** To be sure, the White House further suggests that, absent a privilege, government agencies might be discouraged from conducting internal fact-finding and legal work that they perform to promote "the observance of law." WH Br. 8 (quoting *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981)). But that argument ignores the fundamental distinction between corporations and federal agencies. If there were no corporate privilege in criminal proceedings, corporations would be discouraged from conducting internal investigations because the facts developed could be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to criminal liability. That deterrent to gathering facts and performing legal work does not exist in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States. When an agency becomes aware of internal wrongdoing, the agency's *governmental* interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by doing so and by disclosing the results to federal law enforcement authorities. *Cf.* 28 U.S.C. § 535(b).

And finally, there is no basis for applying a *common-law* rule that distinguishes the President from others. Such a distinction sounds in the nature of a constitutional executive privilege based on the President's unique status under Article II. But there already exists a special *presidential* ***34** communications privilege that applies to *all* official presidential communications, including to government attorneys. That privilege, the Supreme Court has stated, is "fundamental to the operation of Government." *Nixon,* 418 U.S. at 708. A *common-law* presidential attorney-client privilege never before recognized or even asserted in criminal proceedings cannot seriously be termed *more* "fundamental to the operation of government" and applied *more broadly* than the extant presidential communications privilege (in which presidential communications to a government attorney are subsumed).

The White House's suggestion that the President is different for purposes of the common-law attorney-client privilege -- and that this novel common-law presidential attorney-client privilege is *more* protective than the historic and

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constitutional presidential communications privilege -- is a thinly disguised end-run around *Nixon. Cf.* Kutler, *The Wars of Watergate* 268 (1990) ("At another press conference several days afterward, Nixon conjured up a whole new doctrine of 'double privilege' ...: executive privilege plus lawyer-client privilege.").

In sum, the White House's chilling-effect argument is no more effective in this case than it was in *Nixon. See* 418 U.S. at 712.

4. Finally, the White House bases much of its argument on the idea that the grand jury is an arm of Congress because of the reporting provision in the independent counsel statute. *See* ***35** 28 U.S.C. § 595(c). The White House suggests that government attorney-client and work product privileges must apply in federal criminal proceedings because of the prospect of a House impeachment and Senate trial.

The argument is a red herring. If the President objects to the reporting provision in Section 595(c), the remedy is most assuredly not for the federal courts to create broad-ranging governmental attorney-client and work product privileges applicable in federal criminal proceedings. Rather, if the President believes Section 595(c) is unconstitutional, he can so state and act on that basis. And more generally, in his role as Chief Executive, he can order an independent counsel (who is within the Executive Branch) not to provide a report to Congress or not to include certain kinds of information or even not to seek certain information. If an independent counsel refused, the President could dismiss him (which might trigger a judicial "good cause" proceeding and/or congressional hearings of some kind). In short, a President has the constitutional and statutory authority to respond to the concern stated by the Office of the President. But a President must both exercise that power and take responsibility for it. A President cannot rely on the courts to apply a common-law privilege governmental privilege against the grand jury based on some notion of future House impeachment and Senate trial of the President.

***36 E. Because the government attorney-client and work product privileges do not apply in federal criminal proceedings, there is no basis for imposing a heightened relevance requirement.**

Because the White House's proposed common-law privileges would authorize government agencies to conceal criminal activity that has occurred within the Executive Branch, the district court rejected them. On the other hand, the district court did not conclude that the Fed. R. Crim. P. 17 showing of relevance was sufficient. The district court instead imported the two-part test that had been adopted by this Court in *Sealed Case* for presidential communications claims -- importance and difficulty in obtaining the information from another source -- to the government attorney context. JA 195-96.

As we will explain below, were this Court to assume (or decide) that the *Sealed Case* standard for presidential communications in investigations of non-White House officials applies, the judgment should be affirmed. Chief Judge Johnson carefully applied the heightened *Sealed Case* standard and found that the grand jury's need for the information outweighed any interest in confidentiality.

That said, we do not believe that a showing higher than relevance is appropriate when the grand jury seeks information from a government attorney (unless some other governmental privilege has been asserted). That conclusion is supported by four independent reasons.

First, the Supreme Court has taken a dim view of tests of ***37** this sort in common-law privilege cases, particularly in grand jury proceedings. Any such case-by-case approach requires the balancing of intangibles -- the grand jury's need for information and the agency's need for confidentiality -- in the context of a particular investigation, generating endless skirmishing. And the very nature of the uncertain protection undercuts the reason to have the privilege in the first place, which is to encourage communications by informing people when communications will and will not be privileged. [5] Four Supreme Court cases establish these points in terms that are highly relevant in this case.

The Court discussed this issue at some length in *Branzburg,* 408 U.S. at 704-05, where the Court rejected a First Amendment reporter's source privilege, even in a qualified form, in grand jury proceedings.

> [T]he courts would also be embroiled in preliminary factual and legal determinations .... Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

408 U.S. at 705. The court rejected any such preliminary requirements (some of which mirror the *Sealed Case* standard), stating that the administration of such a standard "would present ***38** practical and conceptual difficulties of a high order" such that the courts would be "inextricably involved in distinguishing between the value of enforcing different criminal laws." *Id.* at 705-06. Also, such a requirement would serve little purpose for the communicants because "predicting in advance when and in what circumstances they could be compelled to [testify] would be difficult." *Id.* at 702.

In *University of Pennsylvania,* the Court again spoke to this issue and flagged considerations that are particularly relevant in this investigation:

> Requir[ing] .. a specific reason for disclosure, beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination. A university faced with a disclosure request might well utilize the privilege in a way that frustrates the EEOC's mission. We are reluctant to place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations ....

493 U.S. at 194 (internal citations and quotations omitted).

In *United States v. R. Enterprises,* 498 U.S. 292 (1991), the Court spoke more generally about the problems that preliminary showings generate for grand jury investigations. The Court emphasized that the Government cannot be required to present "evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists." *Id.* at 297. "One simply cannot know in advance whether information sought during the investigation will be relevant and admissible in a prosecution for a particular ***39** offense." *Id.* at 300. The Court rejected the *Nixon* standard for trial subpoenas, which "would invite procedural delays and detours" and "saddle a grand jury with minitrials and preliminary showings." *Id.* at 298-99. This would "impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal law." *Id.* at 299. *"We have expressly stated that grand jury proceedings should be free of such delays." Id.* at 298 (emphasis added).

Finally, in *Jaffee v. Redmond,* the Court again rejected a standard of "relative importance." In that case, the Court recognized a general psychotherapist privilege that was established in the States and refused to allow it to be overcome on a case-by-case "relative importance" basis. 518 U.S. at 6, 17-18.

A case-by-case heightened relevance approach is incompatible with the thrust of Supreme Court jurisprudence. While such a requirement was adopted by this Court in *Sealed Case,* that case involved the constitutional privilege for presidential communications, which is *sui generis.* The court in *Sealed Case* certainly did not suggest that its test should be adopted for every *common-law* privilege issue that might arise.

Second, Section 535 precludes application of these common-law privileges, whether framed as absolute privileges or as some kind of heightened relevance showing. Under Section 535, the chief law-enforcement officer is to have "free access"

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and "complete cooperation" within constitutional limits. ***40** Transporting the *Sealed Case* two-part standard to this *common-law* context thus would thwart the language and history of Section 535.

Third, as a commonsense matter, the ordinary attorney-client and work product privileges presumably either should apply or should not apply to government attorneys in criminal proceedings. If the court concludes that they do not apply, it is unclear why the *court,* as opposed to Congress or the Advisory Committee, should itself try to craft a novel two-part qualified government-attorney privilege never before known in American law. Creating rules of privileges out of whole cloth is ordinarily a task for legislative branch. *Branzburg,* 408 U.S. at 705-06.

Fourth, in the context of the existing *common-law* governmental privilege claims, there is no basis for requiring a showing of heightened relevance. Indeed, the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred" and thus does not authorize non-disclosure of information to a grand jury. *Sealed Case,* 121 F.3d at 746. It logically follows that any common-law government attorney privilege similarly should "disappear" in criminal proceedings, thereby leaving relevance as the guiding standard.

***41 F. If *Sealed Case* provides the relevant test for government attorney-client and work product information, the test is satisfied here.**

The *Sealed Case* court stated that the first prong of its two-part test (importance) "can be expected to have limited impact." 121 F.3d at 754. As to the second prong (unavailability), when an "immediate White House [official] is being investigated for criminal behavior," the prosecutor will be able "easily to explain why there is no equivalent." 121 F.3d at 754-55; *see also id.* at 760 (explaining that in the Espy case, "unlike in *Nixon* cases, the actions of White House officers do not appear to be under investigation"). In so stating, the court explicitly referred to the deliberative process privilege, which itself "disappears" upon an allegation of misconduct. *Id.*

This discussion clarifies that the *Sealed Case* test applicable to presidential communications claims is roughly equivalent to relevance *when White House officials are under investigation.* Thus, even if *Sealed Case* provides the appropriate standard for government attorney information, it is easily satisfied here. [6]

***42** But even were this court to assume *arguendo* (or decide) that the *Sealed Case* standard applicable to investigations of *non*-White House officials should apply here, the judgment should be affirmed. Chief Judge Johnson applied precisely *that* heightened *Sealed Case* standard and found that the grand jury's need for the information outweighed any interest in confidentiality. The *in camera* need submission filed in the district court amply demonstrates that her conclusion was correct and not an abuse of discretion. [7]

The White House, for its part, takes issue with the entirety of the above analysis. Citing *no* relevant precedent, the White House suggests that the district court must assess the grand jury's need for testimony on a question-by-question basis. *See* WH Br. 30. Apart from contravening the body of Supreme Court law discussed above, this argument flatly conflicts with *Sealed* Case, where the court stated that a "party seeking to overcome a claim of presidential privilege must demonstrate: first, that *each discrete group* of the subpoenaed materials likely contains important evidence ...." 121 F.3d at 754 (emphasis added). It also makes no sense. Once the Court has determined that [ ] must be disclosed, the Court need not ***43** analyze separately the hypothetical questions, "What did the President tell you about it on January 20th," "What did the President tell you about it on January 21st," and so on.

The White House further suggests that all testimony must be heard *in camera* by the district court before being released to the grand jury. *See* WH Br. 32. [8] That, too, is senseless, and again the White House cites no precedent for its request. After all, unlike with documents or recordings, " 'testimony *can be* confined to the relevant portions of the conversations

and can be limited to matters that do not endanger national security.' " *Nixon v. Sirica,* 487 F.2d 700, 719 (D.C. Cir. 1973) (en banc) (quoting, with approval, President Nixon's brief) (emphasis added).

In sum, even if the *Sealed Case* standard for presidential communications applies in this *common-law* context, the judgment must be affirmed.

G. For the same reasons that there is no government attorney-client privilege in criminal proceedings, the common interest and work product doctrines do not apply.

1. Some of the communications at issue here occurred between Mr. Lindsey, who is a White House attorney, and President ***44** Clinton's personal attorneys. The same analysis and conclusion apply.

The common interest rule is simply an extension of the attorney-client privilege. It is an exception to the rule that an unnecessary third party destroys the privileged nature of an attorney-client communication. *See Haines v. Liggett Group, Inc.,* 975 F.2d 81, 94 (3d Cir. 1992). Because the White House cannot maintain the governmental attorney-client or work product privilege in these grand jury proceedings and because the common interst rule exists only as an extension of these protections, it necessarily follows that the White House cannot rely on the common interest rule. Any contrary rule would be illogical. If there is no government attorney-client or work product privilege in criminal proceedings when the government attorney receives information from the government employee *directly,* it follows that there is no privilege when the government attorney receives information from the employee's personal attorney on behalf of the employee.

A separate flaw with the common interest assertion against the grand jury and the OIC is that it assumes that White House attorneys are more properly aligned with the *personal* interests of government officers and a slew of private criminal defense attorneys than with the federal grand jury and the OIC representing the United States. But an Executive agency cannot be prosecuted and does not have a judicially cognizable official interest in a federal criminal investigation distinct from that ***45** of the federal prosecutors conducting the investigation and prosecution. *See* 28 U.S.C. §§ 516, 519, 594(a). Thus, in a federal criminal investigation, a federal government agency cannot be in common interest with an individual against the United States.

2. For either of two alternative reasons, the government work product doctrine does not apply.

First, the historical, legal, and policy analysis demonstrating that a government agency cannot maintain an attorney-client privilege in federal criminal proceedings requires the same conclusion for the government attorney work product doctrine. *See Grand Jury,* 112 F.3d at 936 n.4 (Kopf, J., dissenting) ("The same analysis justifies piercing the work product privilege."). Both doctrines are designed to ensure that the client receives appropriate legal representation; thus, either both apply or neither applies. It would be completely illogical to hold otherwise. If so, an agency attorney could be required to disclose a factual memorandum received from a government employee, but could refuse to disclose a memorandum of an interview of a *non-government* individual. Such an approach obviously would turn the two attorney-based privileges on their heads.

Moreover, the Supreme Court relied heavily on the public-private distinction in rejecting a work-product argument in *Arthur Young.* The Court stated that the *Hickman* work-product doctrine "was founded upon the *private* attorney's role as the ***46** client's confidential advisor and advocate," and the doctrine did not apply to an independent auditor who "assumes a *public* responsibility" that *"requires complete fidelity to the public trust." Arthur Young,* 465 U.S. at 817-18. For the reasons articulated in *Arthur Young,* the government attorney work-product doctrine does not apply in federal criminal proceedings.

Our alternative work product argument is straightforward: To be protected, an attorney's work must have been produced in anticipation of "litigation." At the times these communications were made, the White House was not anticipating

criminal litigation because the White House cannot be indicted. It also was not working in anticipation of civil litigation in which the White House or government officials in their official capacities might become parties. [9]

II. [ ]

Note: Pages 47-49 missing in original document

***50** [ ]

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Appendix not available.

Footnotes

* Authorities upon which we chiefly rely are marked with asterisks.

1 *See* DOJ Br. 11 ("The Office of the President contends that the generally absolute character of the government attorney client privilege as against outside parties controls this case. *We do not agree with that submission.*). The Department has indicated that the Attorney General and the Solicitor General provided considerable personal input into the amicus brief. *See* Department of Justice Mot. to File Br. Exceeding Word Limits, at 2 (filed June 17, 1998). The Department has supported a standard akin to that applied by this Court in *Sealed Case* for presidential communications.

2 The district court in the Eighth Circuit litigation did not reach the issue.

3 As to historical practice in civil cases, it is "far from clear that the common law attorney client privilege could be claimed by governments. 24 Wright & Graham, *Federal Practice and Procedure* § 5475, at 124 (1986). Several States do not apply a governmental attorney client privilege even in the *civil* process. *See* Unif. R. Evid. 502(d)(6); *accord* Ark. R. Evid. 502(d) (6); Me. R. Evid. 502(d)(6); N.D. R. Evid. 502(d)(6); 12 Okla. Stat. Ann. § 2502(d)(6); *Concerned Parents v. Housing Auth.,* 934 F. Supp. 406, 411 (M.D. Fla. 1996) (Florida law; "Even the attorney client privilege is not generally extended to communications between lawyers and governmental clients.); *Minneapolis Police Officers Fedn v. City of Minneapolis,* 488 N.W.2d 817, 821 (Minn. Ct. App. 1992) ("the attorney client relationship for the government attorney is different from that in the private sector); *News & Observer Publg Co. v. Poole,* 412 S.E.2d 7, 17 (N.C. 1992) ("So far this Court has not recognized an attorney client privilege for public entity clients, and it is unclear whether the traditional privilege should be so extended.).

4 *See* 24 Wright & Graham § 5475, at 128 n.26 (1986) ("The extent to which the privilege has been accepted by federal courts may be exaggerated by the number of citations .... A significant number of the cases in which the issue has arisen have been suits to compel disclosure of material under the Freedom of Information Act.).

5 In *In re Grand Jury Subpoenas,* 574 A.2d 449 (N.J. Super. Ct. App. Div. 1989), a government agency had retained *outside* counsel, and the court held that the New Jersey government disclosure obligation was inapplicable and thus a privilege could be asserted.

6 Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), applies to documents "which would not be available by law to a party other than an agency in litigation with an agency. The accompanying Senate Report indicated that Exemption 5 "included d] the working papers of the agency attorney and documents which would come within the attorney client privilege *if applied to private parties.* S. Rep. No. 89 813, at 2 (1965) (emphasis added). In other words, if a corporation in an analogous circumstance could assert an attorney based privilege as to particular documents, then the documents would be exempt from FOIA. The Senate Report thus implies that the privileges available to private civil litigants were considered broader than those available to government litigants. *See NLRB v. Sears. Roebuck & Co.,* 421 U.S. 132, 154 (1975); *see also* Barsdate, *Attorney Client Privilege for the Government Entity,* 97 Yale L.J. 1725, 1736 (1988) ("Congressional enactment of FOIA exemption 5 cannot be viewed as a legislative mandate for application of the attorney client privilege to governmental agencies.).

7 The White House points to the 1972 proposed Federal Rules of Evidence, which defined "client to include governmental bodies. That argument is misplaced: Concern over the expansive privileges available to governments under the proposed Rules

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(particularly Rule 509) was one critical reason why Congress did *not* adopt them. *See Weinstein s Federal Evidence* § 501 App. 101 3] G], at 501 App. 22. In any event, the rules did not address whether government entities could assert an attorney client or work product protection in *criminal* proceedings; the notes accompanying the proposed rules cite only civil cases. And the proposed rules are no more than a starting point. *See. e.g., Trammel v. United States,* 445 U.S. 40, 47 48 (1980) (recognizing privilege not in Proposed Rules and rejecting privilege in Proposed Rules).

The White House also suggests that a District of Columbia Bar rule is relevant to the privilege analysis. The comment to that rule, however, states that it "is not intended to govern or affect judicial application of the attorney client privilege or work product doctrine. D.C. Bar. R. Prof. C. 1.6 cmt. 5.

8 Subsection (b)(1) provides that the information in question should be provided to an official or entity other than the Attorney General if "the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law. Pursuant to the independent counsel statute, the independent counsel has the Attorney General's responsibilities to obtain and receive information related to matters within the independent counsel's limited grant of criminal investigative and prosecutorial jurisdiction. *See* 28 U.S.C. § 594(a). Thus, " w]hen issuing grand jury] subpoenas, an independent counsel stands in the place of the Attorney General. S. Rep. No. 100 123, at 22 (1987).

9 *See* OLC Mem. of Mar. 29, 1985, at 5; OLC Mem. of Apr. 3, 1979, at 1; OLC Mem. of Aug. 30, 1978, at 4; OLC Mem. of Nov. 30, 1976, at 1 (all cited in WH Br. 20 21).

10 The White House has pointed to a 1982 OLC opinion, but it does not purport to address the applicability of governmental privileges in *criminal* proceedings. *See* 6 Op. OLC 481, 490 97 (1982); *see also Grand Jury,* 112 F.3d at 921 n.10 (explaining OLC opinions). And, for purposes of congressional inquiries, that opinion and a later 1986 opinion state that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney client privilege should be analyzed in the same fashion as any other intra Executive Branch communications. 10 Op. OLC 68, 78 (1986).

11 28 U.S.C. § 451 defines "agency as "any department, independent establishment, commission, administrative authority, board or bureau of the United States. It has been broadly construed to include organizations that "perform] a governmental function, "are financed by the government, and are "referred to as an agency in other statutes. *In re Hoag Ranches,* 846 F.2d 1225, 1227 28 (9th Cir. 1988); *see Rauscher Pierce Refsnes, Inc. v. FDIC,* 789 F.2d 313, 315, 316 (5th Cir. 1986) (FDIC is agency); *Acron Invs., Inc. v. FSLIC,* 363 F.2d 236, 239 40 (9th Cir. 1966) (FSLIC is agency; rejecting argument that an organization is not an agency for purposes of Title 28 simply because it is not specifically described in section 451).

12 Numerous regulations refer to the Executive Office of the President (and units thereof) as agencies. *They are listed in an addendum to this brief.*

13 This Court's recent opinion in *United States v. Espy,* No. 98 3001, 1998 WL 312146, at *3 (D.C. Cir. June 16, 1998), held that false statements to the EOP were not covered by 18 U.S.C. § 1001, but the court based its decision on the term "jurisdiction in Section 1001, not a conclusion that the EOP could not be an agency.

The White House is exempt from the FOIA, 5 U.S.C. § 552. But the Supreme Court relied on precise language in the FOIA legislative reports indicating that the White House Office should not be subject to that Act. *See Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 156 (1980). Significantly, this Court has rejected reliance on *Kissinger* as a basis for analyzing whether the EOP is an agency under other statutes. *See Espy* at *3.

14 Two other facts further undercut the White House's chilling effect argument. First, the prospect of disclosure to a grand jury does not present the same kind of chilling effect as public disclosure. *See Branzburg v. Hayes,* 408 U.S. 665, 700 (1972). Second, the overwhelming majority of White House business, and federal agency work, never comes under grand jury scrutiny. *See Nixon,* 418 U.S. at 712.

15 The Court has repeatedly emphasized that a privilege should be predictable. *See Upjohn,* 449 U.S. at 393. Contrary to the White House's suggestion, however, that does not mean that a privilege must be absolute in all circumstances at all times for *no* privilege fits that description. Rather, it means that the governing rules for privileges should be as clear as possible in advance so that individuals can make informed decisions. That goal is directly contrary to any test of heightened relevance or compelling need or relative importance or essential to justice.

16 In *Nixon,* the Supreme Court accepted neither President Nixon's primary argument that the privilege was absolute, nor his secondary argument that the Special Prosecutor must show a "unique and compelling need to obtain the tapes. *See* 418 U.S. at 713 14; *cf.* Br. for Cross Pet'r Richard M. Nixon, at 126. The Court found that the showing under Fed. R. Crim. P. 17 itself demonstrated the requisite need to obtain non state secret presidential communications in criminal proceedings. The Court thus ordered that " s]tatements that meet the test of admissibility and relevance on the tapes must be produced to the Special Prosecutor. 418 U.S. at 714. For that reason, we agree with Judge Silberman and the Eighth Circuit as to the precise

application of the *Nixon* standard. *See* *United States v. North,* 910 F.2d 843, 950 53 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part); *Grand Jury,* 112 F.3d at 918 n.9.

17 The district court's analysis of a need submission is reviewed for abuse of discretion. *See* *Director, OTS v. Vinson & Elkins LLP,* 124 F.3d 1304, 1308 (D.C. Cir. 1997).

18 The White House did not raise this new argument until its motion to reconsider and, therefore, has waived it. *See, e.g.,* *Frietsch v. Refco, Inc.,* 56 F.3d 825, 828 (7th Cir. 1995); *Fink v. National Say. & Trust Co.,* 772 F.2d 951, 963 n.* (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (quoting *Fehlhaber v. Fehlhaber,* 681 F.2d 1015, 1030 (5th Cir. 1982)).

19 The White House also argues that it was anticipating congressional proceedings. But such proceedings are not "litigation. And this Court recently stated, as do the advisory committee notes, that " m]aterials assembled in the ordinary course of business, *or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes* are not under the qualified immunity provided by this subdivision. *In re Sealed Case,* No. 98 3032, 1998 WL 321060, at *7 (D.C. Cir. June 19, 1998). The court thus noted that "not all work undertaken by lawyers finds protection in the work product privilege. *Id.* The Eighth Circuit, when presented with the White House's "congressional proceedings argument, correctly stated that the White House had not "cite d] any authority for this proposition, and we have discovered none. *Grand Jury,* 112 F.3d at 924.

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No. 98-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE OF THE PRESIDENT, PETITIONER,

v.

OFFICE OF INDEPENDENT COUNSEL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether under Fed. R. Evid. 501, this Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974), and Section 535(b) of Title 28, a federal government agency can maintain an absolute government attorney-client privilege to withhold relevant evidence from a federal grand jury.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

(i) the United States of America, represented by the Independent Counsel In re Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a)(9); and

(ii) the Office of the President of the United States.

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No. 98-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE OF THE PRESIDENT, PETITIONER,

v.

OFFICE OF INDEPENDENT COUNSEL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported in redacted form at 148 F.3d 1100. The opinion of the district court (Pet. App. 36a-66a) is reported in redacted form at 5 F. Supp. 2d 21.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Section 535(b) of Title 28 provides in relevant part:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General . . . .

STATEMENT

The United States, represented by the Office of Independent Counsel (OIC), filed a motion to compel Assistant to the President Bruce R. Lindsey to testify before a federal grand jury sitting in the District of Columbia. The Office of the President (hereafter "the White House") opposed the motion, asserting *inter alia* a government attorney-client privilege. The district court granted the OIC's motion to compel, Pet. App. 36a-66a, and the court of appeals affirmed, Pet. App. 1a-35a.

1. Pursuant to a January 16, 1998, order of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, the OIC has been investigating whether President William J. Clinton, Monica S. Lewinsky, or others committed federal crimes in concealing the truth from the judicial process during the *Jones v. Clinton* sexual harassment lawsuit.

Shortly after the commencement of this investigation, the grand jury subpoenaed Bruce Lindsey to testify. On three occasions in February and March, Mr. Lindsey refused to answer questions, interposing claims including executive privilege and government attorney-client privilege. *See* Pet. App. 3a, 37a.

2. On March 6, 1998, the OIC moved to compel Mr. Lindsey's testimony. On May 4, 1998, the district court granted the motion to compel in its entirety, holding that neither executive nor government attorney-client privilege barred disclosure.

As to the government attorney-client privilege, the district court agreed with the Eighth Circuit's rejection of an absolute government attorney-client privilege in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997). The district court concluded that any government attorney-client privilege could provide no greater protection than the executive privilege for presidential communications, a privilege that yields to the need for relevant evidence in criminal proceedings. *See United States v. Nixon*, 418 U.S. 683 (1974).

The district court found that the corporate attorney-client privilege did not support the White House's argument because "[a] private organization such as a corporation and a government institution such as the White House differ significantly, especially in the criminal context." Pet. App. 56a. The conduct of corporate employees "can expose a corporation to civil and criminal liability." *Id.* By contrast, the conduct of President Clinton "may subject [him] to criminal prosecution or impeachment," but it cannot expose the White House as an institution to criminal liability. *Id.*

The district court also relied on Section 535(b) of Title 28. That statute requires employees in the Executive Branch to expeditiously report to the appropriate law-enforcement official "any information" relating to federal criminal offenses committed by government officials. Based on this statute, the

district court stated that "White House attorneys, like all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees." Pet. App. 57a.

The district court also analyzed the competing policy considerations. The court quoted with approval the Eighth Circuit's assessment that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of an absolute governmental attorney-client privilege in criminal proceedings inquiring into the actions of public officials." Pet. App. 58a (quotation omitted). The court further stated that it "shares the Eighth Circuit's belief" that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *Id.* (quotation omitted). White House attorneys, the court stated, "are paid by U.S. taxpayers" and are not paid to gather facts and provide advice with respect to "the private decisions of President Clinton, and certainly not private, potentially criminal conduct." *Id.* at 59a.

In sum, because the court found that the executive privilege did not bar production of the subpoenaed information in this case (in light of a factual submission filed by the OIC), it concluded that a government attorney-client privilege similarly did not bar production of the subpoenaed information. Pet. App. 60a-63a.

3. On May 28, 1998, in an effort to obtain Mr. Lindsey's testimony as quickly as possible, the OIC on behalf of the United States filed a petition for a writ of certiorari before judgment in this Court. In its brief in opposition to the petition, the White House abandoned its claims of executive privilege. White House Br. in Opp'n at 6, *United States v. Clinton*, 118 S. Ct. 2079 (1998) (No. 97-1924).[1] The Court denied the petition. 118 S. Ct. 2079 (1998).

4. After expedited briefing and argument, the court of appeals affirmed the judgment of the district court. Pet. App. 1a-35a. At the outset of its opinion, the court stated:

> In these expedited appeals, the principal question is whether an attorney in the Office of the President, having been called before a federal grand jury, may refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others. To state the question is to suggest the answer, for the Office of the President is a part of the federal government, consisting of government employees doing government business, and *neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense.*

Id. at 2a (emphasis added).

In reaching its conclusion, the court of appeals began by noting the differences between government attorneys and private attorneys: "When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed

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[1] Although the White House dropped its claim of executive privilege while the case was pending in this Court, it reasserted executive privilege with respect to Mr. Lindsey's testimony in a subsequent grand jury appearance in August 1998, and also with respect to testimony by other members of the White House Counsel's office that same month. *See* H.R. Doc. No. 105-310, at 206-09 (Sept. 11, 1998).

by those in government, government attorneys stand in a far different position from members of the private bar." Pet. App. 12a-13a. The court explained that the duty of government attorneys "is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure." *Id.* at 13a.

The court of appeals stated that the distinction between government attorneys and private attorneys is embodied in the Constitution, which requires that Executive Branch officials take an oath to defend the Constitution. "This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." Pet. App. 13a.

Citing sources as diverse as Judge Jack Weinstein, former White House Counsel Lloyd Cutler, former Solicitor General Robert Bork, and the Federal Bar Association, the court of appeals stated that the tradition of disclosure by government attorneys is deeply rooted. Pet. App. 14a, 17a. The court noted that it was "not aware of *any* previous deviation from this understanding of the role of government counsel." *Id.* at 18a (emphasis added).

The American tradition of guarding against public corruption further supported disclosure, the court concluded. Quoting James Madison, the court stated that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy." Pet. App. 15a. Evidentiary privileges work against these interests in open government "because their recognition creates the risk that a broad array of materials in many areas of the executive branch will become sequester[ed]." *Id.* (quotation omitted). Furthermore, the court agreed with the Eighth Circuit that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal

investigation would represent a gross misuse of public assets." *Id.* (emphasis added) (quotation omitted).

The court of appeals also examined the implications of 28 U.S.C. § 535(b), the statutory reporting obligation applicable to Executive Branch employees. The court stated that "[w]e need not decide whether section 535(b) alone requires White House Counsel to testify before a grand jury," for "at the very least section 535(b) evinces a strong congressional policy that executive branch employees must report information relating to violations of Title 18, the federal criminal code." Pet. App. 16a (quotation omitted). "Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes." *Id.* at 16a-17a. The court of appeals added that the White House itself had previously stated to the Supreme Court that it "embraces the principles embodied in section 535(b)" and that "the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of the crime." *Id.* at 17a (quotation omitted).

The court of appeals noted that the White House's attempt to equate itself to a corporation for purposes of the attorney-client privilege failed, even on its own terms, to justify non-disclosure: "Under the widely followed doctrine announced in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), corporate officers are *not* always entitled to assert such privileges against interests within the corporation, and accordingly must consult with company attorneys aware that their communications may not be kept confidential from shareholders in litigation." Pet. App. 19a-20a (emphasis added). Based on *Garner*, the court of appeals stated that "[a]ny chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable." *Id.* at 20a.

The court of appeals also found the White House's argument irreconcilable with this Court's decision in *Nixon* because "there is no basis for treating legal advice differently

from any other advice the Office of the President receives in performing its constitutional functions." Pet. App. 2a.

> A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. *The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings.* Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

Id. at 23a (emphasis added) (citations omitted).

As to the specter of impeachment raised by the White House, the court of appeals explained that the constitutionally based executive privilege for presidential communications, whatever its scope, was the only conceivable vehicle for the President to use in attempting to prevent congressional encroachment into Executive Branch communications. Pet. App. 20a-22a.

Based on all of these considerations, the court of appeals determined that "[t]he public interest in honest government

and in exposing wrongdoing by government officials, as well as the tradition and practice, acknowledged by the Office of the President and by former White House Counsel, of government lawyers reporting evidence of federal criminal offenses whenever such evidence comes to them, lead to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime." Pet. App. 2a.

Judge Tatel dissented in part. He agreed with the majority that "government lawyers working in executive departments and agencies enjoy a reduced privilege in the face of grand jury subpoenas." Pet. App. 24a. He also expressed doubt that the attorney-client privilege was implicated by the communications involved in this case: "[O]n this record it is not clear whether those communications involved official legal advice that would be protected by the attorney-client privilege." *Id.* If such communications were involved, however, Judge Tatel stated that he would draw a distinction between government lawyers serving the President and other government lawyers. Judge Tatel concluded that communications between the President and his official lawyers should be subject to an absolute government attorney-client privilege by which the President lawfully can prevent disclosure in federal criminal proceedings of information incriminating of himself or of others. *Id.* at 29a-32a.

ARGUMENT

The two courts of appeals that have considered the question presented — the D.C. Circuit and the Eighth Circuit — have decisively rejected the White House's legal argument. The only district court to decide the issue has done the same.[2] The courts have concluded that the White House's legal position is wrong as a matter of law and, if accepted,

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[2] The district court in the Eighth Circuit litigation did not reach this question.

would flout "the strong public interest in honest government" and would facilitate a "gross misuse of public assets." Pet. App. 2a, 15a, 58a; *Grand Jury*, 112 F.3d at 921.

The courts are not alone. The White House's argument is sufficiently unmoored from history, law, precedent, and policy that Attorney General Reno, Solicitor General Waxman, and Assistant Attorney General Hunger — political appointees of the President — took the extraordinary step of filing an amicus brief in the court of appeals that is *contrary* to the legal position of the White House (that is, of the President in his official capacity). *See* DOJ C.A. Br. 11 (the Department does "not agree with [the] submission [of the Office of the President]"); DOJ Motion (June 17, 1998).

Apart from the merits, the question presented is narrow. The petition presents only the application, in the grand jury setting, of Federal Rule of Evidence 501 and 28 U.S.C. § 535(b). The case does not concern the scope of a government attorney-client privilege when asserted in congressional proceedings or against parties other than the United States, such as in civil proceedings or cases under the Freedom of Information Act. Nor does the petition involve a *constitutionally* based privilege, such as the executive privilege for presidential communications.

Because the courts of appeals are in agreement, because the decisions of those courts are correct and thoroughly grounded in law and public policy, and because the legal issue is discrete and not constitutional, the petition should be denied.

I

1. The two courts of appeals that have decided this issue are in full accord. As a result, this Court's review is unnecessary to resolve any uncertainty in the law. *See* S. Ct. R. 10(a).

A year ago, the Eighth Circuit ruled that a government attorney-client privilege does not authorize non-disclosure of

information in federal criminal proceedings. *See Grand Jury*, 112 F.3d at 910. The White House filed a strongly worded petition for certiorari. But this Court, without dissent, denied the petition. 117 S. Ct. 2482 (1997). The only relevant change since the Court's denial of certiorari a year ago is that the D.C. Circuit now has addressed the issue and agreed with the Eighth Circuit's decision. As a result, the White House's current petition warrants certiorari no more than its petition of a year ago.

2. In addition, the petition raises an exceedingly narrow legal issue that does not pose the kind of far-reaching consequences that justify this Court's review notwithstanding the absence of a circuit split. The question presented concerns only a common-law government attorney-client privilege invoked against the United States in federal criminal proceedings. *See* Fed. R. Evid. 501, 1101. The issues *not* presented include the following:

First, the case presents no issue with regard to the scope of the privileges that an individual or private corporation can maintain.

Second, the petition raises no issue regarding the application of a government attorney-client privilege in *civil* proceedings. The decisions of the D.C. Circuit and the Eighth Circuit do not deny a government attorney-client privilege in federal civil proceedings where the government is opposed to a private party. *See* Pet. App. 6a-8a; *cf. Nixon*, 418 U.S. at 712 n.19.

Third, the case raises no question as to the scope of the privileges that the Executive Branch can maintain in *congressional* proceedings. The case concerns a *common-law* privilege claim under Rule 501, and Rule 501 does *not* apply to congressional proceedings. *See* Fed. R. Evid. 1101. Congress recognizes privileges only as required by the Constitution or pursuant to its own rules and practices under its Article I authority. *See* S. Rep. No. 104-191, at 11-12 (1995). The White House's references to impeachment thus

are a red herring: The *common-law* Rule 501 issue presented by the petition could not and would not have any effect in any impeachment or other proceedings that Congress may undertake. If the President seeks to advance a privilege claim based on his unique constitutional status and the possibility of impeachment proceedings, the appropriate vehicle (if any) is executive privilege.

Fourth, the case does not involve any constitutionally based privilege, such as the executive privilege for presidential communications. The White House maintains that the decision of the court of appeals "upsets the constitutional balance of powers." Pet. 18. That assertion makes no sense: The petition presents no constitutional question, and the White House has never suggested (nor could it plausibly do so) that *the Constitution* requires a government attorney-client privilege. In fact, even the historically rooted attorney-client privilege *for individuals* is not embodied in the Constitution.

Indeed, because the question presented involves only the application of a federal statute and a federal rule of evidence, Congress can further study the issue and address it legislatively. Alternatively, the President could direct the Attorney General to exercise her inherent constitutional authority and specific statutory authority under 28 U.S.C. § 535(b), which we discuss below, to establish regulations or policies limiting the information that federal prosecutors (including independent counsel) can obtain from government attorneys.[3]

In short, the question presented is narrow, it is not constitutional, and it does not justify review in the absence of disagreement in the courts of appeals.

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[3] An independent counsel would be bound by 28 U.S.C. §§ 594(f) and 596(a) to follow established, generally applicable regulations or policies "except to the extent that to do so would be inconsistent with the purposes" of the statute. *Id.* § 594(f).

3. The OIC filed a petition for certiorari before judgment in May 1998 based on the national interest in prompt completion of the aspects of the OIC's criminal investigation relating to Monica Lewinsky. At that time, it was our judgment that this Court's review would be a foregone conclusion if the D.C. Circuit were to disagree with the Eighth Circuit. And it also was our judgment that the Nation's interests would be best served by avoiding the delay occasioned by two layers of appellate review of the district court's decision. The only way *ex ante* to ensure that such delays did not occur was to seek certiorari before judgment.

Although this Court denied the petition, the D.C. Circuit subsequently agreed with the Eighth Circuit's decision. The agreement between the Eighth Circuit and the D.C. Circuit has avoided the circuit split that otherwise would have called for review by this Court. At this point, therefore, the bases on which we filed our petition for certiorari before judgment — the interest that the grand jury gather all relevant evidence in an expeditious manner and the concomitant necessity for final court rulings — counsel against certiorari.

II

The decisions of the D.C. Circuit and the Eighth Circuit are correct. Four separate sources of law dictate the conclusion that a government attorney-client privilege does not apply in federal criminal proceedings: (i) traditional considerations under Rule 501; (ii) this Court's precedent (particularly *United States v. Nixon*); (iii) Section 535 of Title 28; and (iv) public policy.

1. Traditional considerations undergirding Rule 501 analysis lend no support to the White House's claim. The federal courts apply common-law privileges "in the light of reason and experience." Fed. R. Evid. 501. The Court's decisions under Rule 501 rest on the premise that the public "has a right to every [person's] evidence," *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996), and treat that principle as "particularly applicable to grand jury proceedings," *Branzburg v. Hayes*,

408 U.S. 665, 688 (1972). This Court has been mindful that testimonial privileges "obstruct the search for truth," and thus has erected a "presumption against the existence of an asserted testimonial privilege." *Id.* at 690 n.29, 686. As the Court stated in *United States v. Nixon*, privileges "are not lightly created nor expansively construed." 418 U.S. at 710. Accordingly, the Court has limited the application of common-law privileges to circumstances in which the application is both (i) historically rooted or well recognized in the States and (ii) justified by a "public good." *Jaffee*, 518 U.S. at 9; *see Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2088 (1998); *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189, 195 (1990).

In this case, the historical and legal foundations for the White House's privilege claim are nonexistent. To our knowledge, no case, statute, rule, or agency opinion — *ever* — has concluded that a department or agency of the United States (or any state government entity) can maintain a governmental attorney-client privilege in federal criminal or grand jury proceedings. *See Grand Jury*, 112 F.3d at 916-18. Nor are we aware of a contemporary *state* case, law, or rule adopting the privilege for *public* attorneys in state criminal proceedings.

The practice of Executive Branch agencies further reveals that the privilege claim in the criminal context is not rooted in historical practice or contemporary understandings. In the Iran-Contra investigation, for example, White House and other government lawyers provided extensive information about their conversations with the President and other government officials. *See, e.g.*, Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I, at 44, 346-48, 366-68, 470 n.137, 474-79, 517, 520, 536 & nn.116 & 117 (Aug. 4, 1993). In addition, in the OIC's investigation of other matters within its jurisdiction, the White House and other Executive Branch agencies have disclosed vast amounts of information that, under the White House's current

argument, would have been protected by a government attorney-client privilege.

In its amicus brief in the court of appeals, the Justice Department confirmed the absence of any historical or legal foundation for the White House's privilege claim. According to the Department, it is the "rare" case where information possessed by agency attorneys is withheld from a federal criminal investigation conducted by Department of Justice prosecutors. DOJ C.A. Br. 3-4. Indeed, the Department has not identified a single instance in which an Attorney General has authorized an agency to withhold important factual information from a federal criminal investigation on the sole ground that a government attorney representing governmental interests possessed the information.

This consistent practice, coupled with the absence of any authority supporting petitioner, both (i) refutes the White House's suggestion that a government attorney-client privilege has traditionally justified withholding relevant information from the federal criminal process and (ii) counsels judicial rejection of the White House's privilege claim. *See Swidler & Berlin*, 118 S. Ct. at 2088; *University of Pennsylvania*, 493 U.S. at 195; *Branzburg*, 408 U.S. at 685-87; *cf. Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims . . . strongly suggests that it did not read the statute as granting such power").[4]

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[4] Leading commentators and the American Law Institute similarly have concluded that government entities should not possess the absolute attorney-client privilege available to corporations (particularly, when the privilege is asserted against the government). *See* 24 Wright & Graham, *Federal Practice and Procedure* § 5475, at 125 (1986) ("number of considerations" militate against "expansion of the privilege to all governmental entities"); *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("[w]here the entity in question is governmental . . . significantly different considerations appear"); Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (Proposed Final Draft No. 1) ("More particularized rules may be necessary where one agency of government

2. As all of the courts to decide this issue have correctly concluded, the White House's privilege claim is irreconcilable with this Court's decision in *Nixon*.

In *Nixon*, the Court held that the executive privilege for Presidential communications — a privilege constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708 — was overcome by the need for relevant evidence in a criminal investigation. *Nixon* leads inexorably to the conclusion that a *common-law* government attorney-client privilege similarly must yield to the need for relevant evidence in a criminal investigation. *See* Pet. App. 23a (*Nixon* "severely undercuts the argument of the Office of the President regarding the scope of the government attorney-client privilege"); *Grand Jury*, 112 F.3d at 919 (*Nixon* "is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes").

As the D.C. Circuit explained, there is no reason that "a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary." Pet. App. 23a. In the end, this Court's decision in *Nixon* generates a fundamental question that the White House has been unable to answer: How, as a matter of federal common law, can communications between a President and his closest advisors (subject to a deeply rooted constitutional privilege "fundamental to the operation of Government") be deemed *less* worthy of protection in criminal proceedings than communications between *any* government employee and government attorney (as to which

claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

there is neither historical nor contemporary support for a privilege)?

Not only has the White House failed to persuasively answer the question, it has not tried. Its 29-page petition does not address *Nixon* — *at all* — despite the fact that both the Eighth Circuit and the D.C. Circuit found *Nixon* of substantial analytical importance.[5]

3. Even apart from the dearth of historical or contemporary support for the White House's argument, and even apart from *Nixon*, the White House's common-law privilege claim fails because it is contrary to federal statutory law. Rule 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience" except, *inter alia*, as "provided by Act of Congress." In this case, Section 535(b) of Title 28 imposes a specific statutory obligation on Executive Branch employees that contravenes the White House's common-law privilege claim. The statute provides that "*[a]ny information* . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees *shall be expeditiously reported*" to the designated federal law-enforcement officer — in this instance, within his limited criminal jurisdiction, the independent counsel. 28 U.S.C. § 535(b) (emphasis added).[6]

[5] The district court in this case and Judge Kopf in his separate opinion in the Eighth Circuit both concluded that government attorney-client communications should receive protection no greater than, but also no less than, the protection accorded Presidential communications under *Nixon*. That conclusion led those two Judges, based on their understanding of *Nixon*'s requirements relating to executive privilege claims, to suggest certain prerequisites that a prosecutor similarly must satisfy to obtain government attorney-client information. The district court found that the OIC had satisfied those requirements here. Pet. App. 47a, 63a.

[6] "When issuing [grand jury] subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987). The White House suggests that the OIC, by relying on Section

While not relying solely on Section 535(b), the D.C. Circuit stated that the statute "evinces a strong congressional policy that executive branch employees must report information relating to violations of Title 18, the federal criminal code." Pet. App. 16a (quotation omitted).[7] The court concluded that "Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes." *Id.* at 16a-17a. The Eighth Circuit similarly found Section 535(b) "significant" because it established that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. *Grand Jury*, 112 F.3d at 920.

A variety of sources buttress the plain language of the Section 535(b) and support the conclusion that the statute requires disclosure of information by government attorneys

535(b), is claiming to represent both the prosecutorial *and* non-prosecutorial interests of the United States. *See* Pet. 22-24. But that is not so. The President and the Attorney General possess inherent constitutional power and explicit statutory authority under Section 535(b) to order an independent counsel to withdraw a particular subpoena to an Executive agency. The President and Attorney General also could adopt regulations limiting the ability of federal prosecutors to obtain access to government attorney-client information. And they could order dismissal of an independent counsel if he or she refused to follow either such regulations or a direct order of the President or Attorney General. But a President and an Attorney General cannot end-run those constitutional and statutory mechanisms by asking the courts to create a *common-law* privilege in the face of a clear statutory disclosure obligation intended to grant the independent counsel free access and "complete cooperation."

[7] At various points in its petition, the White House suggests that the D.C. Circuit's opinion requires disclosure only of client communications that directly reveal criminal activity. *See* Pet. 16-18. At other places, however, the White House correctly states that the D.C. Circuit held that a government attorney-client privilege does not apply at all in federal criminal proceedings. *See* Pet. 12 (court "declar[ed] that no attorney-client privilege exists at all in criminal cases"). The latter is correct: If the court of appeals in fact had limited its ruling to communications that directly reveal criminal activity, the court could not have affirmed the judgment of the district court on this issue.

(unless some overriding constitutional privilege applies). They include:

(i) the legislative materials leading to enactment of Section 535(b), *see* H.R. Rep. No. 83-2622 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3552 (federal prosecutor "should have complete cooperation from the department or agency concerned");

(ii) federal regulations, *see* 5 C.F.R. § 2635.107 (1998) ("Disclosures made by an employee to an agency ethics official [generally an attorney] are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code.");

(iii) Office of Legal Counsel opinions, *see* 6 Op. OLC 626, 627 (1982) ("evidence of criminal conduct" uncovered during an inspector general investigation "will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535");[8] and

(iv) statements of former officials, such as former White House Counsel Lloyd Cutler, *see* Cutler, *The Role of the Counsel to the President of the United States*, *in* 35 Record of the Association of the Bar of the City of New York, No. 8, at 470, 472 (1980) (discussing "statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute").[9]

[8] The White House has previously cited several unpublished OLC memoranda and argued that they support a government attorney-client privilege available in criminal proceedings. But those memoranda refer only to representations of government employees in their *personal* capacities, such as in *Bivens* cases. Those OLC memoranda have no application here — as the Eighth Circuit correctly concluded a year ago when it reviewed those same materials. *See Grand Jury*, 112 F.3d at 921 n.10.

[9] Mr. Cutler added that "[w]hen you hear of a charge and you talk to someone in the White House . . . about some allegation of misconduct, almost the first thing you have to say is 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Id.*

In sum, the plain language and traditional understanding of Section 535(b) preclude the White House's *common-law* privilege claim.[10]

4. Even if the White House could establish that its claim were (i) rooted in historical or contemporary law, (ii) consistent with this Court's precedents, and (iii) compatible with federal statutory law, it still would have to demonstrate that application of this privilege against the United States in federal criminal proceedings would serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee*, 518 U.S. at 9. The opinions of the Eighth and D.C. Circuits powerfully illustrate that the relevant policy considerations do not support the White House's claim.

To begin with, under the White House's theory, a government official (including a President) could tell a White House or other agency attorney that he had concealed subpoenaed documents or physical evidence, and the communication would be absolutely privileged in criminal proceedings. An agency employee could tell an agency attorney that he had falsified his financial disclosure form or embezzled money from the agency, and the communication would be absolutely privileged in criminal proceedings. A prison guard might admit to an agency attorney that he had

[10] This Court has refused to apply common-law privileges that would contravene statutory disclosure or reporting requirements. In *University of Pennsylvania*, for example, this Court rejected an academic peer-review privilege claim because Title VII authorized government access to information relevant to a discrimination charge and did "not carve out any special privilege relating to peer review materials." 493 U.S. at 191. Similarly, in *United States v. Arthur Young & Co.*, the Court rejected an accountant's work-product claim because Section 7602 of Title 26 granted the IRS a right of access without providing a privilege. The Court stated that "the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry. . . . If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make." 465 U.S. 805, 816-17 (1984).

beaten a prisoner, and the communication would be absolutely privileged in criminal proceedings. It strains credulity that such results — in which attorneys who are *public* employees conceal evidence from the criminal process — serve a "public good."

The White House's desire for a blackout of government information from the grand jury also conflicts with first principles. As the D.C. Circuit stated, "openness in government" — particularly when White House officials may have committed crimes — "has always been thought crucial to ensuring that the people remain in control of their government." Pet. App. 15a (quotation omitted). And as the federal courts have concluded, the White House's contrary and ahistorical vision of the role of government attorneys both flouts the "strong public interest in honest government" and represents "a gross misuse of public assets." *Grand Jury*, 112 F.3d at 921; Pet. App. 15a, 58a.

The White House nonetheless insists that the attorney-client privilege must apply to government agencies against the grand jury to the same extent that it applies to corporations against the grand jury. But a government agency has a dramatically different relationship to the criminal process than does a corporation. The most obvious difference is that a corporation can be indicted, whereas a government entity cannot. That means that the White House as an institution (or the President in his official capacity) can never be a defendant adverse to the United States in a criminal case. *See Grand Jury*, 112 F.3d at 920.

Even were the Court to accept the threshold validity of the White House's argument that it is akin to a corporation, that argument still would not support the White House's conclusion. If corporate shareholders bring a lawsuit alleging misconduct on the part of corporate managers, the attorney-client privilege does not bar the testimony of the corporation's attorneys. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970) (no absolute corporate attorney-client privilege in the context of a shareholder derivative suit); *see*

also Restatement § 134B reporter's note (approving *Garner* principle and stating that it has been "widely followed," including in areas "beyond shareholder suits"). "Although the *Garner* rule does increase uncertainty to some extent, *the risk is not great for organizations attempting to comply with the law in good faith.*" Restatement § 134B reporter's note (emphasis added).

The *Garner* principle, applied to the government context, is straightforward: A federal government agency cannot rely on a common-law attorney-client privilege to thwart the United States' right to information any more than a corporation can do so to frustrate its shareholders' right to information. As the D.C. Circuit stated, "[a]ny chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable." Pet. App. 20a.

Moreover, apart from *Garner*, the primary justification for the corporate attorney-client privilege does not apply to government agencies. The corporate privilege serves the policy of encouraging corporations to conduct internal fact-finding and thereby promote broader interests in observance of the law. *See Upjohn Co. v. United States*, 449 U.S. 383, 391-92 (1981). If there were no corporate privilege, corporations would be discouraged from conducting internal investigations because the facts developed would be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to serious criminal liability.

That legal deterrent to gathering facts and performing legal work does not apply in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States. When an agency becomes aware of internal wrongdoing, the agency's *governmental* interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by

doing so and by disclosing the results to federal law enforcement authorities. *Cf.* 28 U.S.C. § 535(b).[11]

Finally, this Court has firmly rejected the suggestion that the common law of privileges takes no account of the different responsibilities of public and private entities. In declining to apply a work-product privilege to an accountant's workpapers, the Court emphasized:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. . . . [T]he independent auditor assumes a *public* responsibility . . . . This "public watchdog" function demands that the accountant maintain total independence from the client at all times and *requires complete fidelity to the public trust.* To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

Arthur Young, 465 U.S. at 817-18 (emphases added). The Court's language applies here as well: Government attorneys, far more than accountants, owe a public duty inconsistent

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[11] The White House suggests, however, that the lack of a government attorney-client privilege would result in a chilling effect on communications by government employees to government attorneys. Pet. 25. But an employee communicating to an agency attorney does not control the ultimate assertion of any privilege. Accordingly, the employee can have *no* assurance that the communications will remain confidential if called for in federal criminal proceedings, regardless of what the privilege rule may be. A President similarly could not be assured of the ultimate protection from the criminal process of his communications to *government* lawyers: The President's control over the privilege for his own communications terminates when he leaves Office. *See CFTC v. Weintraub*, 471 U.S. 343, 349 & n.5 (1985).

with application of governmental attorney-client privilege in federal criminal proceedings.

5. One further aspect of the petition warrants mention. Because this Court denied certiorari a year ago on the same legal issue and the D.C. Circuit has now issued an opinion agreeing with the Eighth Circuit, the White House has sought to locate supposed "changes" in the law to support a different outcome for its current petition. The White House thus has seized upon this Court's recent decision in *Swidler & Berlin*. In that case, the Court refused to expand the will-contest exception to the attorney-client privilege after the client's death to other cases, including to criminal cases. *See* 118 S. Ct. at 2085, 2087.[12]

According to the White House, the upshot of *Swidler & Berlin* is that there can be no distinction for the *government* attorney-client privilege between civil cases and criminal cases. The White House's reliance on *Swidler & Berlin* ignores the fact that the distinction at issue here, however, is not simply criminal-civil but also between (i) cases in which the government asserts the privilege against a private party (which generally will be civil cases) and (ii) cases in which the government attempts to assert a privilege against itself (which generally will be criminal cases).[13]

In any event, the Court's opinion in *Swidler & Berlin* regarding criminal and non-testamentary civil proceedings referred only to the *posthumous* privilege question at issue there. *See* 118 S. Ct. at 2087. The Court did not purport to

[12] At oral argument in the D.C. Circuit, the White House placed heavy reliance on *Swidler & Berlin*, which had been decided four days earlier. As its opinion reveals, the court of appeals found the argument entirely unpersuasive.

[13] *See* Restatement § 124 cmt. b ("More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

lay down a sweeping new rule that *all* evidentiary privileges are suddenly "all or nothing" and must be absolute or identical in all proceedings if they are to exist at all. Indeed, if *Swidler & Berlin* had done so, the courts now would have to redefine the contours of, for example, the qualified attorney work-product privilege, many government privileges (including executive privilege), certain established exceptions to the attorney-client privilege, and the reporter's privilege.[14]

Indeed, even in *Swidler & Berlin* itself, the Court did not hold that the *posthumous* attorney-client privilege applies identically in all civil and criminal settings. To the contrary, the Court reaffirmed the testamentary rule, under which the privilege does not apply in certain kinds of civil cases (those involving will contests). *Swidler & Berlin* thus endorsed the longstanding principle that context counts in assessing a privilege claim. *See also Nixon*, 418 U.S. at 712 n.19 (recognizing that executive privilege for presidential communications may apply differently in civil and criminal proceedings).

In the end, the White House's discussion of *Swidler & Berlin* boils down to the proposition that this Court, in a single passage in a case involving the post-death application of the individual attorney-client privilege, overruled *Nixon* and the line of *governmental* privilege cases indicating that *governmental* privileges do not necessarily apply the same in

[14] In addition, Congress recently enacted a law (which the President signed) that provides a new form of attorney-client/accountant-client privilege that applies in "any *noncriminal* tax matter before the Internal Revenue Service" and in "any *noncriminal* tax proceeding in Federal court brought by or against the United States." Pub. L. No. 105-206, § 3411(a), 112 Stat. 685, 750 (1998) (emphases added) (codified at 26 U.S.C. § 7525(a)). Congress and the President thus have not subscribed to the novel, all-or-nothing privilege regime advanced by the White House in its petition.

criminal and civil cases.[15] Contrary to the White House's assertion, we do not believe that the Court in *Swidler & Berlin* achieved (or sought to achieve) any such dramatic alteration of legal principles not presented in that case; indeed, the entire thrust of the Court's opinion was to resist any perceived change in the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] Under the White House's reading of *Swidler & Berlin*, executive privilege presumably now could be overcome in *civil* cases as easily as it can be overcome in criminal cases.

No. 96-1783

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Section 535(b) of Title 28 requires that a federal government agency expeditiously provide to federal law enforcement authorities "[a]ny information" relating to federal criminal violations. The question presented is whether, in light of Section 535(b), a federal government agency may withhold relevant information subpoenaed by a federal grand jury.

2. If Section 535(b) does not apply, a second question presented is whether, under Federal Rule of Evidence 501, a federal government agency may rely on a governmental attorney-client or work product privilege to withhold relevant information subpoenaed by a federal grand jury.

3. If a federal government agency can maintain governmental attorney-client and work product protections in federal grand jury proceedings, a third question presented is whether petitioner has satisfied the requirements of those protections.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel In re: Madison Guaranty Savings & Loan Association, see 28 U.S.C. 594(a); the White House Office, which has referred to itself "[f]or convenience" as the "Office of the President" since its September 30, 1996, brief in the district court; and Hillary Rodham Clinton, who was an intervenor in the court of appeals and who has filed a response in support of the petition for a writ of certiorari.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported. The opinion of the district court (Pet. App. 62a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1997. The petition for a writ of certiorari was filed on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating and prosecuting matters "relating in any way to

James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guaranty Savings & Loan Association,* at 2 (D.C. Cir. Spec. Div. Aug. 5, 1994).

Madison Guaranty was a federally insured savings and loan in Little Rock, Arkansas, operated by James B. McDougal and Susan H. McDougal. Hillary Rodham Clinton performed work for Madison in her capacity as an attorney at the Rose Law Firm in Little Rock. Capital Management Services was a federally licensed small business investment company in Little Rock operated by David L. Hale, a Little Rock judge and businessman. Whitewater Development Company was a real estate venture owned by the McDougals and the Clintons. David Hale, James McDougal, Susan McDougal, and nine other individuals have been convicted of federal crimes during this investigation.[1]

This Office has investigated events occurring in the aftermath of the July 20, 1993, death of former Deputy White House Counsel Vincent W. Foster, Jr., including the handling of documents from his White House office. Bates Decl. ¶ 2 (App. 16).[2] On July 22, 1993, Whitewater-related documents (along with others) were transferred from Mr. Foster's office in the White House's West Wing to a room on the third floor of the White House Residence.

[1] On March 22, 1994, Hale pled guilty to a two-count felony information. On May 28, 1996, the McDougals were convicted by jury verdict, along with the then-Governor of Arkansas Jim Guy Tucker. The jury found James McDougal guilty of 18 felony counts including conspiracy, bank fraud, misapplication, false entry, and mail fraud. The jury found Susan McDougal guilty of four felony counts including mail fraud, misapplication, false entry, and false statements. The jury found Tucker guilty of one count of conspiracy and one count of mail fraud.

[2] The citations to "App." refer to Appellant's Appendix in the court of appeals.

On July 27, 1993, documents that had been in Mr. Foster's office and stored on the third floor of the Residence were taken from the Residence to the Clintons' personal lawyers.

This Office also has investigated the circumstances surrounding the discovery of certain copies of Rose Law Firm billing records that reflect Mrs. Clinton's legal work for Madison (and contain handwritten notes of Mr. Foster). Bates Decl. ¶ 2 (App. 16). The records, which were responsive to a May 1994 grand jury subpoena to Mrs. Clinton, were produced to this Office by Mrs. Clinton's personal attorney in January 1996. White House aide Carolyn Huber publicly testified that she found the copies (the originals have never been produced) on the third floor of the White House Residence in August 1995; placed them in a box without realizing exactly what they were; and then discovered the records in her East Wing office in January 1996.

2. This Office has sought numerous documents by grand jury subpoena from the Executive Office of the President and its constituent parts, including the White House Office. This Office informed the White House in March 1995—*before either of the two sets of notes at issue here were created*—that we did not accept the proposition that governmental attorney-client or work product privileges authorized the White House to withhold relevant information from the grand jury. Bates Decl. ¶ 10 (App. 17-18).

Among the documents sought during the course of the criminal investigation have been notes taken by White House officials (including White House attorneys) during meetings or interviews with personnel who were participants in or witnesses to events under criminal investigation. *The White House has produced White House attorneys' notes of their meetings with numerous White House officials.* For example, the White House produced notes taken by White House attorneys during meetings with former White House Counsel Bernard Nussbaum

and Assistant to the President Margaret Williams regarding the handling of documents from Mr. Foster's office in the wake of his death. Bates Decl. ¶ 12 (App. 18). In addition, as is publicly known, White House attorneys have testified before the grand jury about their work.

3. The grand jury subpoena here was issued after this Office learned of certain meetings in 1995 and 1996 between Mrs. Clinton and White House attorneys. It required production of documents reflecting those meetings to the extent they related to subjects including Madison, Whitewater, James B. McDougal, David L. Hale, or Vincent W. Foster, Jr. App. 3. The White House identified nine sets of responsive documents but refused production, interposing claims of Executive privilege, attorney-client privilege, and work product. App. 7-12.

4. On August 19, 1996, this Office filed a motion to compel production of two sets of documents: (1) notes taken by Associate White House Counsel Miriam Nemetz on July 11, 1995, at a meeting with Mrs. Clinton, Special White House Counsel Jane Sherburne, and Mrs. Clinton's personal attorney David Kendall; and (2) notes taken by Ms. Sherburne at meetings with Mrs. Clinton on January 26, 1996, which were also attended by Mr. Kendall and his partner Nicole Seligman, and in part by Jack Quinn, then the White House Counsel. App. 13; Sherburne Decl. ¶¶ 16, 20 (Pet. App. 89a, 90a). The July 11, 1995, notes relate to Mrs. Clinton's activities in the aftermath of Mr. Foster's death. Sherburne Decl. ¶ 16 (Pet. App. 89a). The January 26, 1996, notes relate to Mrs. Clinton's testimony about the Rose Law Firm billing records reflecting Mrs. Clinton's work for Madison. Sherburne Decl. ¶¶ 18-20 (Pet. App. 89a-90a).[3]

[3] Mrs. Clinton was questioned by this Office at the White House on July 22, 1995. She was questioned before the grand jury on January 26, 1996. In the district court, this Office set forth why the subpoenaed notes were relevant, and offered to make a further submission in camera.

The parties disputed whether a federal government agency can maintain *governmental* attorney-client and work product protections to withhold relevant information in federal grand jury proceedings.[4] The district court issued its decision on November 26, 1996. Although noting that "[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility," Pet. App. 75a n.7, the court did not address the fundamental privilege issue. Relying instead on a narrow, factbound argument advanced by Mrs. Clinton, the district court accepted the privilege claim, basing its conclusion on "the reasonable belief of the White House and Mrs. Clinton that the communications were privileged and by the fact that the notes are attorney work product." *Id.* at 82a.

5. The court of appeals reversed. Pet. App. 1a-61a. The court began with Federal Rule of Evidence 501, which states that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience." *Id.* at 5a. Privileges "are not lightly created nor expansively construed" under Rule 501, for they "are in derogation of the search for truth." *Id.* at 12a (quoting *United States* v. *Nixon,* 418 U.S. 683, 710 (1974)).

Turning to the question presented, the court observed that the decision in "*Nixon* is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a. The court rejected the White House's argument that, notwithstanding *Nixon,* a government agency is entitled to the same evidentiary privileges as a private corporation. The court noted several important differences betwen the government and private organizations, including that the

[4] Without explanation, the White House withdrew its claim of Executive privilege on September 30, 1996.

actions of White House personnel "cannot expose the White House as an entity to criminal liability," and that "executive branch employees, including attorneys, are under a statutory duty to report" information relating to criminal violations. *Id.* at 17a (citing 28 U.S.C. 535(b)).

The court also found that the "general duty of public service calls upon government employees and agencies to favor disclosure over concealment." Pet. App. 17a. The court of appeals noted, in this regard, that the Supreme Court had rejected a proposed privilege for accountants because of their "*public* responsibility" and "public obligations." *Id.* at 17a-18a (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984)). The court of appeals explained that "[t]he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." Pet. App. 18a. The court added:

> [T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.

Ibid.

The court similarly concluded that a governmental work product protection, like the governmental attorney-client privilege, could not shield the notes from the grand jury. Pet. App. 25a-27a. Finally, the court rejected the district court's analysis, stating that "we know of no authority, and Mrs. Clinton has cited none, holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one." *Id.* at 24a.

District Judge Kopf, sitting by designation, dissented. He agreed that the White House's argument for an absolute attorney-client privilege was inconsistent with this Court's decision in *Nixon*, which "teaches that the President's general need for confidentiality (expressed here by the attorney-client privilege) is outweighed by a grand jury's need for evidence of the truth." Pet. App. 51a. He concluded that "it is a reasonable extension of *Nixon* to pierce the organizational attorney-client privilege asserted by the White House," *id.* at 57a, and "[t]he same analysis justifies piercing the work product 'privilege,'" *id.* at 51a n.4. Under the particular facts, however, Judge Kopf would have applied the decision prospectively only, and thus would have affirmed the judgment of the district court. *Id.* at 60a-61a.

ARGUMENT

The legal issue before the Court is one of first impression in the federal courts. Not only is there no circuit conflict, but only three federal judges—the court of appeals panel in this case—have addressed the question.[5] Significantly, all three judges rejected petitioner's argument for blanket governmental attorney-client and work product privileges in federal criminal proceedings.

The issue is exceedingly narrow. The case presents only the application, in this particular grand jury setting, of Federal Rule of Evidence 501 and 28 U.S.C. 535(b).[6] The petition raises no constitutional question. Nor does the case concern the availability or scope of governmental privileges in civil or congressional proceedings, or under the Freedom of Information Act.

What the case presents, at bottom, is a bold assertion of a *governmental* privilege against a federal grand jury's interest in securing relevant evidence. The decision of

[5] The district court did not address this issue.

[6] Federal Rule of Evidence 501 and 28 U.S.C. 535(b) are set out in an appendix to this brief.

the court of appeals rejecting that assertion is thoroughly and soundly grounded in law and public policy. To grant plenary review when the case law is so sparse (and the decision of the court of appeals so well-reasoned) not only would represent a departure from the Court's customary practice, it would occasion further delay in sensitive grand jury proceedings in which the national interest would be served by the uninterrupted completion of the criminal justice process.

For those reasons, the petition should be denied.

I

1. At the outset, we note the obvious: This Court's review would delay a highly sensitive criminal investigation; indeed, several parts of the investigation could remain frozen for an additional three to twelve months. "[D]elay is fatal to the vindication of the criminal law." *Cobbledick* v. *United States,* 309 U.S. 323, 325 (1940). That is especially true in the investigative stage. Because "extended litigation" impedes the "orderly progress of an investigation," *United States* v. *Calandra,* 414 U.S. 338, 349 (1974), and "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws," *United States* v. *R. Enterprises, Inc.,* 498 U.S. 292, 299 (1991), federal courts attempt to avoid the "protracted interruption of grand jury proceedings," *Calandra,* 414 U.S. at 349-350.

2. In any event, the dictates of this Court's Rule 10 counsel strongly against review at this time. Not only is there no circuit conflict, but in only one reported case before this dispute, so far as the parties are aware, has the issue even arisen.[7] The novelty of the issue in the

[7] The issue in that case involved a state agency; the court of appeals did not analyze the privilege issue, but instead remanded for consideration of the application of state sunshine laws. See *In re Grand Jury Subpoena,* 886 F.2d 135 (6th Cir. 1989). One intermediate state court decision addressed a similar issue under *state* law, but the case involved a private law firm retained by a state agency, not government attorneys who were public employees, a distinction of importance under state law. See *In re Grand Jury Subpoenas Duces Tecum,* 574 A.2d 449, 455 (N.J. Super. Ct. App. Div. 1989). See also Pet. App. 8a-10a.

courts counsels hesitation before this Court exercises its discretionary certiorari jurisdiction. See *Lackey* v. *Texas,* 115 S. Ct. 1421, 1421-1422 (1995) (Stevens, J., respecting denial of certiorari) ("importance and novelty" of a question with "potential for far-reaching consequences" provide "principled basis for postponing consideration of the issue until after it has been addressed by other courts").

3. Not only is the issue novel in the courts, it is extraordinarily narrow. The question here concerns *governmental* attorney-client and work product protections in federal *criminal* proceedings. See Fed. R. Evid. 501, 1101(c), (d). The issues *not* presented include the following:

First, the case raises no issue regarding the application of government attorney privileges in *civil* proceedings. See Pet. App. 5a.[8] The court of appeals' decision is entirely consistent with recognition of governmental attorney-client and work product privileges in federal civil proceedings,[9] where the government is opposed to a private party and where evidentiary privileges generally carry more weight. Cf. *United States* v. *Nixon,* 418 U.S. 683, 712 n.19 (1974).

Second, because Rule 501 does not apply to congressional proceedings, the case implicates no question re-

[8] Nor is any issue presented regarding the scope of a criminal defendant's discovery from the Government. Such discovery is governed by settled principles under Fed. R. Crim. P. 16, Fed. R. Crim. P. 26.2, 18 U.S.C. '3500, *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Giglio* v. *United States,* 405 U.S. 150 (1972).

[9] That includes proceedings under the Freedom of Information Act (FOIA), in which government agencies can withhold documents based on the civil litigation privileges ordinarily available to private parties. 5 U.S.C. 552(b)(5).

garding the scope of the privileges that a government agency (or an individual) can maintain in congressional proceedings.[10]

Third, the case presents no question as to the scope of the privileges that an individual or private corporation can maintain in any proceedings, civil or criminal.

Fourth, no constitutional issue is presented. Indeed, because the question involves the application of a federal statute and a federal rule of evidence, Congress can further study the issue and address it legislatively at any time.

Fifth, petitioner has not challenged the jurisdiction or authority of this Office to represent the United States in conducting this criminal investigation. See 28 U.S.C. 594(a), 596(a)(1). Nor has petitioner asked the Court to reconsider *Morrison* v. *Olson*, 487 U.S. 654 (1988), or raised any issue of separation of powers.

Finally, petitioner has not raised the question whether Mrs. Clinton's asserted expectation about the law was sufficient to render the communications privileged, which was the basis for the district court's decision. Petitioner also has not raised the question of possible prospective-only application, which in the end was the main issue on which the dissenting judge disagreed with the panel majority in the court of appeals. Hence, those two issues are not before this Court. See Sup. Ct. R. 14.

4. Petitioner indicates that it seeks review because an important principle is at stake, not because of these notes. See Pet. 9-10. The undisputed record belies such a claim. The White House has produced reams of attorney notes virtually identical to those at issue here, *including attorney notes addressing the same subject matters*. Bates Decl.

[10] Congress recognizes privileges as required by the Constitution or pursuant to its own rules and practices under its Article I authority. See S. Rep. No. 104-191, at 11-12 (1995).

¶ 12 (App. 18).[11] The only difference here is that these notes reflect communications with Mrs. Clinton. Petitioner has explained that distinction by saying simply that White House attorneys' documents have been disclosed when that "could be accomplished without compromising important governmental interests." Sherburne Supp. Decl. ¶ 3 (App. 31). The explanation is untenable: No principle, no governmental interest, justifies releasing attorneys' notes of communications with government officials such as Bernard Nussbaum and Margaret Williams *and* simultaneously withholding attorneys' notes of communications with Mrs. Clinton—given that all of the notes concern the same subject matter.

II

The decision of the court of appeals is correct. It is dictated by four separate sources of law: Section 535(b) of Title 28, traditional considerations under Federal Rule of Evidence 501, this Court's precedent (particularly *United States* v. *Nixon*), and compelling public policies.

1. Federal Rule of Evidence 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience" except, *inter alia*, as "provided by Act of Congress." Here, Section 535(b) of Title 28 imposes a specific disclosure obligation on Executive Branch employees that requires rejection of petitioner's common-law privilege claim. The statute provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency * * *.

[11] The technical question whether petitioner waived the privilege as to these notes was complicated, however, because attorneys for two clients were present for the communications. See *John Morrell & Co.* v. *Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990).

28 U.S.C. 535(b) (originally enacted as Act of Aug. 31, 1954, ch. 1143, § 1, 68 Stat. 998, 998). Labeling the statute "significant," the court of appeals stated that "executive branch employees, *including attorneys*," have a duty to report information relating to criminal wrongdoing. Pet. App. 17a (emphasis added).[12]

a. The language of the statute is clear and all-encompassing. It admits of no distinction between information obtained by government attorneys and that obtained by other government employees. See *International Longshoreman's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982) ("[i]n the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision").

In addition, Congress' inclusion of a specific exception for "class[es] of information" as to which the Attorney General "directs otherwise," 28 U.S.C. 535(b)(2), confirms that the statute means what it says and says what it means—and that no further exceptions should be judicially inferred or created. See *United States* v. *Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception"); *Honig* v. *Doe*, 484 U.S. 305, 325 (1988) (Court "not at liberty to engraft onto the statute an exception Congress chose not to create").[13]

[12] The information sought by the grand jury "involv[es] Government officers and employees." 28 U.S.C. 535(b). The notes here are relevant to the grand jury's investigation of several present or former White House officers and employees.

[13] Similarly, in *University of Pensylvania* v. *EEOC*, 493 U.S. 182 (1990), Title VII provided for government access to information relevant to a discrimination charge. A university argued for a "privilege" exception for academic peer review materials. The Court rejected the claim, stating that the Title VII provisions "[o]n their face * * * do not carve out any special privilege relating to peer review materials." *Id.* at 191.

b. The legislative history confirms and strengthens that conclusion. The House Committee Report accompanying Section 535 states that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning *any alleged irregularities* on the part of officers and employees of the Government." H.R. Rep. No. 83-2622 (1954) (emphasis added), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3551. The report emphasizes that "[i]f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have *complete cooperation* from the department or agency concerned." *Id.* at 3552 (emphasis added). The Justice Department supported the legislation. Then-Deputy Attorney General Rogers expressed the Department's views as follows:

> The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law-enforcement officer of the Government is to have *free access* to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office.

Id. at 3553 (emphasis added).[14]

c. This analysis is also consistent with traditional understandings. For example, Lloyd N. Cutler, who has served as White House Counsel in two Administrations, has remarked that there can be "problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government." Cutler, *The Role of the Counsel to the President of the United States*, in The Record of the Association of the Bar of the City of New York, Vol. 35, No. 8, at 470, 472 (1980). Mr. Cutler noted that there is a "rule of making it your duty, *if you're a Government official as we as lawyers are, a*

[14] "When issuing [grand jury] subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a).

statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute." Ibid. (emphasis added). Mr. Cutler further remarked that "[w]hen you hear of a charge and you talk to someone in the White House * * * about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Ibid.*[15]

d. In addition, federal regulations require each agency to have a "designated ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. 2635.107. The regulations state: "Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." *Ibid.*

e. In attempting to avoid the import of Section 535(b) during this litigation, petitioner has advanced several arguments "reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini." *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting). Here, petitioner inters the statute in a footnote, noting (without any explanation) two arguments. See Pet. 22-23 n.7.[16]

[15] Similarly, petitioner has previously acknowledged these disclosure obligations. The 1993 White House report on the Travel Office episode stated that "White House personnel may find that they have information about a *possible* violation of law. If there is a reasonable suspicion of a crime * * * about which White House personel *may have* knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." White House Travel Office Management Review 23 (July 2, 1993) (emphases added).

[16] It is not disputed that the Executive Office of the President and the component White House Office are covered by Section 535. See

First, petitioner refers generally to the "legislative history" of Section 535. Pet. 22 n.7. As noted above, however, the legislative materials strongly support the text.

Second, petitioner cites several unpublished Office of Legal Counsel (OLC) memoranda. But those memoranda have no application here. Under authority delegated by the statute, the Attorney General has authorized an exception to Section 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. 50.15), represent employees in their *personal* capacities—for example, in civil suits alleging *Bivens* violations. The OLC memoranda cited by petitioner address only the exception for these *personal* representations.[17] The Justice Department regulation and the OLC memoranda do not (and do not purport to) apply to situations where a government attorney represents a *government agency* and learns information during the course of her *official* representation of that agency.[18]

Pet. 22-23 n.7; W.H. Br. 40-43 (filed in 8th Cir. Jan. 30, 1997); W.H. Supp. Br. 7-8 (filed in E.D. Ark. Nov. 6, 1996; under seal); U.S. Supp. Br. 9-12 (filed in E.D. Ark. Nov. 6, 1996; under seal).

[17] See OLC Mem. of Mar. 29, 1985, at 5 (analyzing duty under 50.15 and 535(b) of an Assistant U.S. Attorney who discovered information while representing *Bivens* defendants); OLC Mem. of Apr. 3, 1979, at 1 (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); OLC Mem. of Aug. 30, 1978, at 4 (analyzing under 50.15 and 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); OLC Mem. of Nov. 30, 1976, at 1 (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages").

[18] Cf. 6 Op. Off. Legal Counsel 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation, will be referred directly to the Department of Justice, *as is required by 28 U.S.C. § 535*"). OLC is well-versed in the crucial distinction between representation of the

The court of appeals correctly stated that the OLC memoranda deal with representations of individuals pursuant to 28 C.F.R. 50.15 and that "[n]o such personal attorney-client relationship exists between Mrs. Clinton and the White House attorneys." Pet. App. 19a n.10.[19]

In this case, in sum, the grand jury subpoena requires disclosure unless a valid privilege applies. Because petitioner's common-law privilege claim is contravened by Section 535(b), the notes must be produced.

2. Even if Section 535(b) were erased from the United States Code, petitioner's claim would fail under traditional Rule 501 privilege analysis. Federal courts are deeply committed to the principle that "the public has a right to every man's evidence," *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1928 (1996) (quotation omitted)—a principle "particularly applicable to grand jury proceedings," *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). Because testimonial privileges "obstruct the search for truth," there is a "presumption against the existence of an asserted testimonial privilege." *Id.* at 690 n.29, 686. Privileges thus "are not lightly created nor expansively construed." *Nixon*, 418 U.S. at 710.

In light of those settled principles, this Court has recognized common-law privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the States—and is justified by overriding public policy considerations. See Pet. App. 12a-13a. Here, the roots are nonexistent; to the contrary, the parties have found no case, statute, rule, or agency opinion suggesting that a

personal interests of a government employee and representation of the governmental interests of a government agency. See, *e.g.*, 4B Op. Off. Legal Counsel 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

[19] White House attorneys did not represent Mrs. Clinton in her personal capacity. See Sherburne Decl. ¶¶4, 7-10, 17, 21 (Pet. App. 84a-90a); Kendall Aff. ¶¶ 2-3 (Pet. App. 92a-93a). Such representation is not authorized. See 3 U.S.C. 105(a)(1); 28 C.F.R. 50.15(a)(4); 4B Op. Off. Legal Counsel 749, 753 (1980).

department or agency of the United States (or any state governmental entity) can maintain a governmental attorney-client or work product privilege in federal criminal or grand jury proceedings.[20] Nor are we aware of a contemporary *state* case, law, or rule adopting such privileges for public attorneys in the criminal context.

The practice of Executive Branch agencies further suggests that the application of the privilege is not rooted in historical practice or contemporary understandings. In the Iran-Contra investigation, for example, White House and other government lawyers provided extensive information about their conversations with the President and other government officials. See, *e.g.*, Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I, at 44, 346-348, 366-368, 470 n.137, 474-479, 517, 520, 536 & nn.116 & 117 (Aug. 4, 1993). What is more, in this very investigation, the White House and other Executive Branch agencies have disclosed considerable information that, under petitioner's argument, is protected by attorney-client or work product privilege.

Consistent practice, coupled with the absence of any authority supporting petitioner, refutes the claim that a governmental attorney-client or work product privilege has traditionally been understood to justify withholding relevant information from the federal criminal process. Cf. *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims * * * strongly suggests that

[20] Petitioner cites a 1982 OLC opinion, see 6 Op. Off. Legal Counsel 481 (1982), but as the court of appeals indicated, that OLC opinion says nothing about the application of governmental common-law privileges in federal criminal procedings. See Pet. App. 18a n.10. Even for purposes of congressional inquiries, moreover, OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Op. Off. Legal Counsel 68, 78 (1986).

it did not read the statute as granting such power"). The total absence of historical or contemporary support for petitioner's position demonstrates that the privilege claim in this context is a latter-day contrivance that warrants rejection. Cf. *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 195 (1990); *Branzburg*, 408 U.S. at 685-687.

3. In addition, as all three judges on the court of appeals panel concluded, petitioner's argument contravenes this Court's decision in *Nixon*. The decision in *Nixon* held that the Executive privilege for Presidential communications—a privilege that is constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708—was overcome by the need for relevant evidence in criminal proceedings. *Nixon* leads inexorably to the conclusion that a governmental attorney-client or work product assertion similarly must yield to the need for relevant evidence in criminal proceedings. See Pet. App. 15a; accord *id.* at 51a, 57a (Kopf, J., dissenting). It is untenable as a matter of federal common law to say that communications between a President and his closest advisors (subject to a deeply rooted constitutional and common-law privilege "fundamental to the operation of Government") are *less* worthy of protection in criminal proceedings than are communications between any government employee and government attorney (as to which there is neither historical nor contemporary support for the privilege application).

Petitioner suggests that the personal attorney-client privilege exists in criminal proceedings notwithstanding *Nixon*, so why not a governmental attorney-client privilege? Pet. 22. That argument would have force only if there were *no* differences between public and private entities for purposes of common-law privileges in criminal proceedings. But those differences do exist, and they are of profound relevance to a reasoned analysis of the issues presented. Indeed, this Court has firmly rejected the suggestion that the common law of privileges takes no account of the different responsibilities of public and private

entities. In declining to apply a privilege to an accountant's workpapers, the Court emphasized:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. * * * [T]he independent auditor assumes a *public* responsibility transcending any employment relationship with the client. * * * This "public watchdog" function demands that the accountant maintain total independence from the client at all times *and requires complete fidelity to the public trust.* To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

United States v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984) (emphases added). Government attorneys, far more than accountants, owe a *public* duty that is inconsistent with application of governmental attorney-client and work product privileges in federal criminal proceedings.[21]

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[21] Respected commentators and the Restatement similarly reject petitioner's equation of private corporations to public entities in this context. See 1 *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("where the entity in question is governmental * * *, significantly different considerations appear"); 24 Wright & Miller, *Federal Practice and Procedure* § 5475, at 126-127 (1986) ("[T]he costs of the government privilege may be very high. * * * [L]egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information."); Restatement (Third) of the Law Governing Lawyers § 124 cmt. b. (Mar. 29, 1996) ("[U]nlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business."); *ibid.* ("More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

4. Even if petitioner's proposed privilege application were both (i) rooted in historical or contemporary law and (ii) consistent with this Court's precedent, petitioner still would have to demonstrate a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee*, 116 S. Ct. at 1931. The court of appeals correctly concluded that relevant policy considerations point decisively against petitioner's position.

Under petitioner's theory, a government official (including a President) could tell a White House or other agency attorney that he shredded subpoenaed documents or paid off a potential witness or erased a subpoenaed tape or concealed subpoenaed documents. An agency employee could tell an agency attorney that he had falsified his financial disclosure form or embezzled money from the agency. A prison guard might admit to a state agency attorney that he had beaten a prisoner. The possibilities are legion. Yet under petitioner's theory, such revelations of evidence of wrongdoing could be protected from disclosure to a federal grand jury.

It strains credulity to suggest that such results, in which attorneys who are *public* employees conceal information from the criminal process, are justified by a "*public* good." There is no escape from the unsettling consequence of petitioner's theory: Government agencies would be allowed to shield evidence of serious wrongdoing from the grand jury. As the court of appeals concluded, that result would flout "the strong public interest in honest government" and "would represent a gross misuse of public assets." Pet. App. 18a.[22]

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[22] As Judge Weinstein has stated: "If there is wrongdoing in government, it must be exposed. The law officer has a special obligation * * *. His duty to the people, the law, and his own conscience requires disclosure * * *." Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Maine L. Rev. 155, 160 (1966).

Petitioner nonetheless cites policy concerns that, it says, justify the privilege, even in federal *criminal* proceedings.[23] Petitioner contends, for example, that government attorneys must be able to obtain facts to properly perform their functions—providing advice as to privileges, gathering and producing documents, making personnel decisions, rendering public statements, and the like. Pet. 3, 16. But the interest in *gathering* facts to perform those functions in no way requires the further step of *concealing* facts from a federal grand jury if the facts are (or become) relevant to a federal criminal investigation.

Petitioner responds, however, that there might otherwise be a chilling effect on government attorneys and employees. Pet. 14-16. This is familiar argument,[24] and this

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[23] Petitioner's argument that the attorney-client privilege must apply in the same absolute manner for corporations and government entities begs the true question whether there are relevant differences between private corporations and government entities for purposes of the privilege analysis. See Pet. App. 6a. It also fails to acknowledge that there already are many context-specific privileges recognized in federal and state law. Privileges often give way in the criminal context, in particular, in recognition of the paramount importance in criminal proceedings of obtaining relevant information. See *Nixon*, 418 U.S. at 708-713 & n.19; *Branzburg*, 408 U.S. at 688; *McCormick* § 104, at 388 (some States "deny the [physician] privilege in criminal cases generally, or in felony cases, or in cases of homicide").

[24] In *every* privilege case, the proponent argues that, in the absence of the privilege, important communications would be chilled—whether it be Presidential communications, information provided by reporters' sources, academic peer review discussions, state legislator discussions, or parent-child communications. In general, federal courts have concluded that they are ill-equipped to examine the relative merits of such claims. That is why courts generally look to background principles of judicial restraint and such objective criteria as the historical or contemporary support for a privilege. See *Branzburg*, 408 U.S. at 693-694 ("Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup.

Court has routinely rejected this kind of hypothesized effect as a basis for applying a privilege.[25] In addition, petitioner's chilling-effect contention—upon close examination—crumbles.

As has *always* been true, government employees and government lawyers understand that they do not control the ultimate assertion of privilege in any forum.[26] As a result, the government attorney and employee can have *no* expectation of confidentiality and *no* assurance that their communications or work product will remain confidential if called for in federal criminal proceedings. Moreover, as an historical matter, these common-law governmental "privileges" have rarely been asserted in federal grand jury proceedings, including in this investigation. Thus, government attorneys and employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.[27]

Ct. Rev. 309, 361 (tracing "web of effects" from privileges is a "stupefying complex task").

[25] See *Nixon*, 418 U.S. at 712 ("We cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for" in criminal proceedings.); *Branzburg*, 408 U.S. at 693 (rejecting privilege although "argument that the flow of news will be diminished * * * is not irrational"); see also *University of Pennsylvania*, 493 U.S. at 193 (accepting that "confidentiality is important to proper functioning of the peer review process" but rejecting chilling effect as basis for privilege).

[26] The individual who is President at the time the information is sought ultimately controls the privilege. See *CFTC* v. *Weintraub*, 471 U.S. 343, 349 & n.5 (1985) (common-law privilege for entities belongs to current management, not former management).

[27] Two other facts further undercut petitioner's argument. First, the prospect of disclosure to a grand jury does not present the same kind of chilling effect as public disclosure. See *Branzburg*, 408 U.S. at 700. Second, the overwhelming majority of White House business, and federal agency work, never comes under grand jury scrutiny. See *Nixon*, 418 U.S. at 712; cf. *Branzburg*, 408 U.S. at 691.

To be sure, when government employees who are witnesses in a federal grand jury investigation choose to communicate with other

Relying on the corporate privilege, however, petitioner further suggests that, absent a privilege, government agencies might be discouraged from conducting internal fact-finding and legal work that they perform to "promote broader public interests in the observance of law." Pet. 22 (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). But that argument ignores the fundamental distinction between private corporations and federal agencies. If there were no corporate privilege, corporations would be discouraged from conducting internal investigations because the facts developed could be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to criminal liability. That deterrent to gathering facts and performing legal work does not exist, however, in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States.[28] An agency cannot be adverse to the United States in a criminal prosecution.[29] When an agency becomes aware of internal wrong-

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government employees (including government attorneys) about facts under active criminal investigation, the possibility of compelled disclosure to the grand jury is necessarily higher. That raises the question, however, whether communications in those circumstances should be protected. The district court stated that "[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility." Pet. App. 75a n.7. A governmental privilege that allows White House or other agency attorneys to receive information from grand jury witnesses and communicate that information to other witnesses—with all of those communications concealed from the grand jury—is dubious at best as a policy matter. See *Branzburg*, 408 U.S. at 696-697 ("[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. * * * Such conduct deserves no encomium.").

[28] Petitioner suggests this conclusion would apply as well to an immunized witness, Pet. 17, but the analogy is inapt because an immunized witness can face criminal exposure for future crimes.

[29] See 4B Op. Off. Legal Counsel 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

doing, the agency's interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by doing so and by disclosing the results to federal law enforcement authorities. Cf. 28 U.S.C. 535(b).

5. The final gambit of would-be privilege proponents is to conjure up some middle-ground privilege that can be overcome only upon an undefined showing of need or heightened relevance. So it is that petitioner now sets forth such an alternative, Pet. 26-27, an option it did not see fit to advance in the courts below.

Any such approach would render enforcement of a grand jury subpoena contingent on a judicial finding—based on a variety of factors—that the grand jury has demonstrated some specific reason for disclosure (beyond relevance) that outweighs the agency's interest in confidentiality. Such a test would require the balancing of intangibles—the grand jury's need for information and the agency's need for confidentiality—in the context of a particular investigation, generating endless rounds of time-consuming skirmishing. This Court has consistently rebuffed efforts to require this sort of showing.[30] In this

[30] See, *e.g.*, *R. Enterprises*, 498 U.S. at 298 ("grand jury proceedings should be free of such delays" that proposed multifactor test would cause); *Branzburg*, 408 U.S. at 704-705 (under proposed heightened relevance standard, "courts would * * * be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid"); see also *University of Pennsylvania*, 493 U.S. at 194 (requiring "a specific reason for disclosure * * * beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way") (quotation omitted).

There also is no basis in *Nixon* for applying some heightened standard here. *Nixon* holds that even the *constitutional* Executive privilege for presidential communications yields in the face of the showing required to obtain evidence for criminal proceedings. See *United States* v. *Gillock*, 445 U.S. 360, 373 (1980) (Executive privilege does not "justify denying judicial power to secure all relevant evidence in a criminal proceeding"); *United States* v. *North*, 910 F.2d 843, 952 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part) (Court in *Nixon* "does not appear to have meant anything more than the showing that satisfied Rule 17(c)").

case as well, the argument warrants rejection. As the parties have heretofore agreed, governmental attorney-client and work product privileges either are available in federal grand jury proceedings, or are not.

6. Petitioner suggests that common-law privilege claims by federal agencies normally would be resolved internally within the Executive Branch. Pet. 20-21 n.6. But the law of privileges, we submit, can have a substantial effect even on the internal negotiation process within the Executive Branch. It is much more difficult, as a practical matter, for the President to order a Justice Department prosecutor to withdraw a grand jury subpoena (or not to seek certain documents) than it is for the White House to claim reliance on a purported common-law privilege to refuse production of information to the Department. The well-reasoned decision of the court of appeals, and the important principle it reaffirms, should have a positive impact on the ability of the Justice Department to obtain relevant information from the White House in a variety of criminal investigations.[31]

[31] As has been reported in various congressional proceedings, the White House has interposed privilege claims against the Justice Department on several occasions in the last few years. For example, the White House refused to allow Justice Department attorneys to review documents from Vincent Foster's office in the days after his death. That prompted former Deputy Attorney General Heymann, as he has testified publicly, to tell the White House Counsel that he was making a "terrible mistake," and that "you misused us." S. Rep. No. 104-280, at 68, 83 (1996). See also *id.* at 75 (Justice Department's Office of Professional Responsibility referring to "yet another example of the lack of cooperation * * * we received from the White House throughout our inquiry" on Travel Office matter); H.R. Rep. No. 104-849, at 152 (1996) (quoting memo by the head of the Justice Department's Public Integrity Section regarding Travel Office criminal investigation: "[T]he White House's incomplete production greatly concerns us because the integrity of our review is entirely dependent upon securing all relevant documents."). The House Report on the Travel Office matter states that the Justice Department's Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R. Rep. No. 104-849, at 151-153.

III

The attorney-client privilege and work product doctrine are complementary protections that serve the client's interest in obtaining effective legal services. They stem from the same common-law source. The attorney-client privilege applies to communications between attorney and client; the work product doctrine provides qualified protection as well to factual and legal work that the attorney performs in preparing the client's case.

For the reasons stated, a *government* entity, unlike a private corporation, cannot maintain the two attorney-based protections in federal criminal proceedings. That fundamental proposition ends the case: The conclusion applies to both the attorney-client and work product issues. See, *e.g.*, Pet. App. 51a n.4 (Kopf, J., dissenting) (same analysis governs threshold question of existence of governmental attorney-client and work product doctrines in federal criminal proceedings).

IV

Were the Court to grant the petition and ultimately agree with petitioner that a government entity can maintain attorney-client and work product protections in federal criminal proceedings, two additional questions would be presented: whether the requirements of the attorney-client privilege are met under the facts of this case; and whether the requirements of the work product doctrine are met under the facts of this case. Petitioner cannot satisfy the requirements of either privilege, however, as we will briefly explain. See Sup. Ct. R. 15.2.

1. Assuming *arguendo* that a government agency can maintain a governmental attorney-client privilege in federal criminal proceedings, petitioner's privilege claim nonetheless fails. This is so for several reasons. First, because Mrs. Clinton is not a government officer or employee, she is not a representative of the client under *Upjohn*. Cf. *Association of American Physicians and Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 911 (D.C. Cir. 1993) (First Lady, in official role as Chair of the President's Task Force on National Health Care Reform, was "officer or employee" for purposes of Federal Advisory Committee Act). Second, even if Mrs. Clinton is a government officer or employee, the privilege applies only to communications that "concerned matters within the scope of the employees' [governmental] duties." *Upjohn*, 449 U.S. at 394. The handling of the Rose Law Firm billing records and of documents from Mr. Foster's office did not involve governmental duties assigned to Mrs. Clinton.

Even if Mrs. Clinton is a client and the communications concerned matters within the scope of her official duties, the privilege claim still fails because the official meetings in question occurred in the presence of third parties—namely, Mrs. Clinton's personal attorneys. Although that fact would not defeat the privilege if Mrs. Clinton and the White House could satisfy the requirements of the so-called "common interest" exception to the no-third-party-presence requirement of the attorney-client privilege, they cannot do so here.

This Court has not considered whether there is a "common interest" exception to the traditional rule that attorney-client communications, to be privileged, must occur outside the presence of third parties. That is a highly important issue as to which the law is, in the main, underdeveloped. Courts have recognized the exception in two narrowly limited circumstances: (1) when two clients share the same attorney or (2) when two parties are co-defendants or co-plaintiffs in pending litigation. Neither situation exists here. Even if the Court assumed the common-interest exception applied to *anticipated* as well as pending litigation, see *Continental Oil Co.* v. *United States*, 330 F.2d 347, 350 (9th Cir. 1964), it would not be satisfied. At the meetings in question, the White House and Mrs. Clinton were not anticipating the possibility of future litigation in which they might be aligned as parties. The White House Office, as an agency, was not anticipating litigation at all. Moreover, a federal government agency does not possess an interest in common with an individual as *against* the United States in a

criminal investigation or prosecution. See 4B Op. Off. Legal Counsel 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

2. Assuming *arguendo* that a government agency can maintain a governmental work product privilege in federal grand jury proceedings, that claim also fails. The work product doctrine covers work performed by an attorney "in anticipation of litigation." The White House as an entity was not anticipating litigation. That ends the issue. Petitioner's primary response is that congressional proceedings are equivalent to litigation. Pet. 27-29. But that argument has no case law support and contradicts the plain meaning of the term "litigation." The work product doctrine is "grounded in the realities of litigation in our adversary system," *United States v. Nobles*, 422 U.S. 225, 238 (1975), and simply does not apply to "[m]aterials assembled in the ordinary course of business, or pursuant to *public* requirements unrelated to litigation, *or for other nonlitigation purposes*," Fed. R. Civ. P. 26 advisory committee's note (emphases added).

V

Finally, we note a procedural point: The current caption of this case is directly contrary to the independent counsel statute, see 28 U.S.C. 594(a), and to this Court's consistent practice.

The issue also plays itself out in the cauldron of trials. Opposing counsel at times prefer to label prosecutors as "the independent counsel" and to state or imply that the prosecutors do not represent the United States. In the 1996 trial of Jim Guy Tucker and the McDougals, Judge George Howard, Jr., put an end to gamesmanship of this sort in the presence of the jury during the examination of David L. Hale:

> Mr. Collins (Tucker's Attorney): If your Honor please, I said Independent Counsel; I didn't say the United States, and I believe—

> Mr. Jahn (Associate Independent Counsel): We are the United States, your Honor.
>
> Mr. Collins: They are not. * * * [T]hey are Independent Counsel appointed under a special act. * * *
>
> The Court: The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins. Go ahead.

United States v. *McDougal, Tucker, and McDougal,* No. LR-CR-95-173, Tr. 4525-4527 (E.D. Ark. Apr. 11, 1996).

The caption of this case, by referring to the "Office of Independent Counsel," directly contradicts Section 594(a) of Title 28. It is the law, not convention, which establishes that this Office, within its jurisdiction, possesses the full "authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General" and is responsible for "handling all aspects of any case, *in the name of the United States.*" 28 U.S.C. 594(a) (emphasis added).[32] In addition, "[w]hen issuing * * * subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a). The statutory language is supported by the consistent practice of this Court for over two decades of identifying the "United States" as the party in cases involving special prosecutors and independent counsels.[33]

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[32] Under the statute, "the Attorney General or the Solicitor General" may "mak[e] a presentation as amicus curiae." 28 U.S.C. 597(b). But in such cases, the Independent Counsel still exercises authority, within his jurisdiction, "in the name of the United States." 28 U.S.C. 594(a)(9).

[33] See, *e.g.*, *Tucker* v. *United States*, 117 S. Ct. 76 (1996); *Marks* v. *United States*, 117 S. Ct. 76 (1996); *Haley* v. *United States*, 117 S. Ct. 76 (1996); *Fitzhugh* v. *United States*, 117 S. Ct. 256 (1996);

Neither the governing statute nor this Court's practice admits of an exception when the other party before the Court is a separate entity within the Executive Branch. As to that issue, moreover, there is controlling precedent: *United States* v. *Nixon*.[34]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If the Court grants the petition, we respectfully request that oral argument be scheduled expeditiously so that delay in the orderly progress of this sensitive criminal investigation is minimized.

Respectfully submitted.

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May 1997

United States v. *Poindexter*, 506 U.S. 1021 (1992); *North* v. *United States*, 500 U.S. 941 (1991); *United States* v. *Nofziger*, 493 U.S. 1003 (1989); *Poindexter, North, and Hakim* v. *United States*, 490 U.S. 1004 (1989); *Deaver* v. *United States*, 484 U.S. 829 (1987); *Mitchell and Haldeman* v. *United States*, 431 U.S. 933 (1977); *Ehrlichman* v. *United States*, 431 U.S. 933 (1977); *Barker* v. *United States*, 421 U.S. 1013 (1975); *United States* v. *Nixon*, 418 U.S. 683 (1974). In cases arising out of federal grand jury proceedings, moreover, the caption refers to federal government prosecutors as the "United States." See, *e.g.*, *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991). In *Morrison* v. *Olson*, 487 U.S. 654 (1988), the question presented was *whether* the independent counsel did, and constitutionally could, represent the United States in the criminal investigation. There is no such question here.

[34] There, as here, the President asserted a governmental privilege in refusing to comply with a subpoena duces tecum during criminal proceedings.

1998 WL 35188 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Vicki LEWIS, et vir., etc., Petitioners,
v.
BRUNSWICK CORPORATION, Respondent.

No. 97-288.
October Term, 1997.
Jan. 28, 1998.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

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*i QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

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West Headnotes (1)

Products Liability Federal Preemption in General

Products Liability Boats;Watercraft

States Product Safety;Food and Drug Laws

Does Federal Boat Safety Act of 1971 preempt state common-law requirement that recreational boats be equipped with propeller guards, where United States Coast Guard, after extensive administrative proceedings, determined that such requirement would be contrary to interests of boat safety? 46 U.S.C.A. § 4306.

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*1 INTEREST OF *AMICUS CURIAE*

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.

[1] Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

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The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states ***2** that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

***3** Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. *Amicus curiae* General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

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If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance-regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local ***4** conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement [s]" encompass state common law. *See, e.g., Medtronic, Inc. v. Lohr,* 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993); *Cipollone v. Ligget Group, Inc.,* 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury-an *ad hoc* collection of citizens assembled to hear one case-to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938).

***5** 3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause-section 4311(g)-is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. *See Medtronic,* 116 S. Ct. at 2259 (plurality opinion) (implied- ***6** conflict preemption inquiry is proper); *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); *CSX,* 507 U.S. at 673 n. 12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. *See, e.g., International Paper Co. v. Ouellette,* 479 U.S. 481, 493-94 (1987); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

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Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. *See Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain ***7** exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually *has* this effect, for reasons that will be discussed in more detail in Sections II and III, *infra.*

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. *See* U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. *See id.*

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment-regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. *Myrick* is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. *See* U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> ***8** This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.... The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee

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expect[ed] that initial standards will be promulgated as soon as practicable." *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority ***9** conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. *See, e.g.,* 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision ***10** operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act. [2]

[2] Contrary to the assertions made by the Solicitor General, *see* U.S. Br. 14 15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* but not solely] affect State statutes and regulations. 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, *infra.*

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II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

***11** The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that *all* common law damages actions-regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable-are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See Medtronic, Inc. v. Lohr,* 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to *stare decisis* as the Court addresses it once again in this case. [3]

[3] The Solicitor General directly disagrees with the holdings of these cases, *see* U.S. Br. 17 18 & n. 9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in *Medtronic, CSX,* and *Cipollone* when discussing this point. *See* Petrs. Br. 24 28.

***12** In *Cipollone,* the Court was obliged to construe the express preemption provisions contained in two successive federal statutes-the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.' " *Cipollone,* 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language-particularly the reference to "requirement[s] or prohibition [s] ... imposed under State law"-the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24. [4]

[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548 49 (Scalia, J., concurring and dissenting in part).

In *Cipollone,* therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement" ***13** to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the

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1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added). [5]

5 Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond positive] enactments, and "general tort law duties can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548 49 (Scalia, J., concurring and dissenting in part) (brackets in original).

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434. [6] In a single sentence, the Court treated the ***14** issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

6 The Railroad Safety Act's preemption clause provided that " a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement, but included an exception for "an additional or more stringent state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, when "not incompatible with Federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n. 2.

In *Medtronic,* the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements' " within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX,* Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 2262 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 2259 ***15** (Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States,* 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court"). [7]

7 In addition, the Court has frequently held that the term "standards refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.,* 480 U.S. 102, 114 15 (1987) (referring to "safety standards set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.,* 381 U.S. 392, 400 (1965) (referring to "common

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law standards); *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630 31 (1959) (referring to "standard of care imposed by common law).

It bears mention that the Government's position in this case is flatly inconsistent with the position in *Medtronic,* where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, *Medtronic* (No. 95-754), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law ... would also encompass duties imposed by the ... law from whatever source." *Id.* at 46. The Government offers no explanation for this abrupt about-face from its position in *Medtronic.*

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in ***16** each state. Again, the Court discussed this point in *Cipollone,* and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,' " for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic,* 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. *See BMW of N. Am., Inc. v. Gore,* 116 S. Ct. 1589, 1598 n. 17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually ***17** codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law,* (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982). [8]

8 The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision that would appear to read the courts entirely out of the framework of state governments. *See* U.S. Br. 18 19. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. *Id.* We agree that the suggestion is absurd; it also is *irrelevant.* As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency here,

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> the Coast Guard would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g.,* ***18** *Medtronic,* 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case-a jury-to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic,* 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times v. Sullivan,* 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). The very same argument that petitioners and their *amici* put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of ***19** decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone,* the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie,* 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone,* 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

***20 III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.**

The Boat Safety Act contains what some have called a "savings" clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law

or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. *See* Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in *Medtronic,* where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. *See* 116 S. Ct. at 2255; *id.* at 2264 (O'Connor, J., concurring and dissenting in part).

Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. *See* 46 U.S.C. § 4306. This provision ***21** establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or ***22** a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually *preempted,* it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care by complying with the federal regulatory scheme. *See, e.g., Restatement (Third) of Torts: Products Liability* § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance ... with the minimum standards promulgated under the Act will not be a complete defense

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to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not ... a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense, ***23** and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care. [9]

9 Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state law cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.,* Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60 3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g., Wagner v. Clark Equip. Co.,* 700 A.2d 38, 49 50 (Conn.1997); *Brooks v. Beech Aircraft Corp.,* 902 P.2d 54, 63 (N.M.1995). A few States may hold that compliance conclusively negates any defect, *see, e.g., Beatty v. Trailmaster Prods.,* 625 A.2d 1005, 1013 14 (Md.1993), while others may treat compliance as irrelevant and inadmissible, *see, e.g., Sheehan v. Cincinnati Shaper Co.,* 555 A.2d 1352, 1355 (Pa.Super.1989).

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "[c]ompliance with ... this chapter does not relieve a person from liability *at common law or under State law.*" 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a ***24** complete "anti-preemption" clause, and all state law-whether statutory, administrative, or judge-made-would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, *see* Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in *Medtronic,* the position urged by petitioners and their *amici* "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. *Id.* at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." *Id.* at 2259; *see also supra* Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that

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> this Court has long placed on a comparable savings clause in the Interstate Commerce Act. ***25** *Pennsylvania R.R. v. Puritan Coal Mining Co.,* 237 U.S. 121, 129-30 (1915).

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales* (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines v. Wolens,* 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again " 'it is a commonplace of statutory construction that the specific' " language concerning such matters as preemption " 'governs the general' terms of the saving clause." *South Dakota v. Yankton Sioux Tribe,* No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting *Morales,* 504 U.S. at 384)). [0]

10 The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum standards, *see* U.S. Br. 20 21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law is followed by the phrase "or under State law. *See id.* at 21; *see also Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 168 n. 19 (1978) (rejecting argument that because statute referred to "minimum standards, it "requires recognition of state authority to impose higher standards).

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

***26 IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.**

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. *See* Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. *See* U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in *Cipollone, see* 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in *CSX,* when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. *See* 507 U.S. at 673 n. 12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in *Myrick,* therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. *This argument is without merit.*

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption ***27** analysis" in *Cipollone* itself, *id.* at 289, and had done so again in *CSX,* notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, *see id.* After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. *See id.* at 287-88.

Finally, in *Medtronic,* the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. *See, e.g.,* 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." *Id.* at 2259 (citing *Myrick,* 514 U.S. at 289). The statute at issue in *Medtronic,* once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." ***28** *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union,* 468 U.S. 491, 501 (1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry.

11 Petitioners refer to a supposed "presumption against preemption. Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. *Free v. Bland,* 369 U.S. 663, 666 (1962); *see also Cipollone,* 505 U.S. at 516 ("state law that conflicts with federal law is without effect "); *id.* at 544 (Scalia, J., concurring and dissenting in part) (same).

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption. [2] For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing ... a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.; see also International Paper Co. v. Ouellette,* 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted ***29** because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

12 The Solicitor General also appears to accept this proposition, for he states that " u]nder our reading of the savings clause, a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule. U.S. Br. 28.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, *amicus curiae* General Motors accepts the position taken by the Court of Appeals, *see* Pet. App. A15-A21, and presented in more detail by respondents

here-that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act. [3] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978). [4]

13 The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* not to regulate propeller guards results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

14 The Solicitor General's efforts to distinguish *Ray, see* U.S. Br. 28 29 & n. 19, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.,* 33 C.F.R. Pts. 175, 177, 181, 183.

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that ***30** requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. *See, e.g., Ray,* 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

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2000 WL 33992267 (C.A.4) (Appellate Brief)
United States Court of Appeals,
Fourth Circuit.

MEDIAONE GROUP, INCORPORATED; Mediaone of Virginia, Incorporated; AT&T Corporation, Plaintiffs-Appellees,
v.
COUNTY OF HENRICO, VIRGINIA, Defendant-Appellant,
Bell Atlantic Corporation; Bell Atlantic-Virginia, Incorporated; Bell Atlantic Internet Solutions, Incorporated, Intervenors-Defendants,
and
GTE Intelligent Network Services, Incorporated, d/b/a GTE.net, Intervenor-Defendant.

Nos. 00-1680(L), 00-1709, 00-1719.
July 3, 2000.

On Appeal from the United States District Court for the Eastern District of Virginia, Richmond Division

Brief of the Intervenors-Defendants

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RULE 26. 1 CORPORATE DISCLOSURE STATEMENT

GTE Intelligent Network Services, Inc. is a wholly-owned subsidiary of GTE Corporation. The Internet Service Provider doing business as GTE.net is now owned by GTE.net, LLC, which itself is wholly owned by GTE Technology Corporation. GTE Technology Corporation is a Delaware corporation and is a wholly-owned subsidiary of GTE Corporation. GTE Corporation is a New York corporation with its principal place of business at Irving, Dallas County, Texas, whose stock is publicly traded on the New York Stock Exchange under the symbol “GTE” (collectively “GTE”).

Bell Atlantic-Virginia and Bell Atlantic Internet Solutions, Inc. are both wholly owned subsidiaries of Bell Atlantic Corporation. Bell Atlantic Corporation is a New York corporation with its principal place of business at New York, New York County, New York, whose stock is public traded on the New York Stock Exchange under the symbol “BEL” (collectively “Bell Atlantic”).

Bell Atlantic and GTE have recently merged. As of July 3, 2000, shares of Bell Atlantic and GTE will be converted into shares in Verizon Communications, Incorporated, a New York corporation. The new company's shares will trade

under the symbol "VZ" on the New York Stock Exchange. The Intervenor-Defendants will file an amended Rule 26.1 disclosure form and/or a Rule 43 Motion for Substitution as soon as possible.

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*1 INTRODUCTION AND STATEMENT OF THE ISSUES

The primary purpose of the Communications Act, and indeed of virtually of all communications regulation, is to ensure that owners of communication lines into consumers' homes -- often laid with government assistance over public rights of way -- do not exploit their market power to stifle competition or deny consumer choice. While this goal remains constant throughout the Communications Act, the Act takes very different regulatory approaches to the providers of "telecommunications service" on the one hand, and "cable service" on the other. Regulatory jurisdiction over telecommunications service and telecommunications carriers is shared by the Federal Communications Commission ("FCC"), which has jurisdiction over interstate telecommunications, and state and local governments, which retain regulatory jurisdiction over most aspects of intrastate telecommunications. The regulation of "cable service" delivered by "cable systems" has historically been assigned to local governments, like Henrico County, with very limited federal intrusion.

The distinction between traditional telephone companies that provide telecommunications service and traditional cable companies that deliver cable television services is fast collapsing. Nowhere is this more apparent than in the area of Internet access. Both telephone companies and cable operators ***2** now offer high-speed transmission lines from users' premises to Internet Service Providers ("ISPs"). These ISPs provide consumers with the ability to retrieve and utilize all the wide variety of information and services available on the Internet. The threshold question in this case is whether the transmission of information to and from a users' home or business to the Internet is a "cable service" or a "telecommunications service."

The Communications Act defines a "telecommunications service," on the one hand, as "offering for a fee directly to the public" the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §§ 153(43) & (46). A local telephone call is a classic telecommunications service, with the caller determining the origin, terminus and entire content of the communication. Federal law, FCC regulations and orders, and many State laws, require providers of telecommunications services to grant "open access" to their networks, including duties to interconnect with other carriers, to resell services to other carriers, and not to discriminate against any competitor or consumer. *See id.* §§ 202(a) & 251(a)(1), (b)(1). State (and in some cases) local governments maintain ***3** regulatory jurisdiction over certain intrastate aspects of telecommunications services, including the enactment and enforcement of consumer protection laws. *Id.* §152(b); § 253(b); § 541(d)(2).

In contrast, the Act defines a "cable service" as "the *one-way* transmission to subscribers of (i) video programming, or (ii) other programming service, and … subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." *Id.* § 522(6) (emphasis added). The one-way transmission of CNN or HBO from the cable operator to the subscriber's television, or the selection and receipt of a pay-per-view movie, both

constitute classic examples of cable service. Unlike providers of telecommunications services, cable systems that offer only cable services are not subject to general duties of interconnection and non-discrimination. Instead, the Act imposes narrower regulatory requirements on cable service providers intended to promote fair competition and diversity in the area of video programming. *See id.* §§ 531, 533-34. The Act also explicitly recognizes that a cable operator may provide telecommunications services and that, in such case, and with respect to those particular services, the cable operator shall be governed by the rules applicable to all other telecommunications carriers -- not those applicable to cable service. *Id.* § 541(b)(3)(A).

***4** Simply put, this case requires the Court to answer two questions. *First*, is a two-way, high-speed connection to the Internet provided over cable lines a telecommunications service or a cable service. If it is a telecommunications service, then federal law *already requires* AT&T to maintain an open system and allow competing ISPs to use the system to reach consumers. Thus, the "open access" championed by the Henrico County Board of Supervisors is already mandated by federal law. *Second,* if the transmission component of Plaintiffs' Internet service is properly classified as a telecommunications service, do any of the four provisions of federal law at issue in this case preempt the Henrico Ordinance.

STATEMENT OF FACTS [2]

High-speed or "broadband" Internet access refers to the high rate of data transmission between the consumer and an ISP achieved by certain transmission facilities. These high-speed Internet connections allow consumers to flip Internet "pages" as quickly as those in a book and to receive video programming over the Internet of a quality comparable to that of broadcast or cable television. Joint Appendix ("JA") 88-95. Moreover, ***5** unlike traditional "dial up" Internet connections, these broadband connections are "always on." The consumer can access the Internet without delay and, eventually, a host of new interactive services and applications could be offered through this high-speed connection. *Id.* 89. [3]

Both telephone companies and cable systems are able to offer these broadband transmission facilities between the consumer and ISPs. Telephone companies, including GTE and Bell Atlantic, offer a service called Digital Subscriber Line, or "DSL." Using the same copper-paired telephone lines that deliver voice communication, and combining them with high-speed routing facilities and a network of fiber optic cables, DSL provides consumers with broadband transmission to and from their premises to the ISP of their choice. JA 1015-17.

Like traditional telephone networks, cable systems can also be modified to provide a two-way, broadband connection between a customer and an ISP. Through the use of high-speed routing facilities and a network of fiber optic cables connected to the coaxial cable that enters the consumers' premises, cable companies now provide a two-way transmission service that is virtually indistinguishable from the service provided to ***6** consumers by DSL. JA 1014-15; *id.* 1567 (Affidavit of Kenneth M. Dye ("Dye Aff.") ¶¶ 4 & 5) (describing MediaOne upgrades). Indeed, many of the same modifications necessary to provide broadband Internet access also allow cable companies to provide two-way voice communication in competition with local telephone companies. *Id.* 51-52 (Statement of Professor Jerry A. Hausman); *id.* 1567 (Dye Aff. ¶ 5).

Regardless of what entity or entities provide the service, the provision of Internet access consists of two basic elements: (1) a transmission "pipeline" from a customer's home or business (provided by an entity that controls the underlying network), and (2) the capability for acquiring, storing, transforming, processing, retrieving and utilizing all the information available on the Internet (provided by an ISP). JA 187-88; *id.* 1092-93. The transmission "pipeline" can be a traditional telephone line, a high-speed DSL line, upgraded cable lines, or even a wireless "connection" to a satellite. JA 116. The transmission component moves data indiscriminately between the user and the user's ISP. *See* JA 94-95 (*In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability,* 14 F.C.C. Rcd. 2398, ¶

23 (1999)) ("We further find that broadband service does not include content, but consists only of making available a communications path on which content may be transmitted and received.") (footnote omitted). ***7** The ISP, whether it be Road Runner, America Online or GTE.net, provides the connection to the Internet and the ability to interact effectively with the information available on the Internet. These Internet services often include electronic mail, "chat rooms," the ability "visit" any website on the Internet, the ability engage in two-way commercial transactions, as well as any data or information provided by the ISP itself. JA 187-88; *id.* 1567-68 (Dye Aff. ¶¶ 6-7) (describing Internet services offered by Road Runner).

The transmission component of traditional low-speed dial up Internet access (often referred to as "narrowband") is indisputably a telecommunications service. The consumer's computer dials a telephone number that creates a connection with the ISPs' facilities. The ISP then provides the connection to the Internet and services necessary to allow effective utilization of the myriad information and services that the Internet offers. The transmission of Internet services to and from a consumer's premises over DSL lines has also been defined by the FCC as a "telecommunications service" in multiple rulings. *See, e.g.,* JA 1124-51 (*In re: Deployment of Wireline Services Offering, Advanced Telecommunications Capability, (Order on Remand),* 15 F.C.C. Rcd. 385, ¶ 9 (1999) ("[W]e affirm our prior conclusion that xDSL-based advanced services constitute telecommunications services as defined by section 3(46) of the Act."). *See also infra* at p. 27 (citing numerous ***8** FCC orders). Thus, telephone companies, such as GTE and Bell Atlantic, must offer these transmission services to other telecommunications carriers, all ISPs, and consumers in a nondiscriminatory manner. *See* 47 U.S.C. § 202(a). As telecommunications carriers, GTE and Bell Atlantic must also interconnect their networks with those of other carriers and allow other carriers to purchase and then resell their telecommunications services to third-parties. *See* 47 U.S.C. §§ 251(a)(1), (b)(1).[4] Even though both GTE and Bell Atlantic have ISP affiliates, they cannot tie the transmission component of their DSL service to their own (or any other) ISP. This regulatory fact has helped create an open and vigorous competition among ISPs, based on price and quality of services. JA 400-402 (Affidavit of Professor Mackie-Mason ¶¶ 24-34).

Despite the identical nature of the "transmission" component of two-way Internet access --whether provided over cable lines or telephone lines -- AT&T claims that its transmission service is legally no different than the provision of one-way video programming, such as CNN or HBO. JA 1568 (Dye Aff. ¶ 7) (referring to Internet access provided by Road Runner as a ***9** "premium cable service."). AT&T thus claims the right to require consumers to purchase the services of its preferred ISP (in this case Plaintiffs' affiliate "Road Runner") in order to obtain its high-speed transmission service. *Id.* 1571 (Dye Aff. ¶ 16). Consequently, consumers must pay for Road Runner's Internet services -- wanted or not -- and then pay again for the ISP they truly prefer. Through this tying arrangement, cable operators can use their exclusive control of the cable lines to reap monopoly rents in the market for ISP services. JA 40-44 (Hausman Statement).

This case came about because AT&T sought approval to transfer the only cable television franchise in Henrico County from the control of MediaOne to AT&T. Pursuant to this franchise, MediaOne operates a cable system that provides traditional cable television services to approximately 80,000 subscribers. JA 1568-69 (Dye Aff. ¶ 8). MediaOne also provides a very small number of subscribers in Henrico County with Internet access in conjunction with Service Co., LLC, an affiliate of MediaOne that does business under the brand name "Road Runner." *Id.* 1569 (Dye Aff. ¶ 10). MediaOne provides the transmission component of this service through its network of fiber optic and coaxial cables. Road Runner provides the connection to the Internet and the capability to effectively utilize the information available from the Internet. As one of Plaintiffs' affiants ***10** described it: "The inputs of MediaOne's cable modem service that MediaOne directly supplies are the cable 'wires' and related facilities over which content is transmitted to cable modem service subscribers and, at a subscriber's election, a cable modem." JA 1123 (Affidavit of Ann Baxter ¶ 3). Consumers need not subscribe to MediaOne's cable television service in order to receive the Internet access offered by Media One in conjunction with Road Runner. JA 638 (MediaOne/Road Runner Web site) ("[Y]ou are in no way required to purchase cable TV service to get MediaOne Road Runner."). Consumers must rent or purchase additional communications equipment in order to receive transmission of the Road Runner service through MediaOne. *Id.* 638-39 (discussing installation of wiring and modem to customer's computer).

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In the absence of regulatory action by any other state or federal body, and taking AT&T at its word that its service was a "cable service" subject to local control, Henrico County took action to prevent AT&T from leveraging its exclusive control of the cable system into domination of the market for ISP services. On December 14, 2000, the Henrico County Board of Supervisors held a public hearing on the franchise transfer where it heard extensive testimony that AT&T's plans for a "closed system" would result in higher prices, reduced consumer choice, and would stifle innovation and ***11** threaten the economic viability of smaller ISPs. JA 552-634 (transcript of hearing). Based on these concerns, Henrico County adopted Ordinance No. 469B-99 ("Ordinance"). JA 389-90. The Ordinance provides that, as a condition of the transfer of control of MediaOne of Virginia, Inc. to AT&T, AT&T must allow subscribers in Henrico County to choose their ISP and pay only once for that choice. *Id.* 390.

Plaintiffs almost immediately filed suit seeking to enjoin enforcement of the Ordinance. Their complaint was filled with allegations that high-speed Internet access provided over cable lines is "cable service" under state and federal law. *See* JA 19 (Complaint ¶ 14) (characterizing "Road Runner" as a "cable service"); *id.* 20 (Complaint ¶ 16) (stating Plaintiffs "provide[] Road Runner as an optional premium cable service"); *id.* 24 (Complaint ¶ 25) ("Road Runner and other such services fall within the definition of 'cable service' …."); *id.* 25 (Complaint ¶ 28) (referring to "MediaOne Virginia's provision of its own Internet access cable services"). Plaintiffs also alleged that the Henrico Ordinance regulated cable services. *See id.* 26 (Complaint ¶ 32) ("The Ordinance clearly establishes requirements regarding the provision of cable services …."). In its answer, the County affirmatively accepted Plaintiffs' characterization of their Internet access as a cable service. JA 377 (Henrico Answer ¶ 25) ("[T]he County admits that ***12** it too believes that Road Runner is a cable service."). By contrast, the Intervenor-Defendants did not accept this allegation. *Id.* 65 (GTE Answer ¶25); *id.* 79 (Bell Atlantic Answer ¶ 25).

The district court granted the Plaintiffs' motion for summary judgment and permanently enjoined both the County and the private defendants from enforcing the Ordinance. *Id.* 1732-45. Proceeding on the unexamined assumption that the service at issue was a cable service, the lower court nonetheless found that the County did not have any regulatory authority over this service as a matter of state and federal law. *Id.* The lower court characterized the Henrico Ordinance as allowing competing ISPs to "freeload" on the assets of the cable operator. JA 1676.[5] The district also expressed its view that, "it doesn't make any difference how I rule. It has to go to the Fourth Circuit." *Id.* 1693. Timely notices of appeal were filed by the Intervenor-Defendants GTE and Bell Atlantic and by the County of Henrico. JA 1746-54.

***13 SUMMARY OF ARGUMENT**

At the outset, this Court must confront the critical issue of the proper classification of the transmission component of high-speed Internet access under federal law. The Ninth Circuit has recently concluded that the high-speed Internet connection offered to cable subscribers by AT&T and its affiliated ISP is a "telecommunications service" under federal law. *See AT&T Corp. v. City of Portland,* No. 99-35609, 2000 U.S. App. Lexis 14383 (9th Cir. June 22, 2000). Intervenor-Defendants believe that the Ninth Circuit is correct in this regard. The definition of cable service simply does not encompass a two-way interactive service where the consumer has complete control over every aspect of the experience. Electronic mail, for instance, is nothing more than a written telephone call, with the user determining the form, content, and destination of the communication.

Outside of traditional video programming, such as CNN or HBO, the definition of "cable service" is confined to information that the cable operator makes available to all its subscribers generally. 47 U.S.C. §§ 522(6) & (14). Internet access simply does not meet this definition. It is not like a program guide or weather report made available generally to MediaOne's cable television subscribers. Indeed, it is not available to subscribers to MediaOne's traditional cable television service *at all* -- unless they pay an additional ***14** fee and accept new in-home equipment necessary to make Internet access possible.

In addition, it is the individual broadband Internet user who chooses the unique information that he or she wishes to send or receive, to or from any source on the Internet, without regard to the cable operator or the choices made by other users of Plaintiffs' Internet service. The degree of subscriber interaction (and creation of data) inherent in use of the Internet goes far beyond anything contemplated in the definition of cable service.

On the other hand, the two-way transmission component of Internet access provided by cable operators, such as Plaintiffs here, fits squarely into the plain language of the definition of telecommunications service. The subscriber receives pure transmission of the information he or she desires, to and from an ISP (and hence to and from any destination available on the Internet), without any change in the format or content of the information by the cable operator. Moreover, the cable operator and its preferred ISP offer this transmission service to the public for a fee.

DSL is a legally indistinguishable transmission service, which the FCC has repeatedly classified as a "telecommunications service." Indeed, the FCC has acknowledged that, "[i]f the same type of Internet access service is offered over cable systems as well as telephone networks, it is not ***15** readily apparent why the classification of the service should vary with the facilities used to provide the service." JA 994 (Brief of the FCC as Amicus Curiae, *AT&T Corp. v. City of Portland* at 25, 2000 U.S. App. Lexis 14383 (9th Cir. June 22, 2000) (No. 99-35609)). This Court should follow the persuasive reasoning of the Ninth Circuit in the *City of Portland* case and hold that the transmission component of Internet access is a telecommunications service under federal law.

If Plaintiffs' Internet access service entails a "telecommunications service," then local regulation becomes largely irrelevant, and cable operators such as AT&T are immediately subject to broader state and federal duties to interconnect with other telecommunications carriers and to offer their services to all ISPs on a nondiscriminatory basis. *See, e.g.*, 47 U.S.C. § 202(a); § 251(a) & (b). This result, like the Henrico Ordinance, would achieve regulatory parity between high-speed Internet access over cable lines and telephone lines and allow consumers to choose the Internet services they truly desire, whether they purchase the "pipeline" to the Internet from a phone company or a cable company.

Moreover, none of the four provisions of federal law at issue in this case preempt the Henrico County Ordinance. Because the transmission of Internet traffic by cable operators is properly classified as a "telecommunications ***16** service," the preemption analysis employed by the court below is wholly inapposite. Three of the provisions relied upon by the court below are addressed only to "cable services" delivered by a "cable system," and under the proper classification of the service at issue, simply have no relevance to this case. *See* 47 U.S.C. § 544(e); §541(c) & § 541(f)(1). The fourth provision, 47 U.S.C. § 541(b)(3)(D), prohibits only local government regulation that requires a cable operator to construct new telecommunication facilities or offer a new telecommunications service to the public -- a provision the Henrico Ordinance cannot violate because AT&T is already providing the telecommunications facilities and services at issue. Moreover, federal law explicitly reserves a broad role for state and local governments in the regulation of intrastate telecommunications services. *Id.* § 152(b); § 253(b)&(c); § 541(d)(2). Whether Henrico County possesses that authority in this case is a question of state law that was not addressed by the court below.

ARGUMENT

I. A Cable Operator's Transmission Of Internet Access And Services Is Properly Classified As A Telecommunications Service Under Federal Law.

The Ninth Circuit was correct in its conclusion in *City of Portland* that the transmission component of Internet access -- whether provided by a cable ***17** operator or a telephone company -- is a telecommunications service for purposes of federal law. The transmission of information from a subscriber's computer to and from an ISP (and then to and from any third-party connected to the Internet) simply cannot be "shoehorned" into the definition of cable service. Moreover, treating Internet access as cable service leads to absurd results. Many provisions of Title VI of the Communications Act that apply to cable service are inapposite or positively absurd as applied to Internet access.

The hallmark of cable service is the one-way provision of video programming to all subscribers. The Act defines video programming as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). Plaintiffs make no argument that the rich trove of data, communications services, and commerce available over the Internet qualifies as "video programming."

Cable service also encompasses "other programming service," which is defined as "information that a cable operator makes available to all subscribers generally." *Id.* § 522(14). This definition was intended to cover information made available to every subscriber who also receives video programming from the cable operator. Thus, "other programming service" might include program guides, games, weather reports or even a stock market ***18** ticker service offered generally to all cable television subscribers. Congress concluded that these generally offered, one-way non-video services were "sufficiently like video programming" to warrant similar regulatory treatment. H.R. Rep. No. 98-934, at 41 (1984). Congress made crystal clear, however, that:

> [T]he definition of other programming service requires that the information provided in a cable service *must be made available to all subscribers generally and may not include information that is subscriber-specific. If information transmitted on a cable system is made available only to an individual subscriber or to a discrete group of subscribers, the transmission of this information is not a cable service.*

Id. at 41-42 (emphasis added). Congress has not altered this definition of "other programming service" since it was adopted in 1984.

Internet access simply cannot qualify as "other programming service." It most emphatically *does* include "information that is subscriber specific." Consumers purchase Internet access separate and apart from their being subscribers to the traditional video programming provided by MediaOne. They receive Internet access through entirely distinct communications equipment that is not even provided to all subscribers to Plaintiffs' traditional cable ***19** television service. JA 638-39. [6]

Most importantly, it is the individual user and not the cable operator who chooses the content of the information sent and received. Services such as electronic mail are by their nature user-specific and completely beyond the control of the cable operator. Persons outside of Henrico County, with no connection to Plaintiffs' cable system, can send electronic mail containing information of any kind to individual consumers who purchase Internet access from Plaintiffs. Users of Internet access provided by Plaintiffs can purchase a book on Amazon.com, engage in an electronic auction on eBay.com, or participate with hundreds of people in a discussion of a particular book or movie in a "chat room" provided by America Online. None of these activities meets the definition of cable service because their "content" is determined entirely outside of the control of the cable operator.

Moreover, as the record in this case makes clear, a consumer who purchases Internet access from Plaintiffs can set his computer to immediately go to any Web site on the Internet. Plaintiffs' own uncontested affidavits ***20** make clear that the subscriber does not have to view any content provided by the cable operator or its preferred ISP *at all*. JA 1568 (Dye Aff. ¶ 7). [7] Thus, each subscriber receives completely different content, from different sources, that is chosen by the subscriber him or herself without regard to the cable operator or other subscribers. Congress intended the transmission of this kind of interactive data service to fall outside the definition of "other programming services." *See* H.R. Rep. No. 98-934, at 42 ("[A] cable service may not include 'active' information services such as at-home shopping and banking that allow transactions between subscribers and cable operators or third parties."); *accord City of Portland,* 2000 U.S. App. Lexis 14383, at *13 ("The essence of cable service … is one-way transmission of programming to subscribers generally."). [8]

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***21** Even if Internet access could meet the threshold of qualifying as "other programming service," its two-way interactive character, without any control by the cable operator, takes it out of the definition of cable service in any event. Cable service is defined to include only that "subscriber interaction, *if any*, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6)(B) (emphasis added). Congress amended this definition in 1996 to add the words "or use." At the same time, Congress expressed its intent that the amendment not expand the definition of "cable service" to encompass two-way interactive services: "This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service." H.R. Conf. Rep. 104-458, at 169 (1996).

Permissible "subscriber interaction" would obviously encompass, for example, the selection of pay-per-view offerings made available to all cable television subscribers. It might also encompass interaction with electronic games provided to all cable television subscribers by the cable operator. But it cannot be stretched to encompass an interactive information service, completely ***22** unconnected with video programming, whose *defining aspect* is subscriber choice and interaction. Indeed, the subscriber actually *creates* the "programming" in the form of electronic mail or a Web page offered to all other persons connected to the Internet. As the Ninth Circuit correctly concluded in *City of Portland*:

> Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike the transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user views seemingly static content. Thus, the communications concepts are distinct in both a practical and a technical sense. Surfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another.

City of Portland, 2000 U.S. App. Lexis 14383, at *13-14. [9]

Finally, as the Ninth Circuit also recognized, treating Internet access as a cable service makes no sense within the structure of the Communications Act. The provision of cable service over a cable system triggers numerous duties that are utterly incongruous in the context of Internet access. For example, cable operators are generally required to carry certain local ***23** television broadcast stations, to provide channel capacity for public, educational and governmental use, and to carry noncommercial educational programming on their systems. *See, e.g.,* 47 U.S.C. §§ 531, 534 & 535. Cable operators also are under a statutory duty to provide consumers with devices to block obscene or indecent cable service. *Id.* § 544(d). These provisions make no sense in the context of a service where content is entirely under the *consumer's* control. As the Ninth Circuit put it: "We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet." *City of Portland,* 2000 U.S. App. Lexis 14383, at *15. *Accord National Cable Television Ass'n v. FCC,* 33 F.3d 66, 70-72 (D.C. Cir. 1994) (indiscriminate carriage of video programming not a "cable service" and properly classified as a common carrier service regulated under Title II of the Communications Act).

On the other hand, the transmission component of Internet access provided by MediaOne fits squarely into the statutory definition of "telecommunications service." Moreover, the regulatory regime that then applies leads to an eminently logical treatment of a cable operator's offering of Internet access, on a par with legally indistinguishable services provided over similar facilities by other entities.

***24** The Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). In this case, there is no doubt that MediaOne's facilities are indeed providing this "pure transmission" of information to purchasers of their Internet service. JA 1123 (Baxter Affidavit ¶ 3) (stating that

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MediaOne supplies only "the cable 'wires' and related facilities over which content is transmitted"). Moreover, because MediaOne then offers this pure transmission service directly to the public for a fee, it is engaged in the provision of "telecommunications services." JA 1567-68 (Affidavit of Kenneth M. Dye ¶ 6) ("The cable operator obtains the Internet services and content provided by ServiceCo LLC, adds local content and applications, and markets the entire package …."). This combination of high-speed transmission and Road Runner's Internet services is actively marketed to the public at large. JA 635-42 (reprint of MediaOne/Road Runner Web site advertisement); *id.* 635 ("MediaOne Road Runner brings high-speed Internet service to your home computer.").

"Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities* ***25** *used*." 47 U.S.C. § 153(46) (emphasis added). Plaintiffs' service falls under both prongs of this definition. Like DSL service, Plaintiffs are marketing a pure transmission function from the consumer's home to the ISP. When combined with the Internet connection provided by the ISP, Plaintiffs offer the public a pure transmission service to and from any person or entity connected to the Internet. Plaintiffs' transmission to and from the ISP is no different than a local telephone company's transmission of calls to a longdistance company for interstate carriage to their ultimate destination. Media One markets these transmission services as a package, to anyone within range of its facilities -- whether or not that person is a cable television subscriber. [0]

The Communications Act specifically contemplates that cable operators may provide telecommunications services, and under those circumstances, should be regulated as telecommunications carriers with respect to those services. *See id.* § 541(b)(3)(A)(i)&(ii). The Act specifically contemplates that the proper regulatory classification is determined by the nature of the service at issue, from the consumer's point of view. The corporate identity ***26** of the service provider or the type of metal used in his lines is irrelevant to this issue. As the Ninth Circuit tightly concluded: "The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system." *City of Portland,* 2000 U.S. App. Lexis 14383, at *20. —

Indeed, in their pleadings below, Plaintiffs characterized the Henrico Ordinance as requiring the "provision of 'telecommunications services' to requesting ISPs." JA 944 (Plaintiffs' Reply Memorandum in Support of Their Motion for Summary Judgment at 12). What Plaintiffs attempt to ignore is that they are *already* providing telecommunications services to the users of their Internet access service. Plaintiffs themselves conceded below that "a service is a 'telecommunications service' if it satisfies the definition of 'telecommunications' and if it is an indiscriminate offering to part of the public." *Id.* (citing *Virgin Islands Tel. Co. v. FCC,* 198 F.3d 921 (D.C. Cir. 1999)). Plaintiffs are already making an indiscriminate offering of transmission ***27** to and from the public Internet to "part of the public" that is, all potential users of their Internet service within the reach of their cable lines.

The FCC has repeatedly reaffirmed that the transmission component of DSL is a "telecommunications service" and that the Internet services provided by ISPs like Road Runner are properly classified as "information services" delivered via telecommunications, *See, e.g., In re Deployment of Wireline Services Offering, Advanced Telecommunications Capability, (Order on Remand),* 15 F.C.C. Rcd. 385, ¶ 9 (1999); *In re Deployment of Wireline Services Offering, Advanced Telecommunications Capability,* 13 F.C.C. Rcd. 24011, ¶¶ 33-37 (1998); *In re Northern Telecom, Inc.*, 14 F.C.C. Rcd. 12048, ¶ 7 (1999); *In re GTE Telephone Operating Cos.,* 13 F.C.C. Rcd. 22466 (1998); *City of Portland,* 2000 U.S. App. Lexis 14383, at *22 (discussing FCC position). Neither the district court, nor the Plaintiffs, can explain how the combination of an "information service," which by definition is delivered *via telecommunications*, and the transmission pipeline that carries this service to and from end users can become a cable service. When Bell Atlantic or GTE delivers information services -- even through an affiliated ISP -- the DSL transmission component remains a "telecommunications service." Serious statutory and constitutional concerns are raised by treating ***28** identical media delivering identical services in a fundamentally different way.

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Finally, it is not even clear that the facilities MediaOne is using to deliver this two-way interactive service can properly be classified as a "cable system" under federal law. The term "cable system" is defined in part as "a set of closed transmission paths" that is "designed to provide cable service which includes video programming …." 47 U.S.C. § 522(7). This definition does not seem to fit Plaintiffs' Internet transmission facilities when used in conjunction with Road Runners' Internet services. This system is explicitly "open" in the sense that it allows contact with anyone connected to the public Internet. *See City of Chicago v. FCC,* 199 F.3d 424, 428 (7th Cir. 1999) ("[W]here there is no single system or unified control, there is no cable system."). Nor are these Internet transmission facilities designed to provide video programming -- they are explicitly designed to provide indiscriminate data transmission offered apart from MediaOne's video programming.

In any event, the definition of a cable system expressly excludes facilities that provide telecommunications services, such as Plaintiffs' Internet access service. *See* 47 U.S.C. § 522(7)(C). In fact, Congress amended the definition of "cable system" in 1996 to make clear that "interactive on- ***29** demand services," such as Internet access, are deemed delivered by telecommunications providers *not* cable systems. Telecommunications Act of 1996, Pub. L. No. 104-104, § 653, 110 Stat. 56, 124 (1996). The Communications Act is careful to refer to a "cable operator" *not* a "cable system" when discussing the provision of telecommunications services over cable lines. *See* 47 U.S.C. § 541(b)(3). [2]

As the Ninth Circuit observed, the Communications Act, particularly after the 1996 amendments, "mandate[s] a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers." *City of Portland*, 2000 U.S. App. Lexis 14383, at *23. That court concluded that these principles are directly applicable to *any* high-speed telecommunication service -- regardless of who provides it. The court stated:

> Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." 47 U.S.C. § 153(46). The Internet's protocols themselves manifest a related principle called "end-to-end": control lies at the ends of the network where the users are, leaving a simple network that is ***30** neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.

Id. For all the reasons given above, this Court should follow the careful analysis of the Ninth Circuit and conclude that Plaintiffs are providing a telecommunications service indistinguishable from a dial up or DSL connection provided over telephone lines. [3]

II. None Of The Four Provisions Of Federal Law At Issue In This Case Preempt The Henrico Ordinance.

The district court's opinion rests entirely upon the unexamined assumption that the service being provided by Plaintiffs to the public is a "cable service" delivered over a "cable system" and thereby subject to the provisions of Title VI of the Communications Act. *See* JA 1737 ("The MediaOne Virginia services that trigger application of the Henrico Ordinance are 'cable services' and are therefore subject to these provisions."). As we ***31** demonstrated above, the Ninth Circuit's intervening decision in *City of Portland* makes it clear that this underlying assumption is untenable.

Three of the provisions relied upon by the district court to preempt the Henrico Ordinance are completely inapposite, because they address only "cable service," delivered over a "cable system." *See* 47 U.S.C. § 544(e) (addressing cable system's use of subscriber equipment and transmission technology); § 541(c) (cable system may not be treated as common carrier by reason of providing cable service); § 544(f)(1) (prohibiting imposition of requirements regarding the provision and content of cable services). These provisions are explicitly rendered inapplicable to a cable system's provision of telecommunications services. *See id.* § 541(b)(3)(A). The fourth provision, 47 U.S.C. § 541(b)(3)(D), does address itself to local regulation of telecommunications services and facilities. It is, however, not applicable to the County's action in

this case because it only prohibits local governments from requiring cable operators to offer *new* telecommunications services or *construct additional* telecommunications facilities.

In fact, federal law explicitly recognizes the right of states to "regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis." *Id.* § 541(d)(2). States are also given authority to ***32** enact competitively neutral rules to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." *Id.* § 253(b). *See also id.* § 252(c) (reserving local authority over rights of way). As the D.C. Circuit has recognized, these statutory provisions, "set aside a large regulatory territory for State authority." *City of Abilene v. FCC,* 164 F.3d 49, 53 (D.C. Cir 1999). Moreover, the division of this broad authority over the intrastate aspects of telecommunications as between state and local governments is entirely a matter of state law. *Id.* 51-52.

Because of its erroneous classification of the service at issue, and its narrow view of local government authority, the district court did not examine the issue of whether Henrico County may, as a matter of State law, exercise regulatory jurisdiction over a telecommunications service provided by its own cable franchisee. There is much to suggest that it may. The State Corporation Commission of Virginia has not asserted any jurisdiction over Internet access provided by cable operators in the Commonwealth. Moreover, the Virginia Code grants localities, like Henrico County, broad authority over the business activities engaged in by cable operators. *See* Va. Code Ann. § 15.2-2108 (Michie 2000). Both the Henrico County Code and Plaintiffs' franchise agreement include provisions authorizing the County to ***33** regulate telecommunications. *See* JA 800 (Henrico County Code § 7.2) ("The board of supervisors shall retain all authority to regulate noncable communication services to the extent necessary to protect the public interest and ensure compliance with all the provisions of this chapter."); *id.* 832 (franchise agreement provision regarding "advanced telecommunications services."). Under these circumstances, Henrico County's authority may be both fairly implied from its express grant of authority and indispensable to its effective regulation of cable operators. *See Board of Supervisors of Fairfax County v. Horne,* 216 Va. 113, 215 S.E.2d 453 (1975). [4]

Plaintiffs are engaged in a statutory "shell game" designed to avoid the regulatory jurisdiction of the FCC, State telecommunications regulators, and local governments. When Plaintiffs provide customers with Internet access through their affiliated ISP, they argue that this activity should be classified as a "cable service" delivered over a "cable system." As a result, Plaintiffs argue that they are immune from state and federal regulation applicable to entities that provide telecommunications service. In particular, Plaintiffs avoid the applicability of state and federal statutes that require telecommunications providers to interconnect with other providers and to ***34** offer nondiscriminatory service to all customers. *See* 47 U.S.C. §§ 202(a) & 251(a) & (b).

However, when Plaintiffs are required by the County to allow consumers to choose to receive the same package of services, delivered over the same physical plant, from a competing ISP, they claim their physical plant is magically transformed under federal law into a "telecommunications facility." This is despite the fact that the competing ISP is providing the identical service to the consumer -- a service Plaintiffs elsewhere vehemently maintain is a cable service. Local governments are thus divested of regulatory authority over Plaintiffs' provision of Internet access.

The court below adopted this flawed reasoning. It found that Plaintiffs' service is a "cable service," but at the same time the Henrico Ordinance requires Plaintiffs to provide a "telecommunications facility." This result cannot be reconciled with the district court's conclusions that three other provisions of federal law -- each of which addresses only "cable service" delivered over a "cable system" -- also preempt the Henrico Ordinance.

In fact, the Henrico Ordinance is completely irrelevant to the proper classification under federal law of the service provided by Plaintiffs and their ISP. As demonstrated above, that service, which Plaintiffs provide today, *already entails* "the transmission, between or among points specified by ***35** the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *See* 47 U.S.C. § 153(43). Every time a subscriber

to Plaintiffs' cable modem Internet service sends an email to another person connected to the Internet, or exchanges data with any Internet Web site, Plaintiffs are already offering "telecommunications" to those subscribers for a fee. Like the Ninth Circuit in *City of Portland,* this Court should emphatically reject Plaintiffs' bald attempt to manipulate the definitions in the Communications Act to divest every regulatory body of jurisdiction over this service.

Thus, Plaintiffs are *already today providing both a telecommunications service and the telecommunications facilities that deliver the service*. 47 U.S.C. § 541(b)(3)(D) states that a local government "may not *require a cable operator to provide* any telecommunications service or facilities …." (emphasis added). The plain language of this section is focused on regulation that forces the cable operator to construct a facility or provide a service that it *does not already provide*. In other words, the decision of whether or when to enter the market for telecommunications services is required to be left to the cable operator. This is exactly the interpretation of Section 541(b)(3)(D) adopted by the FCC in a recent preemption decision: "We conclude that the decision of when or whether to provide telecommunications ***36** service has been left to TCI, and cannot be attributed in any manner to the City. Therefore, we find no violation of section [541](b)(3)(D)." *See In re TCI Cablevision of Oakland, Inc.*, 12 F.C.C. Rcd. 21396, ¶ 80 (1997) (footnote omitted).

In this case, Henrico County has not required the Plaintiffs to construct any new facility or offer any new service of *any kind*. The Henrico Ordinance leaves the decision whether and when to provide Internet access over their cable lines entirely to the Plaintiffs -- however that service is characterized under federal law. Thus, the Ordinance cannot violate Section 541(b)(3)(D). [5]

*37 CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Appendix not available.

Footnotes

1 For the convenience of the Court, the Intervenor Defendants have reprinted the provisions of the Communications Act central to this appeal in the Statutory Appendix attached to this brief. *See* pp. A(1) to A(31).

2 The Intervenor Defendants GTE and Bell Atlantic adopt the Statement of Subject Matter and Appellate Jurisdiction, Statement of the Case, and Standard of Review contained in the Brief of Defendant Henrico County.

3 The FCC has defined "broadband generally as having a transmission rate at or above 200 kilobits per second. JA 93 94.

4 Because GTE and Bell Atlantic are "incumbent local exchange carriers, they have additional network sharing duties not imposed on telecommunications carriers or local exchange carriers generally. *See* 47 U.S.C. § 251(c).

5 The district court's comments about "freeloading are mystifying, because the Ordinance specifically requires competing ISPs to pay the cable operator market rates, *viz.* the same rates as AT&T's preferred or affiliated ISP. *See* JA 390 (Ordinance § 1(c)).

6 Indeed, if "subscriber does not mean a person who receives traditional video programming from the cable operator, it is difficult to see what other meaning the term could have. A person who receives only voice telephony service from MediaOne, but video programming from a satellite carrier, could not be considered a "subscriber to Plaintiffs' "cable service.

7 Indeed, AT&T has assured the FCC that it will adhere to the "one click rule, whereby a subscriber can program his or her computer to go directly to a competing ISP without viewing any content from AT&T's affiliated ISP. *See* JA 95 96 (*In re Transfer of Control of Licenses and Section 214 Authorizations from Tele Communications, Inc. to AT&T Corp.*, 14 F.C.C. Rcd. 3160, ¶¶ 95 96 (1999)).

8 Plaintiffs may argue that they provide subscribers generally with the capability of accessing the entire Internet, and thus they offer the whole Internet as kind of giant "other programming service. This argument proves too much. It would mean that telephone companies offer a cable service when they allow subscribers to dial up to reach the entire Internet in conjunction with an ISP, such as America Online. Moreover, the content of the Internet is not "made available in any sense by the cable operator, but by the millions of people connected to it that create Web sites and exchange electronic mail completely divorced from any control of the cable operator.

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9 Indeed, if Plaintiffs' Internet access is a "cable service it is difficult to see how data search services like LEXIS/NEXIS(R) would not qualify as "cable service, at least when they are accessed through an Internet connection over Plaintiffs' cable lines.

10 Whether viewed as a "call from the consumer's home to the ISP or a "call from the consumer's home to any point on the Internet, the cable operator still serves a pure transmission function that is then offered to the public, in the same manner as DSL.

11 The Internet services themselves provided by Road Runner (as opposed to the transmission of those services) are essentially no different from those provided by America Online or any other ISP. They are properly classified as "information service s] under federal law. The Act defines information services in pertinent part as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications* …. 47 U.S.C. § 153(20) (emphasis added).

12 The same principle applies to a telecommunications carrier. It is regulated as such "only to the extent that it is engaged in providing telecommunications services …. 47 U.S.C. § 153(44). The Communications Act focuses on the nature of the service provided to the consumer not corporate identity or the equipment used to deliver the service.

13 As the Ninth Circuit noted, if the FCC wishes to leave Plaintiffs' Internet access service unregulated, the proper legal procedure is to conduct a forbearance proceeding under 47 U.S.C. § 160(a). *City of Portland,* 2000 U.S. App. Lexis 14383, at *23 24. Satisfaction of the stringent criteria for forbearance seems well nigh impossible given AT&T's enormous market power as the Nation's largest cable operator and its vertical integration with ISPs and other programming interests. Moreover, the FCC's treatment of the identical transmission service provided by DSL would render any forbearance limited to cable operators subject to challenge as arbitrary and capricious.

14 As they did below, Intervenor Defendants defer to the County on issues of Virginia law.

15 As noted above, Plaintiffs' other three preemption arguments all rest upon the erroneous premise that Internet access is a "cable service. Intervenor Defendants agree with the County that *if* that premise were true, the County's Ordinance would not be preempted by 47 U.S.C. §§ 544(e), 541(c) or 544(f)(1).

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2000 WL 35605570 (E.D.Va.) (Trial Pleading)
United States District Court, E.D. Virginia.

MEDIAONE GROUP, INC., Mediaone of Virginia, Inc., and AT&T Corporation, Plaintiffs,
v.
COUNTY OF HENRICO, VIRGINIA, Defendant,
Bell Atlantic Corporation, Bell Atlantic-Virginia, Inc. and Bell Atlantic Internet Solutions, Inc., Applicants for Intervention.

No. 3:00CV33.
February 14, 2000.

Answer

Respectfully submitted, John Thorne, Robert H. Griffen, Bell Atlantic Corporation, 1320 N. Courthouse Road, Arlington, VA 22201, (703) 974-1600.

Steven G. Bradbury, Brett M. Kavanaugh, Theodore W. Ullyot (VSB #41130), Kirkland & Ellis, 655 Fifteenth Street, N.W., Washington, DC 20005, (202) 879-5000, Attorneys for Bell Atlantic Corporation, Bell Atlantic-Virginia, Inc. and Bell Atlantic Internet Solutions, Inc.

By Applicants for Intervention Bell Atlantic Corporation, Bell Atlantic-Virginia, Inc. and Bell Atlantic Internet Solutions, Inc.

For its answer to the complaint of plaintiffs' MediaOne Group, Inc. ("MediaOne"), MediaOne of Virginia, Inc. ("MediaOne-Virginia") and AT&T Corp. ("AT&T") (collectively, "Plaintiffs"), intervenors Bell Atlantic Corporation, Bell Atlantic-Virginia, Inc., and Bell Atlantic Internet Solutions, Inc. (hereafter, collectively "Bell Atlantic" except where otherwise indicated) admit, deny, or allege as follows:

1. Bell Atlantic admits that plaintiffs have invoked the jurisdiction of this Court to challenge Henrico County ("County") Ordinance No. 469B-99 ("Ordinance"). Bell Atlantic denies the remaining allegations in Paragraph 1.

2. Bell Atlantic admits that the County enacted the Ordinance on December 14, 1999, and that the Ordinance requires that no later than December 31, 2000, MediaOne Virginia must allow requesting ISPs "access" to its "cable modem platform" on "rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other person." Bell Atlantic denies the remaining allegations in Paragraph 2.

3. Bell Atlantic denies the allegations in Paragraph 3.

4. Bell Atlantic denies the allegations in Paragraph 4.

5. Paragraph 5 sets forth the relief sought by Plaintiffs. Bell Atlantic opposes all relief sought by Plaintiffs in this action.

6. Bell Atlantic admits, on information and belief, the allegations in Paragraph 6.

7. Bell Atlantic admits, on information and belief, the allegations in Paragraph 7.

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8. Bell Atlantic admits that AT&T is a New York corporation with its principal place of business in Basking Ridge, New Jersey. Bell Atlantic admits that AT&T currently operates cable systems in other parts of the United States. Bell Atlantic is without sufficient information to admit or deny the balance of Paragraph 8.

9. Bell Atlantic admits that the County is a political subdivision formed under the laws of the Commonwealth of Virginia and is a "franchising authority" as that term is defined in 47 U.S.C. § 522(10). Bell Atlantic denies the remaining allegations in Paragraph 9.

10. Bell Atlantic admits that plaintiffs assert claims under 42 U.S.C. § 1983, the United States Constitution, and the Federal Communications Act of 1934. Bell Atlantic is without sufficient information to admit or deny whether plaintiffs have standing and whether the case is ripe -- and therefore whether this Court has jurisdiction over this action. Bell Atlantic admits that, if jurisdiction were present, venue is proper in this District.

11. Bell Atlantic is without sufficient information to admit or deny the allegations in Paragraph 11.

12. Bell Atlantic admits that historically cable operators provided one-way video programming to subscribers, including programming such as Home Box Office, Bell Atlantic is without sufficient information to admit or deny the remaining allegations in Paragraph 12.

13. Bell Atlantic admits that cable systems may be upgraded to provide high-speed two-way interactive services, including access to the Internet. Bell Atlantic provides DSL service that allows customers to obtain broadband access to the Internet. Bell Atlantic is without sufficient information to admit or deny the remaining allegations in Paragraph 13.

14. Bell Atlantic admits that ServiceCo LLC d/b/a "Road Runner" is affiliated in some manner with Plaintiffs. Bell Atlantic is without sufficient information to admit or deny the remaining allegations in Paragraph 14.

15. Bell Atlantic is without sufficient information to admit or deny the allegations in Paragraph 15.

16. Bell Atlantic admits, on information and belief, that MediaOne Virginia is the only cable system operator in Henrico County. Bell Atlantic is without sufficient information to admit or deny the remaining allegations in Paragraph 16.

17. Bell Atlantic admits that AT&T and MediaOne submitted an application to obtain the County's approval for a change of control on July 13, 1999. Bell Atlantic admits that section 7-66 of the Henrico County Code provides that the franchisee must obtain approval for a transfer of the franchise. Bell Atlantic denies the remaining allegations in Paragraph 17.

18. Bell Atlantic admits that the County enacted the Ordinance on December 14, 1999, and that the Ordinance requires that no later than December 31, 2000, MediaOne Virginia must allow requesting ISPs "access" to its "cable modem platform" on "rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other person." Bell Atlantic denies the remaining allegations in Paragraph 18.

19. To the extent that Paragraph 19 makes allegations regarding MediaOne Virginia's and AT&T's intentions or future events, Bell Atlantic is without sufficient information or knowledge to admit or deny such allegations. Bell Atlantic denies the remaining allegations in Paragraph 19.

20. Bell Atlantic admits that under MediaOne Virginia's franchise agreement, MediaOne Virginia cannot transfer control without prior approval of the County. To the extent that paragraph 20 makes allegations regarding MediaOne Virginia's and AT&T's intentions and future events, Bell Atlantic is without sufficient information or knowledge to admit or deny such allegations. Bell Atlantic denies the remaining allegations in Paragraph 20.

21. Bell Atlantic denies the allegations in Paragraph 21.

22. Bell Atlantic admits that Title II of the Communications Act regulates "telecommunications carriers" and that the FCC has implemented Title II through various reports, orders, rules, and regulations imposing duties on "common carriers" and on providers of DSL service. The statutory and regulatory requirements imposed on telecommunications carriers and DSL service providers are subject to the constraints of the Constitution. Bell Atlantic denies the remaining allegations in Paragraph 22.

23. Bell Atlantic denies the allegations in Paragraph 23.

24. Bell Atlantic denies the allegations in Paragraph 24.

25. Bell Atlantic denies the allegations in Paragraph 25.

26. Bell Atlantic admits that Section 541(b)(3)(D) of the Communications Act imposes a limitation on a "franchising authority" as stated in 47 U.S.C. § 621(b)(3)(D). Bell Atlantic denies the remaining allegations in Paragraph 26.

27. Section 541(c) of the Communications Act indicates that Title II of the Communications Act, entitled "Common Carriers," is not a residual or alternative source of regulatory authority over a cable system. Bell Atlantic denies the remaining allegations in Paragraph 27.

28. Bell Atlantic denies the allegations in Paragraph 28.

29. Bell Atlantic admits that Section 544(e) of the Communications Act imposes a limitation on a "State" or "franchising authority" as stated in 47 U.S.C. § 624(e). Bell Atlantic denies the remaining allegations in Paragraph 29.

30. Bell Atlantic denies the allegations in Paragraph 30.

31. Bell Atlantic admits that Section 544(f)(1) of the Communications Act imposes a limitation on a "Federal agency," a "State," and a "franchising authority" as stated at 47 U.S.C. § 624(f)(1). Bell Atlantic denies the remaining allegations in Paragraph 31.

32. Bell Atlantic denies the allegations in Paragraph 32.

33. Bell Atlantic denies the allegations in Paragraph 33.

34. Bell Atlantic denies the allegations in Paragraph 34.

35. Bell Atlantic denies the allegations in Paragraph 35.

36. Bell Atlantic denies the allegations in Paragraph 36.

37. Bell Atlantic denies the allegations in Paragraph 37.

38. Bell Atlantic denies the allegations in Paragraph 38.

39. Bell Atlantic denies the allegations in Paragraph 39.

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40. Bell Atlantic denies the allegations in Paragraph 40.

FIRST CLAIM FOR RELIEF

41. Bell Atlantic reincorporates its responses to paragraphs 1 through 40.

42. Bell Atlantic denies the allegations in Paragraph 42.

SECOND CLAIM FOR RELIEF

43. Bell Atlantic realleges its responses to Paragraphs 1 through 42.

44. Bell Atlantic admits the allegations in Paragraph 44.

45. Bell Atlantic denies the allegations in Paragraph 45.

46. Bell Atlantic denies the allegations in Paragraph 46.

47. Bell Atlantic denies the allegations in Paragraph 47.

THIRD CLAIM FOR RELIEF

48. Bell Atlantic realleges its responses to Paragraphs 1 through 47.

49. Bell Atlantic denies the allegations in Paragraph 49.

50. Bell Atlantic denies the allegations in Paragraph 50.

FOURTH CLAIM FOR RELIEF

51. Bell Atlantic realleges its responses to Paragraphs I through 50.

52. Bell Atlantic denies the allegations in Paragraph 52.

53. Bell Atlantic denies the allegations in Paragraph 53.

RELIEF REQUESTED

54. Bell Atlantic denies that Plaintiffs are entitled to any relief and opposes any and all relief requested by Plaintiffs in subparagraphs a) through f).

AFFIRMATIVE DEFENSE

55. Plaintiffs fail to state a claim upon which relief may be granted.

John Thorne

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February 14, 2000

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1999 WL 33622100 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

MERCURY COMMUNICATIONS LIMITED, Defendant and Appellant,
v.
COMMUNICATIONS TELESYSTEMS INTERNATIONAL, Plaintiff and Appellee.

No. 99-56358.
September 10, 1999.

Appeal from the United States District Court for the Southern District of California, The Honorable Thomas A. Whelan Case No. 98-CV-2127 (TWJAH)

Opening Brief of Appellant

Kirkland & Ellis, Robert G. Krupka, Brett M. Kavanaugh, Andrew E. Paris, James B. Ransom, 300 South Grand Avenue, Suite 3000, Los Angeles, CA 90071, (213) 680-8400, Counsel for Defendant and Appellant.

***1 CORPORATE DISCLOSURE STATEMENT**

Appellant Mercury Communications Limited is a wholly-owned subsidiary of Cable and Wireless Communications PLC ("CWC"), which, in turn, is 56% owned by Cable and Wireless PLC. No other publicly held company owns 10% or more of CWC.

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***1 STATEMENT OF JURISDICTION**

Communications Telesystems International ("CTS") filed this action in San Diego Superior Court. Pursuant to 28 U.S.C. §§ 1332 and 1441(b), Mercury removed the case to the United States District Court for the Southern District of California. The district court had jurisdiction under 28 U.S.C. § 1332.

On July 23, 1999, the district court issued an "Order Granting Plaintiffs Motion for a Preliminary Injunction." Mercury filed a notice of appeal on August 12, 1999. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. May a federal district court take the extraordinary step of issuing an antisuit injunction against prosecution of a parallel foreign suit merely because the issues and parties are duplicative?

2. In the alternative, may the federal district court issue an antisuit injunction against prosecution of the foreign suit when the parties have contractually agreed to "submit" to that foreign jurisdiction for resolution of their contract disputes?

3. In the alternative, may the federal district court issue an antisuit injunction sought by one party against prosecution of the foreign suit when the foreign court has rejected a forum non conveniens motion by that same party and ***2** ruled that the contract requires the party to "submit" to the foreign court's jurisdiction.

STATEMENT OF THE CASE

On October 23, 1998, CTS filed a breach of contract suit in San Diego Superior Court, alleging that Mercury had breached its contractual obligation to treat CTS as one of its "most favoured customers." Mercury removed the case to the United States District Court for the Southern District of California.

Two months later, on December 22, 1998, Mercury filed suit against CTS in England to recover approximately $5.2 million in invoices (plus interest) that CTS had failed to pay. On February 19, 1999, CTS filed a motion to dismiss Mercury's English action on forum non conveniens grounds. On May 27, 1999, England's High Court of Justice, Commercial Court, denied CTS' motion, holding that the contract's forum selection clause precluded CTS from resisting suit in England. Excerpts of Record ("ER") 40 at 14-18 (English Judgment). The English court ruled as follows:

[The clause] involves a contract by each party to submit to the jurisdiction of the English courts if the other chooses to bring proceedings in this country. Although neither party binds itself to bring any action here, *each of them does agree to submit to the jurisdiction if an action is brought against it*.... [A]s part and parcel of agreeing to submit to the jurisdiction each party must be taken to have recognised that this country would be an appropriate forum for ***3** the trial of the action.... *[P]articular weight should attach to the fact that the defendant has freely agreed as part of his bargain to submit to the jurisdiction.* In principle he should be held to that bargain unless there are overwhelming reasons to the contrary.... [I]t is the defendant, in this case CTS, who has brought upon itself the risk of two sets of proceedings since it must have been aware when it started its own action that Mercury might well bring proceedings here .... *If the court were generally to stay proceedings here simply on the grounds that the defendant had already commenced proceedings in another jurisdiction, it would effectively deny the plaintiff the benefit of the defendant's submission to the jurisdiction* ....

ER 40 at 14-18 (emphases added). (CTS later sought to appeal the English court's ruling, but withdrew its appeal after the district court here granted the antisuit injunction.)

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Meanwhile, Mercury also had filed a forum non conveniens motion in the federal district court. On May 4, 1999, the district court denied that motion. ER 32 at 13 (May 4 Order)

On May 18, 1999, Mercury filed its answer in federal district court, as well as a counterclaim based on the same facts at issue in the English action. On June 6, 1999, CTS moved for an antisuit injunction to prevent Mercury from prosecuting its suit against CTS in England. On July 23, the district court granted the motion and issued an order that Mercury is "hereby enjoined from further prosecuting its suit against CTS in London, England." ER 49 at 17 (July 23 Order).

***4** The district court first found that Mercury's counterclaim was in fact "compulsory" within the meaning of Fed. R.Civ.P. 13(a). Rule 13(a) provides that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim ...." The court recognized that "Rule 13(a) does not expressly prevent a pleader from asserting a claim in a subsequent suit while the first filed action in which the claim is compulsory is still pending." ER 49 at 5. The court stated, however, that "[i]n the Ninth Circuit, a district court may properly enjoin a party from prosecuting a subsequently filed foreign action where its foreign claim constitutes a compulsory counterclaim in the first filed district court action." ER 49 at 8. The court relied for this proposition on *Seattle Totems Hockey Club. Inc. v. National Hockey League,* 652 F.2d 852 (9th Cir. 1981).

The court then found that "[t]o permit Mercury to continue prosecution of the England Proceeding would directly contravene the undisputed policies of Rule 13 of the Federal Rules of Civil Procedure.... Adjudicating this issue in two separate actions is likely to result in unnecessary delay, substantial inconvenience and needless expense to the parties and witnesses. In addition, separate ***5** adjudications could result in inconsistent rulings or even a race to judgment." ER 49 at 10.

Mercury argued that the result in *Seattle Totems* did not govern this case because the party there filed the subsequent foreign litigation over 27 months after the original district court action had been filed. By contrast, Mercury filed its English Proceeding only two months after CTS initiated this action in the United States. The district court rejected that argument, however, finding it not to be a "distinguishing fact." ER 49 at 11.

Mercury also pointed to the contract's non-exclusive forum selection clause. The court found that reliance on this clause would contravene "the public policy underlying Rule 13(a)." ER 49 at 12. In addition, the court suggested that acceptance of this argument would "convert what the parties bargained for ... into a court imposed exclusive jurisdiction clause." ER 49 at 12.

The district court did not specifically address the English court's contrary decision that the contract required (i) that the parties "submit" to the jurisdiction of the English courts and (ii) that the parties therefore not resist jurisdiction in England even if a duplicative suit were pending elsewhere.

***6 STATEMENT OF FACTS**

In 1994, plaintiff CTS, a long-distance company, contracted to obtain wholesale international long-distance telecommunications services from defendant Mercury. The contract specified that Mercury would treat CTS as one of its "most favoured customers" and would not charge similarly situated customers a lower package of rates than it offered to CTS. ER 40 at 25 (Contract).

The parties also agreed as follows in the contract: "This Agreement shall be governed by, and construed in accordance with, the laws of England, and the parties hereby submit to the non-exclusive jurisdiction of the English courts." ER 40 at 25.

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SUMMARY OF ARGUMENT

For any of three alternative and independent reasons, this Court should reverse the judgment of the district court.

First, a federal court may not enjoin a foreign suit merely because the parties and issues are the same. Rather, as the vast majority of courts of appeals have concluded, principles of comity require that a federal court issue an antisuit injunction against prosecution of a foreign suit only when necessary to preserve the federal court's jurisdiction or to protect important policies. Here, the district court erred by ignoring comity and misreading the Ninth Circuit decision in ***7** *Seattle Totems* to broadly require an antisuit injunction in virtually all cases where the parties and issues in the foreign suit are the same.

Second, and in the alternative, while there appears to be no case on this precise issue, a federal district court may not enjoin prosecution of a foreign suit when (as here) the parties have expressly agreed by contract to "submit" to the foreign court's jurisdiction. By its plain terms, the language in the contract between CTS and Mercury requires that the parties "submit" to the jurisdiction of the English courts - and prevents them from resisting that jurisdiction by an antisuit injunction filed in American federal court.

Third, and again in the alternative, the English courts have already interpreted the relevant contractual language between CTS and Mercury to require that the parties submit to jurisdiction of the English courts notwithstanding the pendency of the California suit. The English court so ruled in denying CTS' forum non conveniens motion in England. The factors considered by the English court in addressing that motion (the convenience and resources of the parties in light of the contract's forum selection language) were the same factors considered by the district court here in reaching the opposite conclusion and issuing the antisuit injunction. As a matter of comity and in light of the respect due international courts - a principle that incorporates collateral estoppel principles - the English ***8** court's interpretation of the contract precludes the district court's antisuit injunction.

STANDARD OF REVIEW

This case involves purely legal issues regarding the appropriate standards under which a federal court may issue an antisuit injunction against the prosecution of a foreign suit. This Court exercises de novo review of such legal issues. *See San Antonio Community Hosp. v. So. Calif. Dist. Council of Carpenters,* 125 F.3d 1230, 1234 (9th Cir. 1997).

ARGUMENT

For any of three alternative and independent reasons, this Court should reverse the judgment of the district court.

A. Federal Courts May Not Issue an Antisuit Injunction Against Prosecution of a Foreign Suit Except to Preserve Their Jurisdiction or to Protect Important Policies in the American Forum.

1. The Majority of Courts of Appeals to Consider the Questions Have Adopted That Standard.

Federal courts have the raw power to issue antisuit injunctions against prosecution of foreign suits. *Seattle Totems Hockey Club, Inc. v. National Hockey League,* 652 F.2d 852 (9th Cir. 1981). The question, for purposes of our first argument, is the proper standard by which courts should grant them.

***9** No statute or rule governs that question. Many courts of appeals have grappled with the issue, however. In addressing this knotty question, the courts have attempted to balance the parties' desire to avoid duplicative litigation against the respect and comity owed to the courts of an independent sovereign nation.

In balancing those considerations, the majority of the courts of appeals to consider the questions have agreed that federal courts should not enjoin foreign suits unless an injunction is necessary either to preserve the federal court's jurisdiction (as in proceedings in rem) or to protect the litigant's evasion of the forum's important public policies. In particular, the D.C., First, Second, Third, and Sixth Circuits have issued lengthy and well-reasoned decisions reaching that or equivalent conclusions. *See Laker Airways Ltd. v. Sabena,* 731 F.2d 909 (D.C. Cir. 1984); *Canadian Filters Ltd. v. Lear Siegler. Inc.,* 412 F.2d 577 (1st Cir. 1969); *China Trade & Devel. Corp. v. M.V. Choong Yong,* 837 F.2d 33 (2d Cir. 1987); *Compagnie des Bauxites de Guinea v. Ins. Co. of No. Am.,* 651 F.2d 877 (3d Cir. 1981); *Gau Shan Co. v. Bankers Trust Co.,* 956 F.2d 1349 (6th Cir. 1992).

[1] Substantial academic commentary largely supports this approach as well. *See* Eric Roberson, *Comity Be Damned: The Use of Antisuit Injunctions Against the Courts of a Foreign Nation,* 147 U. Pa. L. Rev. 409 (1998); Steven Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions,* 30 Geo. Wash. J. Int'l L. & Econ. 1 (1997); Arif Haq, *Kaepa. Inc. v. Achilles Corp.: Comity in International Judicial Relations,* 22 N.C. J. Int'l L. & Com. Reg 365 (1996); Haig Najarian, *Granting Comity Its Due,* 68 St. John's L. Rev. 961 (1994); Laura Salava, *Balancing Comity With Antisuit Injunctions: Considerations Beyond Jurisdiction,* 20 J. Legis. 267 (1994); Teresa Baer, *Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach,* 37 Stan. L. Rev. 155 (1984).
The Baer article, while slightly dated, presents a particularly thorough explication of the important issues at stake in this case.

***10** Over Judge Garza's forceful dissent, the Fifth Circuit by contrast recently stated that it was constrained by stare decisis to adhere to an earlier (and rather parochial) 1970 Fifth Circuit precedent setting forth a far more expansive view of its antisuit injunctive authority. The Fifth Circuit cases hold that a foreign suit should be enjoined virtually automatically when it involves the same parties and issues. *See Kaepa, Inc. v. Achilles Corp.,* 76 F.3d 624 (5th Cir. 1996); *In re Unterweser Reederei, Gmbh,* 428 F.2d 888 (5th Cir. 1970). Given the circuit split and the importance of the issue to international relations, the question is "ripe for a Supreme Court decision." *See* Swanson, 30 Geo. Wash. J. Int'l L. & Econ. at 3.

In the Ninth Circuit, the precedent that necessarily must guide this panel's consideration is *Seattle Totems.* Some commentators and courts (including the district court in this case) have interpreted *Seattle Totems* as holding that an antisuit injunction against the prosecution of a foreign suit should issue virtually ***11** automatically (along the lines of the Fifth Circuit's approach). While one might pick out isolated snippets of *Seattle Totems* to so suggest, that interpretation would render the opinion entirely self-contradictory and nonsensical, as we will explain below.

2. The Majority Approach Is Well-reasoned and Correct.

To properly analyze *Seattle Totems,* we first must examine the approach and analysis of the vast majority of courts of appeals to address this issue. "Ordinarily when the courts of two sovereigns have in personam jurisdiction, one court will not try to restrain proceedings before the other." *Computer Associates Int'l., Inc. v. Altai. Inc.,* 126 F.3d 365, 372 (2d Cir. 1997). The D.C. Circuit's decision in *Laker Airways* is the leading court decision applying this rule in the international context and, in fact, was the "first court to provide a definitive standard considering international comity concerns." Swanson, *supra,* at 2.

The *Laker* court began by recognizing that "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other. The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction." 731 F.2d at 927. The court also pointed out that an injunction effectively

restricts the ***12** foreign court's ability to exercise its jurisdiction. And if the foreign court reacts with a similar injunction, "no party may be able to obtain any remedy." *Id.*

Based on those principles, the court concluded that an injunction would properly issue only when necessary to protect the jurisdiction of the issuing court - "when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court," *id.* - or when "necessary to prevent litigants' evasion of the forum's important public policies," *id.* at 931.

In explicating the second exception, the court stated that "laches or similar equitable principles make it more appropriate to enjoin the second action" when a party has delayed substantially in bringing the second suit. *Id.* at 929 n.63. For this proposition, the court cited *Seattle Totems* - the leading Ninth Circuit case on this issue where this court affirmed an injunction after the party had delayed 27 months before initiating the foreign suit.

The D.C. Circuit in *Laker* rejected the broader Fifth-Circuit-like approach that would call for a virtually automatic injunction against parallel foreign suits. The D.C. Circuit concluded that the economies of consolidated litigation "do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings." *Id.* at 928.

***13** This *Laker* approach - which the vast majority of courts of appeals have adopted - is the right approach. To reject *Laker* is to conclude that the parties' narrow concern for their own resources (which in many cases will be addressed, in any event, by the grant of a forum non conveniens motion in one or the other jurisdiction) outweighs important considerations of international comity.

Indeed, efficiency and resource considerations do not authorize federal courts to issue antisuit injunctions even against *state* court proceedings (or authorize state courts to issue antisuit injunctions against federal court proceedings). If the efficiency concerns are not sufficient in those circumstances, how can they possibly justify enjoining *foreign* suits, where far more delicate issues of comity and respect come into play (given that the one jurisdiction is not a constituent part of the other, unlike the state-federal situation)? *Cf.* Baer, 37 Stan. L. Rev. at 162-63 n.23. In trying to explain why its approach is *right,* not just to explain that its approach is required by *Seattle Totems,* CTS *must* persuasively answer that fundamental legal and policy question.

In this regard, the Supreme Court's analogous decision in *Donovan* is quite instructive. *See Donovan v. City of Dallas,* 377 U.S. 408, 412 (1964). There, the Supreme Court considered the proper standard for a state court to enjoin a parallel federal proceeding. As here, no statute or rule provided the answer. But the ***14** Supreme Court held that an antisuit injunction should not issue (except for in rem cases).

The Court explained that "[e]arly in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings." *Id.* at 412. Congress had "in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here." Id. at 412-13. The Court thus held that state courts could not issue an antisuit injunction against federal court proceedings. *See also Baker v. General Motors Corp.,* 522 U.S. 222, 1185 S. Ct. 657, 665 n.9 (1998).

As to the converse situation of federal courts' ability to enjoin *state* court suits, a statute addresses the issue. The Anti-Injunction Act, first enacted in 1793 and one of the oldest federal statutes, prohibits federal courts from enjoining state court proceedings (except in certain rare and defined circumstances, such as to preserve in rem jurisdiction, that do not apply here). *Donovan* and the Anti-Injunction Act each establish that, in this country, efficiency concerns do not justify ***15** courts issuing antisuit injunctions against the judicial proceedings of a separate sovereign. [2]

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2 At first glance, one might contend that the Anti Injunction Act implies, based on the *expressio unius* canon of statutory interpretation, that courts are free to issue antisuit injunctions as a matter of course in other circumstances not governed by statute. But the *Donovan* Court rejected precisely that reasoning, concluding that background common law principle applied regardless whether a specific statute existed.

That comity principle, applied in those situations as to separate federal and state sovereigns, has even greater force in the international arena. *In re Simon,* 153 F.3d 991, 996 (9th Cir. 1998) (rationale of *Donovan* extends to foreign proceedings). After all, comity in the *international* arena is a critically important common-law principle that has been applied in countless decisions of the courts of this country and others around the globe. As the Supreme Court has explained, comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation ...." *Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895).

Every court to consider the antisuit injunction question thus has recognized the importance of comity to the issue. *See Seattle Totems,* 652 F.2d at 855. As most courts have recognized, an antisuit injunction flies in the face of the comity ***16** principle, "convey[ing] the message ... that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility." *Gau Shan,* 956 F.2d at 1355. An antisuit injunction "effectively restrict[s] the foreign court's ability to exercise its jurisdiction." *Laker,* 731 F.2d at 927. As a result, "antisuit injunctions are even more destructive of international comity than, for example, refusals to enforce foreign judgments. At least in the latter context, foreign courts are given the opportunity to exercise their jurisdiction." *Gau Shan,* 956 F.2d at 1355.

If "domestic courts fail to follow comity and issue antisuit injunctions, foreign courts will likely respond in a similar manner in the future." Michael Schimek, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach,* 45 Baylor L. Rev. 499, 505 (1993); *see also* Swanson, 30 G. Wash. J. Int'l L. & Econ. 1, 32 ("If U.S. courts enjoin foreign actions regularly, foreign courts will likely respond in kind, creating gridlock and making transnational business more difficult."). That is precisely what happened in *Laker.* The result can be chaos, which explains one commentator's admonition that "[i]gnoring the differing interests of a foreign tribunal overlooks the lessons learned centuries ago in England about the disruptive effect of antisuit injunctions." Roberson, 147 U. Pa. L. Rev. at 427.

***17** Antisuit injunctions cause a deleterious effect not only on international legal relations, but also on international business. "The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations." *Gau Shan,* 956 F.2d at 1354. "The inappropriate use of antisuit injunctions can have unintended, widespread effects. International commerce depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets.... The issuance of antisuit injunctions threatens predictability by making cooperation and reciprocity between courts of different nations less likely." *Id.* at 1355.

And contrary to the district court, Rule 13(a) of the Federal Rules does not speak to antisuit injunctions or trump the principle of comity recognized by so many courts. Rule 13(a) merely provides that defendants must bring compulsory counterclaims in federal actions (or forfeit them in the future by operation of res judicata or related doctrines). The Rule does not grant authority to the federal court to enjoin other parallel or overlapping actions in independent sovereigns (whether state or foreign courts). *See* Wright & Miller, 6 Fed. Prac. & Proc.Civ.2d § 1418 ("Clearly the language of Rule 13(a) cannot be construed as empowering the federal court to restrain state court proceedings."). Indeed, such an interpretation of Rule 13 would almost certainly violate the Rules Enabling Act. *See* ***18** 28 U.S.C. § 2072; *cf.* Wright & Miller, 6 Fed. Prac. & Proc.Civ.2d § 1417 ("[I]t is doubtful whether the rulemakers are given the power by the Rules Enabling Act to ... extend the effect of the federal rules to the state courts.").

All of that surely explains why no court (save the district court here) has found that Rule 13(a) requires an antisuit injunction against prosecution of cases pending in a separate sovereign (whether state or foreign). *Cf. Kaepa,* 76 F.3d at

628 n. 14 (adhering to lax standard in which antisuit injunctions are granted as matter of course, but refusing to base its decision on Rule 13); *Seattle Totems,* 652 F.2d at 855 (noting Rule 13's existence, but stating that antisuit injunctions should be issued "sparingly" and not reading Rule 13 to require a rule in favor of antisuit injunctions).

The proper approach, then, when dual federal and foreign suits exist is for the courts to consider any forum non conveniens motions. That doctrine "helps solve the problems of inconvenient and duplicative litigation" without requiring resort to the meat cleaver of an antisuit injunction. Baer, 37 Stan. L. Rev. at 170. To be sure, in some cases (as here), if courts in both fora deny the motions, both suits will proceed apace. But that possibility, which in most cases will terminate when one court reaches judgment and res judicata can be pled, surely does not ***19** necessitate an antisuit injunction, which may well be reciprocated, leaving the parties without any forum at all. [3]

[3] The district court erred in analyzing our opposition to CTS' antisuit injunction as if it were essentially the same as our forum non coveniens motion. *See* ER 49 at 10. "In contrast to granting an international antisuit injunction, ... dismissing a case of the ground of forum non conveniens promotes comity instead of hindering it. Baer, 37 Stan. L. Rev. at 173.

In sum, the important comity considerations at stake here, the long-settled policy against antisuit injunctions in federal-state cases, and the absence of any statute or rule authorizing or requiring antisuit injunctions against foreign suits combine to compel the conclusion that the *Laker* majority approach is also the right approach.

3. in Rejecting the Majority Approach, the District Court Erred by Ignoring Comity Considerations.

As we will explain shortly, the district court thought that existing Ninth Circuit precedent required it to grant the injunction. ER 49 at 8 n. 2. The court also suggested that it would have reached the same decision even absent the Ninth Circuit precedent. ER 49 at 15 n. 5. In that regard, however, the district court paid mere lip service to the comity principle, stating simply that "the equitable considerations presented in this case substantially outweigh the minimal impact upon comity that issuance of the injunction would occasion." *Id.*

***20** Even apart from the fact, explained below, that the district court's comity analysis did not account for the highly relevant forum selection clause and English court judgment, the district court's conclusory statement reflected a fundamentally flawed vision of comity. To wit: The interest in comity may sometimes look insignificant in a single case. But many systemic legal principles can look underwhelming within the cauldron of a particular case - the attorney-client privilege, for example. Like many legal doctrines, therefore, comity rests on a longer-term vision that recognizes the systemic considerations that justify adherence to the doctrine in run-of-the-mine cases. [4]

[4] In finding comity "outweighed here, the district court further reasoned that an antisuit injunction was necessary to preserve CTS' discovery rights. ER 49 at 13, 15. That betrays the court's fundamental confusion about the difference between a forum non conveniens motion and an antisuit injunction. The antisuit injunction issue (whether granted or denied) has zero effect on the San Diego action and thus no effect on discovery.

By focusing on "the minimal impact on comity that issuance of the injunction would occasion," the district court entirely overlooked that critical point. And the upshot is that the district court's analysis shows absolutely no recognition of the fact that "it is serious business to issue an injunction against proceedings in a sister nation. This is most keenly true with respect to a nation from which we ***21** inherited so much of our legal system." *Laker,* 731 F.2d at 959 (Starr, J., dissenting).

4. The Ninth Circuit's Decision in *Seattle Totems* is Consistent with the Majority Approach.

In any event, the district court also stated that the majority approach, and the policy and legal arguments in support of that approach, were all but irrelevant because this court's decision in *Seattle Totems* was to the contrary. We agree, of course, that *Seattle Totems* is binding precedent on panels in this circuit, but the district court (and certain other courts and commentators before it) have misread that decision. *Seattle Totems* in no way prevents this Court from applying the test advanced by the majority of courts.

To begin with, the broad reading of *Seattle Totems* advanced by the district court here (and by some other courts and commentators) renders the case entirely incoherent and internally inconsistent - which necessarily means that the district court's interpretation cannot be correct.

To be specific, the *Seattle Totems* court explained that although a federal district court with jurisdiction over the parties may have the power to enjoin the parties from proceeding with an action in courts of a foreign country, that power should be "used sparingly." 652 F.2d at 852, 855. An earlier Ninth Circuit case on ***22** which *Seattle Totems* relied stated that "it must appear that an equitable right will otherwise be denied... The power [to enjoin a party from prosecuting a suit in a foreign jurisdiction] is not to be lightly exercised." *Philp v. Macri,* 261 F.2d 945, 946 (9th Cir. 1958) (emphasis added; citation omitted). *Seattle Totems* also cited with approval *Canadian Filters (Harwich) Ltd. v. Lear Siegler. Inc.,* 412 F.2d 577, 578 (1st Cir. 1969), where the court had stated that "the direct effect of the district court's action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint." *Id.* (emphasis added).

Seattle Totems thus stands for the proposition that the raw power to issue antisuit injunctions against prosecution of foreign suits is to be "used sparingly," is "not to be lightly exercised," and is to be "used only with care and great restraint." Those formulations of the standard require that a federal court, when considering whether to issue an antisuit injunction against prosecution of a foreign suit with the same parties and issues, ordinarily must decline to issue the injunction.

The district court here, by contrast, read *Seattle Totems* to mean that an antisuit injunction should be granted virtually automatically when the parties and issues are the same. In particular, the district court concluded that "the issuance of an antisuit injunction is warranted" virtually always when the claim the parties and ***23** issues are the same. If that were true, of course, the plain sense of *Seattle Totems*' admonition that "such power must be used sparingly" would be obliterated.

To be sure, the court in *Seattle Totems* quoted from an earlier Fifth Circuit case that had cited a number of "factors," and it is true that the "factors" identified in that Fifth Circuit case could well require an injunction in virtually all cases where the issue arises. In interpreting the *Seattle Totems* opinion, however, focusing on those factors in isolation would neuter the court's earlier pronouncement that antisuit injunctions should issue only "sparingly." As a result, *Seattle Totems* must stand for a narrower proposition that makes sense out of the court's statement that antisuit injunctions are to be issued "sparingly." *See* Baer, 37 Stan. L. Rev. at 174 (noting that Fifth Circuit factors cited in *Seattle Totems* "appear in every case involving parallel proceedings. Surely the [*Seattle Totems*] court did not wish to set the precedent that an American court should always enjoin foreign parallel proceedings.").

This court's task, then, is to reconcile (i) *Seattle Totems*' forcefully expressed reluctance to grant antisuit injunctions when the issue of duplicative federal-foreign suits arises *and* (ii) its decision to affirm the antisuit injunction in that case. *See generally* Ruggiero Aldisert, *The Judicial Process* (1996).

***24** The court has two options, both of which lead to the same result. The court could try to divine a core holding from *Seattle Totems* that explains both aspects of the opinion. Or the court could conclude that *Seattle Totems* simply does not present any coherent legal standard to guide future cases and that the proper standard for issuing antisuit injunctions against foreign courts remains an open issue in this Circuit.

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If this court attempts to reconcile the seemingly contradictory aspects of *Seattle Totems,* the best (indeed, only) way is as follows. This court must focus on the particular facts in *Seattle Totems* that would have justified the court to say that antisuit injunctions are to be issued "sparingly," but also have allowed the court to affirm the injunction in that case.

One central fact stands out - and the *Seattle Totems* court identified the fact in its introduction: The defendant in the federal suit had waited 27 months before filing the parallel foreign suit. This extraordinary delay bespoke a lack of good faith and a sitting on one's rights (laches) that arguably justified the district court in issuing an injunction. Indeed, such a delay is virtually tantamount to an agreement not to contest exclusive jurisdiction in the federal court. In any event, the federal forum certainly has an inherent policy interest in ensuring that a party not delay for strategic advantage before filing a second parallel suit. *Cf.* Fed. R.Civ.P. 1, 12.

***25** As we outlined above, the majority approach of the courts of appeals has established two exceptions to the general principle that antisuit injunctions should not be issued - (i) to preserve the federal court's jurisdiction and (ii) to protect important federal policies. As to *Seattle Totems,* the party's extraordinary delay in filing the foreign suit at issue fits that case snugly within the second exception identified by *Laker* and subsequent cases. Indeed, the D.C. Circuit in its seminal *Laker* decision stated that "when substantial time has lapsed between the commencement of the two actions, laches or similar equitable principles make it more appropriate to enjoin the second action." 731 F.2d at 929 n.63. In support of that proposition, the court cited this Court's decision in *Seattle Totems,* which is a telling indication that the fact of delay is of importance in understanding *Seattle Totems.*

In the end, *Seattle Totems* is not a model of clarity. The only way to interpret *Seattle Totems* to make sense both of its "sparingly" language and its conclusion that the injunction issued in that case was permissible is to focus on the delay that had occurred in that case. (To be sure, some other courts and commentators have read *Seattle Totems* far more broadly, but they have done so by ignoring the "sparingly" language in the *Seattle Totems* opinion.)

***26** Alternatively, this court could conclude that *Seattle Totems* has no clear legal standard that can possibly guide resolution of this and future cases. If a decision is so internally contradictory and nonsensical, it cannot be said to have a legal "holding" that governs future cases. *Cf. Nichols v. U.S.,* 511 U.S. 738, 74546 (1994). To be sure, that juridical doctrine must be narrowly cabined, but it legitimately can apply here.

No matter which of those two interpretive paths this court chooses, the court should expressly adopt the majority standard as outlined in *Laker.* If the court does so, the district court's decision clearly must be reversed, as neither CTS nor the district court has suggested that this case could fall within either exception to the majority's general rule against antisuit injunctions.

B. in the Alternative, the Parties' Forum Selection Clause Precludes the Antisuit Injunction.

Of course, this court need not address *Seattle Totems* if it agrees with either of our other two alternative arguments outlined in this and the next section. (Thus, even if the court were to find, for example, that *Seattle Totems* requires the antisuit injunction, that conclusion would *not* resolve this appeal.)

The forum selection clause in the parties' contract provides an alternative and independent basis for reversing the district court's judgment. CTS and ***27** Mercury contractually agreed as follows: "This Agreement shall be governed by, and construed in accordance with, the laws of England, *and the parties hereby submit to the non-exclusive jurisdiction of the English courts.* " ER 40 at 25 (Contract) (emphasis added). Because of the forum selection clause, this court should grant *no* weight to CTS' desire to avoid duplicative litigation (even if the court otherwise would consider that factor sufficient to outweigh comity considerations and justify an antisuit injunction). In particular, when CTS filed suit in San Diego, CTS was well aware of the forum selection clause and of CTS's duty to "submit" to jurisdiction in England if Mercury

filed suit there. Any duplication of litigation (and attendant expenditure of resources for CTS) thus would be the direct result of CTS' decision to bypass the forum to which the parties agreed to "submit" in the contract.

As England's High Court of Justice explained, the effect of the contract's language is to give to each party the right to sue in England and to oblige each party not to resist being sued in England. ER 40 at 14-15. Similarly, in its May 4 order denying CTS's motion to dismiss (before CTS' motion for antisuit injunction had been filed), the district court in this case stated that "the provision certainly requires the parties to not dispute jurisdiction if and when they are haled into an English court." ER 32 at 8.

***28** For two reasons, the district court in its subsequent order granting the antisuit injunction found that the contract's language did not prevent an antisuit injunction against prosecution of the English suit. Neither of the district court's rationales is remotely persuasive, however.

First, the district court stated that interpreting the contract to prevent an antisuit injunction would contravene the public policy underlying Rule 13(a) (regarding compulsory counterclaims) and would result in an undue race to judgment. To begin with, apart from rare exceptions not implicated here, parties are free to bargain away rights they otherwise might possess. *See United States v. Mezzanatto,* 513 U.S. 196, 201 (1995) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit") (citation omitted). In any event, as explained above, Rule 13(a) simply does not speak to the question of antisuit injunctions in this context. The district court thus erred in finding that Rule 13(a) - and the public policy underlying it - overrides the express contractual language in which the parties agreed to submit to the English court's jurisdiction. [5]

[5] The district court also cited the "first filed rule. ER 49 at 5. That rule is irrelevant here. It allows a district court to transfer, stay, or dismiss an action when a similar complaint has already been filed in another federal court. *Alltrade. Inc. v. Uniweld Products. Inc.,* 946 F.2d 622, 623 (9th Cir. 1991). "The rule has never been applied, and in fact it was never meant to apply, where the two courts involved are not courts of the same sovereignty. *Compagnie des Bauxites de Guinea v. Insurance Co. of North America,* 651 F.2d 877, 887 n. 10 (3d Cir. 1983).

***29** Second, the district court found the forum selection clause of limited relevance "because the clause only requires the *non-exclusive* jurisdiction of English courts." ER 49 at 12 (emphasis original). The district court explained that the "non-exclusive" language means that the parties can sue in jurisdictions other than England and that there was no basis for ruling that suits under the contract "*only* proceed in England." ER 49 at 12.

But that point, while true, is entirely irrelevant because that is not the issue here. We do not contend that suits under the contract must occur *only* in England. Our more limited submission to this court - and the distinction, overlooked by the district court, is absolutely critical - is that a party to this contract cannot seek to prevent the English court's exercise of its jurisdiction even though that party is free also to bring suit elsewhere.

Under the contract, the parties agreed to "submit" to the "non-exclusive" jurisdiction of the English courts and agreed that English law would apply. By using the terms "submit" and "*non-exclusive* jurisdiction" and specifying the choice of law, the parties evinced their understanding that they would litigate in the ***30** English courts under English law if one party filed suit there. Otherwise, the language would have no meaning.

If the phrases "submit" and "non-exclusive" mean that the English courts are merely an available forum, then the language is meaningless because that would be true even without the contractual language. On the other hand, the language does not require *exclusive* jurisdiction - namely, that all suits be brought in the English courts.

The only possible interpretation of the phrases "submit" and "nonexclusive," therefore, is that a party must submit to jurisdiction in the English courts and under English law if one party files suit there. The fact that the defendant in

the English court might find another forum a more convenient or appropriate or efficient venue does not trump that bargained-for language. And if a party files suit in the designated forum, the defendant has absolutely no equitable basis to object to that court's exercise of jurisdiction.

To be sure, the contract's "non-exclusive" language does not necessarily prevent a party to the contract from filing suit - even a parallel suit - in a country other than England. But the "submit" language logically must prevent a party from directly or indirectly resisting the English court's exercise of its jurisdiction.

***31** That interpretation of the forum selection makes particular sense here given that an antisuit injunction against foreign proceedings is an extraordinary remedy that federal courts disfavor (as we explained above). This court has emphasized that such injunctions should be issued "sparingly" because of their effect on international relations. The existence of a forum selection clause contractually obliges a party to consent to a foreign court's exercise of its jurisdiction and thus defeats any equitable considerations of efficiency and convenience that a party otherwise might advance to override comity and support an antisuit injunction.

In sum, in this second alternative argument on appeal, a simple and thoroughly sensible rule of federal law would quickly and easily dispose of this case (without requiring the court to address *Seattle Totems*): When parties contractually agree to a non-exclusive forum selection clause in which they agree to "submit" to the jurisdiction of a foreign court, the parties may not later resist the jurisdiction of *that* foreign court by a motion for antisuit injunction filed in federal court in the United States. For that reason alone, this court can reverse the judgment of the district court.

***32 C. In the Alternative, the English Court's Decision Precludes the Antisuit Injunction.**

There is a third independent and alternative basis for reversing the district court. The English courts have already interpreted the contract in the manner we just suggested. As a matter of comity, the English court's interpretation strongly counsels against allowing CTS to relitigate the meaning of the contract in the federal courts in the United States.

The English court ruled as follows:

> [A] clause of that kind involves a contract by each party to submit to the jurisdiction of the English courts if the other chooses to bring proceedings in this country. Although neither party binds itself to bring any action here, *each of them does agree to submit to the jurisdiction if an action is brought against it*.... [A]s part and parcel of agreeing to submit to the jurisdiction *each party must be taken to have recognised that this country would be an appropriate forum for the trial of the action*.... [P]articular weight should attach to the fact that the defendant has freely agreed as part of his bargain to submit to the jurisdiction. In principle he should be held to that bargain unless there are overwhelming reasons to the contrary.... [I]t is the defendant, in this case CTS, who has brought upon itself the risk of two sets of proceedings since it must have been aware when it started its own action that Mercury might well bring proceedings here .... *If the court were generally to stay proceedings here simply on the grounds that the defendant had already commenced proceedings in another jurisdiction, it would effectively deny the plaintiff the benefit of the defendant's submission to the jurisdiction* and encourage other parties who have had second thoughts about their contracts to rush to begin proceedings in another forum.

ER 40 at 14-18 (emphases added).

***33** The English court concluded that the contract did not allow the court to grant CTS' forum non conveniens motion. In reaching that conclusion, the court explained that, under the contract, the parties could not object to jurisdiction in the English courts - even with a duplicative suit pending elsewhere - without violating the letter and spirit of the contract.

That decision is important. It is true that collateral estoppel does not necessarily apply of its own force to decisions of foreign courts. It is also true that the ultimate decision whether to grant an antisuit injunction, and the precise weight to give a forum selection clause in that analysis, may be a matter of federal law. But neither of those points requires that a federal court disregard the principle of comity and ignore the interests of the foreign courts. Thus, American courts have not hesitated, as a matter of comity, to afford the equivalent of collateral estoppel effect to judgments of foreign courts. *See In-Tech Marketing. Inc. v. Hasbro, Inc.,* 719 F. Supp. 312, 316 (D.N.J. 1989) ("The touchstone of both principles [comity and collateral estoppel] is whether the prior proceeding was essentially a fair one for the party now to be bound by its result."); *see also Hilton,* 159 U.S. at 202-03.

Here, there is no plausible reason that federal courts would ignore the English court's interpretation of the forum selection clause's interaction with the efficiency and convenience considerations that CTS has cited in trying to halt the ***34** English litigation. If a foreign court concludes that its forum is convenient based on language in the parties' contract, and thus rejects a forum non conveniens transfer, it is wholly inappropriate for a federal court to conclude that the *foreign* forum is, in fact, *not* convenient and on that basis issue an antisuit injunction. Let us be clear: It is one thing for the federal court to conclude that its own forum is covenient (an action entirely within its authority); it's an entirely different matter for the federal court to conclude, as the district court here did, that the *foreign forum* is inconvenient (contrary to the foreign court's own determination) and for the federal court to take the drastic step of issuing an antisuit injunction.

For this reason alone, this court can reverse the district court's order.

CONCLUSION

The judgment of the district court should be reversed.

*37 STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Mercury states that it is unaware of any related cases pending in this Court.

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1999 WL 33622099 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

MERCURY COMMUNICATIONS LIMITED, Defendant and Appellant,
v.
COMMUNICATIONS TELESYSTEMS INTERNATIONAL, Plaintiff and Appellee.

No. 99-56358.
October 22, 1999.

Appeal from the United States District Court for the Southern District of California, The Honorable Thomas A. Whelan Case No. 98-CV-2127 (TWJAH)

Reply Brief of Appellant

Kirkland & Ellis, Robert G. Krupka, Brett M. Kavanaugh, Andrew E. Paris, James B. Ransom, 300 South Grand Avenue, Suite 3000, Los Angeles, CA 90071, (213) 680-8400, Counsel for Defendant and Appellant.

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***1** INTRODUCTION

CTS's entire brief boils down to its contention that this Court's decision in *Seattle Totems Hockey Club. Inc. v. National Hockey League,* 652 F.2d 852 (9th Cir.) *cert. denied,* 457 U.S. 1105 (1982) plainly requires affirmance of the district court's decision to issue an antisuit injunction. That argument is fundamentally flawed for two reasons.

First, as we explained in our opening brief, this Court need not address *Seattle Totems*' holding as to the standard for issuing an antisuit injunction in the ordinary case because we have raised two additional arguments that are unique to this case and do not depend on or implicate *Seattle Totems.*

The contract's forum selection clause requires that CTS and Mercury "submit" to the jurisdiction of the English courts for their contract disputes. While that language does not require that suit proceed *only* in England, it necessarily precludes CTS from resisting suit in England, including by means of an antisuit injunction in American court.

Alternatively, the English court, in ruling on CTS' forum non conveniens motion, already held that the contract precluded CTS from resisting suit in the ***2** English courts. The district court erred by not deferring to the English court's interpretation of the contract.

CTS has no answer to those two arguments, and either argument requires reversal regardless of which party to this appeal has provided the best interpretation of *Seattle Totems.*

Second, even were this Court to decide that the forum selection clause and the English court's ruling are not dispositive, and that the case thus depends upon a proper application of *Seattle Totems,* CTS offers no explanation for the *Seattle Totems* Court's express admonition that antisuit injunctions are to be issued "sparingly." In our view, that language

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demonstrates that this Court can and should adopt the majority *Laker* approach: that antisuit injunctions should not issue unless necessary to protect the court's jurisdiction or important policies in the federal forum. Under that approach - an approach in which antisuit injunctions would in fact be issued "sparingly," as *Seattle Totems* requires - the antisuit injunction in this case was clearly improper.

I. The Standard of Review is De Novo.

CTS claims that the district court's order is subject to review for abuse of discretion. CTS Br. at 8. That's incorrect. All three of our arguments are purely ***3** legal and subject to *de novo* review.

At the outset, notwithstanding its rhetoric, even CTS concedes that in this antisuit injunction context, legal arguments are subject to de novo review. In particular, CTS quotes from this court's case law in stating that "where the district court is alleged to have relied on erroneous legal premises, review is plenary." CTS Br. at 11 (citations omitted). Our argument here is exactly that: The district court relied on erroneous legal premises.

First, as to the contract, we advance a straightforward *legal* argument: When parties contractually agree to a non-exclusive forum selection clause in which they agree to "submit" to the jurisdiction of a foreign court, the parties may not later resist the jurisdiction of *that* foreign court by a motion for antisuit injunction filed in federal court in the United States.

Second, our argument concerning the English court's decision also is purely legal: When a foreign court, in addressing a party's forum non conveniens motion, concludes that the contract's non-exclusive forum selection clause precludes the party from relying on efficiency and convenience considerations to resist suit in the foreign tribunal, comity requires that the federal court reach the same conclusion in deciding the party's antisuit injunction motion in the United States.

***4** Third, we also have argued that federal courts may not issue an antisuit injunction against prosecution of a foreign suit except to preserve their jurisdiction or to protect important policies in the American forum. As to this argument, CTS contends that this Court's decision in *Seattle Totems* adopted a different legal standard. Our dispute with CTS thus concerns the proper legal standard for issuance of an antisuit injunction. We do not here contend (i) that the district court considered the appropriate test but simply incorrectly applied it or (ii) that the court made incorrect findings of fact. If those were our arguments, we would agree that abuse of discretion or clearly erroneous is the appropriate standard of review. Because those are not our arguments, CTS is incorrect in asserting that abuse of discretion is the proper standard of review on these legal issues.

In sum, CTS' argument as to the standard of review is incorrect as applied to the three straightforward and purely legal arguments that we have raised as alternative grounds for reversal.

II. The Parties' Forum Selection Clause Precludes the Antisuit Injunction.

CTS and Mercury contractually agreed as follows: "This Agreement shall be governed by, and construed in accordance with, the laws of England, *and the parties hereby submit to the non-exclusive jurisdiction of the English courts."* ER ***5** 40 at 25 (Contract) (emphasis added). As we explained in our opening brief, the underscored language compels reversal of the district court's decision. Indeed, the following simple rule would quickly and easily dispose of this appeal (without requiring the court to address the more difficult *Seattle Totems* issue): When parties contractually agree to a non-exclusive forum selection clause in which they agree to "submit" to the jurisdiction of a foreign court, the parties may not later resist the jurisdiction of *that* foreign court by a motion for antisuit injunction filed in federal court in the United States.

CTS offers three arguments in response, none of which is correct.

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1. in the District Court, We Raised the Contract Argument Repeatedly, and the District Court Specifically Addressed It.

CTS contends that we did not raise our contract-based argument below and "[i]t is therefore improper to argue this new legal theory for the first time in this appeal." CTS Br. at 30-31. That's incorrect. In the district court, we not only relied on the contract's forum selection language, but resorted to it *repeatedly* in our opposition to CTS' motion for an antisuit injunction.

[1] At page 2 of our opposition, we cited and discussed the forum selection clause in summarizing the relevant facts. Appellant's Further Excerpts of Record ("FER 39) at 6 (Mercury's Opposition to CTS' Motion to Enjoin). We stated that the contract's forum clause distinguished this case from others CTS cited. FER 39 at 9, 12, 14. We argued that " i]n this case, the parties agreed that England would be an appropriate forum for the resolution of any contract disputes, and that if one party instituted proceedings there, the other would not contest jurisdiction. FER 39 at 15. We continued: "In fact, under the interpretation of both this Court and the English court, it follows that CTS' attempt to enjoin Mercury's English proceedings itself probably constitutes a breach of the contract's forum clause. FER 39 at 18. We then emphasized that " t]he parties bargained for the right to have disputes under the contract adjudicated in an English court....CTS seeks to summarily strip Mercury of that] right. Such a precedent would effectively deny Mercury the benefit of CTS' agreement to submit to English jurisdiction and English law. FER 39 at 19 20.

***6** Indeed, one need look no further than the district court's opinion, one section of which is entitled: "*The non-exclusive forum selection clause does not alter the court's analysis.*" ER 49 at 11. (The court's opinion bolded and underlined that sentence.) And in the first sentence of that section, the court stated: "*Mercury next contends that* the Contract's forum selection clause by which the parties agreed to submit to non-exclusive English jurisdiction requires that both actions proceed simultaneously." ER 49 at 11 (emphasis added). The court also noted that at oral argument we had argued that CTS "breached the non-exclusive forum selection provision." ER 49 at 12 n.4. The court then spent 1 ½ pages of its 17-page opinion discussing the forum selection clause. To be sure, the court rejected our argument regarding the forum selection clause, but the court had no doubt (and there is no doubt) that we made that argument.

***7 2. The Contract Precludes CTS From Resisting the Jurisdiction of the English Courts by Means of an Antisuit Injunction.**

CTS also contends that the forum selection clause does not preclude an antisuit injunction because an antisuit injunction "does not question the existence of the foreign court's jurisdiction over the parties." CTS Br. at 31. That argument makes no sense. As we explained in our opening brief, the contract speaks to the *parties*' obligations and *requires* that the parties "*submit*" to the "non-exclusive" jurisdiction of the English courts. As England's High Court of Justice explained, the effect of the contract's language is clear: It gives each party the right to sue in England and to oblige each party not to resist being sued in England. ER 40 at 14-15.

The non-exclusive forum selection clause thus logically and necessarily precludes the defendant in the case filed in English court from resisting that suit by means of (i) a motion to dismiss for lack of personal jurisdiction in the English court, (ii) a forum non conveniens or venue-transfer motion in the English court, or (iii) a motion for antisuit injunction filed in some other court (which if granted has the same practical effect as a forum non conveniens ruling in the English court).

CTS contends that notwithstanding the non-exclusive forum selection clause, it may resist Mercury's suit in England on the ground that litigation in San Diego ***8** would be more efficient and convenient. But what's most telling is that CTS' argument, if accepted, would mean that the contract's forum selection clause - which the parties bargained for at arms' length - would accomplish absolutely nothing. Indeed, CTS has not even *attempted* to provide any meaning for that clause, which is a glaring omission in its brief.

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Contrary to CTS's argument, courts enforcing *non-exclusive* forum clauses have held that parties to them generally cannot resist a suit filed in the designated forum by arguing (as CTS does here) that another forum would be more efficient or convenient. *See Northwestern Nat'l Ins. Co. v. Donovan,* 916 F.2d 372, 378 (7th Cir. 1990) ("[O]ne who has agreed to be sued in the forum selected by the plaintiff has thereby agreed not to seek to retract his agreement by asking for a change of venue on the basis of costs or inconvenience to himself."); *United Mortgage Corp. v. Plaza Mortgage Corp.,* 853 F. Supp. 311, 315 (D. Minn. 1994) ("Because [the defendant] expressly consented to the choice of Minnesota as a forum the court has little sympathy for [the defendant's] claims of inconvenience in defending suit in Minnesota."); *Quinones v. Swiss Bank Corp.,* 509 So. 2d 273, 274-75 (Fla. 1987) (Non-exclusive jurisdictional clauses are "consent to jurisdiction and venue in the named forum").

***9** And the Supreme Court, too, has recognized that the designation of a forum in a contract (there, in an exclusive forum selection clause) is flatly inconsistent with any later argument that the designated forum is inconvenient. *See M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 17 (1972) ("Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting").

As we said in our opening brief, the contract here does not require that a suit be brought *only* in England - and thus did not preclude CTS from filing its suit in California. But the language prohibits CTS from resisting the suit filed by Mercury in England. And contrary to CTS' suggestion, neither the contract nor any principle of law precludes two suits from proceeding simultaneously in English court and another court.

In short, by seeking an antisuit injunction that prevents Mercury from prosecuting the case in the English courts, CTS has not "submit[ted]" to the jurisdiction of the English court as the contract requires.

3. *Seattle Totems* Analyzed a Contractual Choice-of-Law Provision, Not a Non-Exclusive Forum Selection Clause and Thus Did Not Address This Argument.

Finally, CTS argues that *Seattle Totems* rejected "essentially the same ***10** argument" that we have made here regarding the forum selection clause. CTS Br. at 31. That's incorrect. The contract clause analyzed in *Seattle Totems* was a choice-of-law provision, not a forum selection clause.

As *Seattle Totems* held, a choice-of-law provision does not itself compel a decision one way or another as to the propriety of an antisuit injunction. 652 F.2d at 854. Therefore, if the contract here specified that English law applied, but was silent about forum, we would not rely on the contract alone to argue against the antisuit injunction. But the contract here does much more than that: It also specifies that the parties have agreed to "submit" to the non-exclusive jurisdiction of the English courts. And *Seattle Totems* did not consider the import of a non-exclusive forum selection clause to the propriety of an antisuit injunction. [2]

[2] CTS also suggests that we are relying on English procedural law in making this contract argument. CTS Br. at 32. Not at all. Our simple submission is that, as a matter of United States law, an antisuit injunction is legally improper when the parties have contractually agreed to "submit to the jurisdiction of the foreign forum.

III. The English Court's Decision Precludes the Antisuit Injunction.

In our opening brief, we identified a second basis for reversing the district court - one that does not require the Court to grapple with the *Seattle Totems* issue or even to interpret for itself the contract's forum clause. The English court has ***11** already interpreted the contract in response to CTS's forum non conveniens motion in England and concluded that the forum selection clause precludes CTS from resisting jurisdiction in England on grounds of inefficiency and

inconvenience. The federal district court should have deferred to the English court's interpretation and not independently reexamined whether the contract precludes CTS from relying on convenience and efficiency considerations to support an antisuit injunction.

In response, CTS offers four arguments, none of which is persuasive.

1. in the District Court, We Raised this Argument Repeatedly.

CTS contends that we did not advance this theory in the district court. Again, that is wrong. We repeatedly relied on the English court's ruling in our opposition to CTS' antisuit injunction motion.

• In the first paragraph of our opposition, we stated: "CTS now seeks to reverse that decision by the English court, not by appealing it in England but by asking this Court to do something no other U.S. court has ever done: overrule an English court's decision and enjoin a party from enforcing its contractual rights in the forum designated by the contract." FER 39 at 5.

• A page later, we stated that "CTS requested relief ... would directly clash with the English court's ruling, a critical distinction between this case and all those cited by CTS." FER 39 at 6.

***12** • Several pages later, we elaborated: "Mercury's right to proceed against CTS in the contractual forum has now been reviewed and resoundingly reaffirmed in the English courts .... *This ruling is entitled to deference.*" FER 39 at 11 (emphasis added).

• We also stated that "CTS should be barred from its collateral attack that seeks, in effect, relitigate its motion to dismiss in this Court when it originally submitted the question to jurisdiction of the English court but obtained an unfavorable ruling." FER 39 at 15.

• And in our conclusion, we stated that "comity *unequivocally* requires that CTS' collateral attack on the English High Court's decision be denied." FER 39 at 20 (emphasis added).

These references demonstrate beyond a shadow of a doubt that we raised this argument in the district court.

2. in Ruling on CTS' Forum Non Conveniens Motion, the English Court Did Not Owe Deference to the American Court's Earlier Ruling on Mercury's Forum Non Conveniens Motion.

CTS contends that in addressing CTS' forum non conveniens motion, "the English court should have deferred to the findings and conclusions of the district court which first ruled on the question" in addressing Mercury's forum non conveniens motion. Therefore, CTS contends that the English court's ruling is entitled to no deference. CTS Brief at 33-34.

But that argument confuses two distinct issues. A non-exclusive forum clause specifying *one* forum as appropriate is not decisive when a court in a second ***13** forum determines whether that second forum is convenient. By contrast, a forum selection clause is obviously relevant to the decision of a court in the designated forum whether *that* designated forum is convenient, as the Supreme Court itself has suggested. *See Bremen,* 407 U.S. at 16 ("it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable"). Therefore, the English court quite properly looked to the forum selection clause (which expressly provides for jurisdiction in the English courts) in analyzing CTS's forum non conveniens motion. *See* ER 40 at 14 (p. 11 of English court's ruling) ("as part and parcel of agreeing to submit to the jurisdiction each party must be taken to have recognized that this country would be an

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appropriate forum for the trial of the action"). And the federal court did not look to the non-exclusive forum selection clause because the clause is not decisive on the question whether the federal forum in San Diego is convenient (even though it is decisive on the question whether the English forum is convenient). *See* ER 32 at 9-13.

Because the two courts considered entirely different issues, CTS has absolutely no basis for arguing that the English court should have deferred to the federal court's ruling on Mercury's forum non conveniens motion.

***14 3. We Agree The Scope of Deference to the English Court on this Issue is a Matter of Federal Law.**

CTS' third response to this argument is as follows: "[T]he issuance of a preliminary injunction is governed by federal procedural law, not by English law." CTS Br. at 34. As we stated in our opening brief, we agree that federal law governs the weight to be afforded to the English court's ruling. Mercury Br. at 33. Our sole point is that principles akin to collateral estoppel come into play when a foreign court (here, the English court) has already analyzed a contract's language under that country's law (English law) and determined that the contract precludes the parties from relying on convenience and efficiency considerations to avoid that country's courts.

4. The English Court Analyzed Precisely the Same Issue as the District Court.

Finally, CTS contends (i) that the English court's forum non conveniens decision did not address the propriety of an antisuit injunction and (ii) that the two issues involve different burdens of proof. The first point is irrelevant and confuses res judicata with collateral estoppel. *See* Restatement (Second), Judgments § 27 (1982). The second point is incorrect because the burden of proof was on CTS in both fora.

***15** We begin with the relevant decisions. In ruling on CTS' forum non conveniens motion, the English court stated that "the inconvenience for witnesses, the location of documents, the timing of a trial and *all such like matters* are aspects which [CTS is] simply precluded from raising" by the contract's forum selection clause. ER 40 at 14 (quoting prior ruling) (emphasis added).

In ruling on CTS' motion for an antisuit injunction, the district court analyzed the precise same issue: whether the contract's forum selection clause precludes CTS from relying on factors such as inconvenience and efficiency in seeking to resist jurisdiction in England. And the district court held that the contract did not preclude it from considering those factors and granting the antisuit injunction. ER 49 at 10-12.

The same *issue* thus was considered and decided by both courts in the context of CTS' antisuit injunction motion in the United States and CTS' forum non conveniens motion in England. The English court answered the question one way, and the American court answered it another way without showing any deference at all to the English court's prior interpretation of the contract. [3]

[3] CTS has not pursued an appeal of the English court's forum non conveniens ruling, so the English court's decision is final.

***16** The American court should have deferred to the English court's interpretation of the contract and rejected Mercury's identical argument based on convenience and efficiency considerations (this time, arguments made in seeking an antisuit injunction). As this Court has held, one court's interpretation of a forum selection clause generally precludes relitigation of the meaning and effect of that clause. *See Offshore Sportswear. Inc. v. Vuarnet Int'l. B.V.,* 114 F.3d 848, 851 (9th Cir. 1997); *see also* Restatement (Second) of the Law of Judgments §§ 27, 13. And CTS does not dispute that courts in this country, as a matter of comity, afford the equivalent of collateral estoppel effect to judgments of foreign courts. *See I-Tech Mktg., Inc. v. Hasbro. Inc.,* 719 F. Supp. 312, 316 (D.N.J. 1989) ("The touchstone of both principles

[comity and collateral estoppel] is whether the prior proceeding was essentially a fair one for the party now to be bound by its result.").

As to the burdens of proof, both courts placed the burden on CTS. *See* ER 49 at 13 (federal court: "the court also finds that CTS has made a sufficient showing of irreparable harm and that the balance of hardships tips sharply in its favor"); ER 40 at 12 (English court: "the burden is on CTS to satisfy the court that the action should be stayed"). At a more fundamental level, the question of burden of proof is irrelevant because both courts considered a simple question as to which ***17** there was a yes or no answer: Does the contract's forum selection clause preclude CTS from relying on efficiency and convenience considerations to resist jurisdiction in England? The two courts analyzed the same question, and neither court indicated that burden of proof was at all relevant in answering that question.

IV. Federal Courts May Not Grant an Antisuit Injunction Against Prosecution of a Foreign Suit Except to Preserve Their Jurisdiction or to Protect Important Policies in the American Forum.

The D.C. Circuit in *Laker Airways Ltd. v. Sabena Belguim World Airlines,* 731 F.2d 909 (D.C. Cir. 1984) concluded that an injunction would properly issue only when necessary to protect the jurisdiction of the issuing court - "when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court," *id.* at 927 - or when "necessary to prevent litigants' evasion of the forum's important public policies," *id.* at 931. In our opening brief, we urged this Court to adopt this approach. In response, CTS focuses all of its attention on this Court's decision in *Seattle Totems.*

At the outset, as we have explained, this Court has to address the difficult *Seattle Totems* issue *only* if this Court finds that neither the contract nor the English court's ruling resolves this appeal in our favor.

***18** As to the merits of CTS' argument, we disagree with CTS' reading of *Seattle Totems.* The Court in *Seattle Totems* stated that antisuit injunctions are to be issued "sparingly" when duplicative cases are pending in federal and foreign courts. 652 F.2d at 855. That language means that an antisuit injunction should not be issued as a matter of course when the issue arises and duplicative suits are pending in federal and foreign forums.

Later in the opinion, the court identified certain factors in considering the propriety of the injunction in that case. The following passage contains the entirety of the court's analysis: "Adjudicating this issue in two separate actions is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses. Moreover, separate adjudications could result in inconsistent rulings or even a race to judgment." *Id.* at 856.

But the problem is that *those factors apply in every case where the antisuit injunction arises,* as we explained in our opening brief and as commentators have recognized. *See* Teresa Baer, *Injunctions Against the Prosecution of Litigation Abroad,* 37 Stan. L. Rev. 155, 174 (1984) (noting that factors cited in *Seattle Totems* "appear in every case involving parallel proceedings"). In *every* case where there are duplicative federal-foreign suits, adjudicating the issue in two ***19** separate forums will result in "delay" and "inconvenience" and "expense" to the parties and witnesses. In *every* case where there are duplicative federal-foreign suits, "separate adjudications could result in inconsistent rulings or even a race to judgment." On what possible basis, therefore, could a federal court using those factors refuse to issue an antisuit injunction when there are duplicative federal and foreign suits? That is a fundamental and critical question that CTS does not answer in its brief.

And that highlights the critical issue: The court of appeals in *Seattle Totems* stated that antisuit injunctions are to be issued "sparingly" when the issue arises but also listed factors justifying the injunction there that will, in fact, apply in *every* case. Both aspects of *Seattle Totems* cannot be right. Both aspects of *Seattle Totems* cannot be adhered to. One or the other aspect of *Seattle Totems* must be discarded.

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This Court's task, if it finds the need to reach this *Seattle Totems* issue, is to reconcile the decision. The bottom line is that if the Court agrees with CTS, it would have to conclude that the "sparingly" language in *Seattle Totems* is a dead letter. In our view, if it reaches the issue, this Court instead should adhere to the "sparingly" language. The Court should conclude that the factors cited towards the ***20** end of the *Seattle Totems* opinion were not meant to suffice for all antisuit injunction cases because those factors would be incompatible with the Court's statement that antisuit injunctions are to be issued "sparingly." The Court thus should follow the D.C. Circuit's *Laker* approach and hold that federal courts may not issue an antisuit injunction against prosecution of a foreign suit except to preserve their jurisdiction or to protect important policies in the American forum - conditions which occur "sparingly."

Contrary to CTS' suggestion, neither CTS' nor our approach to this issue would require this Court to "overrule" the actual result in *Seattle Totems* (a step that clearly would require en banc review). If the court adopts the broader Fifth Circuit approach advanced by CTS, then the Court would conclude that the decision in *Seattle Totems* to affirm the antisuit injunction was correct, although the Court also would have to find that the "sparingly" language is no longer good law. If the Court adopts the *Laker* approach that we have advocated, the Court still would conclude that the decision in *Seattle Totems* to affirm the antisuit injunction was correct because, as the *Laker* court found and we suggested in our opening brief, the defendant's 27-month delay before filing the second suit was a critical ***21** fact in *Seattle Totems* that would justify an antisuit injunction even under the *Laker* approach. [4]

[4] CTS points out that *Seattle Totems* referred to Rule 13(a) in the course of its opinion. CTS Br. at 15 16. But CTS does not rely on that rule and with good reason. The *Seattle Totems* court did not conclude that Rule 13(a) requires an antisuit injunction when duplicative suits are pending in federal and foreign courts. If it had, then the Court's reference to "sparingly and its discussion of the factors justifying the injunction there would have been unnecessary surplusage. The Court simply would have said that Rule 13(a) requires the injunction and ended its opinion. It did not do so. Rule 13(a) thus is not relevant to this appeal. *See also* Mercury Br. at 17 18.

CTS points out that the court in *Seattle Totems* did not place dispositive weight on the 27-month delay. That's true, but does not defeat our point. Our sole contention in highlighting that fact here has been to explain that this Court can *both* (i) conclude that the actual *holding* in *Seattle Totems* was correct because of the delay there *and* (ii) adopt the *Laker* approach.

It often is the case that an appellate court will find the need to emphasize or highlight particular aspects of a prior case or opinion in a way that the prior opinion itself did not - and that is particularly so where the legal discussion in the prior case is confusing or internally contradictory or contrary to other precedent. That is the nature of an adjudicatory system that rests on written opinions (which are not always a model of clarity and cannot always foresee all issues and problems) and ***22** on stare decisis. *See United States v. Ross,* 456 U.S. 798, 824 (1982) ("Our decision today is inconsistent... with the portion of the opinion in *Arkansas v. Sanders* .... Nevertheless, the doctrine of stare decisis does not preclude this action. Although we have rejected some of the reasoning in *Sanders,* we adhere to our holding in that case.").

For reasons that we outlined in the opening brief, moreover, adopting the D.C. Circuit's *Laker* approach would bring this Court's jurisprudence on this important issue in line with the majority view in the circuits. CTS contends that its interpretation of *Seattle Totems* actually reflects the majority view in the court of appeals. That's not so. In fact, the D.C., First, Second, Third, and Sixth Circuits all adhere to an approach identical or akin to the *Laker* approach. *See Laker Airways Ltd. v. Sabena. Belgian World Airlines,* 731 F.2d 909 (D.C. Cir. 1984); *Canadian Filters Ltd. v. Lear Siegler. Inc.,* 412 F.2d 577 (1st Cir. 1969); *China Trade & Dev. Corp. v. M.V. Choong Yong,* 837 F.2d 33 (2d Cir. 1987); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.,* 651 F.2d 877 (3d Cir. 1981) *cert. denied,* 454 U.S. 963 (1981); *Gau Shan Co. v. Bankers Trust Co.,* 956 F.2d 1349 (6th Cir. 1992). Only the Fifth Circuit clearly adopts a contrary approach. *See Kaepa. Inc. v. Achilles Corp.,* 76 F.3d 624 (5th Cir. 1996); *In re* ***23** *Unterweser Reederei. Gmbh,* 428 F.2d 888 (5th Cir. 1970). The Seventh Circuit's approach is open to debate because its decision in *Allendale Mut. Ins. Co. v. Bull Data Sys. Inc.* indicates that the antisuit injunction likely was proper under both approaches - what it termed the stricter and laxer

approaches. 10 F.3d 425, 432 (7th Cir. 1993). And CTS' effort to shoehorn the First and Fourth Circuits into its camp is flawed: The First Circuit's decision is clearly in line with *Laker* (the First Circuit overturned an antisuit injunction), and CTS tries to enlist the Fourth Circuit by citing a 1912 unpublished summary affirmance that is not precedent in that circuit. *See* 4th Cir. R. 36(c).

In our opening brief, we also explained *why* the *Laker* approach was superior. We pointed out that "antisuit injunctions are even more destructive of international comity than, for example, refusals to enforce foreign judgments." *Gau Shan,* 956 F.2d at 1355. We explained that foreign courts may well respond by issuing antisuit injunctions of their own, with the result being gridlock and that "no party may be able to obtain any remedy." *Laker,* 731 F.2d at 927. And we noted that antisuit injunctions have a deleterious effect not only on international legal relations, but also on international business.

***24** We also stated that neither federal nor state courts can issue antisuit injunctions against proceedings in the courts of the other sovereign. And we therefore asked: "If the efficiency concerns are not sufficient in those circumstances, how can they possibly justify enjoining *foreign* suits, where far more delicate issues of comity and respect come into play ..." Mercury Br. at 13. We contended that "CTS must persuasively answer that fundamental legal and policy question." *Id.* In response, CTS did not even try to answer this question an omission strongly implying that CTS has no policy justification for the jurisprudential anomaly it seeks to enshrine in this Circuit's law (namely, that it's easier for a federal court to enjoin *foreign* suits than to enjoin *state* suits).

Finally, if this Court determines that our arguments based on the contract and the English court's decision are not dispositive and that the appeal thus turns solely on *Seattle Totems,* it may well be that the en banc court should hear the case. Given the evident confusion and inconsistency within the *Seattle Totems* opinion, the critical importance of this issue to international comity and legal and business relations, and the deep split in the circuits, *see* Fed. R. App. P. 35, the en bane court could consider this important issue without the distraction of trying to reconcile the inconsistencies in *Seattle Totems.*

***25** That said, we believe that the panel has the authority to adopt the *Laker* approach and resolve this issue in our favor without en banc review.

CONCLUSION

The judgment of the district court should be reversed.

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1999 WL 33615188 (C.A.4) (Appellate Brief)
United States Court of Appeals,
Fourth Circuit.

GTE SOUTH INCORPORATED, Appellant,

v.

Theodore V. MORRISON, Jr., Hullihen Williams Moore, and I. Clinton Miller (in their official capacities as commissioners of the virginia state corporation commission), Cox Fibernet Commercial Services, Inc., MCI Telecommunications Corporation; MCI Metro Access Transmission Services, Inc., and AT&T Communications of Virginia, Inc., Appellees.

No. 98-1887.
April 14, 1999.

Appeal from the United States District Court for the Eastern District of Virginia

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*1 STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction to review the arbitration decision of the Virginia State Corporation Commission ("SCC") pursuant to 47 U.S.C. § 252(e)(6).

This Court has jurisdiction over this appeal from a final decision of the District Court under 28 U.S.C. § 1291. The District Court issued its order granting summary judgment on May 19, 1998. GTE timely filed its notice of appeal on June 16, 1998.

STATEMENT OF ISSUES

1. Can legislative FCC rules be applied retroactively?
2. If the FCC's pricing rules are not applied retroactively:

a. Where § 252(d)(1) of the Telecommunications Act requires that prices for elements of GTE's telephone network "be based on the cost" of "providing" the elements and "may include a reasonable profit,"

i. Did the District Court err in holding that the Act bars consideration of the actual, historical costs of the network?

ii. Where GTE had argued for "recovery of at least *all* of GTE's historic and forward-looking costs," did the District Court err in holding that GTE failed to raise its claim for historical costs?

iii. Did the SCC err in basing prices on the so-called "Hatfield Model," which projects the forward-looking costs of a hypothetical, ***2** most-efficient carrier, even though that model admittedly bears no relation to the forward-looking costs *GTE* will actually incur, or could possibly incur under any scenario, in providing network elements?

b. Where § 252(d)(3) of the Act directs that wholesale rates for services shall be based on "retail rates" "excluding ... costs that will be avoided by the local exchange carrier," did the SCC err by basing rates on the counterfactual assumption that GTE will exit the retail market entirely, thus deeming *all* retail costs, including fixed costs, avoidable?

3. If the FCC's pricing rules should be applied retroactively here, should the Court of Appeals attempt to apply those rules to the facts of this case in the first instance, or should it remand to the SCC?

4. Are the FCC's pricing rules contrary to the Act where they:

a. base prices for network elements on the forward-looking costs of a hypothetical network, and

b. base discounts for wholesale service on the counterfactual premise that GTE will exit the retail market entirely?

5. Did the SCC violate the FCC's rules by basing prices on a model that the FCC itself has determined does not comply with its methodology?

*3 STATEMENT OF THE CASE

INTRODUCTION

In the Telecommunications Act of 1996 ("Act" or "1996 Act"), Congress opened local telephone service to competition and required incumbent telephone companies to share their property and services with new entrants to help them

compete. This case concerns the critical pricing standards that govern entrants' access to an incumbent's property and services.

1 Pub. L. No. 104 104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

The Supreme Court has recently determined that the Federal Communications Commission ("FCC") has jurisdiction to promulgate rules implementing the pricing terms of the Act. *AT&T Corp. v. Iowa Utilities Board,* 119 S. Ct. 721, 729-33 (1999). That decision - which did not address the merits of the FCC's pricing rules - does not significantly alter the substantive legal questions at issue, but it does raise threshold questions about how to proceed with this case. The FCC's pricing rules were stayed by the Eighth Circuit before they went into effect and, even assuming they will soon go into force,[2] they cannot now be applied retroactively to the arbitration here. If the rules did govern retroactively, moreover, this Court would have to remand for the SCC to apply them in the first instance.

2 *See infra* note 10.

***4** Absent a remand, this Court could not enforce the FCC rules itself, or even accept them as an authoritative interpretation of the Act, without first considering whether those rules are contrary to the Act. But doing so would necessarily require addressing several questions of statutory construction currently pending before the Eighth Circuit on remand from the Supreme Court. The Eighth Circuit case is an industry-wide, consolidated proceeding on direct review of the FCC's rulemaking. Most of the parties to the present appeal are parties to that proceeding, and the petitioning local telephone companies there, including GTE, have raised statutory challenges to the FCC rules that are identical in key respects to the statutory claims raised by GTE here. In light of the parallel Eighth Circuit proceeding, interests of judicial economy and of avoiding potentially conflicting rulings overwhelmingly favor a stay of the present appeal pending a decision on the merits from the Eighth Circuit.

If, notwithstanding the pendency of the Eighth Circuit proceeding, this Court were to decide not to stay this appeal and were to consider whether the FCC's rules are contrary to the Act, the Court would have to decide two fundamental issues of statutory construction that are common *both* to the SCC's pricing order in this case *and* to the FCC's pricing rules:

***5** *First,* § 252(d)(1) expressly commands that the prices for unbundled elements of GTE's network "shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the ... network element" and "may include a reasonable profit." That directive requires prices based on the actual costs *GTE* will incur in making pieces of its network available. The cost "of providing" a particular "element" of GTE's network is necessarily *GTE's cost,* not the cost that might be projected for a hypothetical fantasy carrier using a different, imaginary network.

Despite the unambiguous statutory command, however, the SCC (and the FCC in its rules) based prices on precisely such a hypothetical network. The SCC not only ignored the actual costs GTE has incurred in constructing its network (as reflected on GTE's books), it even ignored the forward-looking costs that could be projected for GTE's real-world network. Instead, it relied on a model designed to project the costs of a wholly imaginary carrier using a platonic network that has been completely reconfigured from a blank slate with the most efficient architecture and technology possible. The SCC's own witness admitted that the resulting prices failed to cover the costs GTE will incur in providing network elements. That scheme flatly violates the command that prices be "based on the cost ... of providing" the network elements. § 252(d)(1)(A).

***6** *Second,* § 252(d)(3) requires that wholesale rates be based on "retail rates," excluding "any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." In requiring exclusion of "costs that *will*

be avoided" by the incumbent, § 252(d)(3) plainly demands exclusion only of costs that an incumbent can reasonably avoid when it begins wholesale operations.

Rather than following the text of the Act, the SCC (and the FCC in its rules) substituted a different pricing standard based on the distinct principle that *all* costs associated with retailing - even fixed costs that cannot be avoided by the incumbent - should be excluded. Thus, the SCC *overstated* the costs that "will be avoided" by basing wholesale rates on the counterfactual premise that GTE would exit the retail market and become solely a wholesaler.

I. NATURE OF THE CASE.

GTE brought this case under 47 U.S.C. § 252(e)(6) to review and challenge an interconnection agreement arbitrated by the SCC. The District Court granted summary judgment for defendants, the commissioners of the SCC, Cox Fibernet Commercial Services, Inc. ("Cox"), MCI Telecommunications Corporation ("MCI"), and AT&T Communications of Virginia, Inc. ("AT&T"). *See* J.A. 317-44.

*7 II. STATEMENT OF FACTS.

A. The Regulatory Background Before 1996.

Prior to passage of the 1996 Act, state utility commissions, like the SCC, regulated local telephone service as a natural monopoly. Commissions typically granted a single company, known as the incumbent local exchange carrier or "LEC," an exclusive franchise to serve a designated area. The incumbent LEC, here GTE, then undertook the enormous investment required to build a ubiquitous telephone network. In return, the SCC precluded entry by competitors and regulated the incumbent's rates to ensure that they were "reasonable and just" - that is, the SCC ensured a reasonable return for the incumbent and fair rates for consumers, all based on the actual amounts the incumbent had prudently invested in the network. *See* Va. Code Ann. § 56-234 (1995 Replacement Vol.).

The SCC and other state commissions also sought to preserve universal service - that is, making service available to all consumers, even in remote areas, at affordable rates. The SCC promoted that goal in part by artificially prolonging the period over which GTE could claim depreciation on its capital investments. This meant GTE accumulated a large account of undepreciated historical investments on its books.

*8 B. The Telecommunications Act of 1996.

In the 1996 Act, Congress dismissed the notion that the local exchange is a natural monopoly. Adopting the view that "meaningful facilities-based competition is possible," H.R. Conf. Rep. No. 104-458, at 148 (1996), Congress established a "pro-competitive, de-regulatory" framework for promoting competition in the local market, *id.* at 113, and preempted all state barriers to entry, *see* § 253(a).

To achieve the transition to competition, Congress imposed duties on incumbent LECs to make their property and services available for new entrants' use. Incumbents must: (i) allow entrants to interconnect their own facilities with the incumbent's network, § 251(c)(2); (ii) provide entrants access to unbundled elements, or pieces, of the incumbent's network, § 251(c)(3), [3] and (iii) sell finished service at wholesale rates so that entrants could provide a limited form of competition by reselling the incumbent's own service, § 251(c)(4).

[3] In simplified terms, the local exchange includes the wire, known as the "local loop, that connects a customer's premises to a "switch ; the switch, which routes calls and is housed in a "central office ; and "interoffice transmission facilities that connect the local switch to other switches or to long distance carriers' facilities.

Incumbents and new entrants must bargain in good faith over these requirements, but failing a negotiated contract, either party may petition a state utility commission to arbitrate the terms of a binding "interconnection agreement." *See* ***9** §§ 251(c)(1); 252(a), (b). Congress charged state commissions with resolving issues in arbitrations by imposing terms in accordance with the Act, *see* §§ 252(b)(4)(C); 252(c)(1), particularly prices, *see* § 252(c)(2), (d). For interconnection and unbundled elements, Congress commanded that the rate "shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network elements" and "may include a reasonable profit." § 252(d)(1)(A), (B). [4] For wholesale service, a "State Commission shall determine wholesale rates on the basis of retail rates ... excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." § 252(d)(3).

[4] The remaining discussion in this brief, while cast for simplicity in terms of pricing for unbundled network elements, applies to interconnection as well.

Finally, Congress provided for exclusive jurisdiction in the federal district courts to review any arbitration decision to ensure that it "meets the requirements of section 251 and [section 252]." § 252(e)(6). *See also* § 252(e)(4).

C. The Stay of the FCC's Pricing Rules.

On August 8, 1996, the FCC promulgated rules for implementing the Act, including rules concerning the pricing methods to be used by state commissions. *See* Implementation of the Local Competition Provisions in the Telecommunications ***10** Act of 1996, First Report and Order, 11 FCC Rcd 15,499 (Aug. 8, 1996) ("First Report & Order"). [5] Numerous state commissions and incumbent LECs challenged the FCC's pricing rules on both substantive and jurisdictional grounds. On September 27, 1996, three days before the rules were scheduled to go into effect, the Eighth Circuit entered a temporary stay of the FCC's rules, *Iowa Utils. Bd. v. FCC,* 96 F.3d 1116, 1118 (8th Cir. 1996), and later entered a permanent stay of the pricing rules, *Iowa Utils. Bd. v. FCC,* 109 F.3d 418 (8th Cir. 1996). Subsequently, the Eighth Circuit vacated those pricing rules - which had never gone into effect - as beyond the agency's authority. *Iowa Utils. Bd. v. FCC,* 120 F.3d 753, 793-800 (8th Cir. 1997), *aff'd in part. rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.,* 119 S. Ct. 721 (1999).

[5] The First Report & Order is included in GTE's Separate Addendum.

D. Arbitration Proceedings Below.

1. Network Element Pricing.

Before the SCC, GTE argued that the Act's cost-based standard for network element prices meant that GTE must be permitted to recover all of the actual costs of its network, including its historical costs approved by the SCC and reflected on its books. *See, e.g.,* GTE's Resp. to AT&T's Pet. for Arb., Sect. IV, part X, at 1 ("[T]he [SCC] *must* ... provide for the recovery of at least *all* of GTE's historic and forward- ***11** looking costs of unbundled elements ....") (emphases in original) (J.A. 659). *See also id.* at 32-33 (J.A. 690-91). [6] GTE offered a multi-step proposal. First, GTE projected the direct forward-looking incremental cost of each element. In jargon borrowed from the FCC's stayed rules, such studies were known as Total Element Long Run Incremental Cost (or "TELRIC") studies. [7] After determining the costs directly attributable to each element, GTE determined the additional joint and common costs (*i.e.,* those shared by two or more elements) that would also have to be recovered by comparing the study's direct cost figures to GTE's 1995 annual revenue.

Under the SCC's prior regulation of GTE's rates, those revenue figures reflected GTE's prudently incurred actual costs. *See* J.A. 1401-03 (Tr. 721-23); J.A. 1342 (Tr. 504).

6 As used here, "historical or "embedded cost pricing refers to pricing based on all the costs reflected on an incumbent's regulated books of account. Forward looking, replacement cost pricing ignores book costs and instead projects what would have to be expended today to recreate the company's assets. If declining costs make it cheaper today to replace assets than it was to build them initially, a forward looking methodology will project lower costs.

7 Such a study projects the incremental costs for each element over a long run period during which all costs are treated as variable. *See* First Report & Order ¶ 677.

Lastly, GTE concluded that anomalies in the current regulatory system meant that some of GTE's actual costs should be recovered through an end-user charge assessed directly on consumers. For example, GTE has accumulated a large account ***12** of undepreciated investment due to the prolonged depreciation rates imposed by the SCC. With the advent of competition and competitive pricing, GTE would not be able to recover such excess unrecovered depreciation in its rates - that investment would become "stranded." [8] By providing for recovery of such costs through an end-user charge, GTE's proposal would have reduced the total costs to be recovered in network element rates. [9]

8 *See* J. Sidak & D. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. L. Rev. 851, 868 69 (1996).

9 GTE explained that the end user charge was thus an alternative for recovering costs that otherwise would have to be included in prices under the Act. *See, e.g.,* GTE's Resp. to AT&T's Pet. for Arb., Sect. IV, part X, at 32 33 (" T]o the extent AT&T now seeks access to GTE's network, it should have to *either* pay for an appropriate share of (and return on) those historic costs *or* GTE should otherwise be made whole through ... an] end user charge ....) (emphases added) (J.A. 690 91).

AT&T and MCI proposed a radically different theory. Arguing that both GTE's historical costs and the actual forward-looking costs of GTE's real-world network were irrelevant, they proposed a model - the Hatfield Model - designed to project the forward-looking costs of a *wholly hypothetical* network that reflected the costs an imaginary, most-efficient carrier would face in a competitive market if it deployed only the most efficient technology and if it rebuilt the network from scratch - an assumption that could never be true in reality. As the SCC's witness acknowledged, the Hatfield Model was not designed to project the costs that GTE would ever ***13** actually incur in providing elements given its existing network, *see* J.A. 1437 (Tr. 945), and it did not even make a pretense to predict those costs accurately.

Hatfield's only concession to the reality of GTE's network was that it assumed the same location for switches; all other aspects of the network configuration could be entirely redesigned by the modeler. *See* J.A. 1518 (Tr. 1233). The model, in fact, systematically ignored the way GTE's customers are actually connected to central offices and instead assumed that all customers would be connected to the nearest office, regardless of geographical barriers (such as lakes) or existing rights of way. *See* J.A. 1511-13 (Tr. 1226-28).

Given the flaws in the Hatfield Model, the SCC's Staff concluded that it could not "wholeheartedly endorsee" it. J.A. 1417 (Tr. 910). Nevertheless, after making only two minor modifications to the model's 490 inputs, the Staff proposed prices generated by the Hatfield Model. When asked whether these Hatfield prices would permit GTE to recover its costs, the Staff conceded, "Quite honestly, probably not." J.A. 1586 (Tr. 1357). Despite the Staffs concession, the SCC adopted the Hatfield prices and stated, without further explanation, that the "Staff's approach is the only reasonable option." J.A. 1765.

***14 2. Wholesale Pricing of Finished Service.**

To establish the discount that should be applied to retail rates to set wholesale rates under § 252(d)(3), GTE presented two studies of GTE's retailing practices to project the costs that GTE could reasonably avoid when it began providing service at wholesale. *See* Test. of Douglas E. Wellemeyer, GTE Exh. DW-1, at 7- 1, 30-33 (J.A. 1258-62, 1281-84).

The SCC, however, determined that in calling for a calculation of the costs that "will be avoided" by an incumbent, § 252(d)(3) should be interpreted as referring to "those costs that would be reasonably avoidable by a local exchange company furnishing *only* wholesale service." J.A. 1759 (emphasis added). The SCC thus projected avoided costs on the premise that GTE would exit the retail market and avoid *all* retailing costs. It was undisputed that GTE will not, in fact, cease its retail operations; indeed, GTE is required by law to continue providing service. *See* Va. Code Ann. § 56-234.

E. Review in the District Court Pursuant to § 252(e)(6).

On cross motions for summary judgment, the District Court reviewed GTE's legal claim that the Hatfield Model violated the requirements of the Act under "the arbitrary and capricious standard" and upheld the SCC's decision. J.A. at 333.

***15** Next, the court offered two rationales to reject GTE's claim for historical costs. First, although in rejecting GTE's pricing proposal the court had asserted that it was designed to recover current revenues (which are set to recover historical costs), the court ruled that GTE failed to preserve its claim for historical costs. The sole basis for that ruling was GTE's use of a "forward-looking" cost study as part of its pricing proposal. J.A. 336. In the alternative, the court ruled that, because § 252(d)(1) of the Act refers to costs "determined without reference to a rate-of-return or other rate-based proceeding," and because rate-of-return proceedings are commonly used to determine historical costs, the statute must be read to bar categorically the use of such costs. J.A. 336-37.

On wholesale pricing, the court approved the SCC's "'wholesale only' construct," J.A. 327, and asserted, without citation, that this counterfactual assumption would accurately reflect the way GTE's costs would decline, *id.*

F. The Supreme Court's Decision in *AT&T Corp. v. Iowa Utilities Board* and the Impending Effectiveness of the FCC's Pricing Rules.

Long after the arbitration and the District Court's decision in this case, the Supreme Court issued its opinion in *AT&T Corp. v. Iowa Utilities Board,* 119 S. Ct. 721 (1999). As relevant here, the Court reversed the Eighth Circuit's holding that the FCC lacked jurisdiction to promulgate rules implementing the pricing provisions of ***16** the Act. *See id.* at 733. The Court did not address the merits of the FCC's pricing rules. *See id.* at 728 n.3. Instead, it remanded the case to the Eighth Circuit for that Court to hear substantive challenges to the rules, and those challenges are now pending before the Eighth Circuit in its consolidated review proceeding. As a result of the Supreme Court's decision, the FCC's pricing rules, which were stayed before they became effective in 1996, may soon go into effect for the first time. [0] (The text of the major pricing rules is reproduced in Addendum 1.) The substance of the rules, to the extent they may be relevant here, is easily summarized:

10 As of this filing, the Eighth Circuit has not modified its prior mandate vacating the FCC's pricing rules, and it has yet to rule on a motion filed by GTE and others requesting that it withhold any modification pending its decision on the challenges to the rules now before it. This Court, however, has ordered this case briefed on the assumption that the Eighth Circuit will allow the pricing rules to go into effect before its ruling on the merits. *See* Order of Mar. 15, 1999, at 2. By complying with the briefing order, GTE does not waive its position that the FCC's rules are not in effect and that, if the Eighth Circuit either fails to act by the time this Court renders judgment or reimposes a stay of the rules, the rules cannot be applied in this case.

For network elements, the FCC concluded that § 252(d)(1) "does not specify whether historical or embedded costs should be considered" in setting network element rates. First Report & Order ¶ 705. Nevertheless, the FCC prohibited pricing

based on historical costs because, according to the FCC's economic theory, only prices based on forward-looking costs, which are designed to replicate[e, to the extent possible, the conditions of a competitive market," ¶ 679, could promote the ***17** development of competition. *See id.* at ¶ 706 (stating that recovering embedded costs in network element rates "would interfere with the development of efficient competition").

The FCC developed its own detailed TELRIC pricing methodology for network elements, under which prices must ignore not only an incumbent LEC's historical costs, but also the forward-looking costs that the incumbent will actually incur operating its real-world network. Instead, prices must be based on the forward-looking costs of a hypothetical network that uses only "the most efficient technology deployed in the incumbent LEC's current wire center locations." *Id.* ¶ 685. Even under the FCC's TELRIC methodology, however, the projected network must still reflect "actual [incumbent] wire center line counts" and "actual average loop length." Federal-State Joint Board on Universal Service, ¶ 250(1), 12 FCC Rcd 8776 (May 8, 1997) ("Universal Service Order").

As for wholesale rates, even though incumbents would indisputably continue their retail operations, the FCC suggested that, in determining the costs "that will be avoided by the local exchange carrier," § 252(d)(3), state commissions should nevertheless adopt the counterfactual assumption that an incumbent would "cease retail operations and instead provide all of its services through resellers." First Report & Order ¶ 911.

***18** SUMMARY OF ARGUMENT

1. Even assuming that the FCC's pricing rules will now go into effect as a result of the Supreme Court's decision, they were stayed before ever becoming effective. They cannot now be applied *retroactively* to the decisions the SCC made while the rules were stayed or vacated.

11 *See supra* note 10.

2. Because the FCC's rules cannot be applied retroactively, the SCC's decisions must be evaluated directly under the terms of the Act. They violate the Act for the following reasons:

a. By commanding that prices for network elements shall be "based on the cost ... of providing" the network elements, § 252(d)(1), Congress required prices that reflect *all* of an incumbent's actual historical costs. The Act, moreover, may not be construed to preclude consideration of historical costs, because ignoring those costs would lead to an unconstitutional taking of GTE's property. The SCC erred in setting prices that precluded recovery of GTE's historical costs.

b. Even if a forward-looking cost method were permissible under the Act, prices must still be "based on the cost" of *GTE's network.* The SCC violated the Act by adopting a pricing model - the Hatfield Model - expressly designed to ignore GTE's network and to base prices instead on the costs of an imaginary carrier using ***19** a wholly redesigned fantasy network. As the SCC Staff conceded, the prices set by this model will not cover even GTE's actual forward-looking costs of providing elements from its real-world network no matter what technology GTE employs or how efficiently it operates.

c. By directing that wholesale rates must be based on "retail rates" excluding costs that "will be avoided by" the incumbent, § 252(d)(3), Congress required rates that exclude only the costs that an incumbent can actually avoid as it begins wholesale service. By using instead the false assumption that GTE would cease retailing entirely, and thus avoid *all* retailing costs, including fixed costs, the SCC ignored the terms of the Act and adopted a flawed wholesale discount.

3. If the Court concludes that the FCC's pricing rules should apply retroactively, the proper course here is to remand for the SCC to consider how it should apply those rules in the first instance. This Court should not attempt to fulfill the agency's role by applying the rules itself. *See SEC v. Chenery Corp.,* 318 U.S. 80, 88 (1943).

4. If the Court chooses not to remand and instead seeks to enforce the FCC's pricing rules itself, or to accept them as an authoritative interpretation of the Act, it must first address GTE's arguments that the FCC's pricing methodology is contrary to the Act. The Court cannot judicially enforce the rules against GTE ***20** without permitting GTE an opportunity for judicial review. Thus, the Court must either assess the rules itself or, if it believes that task should be left initially to the Eighth Circuit (which has before it the consolidated proceeding for direct review of the FCC's rulemaking), it should *stay* this case pending the Eighth Circuit's ruling on the merits. If the Court addresses the merits of the FCC's pricing methodology, it should hold that that methodology is inconsistent with the plain terms of the Act because it bases prices for network elements on the forward-looking costs of a hypothetical, imaginary network, and bases discounts for wholesale service on the counterfactual premise that GTE will exit the retail market.

5. If the Court concludes that the FCC's rules apply retroactively, that remand is unnecessary, and that the rules properly interpret the Act, the SCC's pricing decisions still must be vacated because they do not comply with the FCC's rules. Indeed, the SCC relied on a pricing model that the FCC has already determined does not comply with the FCC's own detailed pricing methodology.

***21 ARGUMENT**

This Court should review legal rulings by the SCC or the District Court *de novo* and should independently review any factual determinations made by the SCC under the arbitrary and capricious standard. *See. e.g., Fishermen's Dock Co-Op., Inc. v. Brown,* 75 F.3d 164, 168 (4th Cir. 1996). Because the SCC is a state agency, *Chevron* deference to reasonable federal agency interpretations of federal law does not apply. *See Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1495 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 864 (1998); *see also U S WEST Comms., Inc. v. Hix,* 986 F. Supp. 13, 17-18 (D. Colo. 1997). *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984).

I. THE FCC'S PRICING RULES CANNOT BE APPLIED RETROACTIVELY TO THIS ARBITRATION.

Even if the FCC's pricing rules become effective before a decision is rendered in this case, [2] the rules cannot be applied retroactively to this arbitration. The pricing rules were stayed before they ever went into effect and cannot now be applied retroactively.

12 *See supra* note 10.

Judicial decisions, of course, must generally be given retroactive effect, *see, e.g., Rivers v. Roadway Express,* 511 U.S. 298, 312-13 (1994), but applying the ***22** FCC's *rules* does not involve simply applying an authoritative interpretation of the Act declared by the Supreme Court in *AT&T Corp.* To the contrary, it involves the question whether substantive rules delineating new legal obligations that were stayed before they ever went into effect in 1996 (and were then vacated) can now be applied, once they go into force for the first time in 1999, to an arbitration concluded in 1997. The relevant principle is that such substantive agency rules presumptively cannot be applied retroactively. *See Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208-09 (1988).

Indeed, as far as GTE is aware, the *only* federal court directly to address this issue has ruled that, for precisely the reasons outlined above, the FCC's pricing rules cannot be applied to arbitrations conducted before the rules become effective. *See MCI Telecomms. Corp. v. GTE Northwest, Inc.,* No. 97-1687-JE, 1999 WL 151039, at * 1-*7 (D. Or. March 17, 1999) ("*MCI v. GTE*") (attached at Addendum 2).

II. THE SCC'S PRICING DECISIONS VIOLATE THE ACT.

Because the FCC's pricing rules cannot be applied retroactively, the SCC's pricing decisions must be evaluated directly under the terms of the Act.

*23 A. Prices for GTE's Network Elements Must Be Based on GTE's Actual Network Costs.

1. The Plain Terms of the Act Require Prices Based on *All* of GTE's Actual Costs.

Section 252(d)(1) of the Act commands that prices for network elements "shall be based on the cost ... of providing" the network element and "may include a reasonable profit." That directive requires that prices be based on all of the actual costs GTE has incurred in constructing the network that it must now make available to entrants. Because GTE is the carrier providing network elements, the costs "of providing" a particular element are necessarily *GTE's costs* - not the costs of another carrier or of a hypothetical network projected by a cost model.

The plain and ordinary meaning of the term "cost," moreover, includes all expenditures GTE has made in constructing the network that have not yet been recovered. *Cf. Smith v. United States,* 508 U.S. 223, 228 (1993) (where term is not defined "we normally construe it in accord with its ordinary or natural meaning"). There can be no dispute that historical costs are real costs - "as real a cost for the enterprise as any other." [3] These costs were incurred under regulatory oversight and, in fact, were often incurred to meet requirements set by the SCC. And they are ***24** plainly part of the cost "of providing" network elements. As one commissioner of the SCC noted, it is GTE's past investment in the network that "makes it possible for the company to be there now for [a new entrant] ... to come in and pick off their operation." J.A. 1365-66 (Tr. 551-52).

13 W. Baumol & J. G. Sidak, Transmission Pricing and Stranded Costs in the Electric Power Industry 147 (1995).

By specifying without limitation that prices must be based on "cost," the plain terms of the Act require that *all* costs be taken into account. *Cf. Northern Pac. Ry. v. North Dakota,* 236 U.S. 585, 596 (1915) (explaining, in context of railroad rates, that "we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered"). Indeed, where Congress intended in the 1996 Act to restrict consideration to a particular type of cost, it has made that intention express. The next subsection of § 252 specifies that charges for transport and termination of traffic must be based on an "approximation of the *additional* costs of terminating" calls. § 252(d)(2)(A)(ii) (emphasis added).

The final clause of § 252(d)(1) further confirms the need to include all historical costs in prices, since it provides that prices "may include a reasonable profit." There can be no possibility of a profit unless a firm recovers its actual outlays. Indeed, even the FCC effectively conceded this much in its pricing rules: "[I]n plain English, profit is defined as 'the excess of returns over expenditure in a ***25** transaction or a series of transactions,'" and "is the total revenue required to cover *all of the costs* of a firm." First Report & Order ¶ 699 (emphasis added). Given the ordinary meaning of the term "profit," the statement that, in addition to being "based on cost," prices could also "include a reasonable profit" would make no sense if prices "based on the cost" of network elements did not already cover *all* of an incumbent's actual, historical outlays.

In rejecting GTE's reading of § 252(d)(1)(A), the District Court relied primarily on the parenthetical directing that "cost" should be "determined without reference to a rate-of-return or other rate-based proceeding." § 252(d)(1). According to the court, because "[h] historical costs are determined in a rate-of-return" proceeding, the Act must categorically prohibit their use in network element pricing. J.A. 336-37. But that misreads the parenthetical. Rather than straightforwardly banning the use of "book costs" or "historical costs," Congress instead limited only the *procedures* a state commission

may use in determining costs. Even the FCC, which advocated excluding historical costs from prices, concluded that "the parenthetical [in section 252(d)(1)] does not further define the type of costs that may be considered, but rather specifies a *type of proceeding* that may not be employed to determine the cost of interconnection and unbundled network elements." First Report & Order ¶ 704 (emphasis added).

***26** Congress sought to foreclose the use of rate-of-return proceedings because they are typically lengthy and complex. By freeing the Act's streamlined arbitration process from cumbersome rate proceedings, Congress did not intend to bar state commissions entirely from drawing on the expertise they had accumulated over decades of determining incumbents' costs. Such a rule would have defeated Congress's very objective in relying on state commissions' expertise in conducting arbitrations and setting prices "based on the cost" of network elements.

Indeed, if anything, the parenthetical *confirms* that § 252(d)(1) requires rates that cover all costs, including historical costs. Congress's explicit warning against one type of proceeding traditionally used to determine historical costs makes sense only if the section otherwise contemplates a rate method that includes historical costs.

Next, the District Court pointed out that in other statutes Congress has expressly called for pricing based on "actual capital cost." J.A. 337. But the interpretive principle the court sought to apply - namely that courts must assume "Congress acts intentionally and purposely in the disparate inclusion or exclusion of particular language" in different statutory sections, *id.* (citing *Russello v. United States,* 464 U.S. 16, 23 (1983)) - can properly apply "only if the two provisions in question are included within the same legislative enactment." *Halverson v. Slater,* 129 F.3d 180, 186 (D.C. Cir. 1997); *see also* ***27** *Kim v. United States,* 121 F.3d 1269, 1276 (9th Cir. 1997). The provision on which the court relied, however, was not part of the 1996 Act. The court mistakenly cited the language as appearing in § 254(d)(1), but in reality it was part of the Communications Act Amendments of 1978 and was codified at 47 U.S.C. § 224(d)(1) - not in § 254.

Even apart from that error, the use of limiting terms in one statute to specify that only "actual capital cost" should be considered cannot be used to suggest that when Congress uses the more general, all-encompassing term "cost" *without* qualification, the term should be deemed to *exclude* a particular measure of costs.

The District Court made only a superficial attempt to reconcile its exclusion of historical costs with the direction that prices "may include a reasonable profit." § 252(d)(1)(B). It suggested that forward-looking cost measures could include the cost of capital and, in that sense, could reflect a "profit." *See* J.A. 338. But merely taking into account the forward-looking cost of capital does not provide a firm a "profit" in any ordinary sense of the term. Consider a firm that purchased a computer for $10,000. A year later a comparable computer might cost $5,000, thus making the forward-looking, replacement cost of the computer $5,000. At the same time, assume the firm, like GTE, was forced by government regulation artificially to prolong its depreciation, so that it still carried the computer on its books with a value of $6,000. ***28** If the firm were required to sell this computer for $5,500, under the District Court's interpretation, the firm would reap a "profit" of $500. But that makes no sense.

The inescapable fact is that requiring a firm to sell an asset at less than the firm's actual, historical costs forces the firm to suffer a loss. Any method of determining network element prices that systematically ignores a firm's full historical costs thus cannot provide a "reasonable profit" as contemplated by § 252(d)(1)(B).

Lacking a plausible textual basis for ignoring historical costs, proponents of forward-looking cost methodologies, such as appellees here, inevitably resort to policy arguments. The policy theories that apparently swayed the lower court, however, *see* J.A. 338, rest on a pair of assumptions that are utterly unfounded.

First, for rhetorical effect, opponents of historical-cost pricing charge that incumbents are inefficient "monopolists" whose costs cannot possibly be used in the new competitive world. But these assertions (adopted by the lower court) about

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"monopoly revenue," J.A. 335, and "inefficiencies" are unsupported by any record evidence or reasoned evaluation. The SCC's function in regulating rates has been to ensure that incumbents earn only a reasonable return - *i.e.,* not a monopoly profit. *See, e.g.,* Va. Code Ann. § 56-234 (1995 Replacement Vol.); *Virginia Elec. & Power Co. v. SCC,* 312 S.E.2d 25, 28, 226 Va. 541,546 (1984). Not surprisingly, therefore, the SCC itself nowhere suggested that it was justified in ignoring GTE's historical ***29** costs because GTE had been earning monopoly profits. The District Court's gratuitous reference to supposed "monopoly revenue," J.A. 335, unsupported by any SCC finding, provides no basis for construing the Act to preclude recovery of historical costs.

Second, opponents of historical-cost pricing invariably assert that prices should reflect the conditions in a perfectly competitive market *after* the process of competition has already run its course. Indeed, they claim that "competition will *emerge* only if prices are set at rates that mirror those that would occur in a competitive market." *E.g.,* MCI Resp. to GTE's Mot. for Summ. J. at 11-12 (emphasis added). But that theory is economic nonsense. Rather than allowing the process of competition to play out its course and to lower prices gradually, this theory would demand leap-frogging by regulatory fiat to the prices a regulator thinks *might* be produced through competition. That is not the process Congress sought to establish through the Act. Congress envisioned a system in which competition itself would bring about the benefits of increased efficiencies and lower prices for consumers. *See, e.g.,* Pub. L. 104-104 Preamble (Act is designed "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services").

***30** Setting prices for elements of GTE's network based on all the actual costs GTE has incurred in constructing and operating its existing network would not hinder that competitive process in the slightest, but rather would promote it. It would simply require entrants to pay the actual cost of the facilities they are using. Even if GTE's costs reflected inefficiencies (a claim that has never been established empirically), such prices would still *encourage* competitive entry by preserving the incentive for entrants to develop more efficient alternative facilities of their own. That is true competition as Congress intended. Ignoring GTE's actual costs (either by ignoring historical costs or by projecting the costs of an imaginary network) will distort the incentives for nascent competitors by making GTE's facilities available at rates that mask their full cost. *See infra* pp. 41-43.

2. Construing the Act To Preclude Consideration of GTE's Actual, Historical Costs Would Result in an Unconstitutional Taking.

Even if the statutory terms did not make it so clear that prices must reflect all of GTE's actual costs, that interpretation is necessary to avoid an unconstitutional taking of GTE's property. *See, e.g., United States v. Security Indus. Bank,* 459 U.S. 70, 78-80 (1982); *Ashwander v. Tennessee Valley Auth.,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

***31** The Fifth Amendment requires rates that allow a utility to "maintain its financial integrity, to attract capital, and to compensate its investors for the risk [they have] assumed." *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 310 (1989) (quotation omitted). That requires that "there be enough revenue not only for operating expenses, but also for ... capital costs" which "include service on the debt and dividends on the stock." *Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944). Thus, "[o]ne of the elements always relevant to setting the rate ... is the return investors expect." *Duquesne,* 488 U.S. at 314. But there can be no return to investors if a company cannot recover its actual outlays. *See Tenoco Oil Co. v. Department of Consumer Affs.,* 876 F.2d 1013, 1020 (1st Cir. 1989).

Duquesne, of course, does explain that constitutional analysis should focus on the "total effect" of a rate order. *See Duquesne,* 488 U.S. at 310. But reliance on that language to exclude historical costs would be misplaced. *First,* in ruling that the "subsidiary aspects of valuation" used in ratemakings are not of constitutional dimension, 488 U.S. at 310, *Duquesne* never suggested that a rate method expressly designed to deprive a regulated entity of any recovery of historical costs could pass constitutional muster. To the contrary, the Court acknowledged that, for purposes of determining whether a rate order provided a fair return, the measure of costs used has "constitutional overtones." Id. As Justice Scalia, joined by Justice White and Justice ***32** O'Connor, explained in his concurrence, to determine whether a company has

been allowed a fair return, "all prudently incurred investment [*i.e.,* historical costs] may well have to be counted." *Id.* at 317. *See also Missouri ex rel. Southwestern Bell Tel. v. Public Serv. Comm'n,* 262 U.S. 276, 289, 306-10 (1923) (Brandeis, J., joined by Holmes, J., concurring) (arguing that the "capital prudently invested in the utility" should be the base against which a fair return is measured).

Second, the "total effect" test cannot salvage a pricing method that systematically ignores recovery of historical costs on the theory that overall, on all its operations, an incumbent may still earn a fair return. The Supreme Court has squarely held that a firm in a competitive market cannot be forced to operate one line of business at a loss on the expectation that profits from other operations will make up the shortfall. *See Brooks-Scanlon Co. v. Railroad Comm'n,* 251 U.S. 396, 399 (1920). The "total effect" test makes sense only when an incumbent enjoys a franchise limiting competitive entry. In that environment, a regulator can balance losses in rates for some services with higher returns elsewhere. Because the Act has opened markets to competition, however, it is no longer possible to calibrate returns in that fashion. *See MCI v. GTE,* 1999 WL 151039, at * 11 ("If GTE is forced to sell unbundled network elements or finished services at below cost to MCI, the [state commission] cannot simply compensate GTE by raising retail prices for other ***33** telephone services, because competitors could then under-price GTE."). In the competitive environment, the rule from *Brooks-Scanlon* applies. Precluding all recovery of historical costs in network element prices violates that rule by requiring incumbents to sell network elements at less than their total cost.

Moreover, the SCC has prolonged the recovery of GTE's capital investments by extending the depreciation life on GTE's equipment. As a result, GTE has accumulated substantial undepreciated historical investments. [4] Were the SCC now to ignore all historical costs in setting prices, GTE would be denied any opportunity to recover those investments. As the Supreme Court explained in *Duquesne,* however, for a regulator to switch rate-making methodologies in a manner that artificially creates losses for a utility would raise "serious constitutional questions." 488 U.S. at 315.

14 *Cf.* First Report & Order ¶ 659 n. 1633.

3. GTE Did Not Waive Its Claim for Historical Costs.

The District Court erred in ruling that GTE had failed to argue for historical costs before the SCC. *See* J.A. 336. GTE expressly argued that the Act must be construed to "provide for recovery of at least *all* of GTE's historic and forward-looking costs of unbundled elements." GTE's Resp. to AT&T's Pet. for Arb. 1, Sec. IV, part X, at 1 (J.A. 659) (emphasis in original); *see also id.* at 30-31. The central ***34** premise of GTE's overall pricing proposal was that GTE must be permitted to recover the actual costs reflected in GTE's current, regulated revenues - revenues derived from rates based on GTE's historical costs. *See. e.g.,* J.A. 1406 (Tr. 728).

Indeed, the opposing parties attacked GTE's pricing submissions on the express understanding that GTE was seeking historical costs, [5] and even the District Court tacitly acknowledged the same point. Only one page before ruling that GTE had waived its historical costs claim, the court contradicted that conclusion by criticizing GTE's proposal as a method designed to recover "all of [GTE's] expected profits and revenues." J.A. 335. A pricing plan designed to recover GTE's current rate-of-return revenues by definition seeks recovery of historical costs.

15 *See. e.g.,* Supp. Test. of Francis R. Collins on Behalf of Cox at 10 (J.A. 697) ("GTE erroneously asse r]ts that the Commission must interpret the Act to provide for recovery of at least all of GTE's *historic and forward looking costs* of unbundled elements .... (emphasis added)); *id.* at 13 (J.A. 698) (criticizing GTE's position that "to the extent that Cox now seeks access to GTE's network, it should have to *either pay for an appropriate share of (and return on) those historic costs or GTE should otherwise be made whole through rate rebalancing, [an] end user charge, or one time payment*) (emphasis added); Supp. Test.

of Joseph W. McAnneny on Behalf of MCI at 6 7 (J.A. 694 95) (criticizing GTE's expert on pricing for seeking recovery of "(1) forward looking costs, and (2) historic costs).

Similarly, the court's suggestion that use of a forward-looking cost study was somehow a concession[n" by GTE, J.A. 336, was also mistaken. GTE used a forward-looking study simply as one sub-part of its pricing proposal to determine the ***35** direct costs of individual elements. The overall proposal recovered historical costs by using current revenues as the touchstone for GTE's total costs.

B. Even If Forward-Looking Costs Could Be Used, Prices Still Must Be Based on the Costs of *GTE's Network,* Not a Wholly Imaginary Network.

Even if historical-cost pricing were not required, the SCC's Hatfield prices incorporate yet another glaring legal error. Even if forward-looking costs could properly be used under § 252(d)(1), network-element prices must still be based on *GTE's costs.* By commanding that network element prices be "based on the cost ... of providing" the network element, the "language of the Act contemplates that the touchstone of permissible pricing rules will be the *actual costs* an [incumbent LEC] will incur in providing network elements." *AT&T Comms. v. BellSouth Telecomms.,* 20 F. Supp. 2d 1097, 1101 (E.D. Ky. 1998) (emphasis added). *See also id.* (approving state decision to reject [] AT&T's cost studies that were based on a perfectly efficient hypothetical model" for studies based on "BellSouth's preexisting network"); *U S WEST v. Thoms,* No. 4-97-CV-70082, slip op. at 69-70 (S.D. Iowa Jan. 25, 1999) (stating that the "Act expressly requires" an "accurate approximation of US West's costs associated with 'providing the interconnection or network element"' and thus approving use of data reflecting the "existing local exchange network") (attached at Addendum 3).

***36** By adopting the Hatfield Model, however, the SCC rejected the fundamental premise that prices for elements of GTE's network must be based on the costs of *that network.* Instead, Hatfield bases prices on a wholly hypothetical network that will never exist. The result is prices that, as the SCC's Staff *conceded,* will not cover GTE's forward-looking costs in providing elements with GTE's real-world network.

1. Hatfield Violates the Act By Ignoring the Forward-Looking Costs of GTE's Actual Network and By Projecting Hypothetical Costs that No Real-World Carrier Could Hope To Match.

It is undisputed that the Hatfield Model makes no attempt to reflect the actual costs that GTE will incur in providing elements of the existing network it uses to serve customers. As the SCC's own expert witness made clear, Hatfield is not intended to describe the costs of GTE's facilities in Virginia at all, either now or in the foreseeable future. *See* J.A. 1437 (Tr. 945). *See also* J.A. 1511 (Tr. 1226). Rather, the model is founded on the erroneous legal premise that the only costs relevant under the Act are those of a hypothetical, most-efficient carrier using a perfectly reconfigured network and operating in a perfectly competitive market. The model thus incorporates two sets of legal errors: *First,* it ignores the costs of GTE's actual network in favor of the hypothetical costs of an imaginary network; *second,* by setting out to project hypothetical cost savings of an idealized carrier, it devises costs that could never be achieved by *any* real-world carrier starting with GTE's network.

***37** Using a "scorched node" approach that takes only the location of an incumbent's switches as a given, the Hatfield Model devises an entirely imaginary network using only the most efficient configuration and most efficient technology available. *See, e.g.,* J.A. 1518 (Tr. 1233) (aspects of network design other than switch location are considered "variables"). Unconstrained by the realities of the existing network that GTE has built over decades, Hatfield can devise configurations to cut costs that are plainly not possible using the actual network GTE has in the ground.

To give one example, Hatfield ignores the way the network connects customers to GTE's switches; instead, it reassigns them to the nearest central office to achieve the lowest costs. *See* J.A. 151-12 (Tr. 1226-27). Indeed, the model plans out its fantasy network on a blank slate without regard to natural barriers or the use of existing rights of way. It thus sets out

to create cost savings that have nothing to do with the real world, and that could never be achieved by GTE or any other carrier, no matter what technology it used to replace GTE's existing network or how efficiently the network is operated.

In addition, in keeping with its assumption that the actual costs are irrelevant, the model does not attempt to use data specific to GTE or even to Virginia. Instead, of the model's 490 inputs, all but one are based on nationwide default values or simply on undocumented assumptions provided by the model's creators. J.A. 1478- ***38** 80 (Tr. 1193-95). Thus, the model makes assumptions about average drop lengths (the length of the wire connecting a customer's premises to the feeder cable of the network) that have nothing to do with conditions in Virginia. As a result, in some areas the model would plan out a hypothetical network that, as its own proponents conceded, would have insufficient cable even to reach GTE's customers. *See* J.A. 1522 (Tr. 1237). Not surprisingly, such a miscalculation has a dramatic effect on loop prices, for as GTE demonstrated, distribution plant accounts for 70% of loop costs in Virginia. *See* J.A. 1392 (Tr. 687).

Even worse, in projecting the rock-bottom costs of an idealized carrier in a perfectly competitive market, Hatfield projects supposed efficiencies that neither GTE nor any other real-world carrier could *ever* achieve. As noted above, for example, the model plans out the cables of the network without regard to existing rights of way and natural barriers. No real-world carrier, however, could ever have a network that did not build along roads and around lakes. Similarly, by automatically assuming that the costs of support structures for cables (*i.e.,* poles, conduit and buried cable) would be shared with two other utilities, Hatfield assumed away two-thirds of these costs for its imaginary LEC. *See* J.A. 1394 (Tr. 689). [6] But that assumption was not based on ***39** any evidence and does not reflect the real-world experience of GTE. Changing that input, moreover, could affect the price for an unbundled loop by $3 to $5 - up to 25% of the overall loop price. *See* J.A. 1395 (Tr. 690). Further, without any specific explanation, the model radically discounts actual operating costs by 75% based on the assumption that firms in a competitive market will have reduced costs. *See* J.A. 1396-97 (Tr. 695-96). Yet, at the same time, the model makes no effort to use forward-looking costs of capital or depreciation rates. There can be no dispute that increased risks in a competitive environment will increase GTE's cost of capital. *See, e.g.,* J.A. 1398 (Tr. 699). But Hatfield incongruously projects a *decreased* cost of capital for its imaginary carrier. *See* J.A. 959-60.

16 Hatfield further slashed costs by projecting that its imaginary LEC would have only 55% of GTE's investment and 41% of GTE's expenses, J.A. 1599 projections that the SCC's own expert could not endorse as reasonable. *See* Tr. 1324 25, 1336.

Even the FCC, an ardent proponent of forward-looking cost models, has criticized Hatfield for its unrealistic projections. Indeed, the FCC recently concluded that even the significantly updated version of the model includes so many errors that systematically underestimate even the costs that might be achieved by a hypothetical, most-efficient carrier, that it cannot be used to project the costs of providing universal service. *See* In re Federal-State Joint Board on Universal Service, *Fifth Report and Order,* CC Docket No. 96-45, FCC 98-279 (Oct. 28, 1998). For example, the FCC ***40** explained that by ignoring the actual location of customers and instead distribut[ing] them uniformly in square or rectangular distribution areas," the Hatfield Model creates[] an apparent systematic downward bias in the required amount of distribution plant that is constructed in less dense areas." Id. ¶ 60. Similarly, echoing another criticism that GTE raised in this case, the FCC expressed concern that "the angling of feeder routes toward population centers *without regard to considerations such as rights of way* may lead to significantly lower cost estimates than are practicable in reality." *Id.* ¶ 62 (emphasis added).

Not surprisingly, the prices the SCC derived from the model will never cover even the forward-looking costs of GTE's network. GTE provided uncontested evidence showing that, if GTE's entire network were sold as elements, the Hatfield prices would slash GTE's revenues by *53%, see* J.A. 1404-06 (Tr. 726-28), a plain indicator that the prices have nothing to do with GTE's costs. And when asked whether Hatfield would allow GTE to recover its costs in delivering unbundled elements, the SCC Staffs own witness *conceded,* "Quite honestly, probably not." J.A. 1586 (Tr. 1357). That concession is fatal. The statutory command that prices ***41** be "based on the cost" of network elements does not permit prices that fail to cover even the actual forward-looking costs of an incumbent's network. [7]

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17 The District Court improperly reviewed the use of Hatfield prices under the arbitrary and capricious standard, *see* J.A. 333, and thus failed even to address, much less review *de novo,* GTE's fundamental *legal* claim that it violates the Act to base prices on a hypothetical network that does not exist and that concededly will not reflect the *actual* costs GTE will incur (or ever could incur in any scenario) in leasing pieces of its network.

Lacking any textual basis for the theory underpinning Hatfield, the model's supporters resort to policy rationales and argue that prices must be set at the level they believe would prevail in a competitive market. The Hatfield Model takes this premise to its extreme by positing costs (and prices) that would be attained by a hypothetical, most-efficient carrier in an already-competitive market. As AT&T has explained, the explicit intention is thus for Hatfield to "serve as a *surrogate for competition.*" AT&T Br. in Supp. of Mot. for Summ. J. at 23 (emphasis added).

Requiring regulators to project the outcomes that *might* eventually be obtained by perfect competition and to impose them by fiat, however, was not part of the "pro-competitive, de-regulatory" plan Congress sought to establish in the Act. H.R. Conf. Rep. 104-458, at 113. Rather than requiring regulators to impose a *surrogate* for competition, the Act seeks to encourage *competition itself* so that the process of ***42** competition will provide consumers the benefits of innovation and increased efficiency and, as a result, lower prices.

The ultimate argument behind Hatfield - that competition can be promoted and can *emerge* only if prices are set today by guessing at cost savings and efficiencies that *might* be achieved by a hypothetical carrier *after* competition has run its course - is nonsense. Justice Breyer explained this very point in his separate opinion in *AT&T Corp.* as he rejected the FCC's claims that the goal of promoting competition somehow required the use of hypothetical, forward-looking costs:

> The competition that the Act seeks is a process, not an end result; and a regulatory system that imposes through administrative mandate a set of prices that tries to mimic those that competition would have set does not thereby become any the less a regulatory process, nor any the more a competitive one.

119 S. Ct. at 751 (Breyer, J., concurring in part and dissenting in part).

Indeed, as the eminent economist Alfred Kahn has explained, auctioning off the real-world network at hypothetical prices "would actually discourage competitors coming in and building their own facilities, which it was the clear intention of the new Act to encourage." Alfred E. Kahn, *Letting Go: Deregulating the Process of Deregulation or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness* 96 (Mich. State Univ. 1998) ("Kahn"). No rational ***43** entrant would invest in facilities if it could purchase the use of the existing network at prices based on the costs that would be achieved by the most efficient carrier in a perfectly competitive market. *See id.* at 101. Pricing the existing network based on hypothetical projections of future efficiencies is thus *guaranteed* to *stifle* genuine competition and to ensure that real efficiencies are never actually achieved by entrants putting facilities in the ground. As a result, far from favoring the use of hypothetical costs, "considerations of economic efficiency and efficient competition alone *require* that the prices charged to competitors be based upon the [incumbent] LECs' *actual* costs." *Id.* at 94 (emphases in original).

Pricing based on a hypothetical network, in contrast, promotes only the illusion of competition. While new entrants (and their customers) may get immediately lower prices, they enjoy that windfall because they are not paying the full cost of the actual network they are using for telephone service. The result is thus not promoting deployment of more cost-effective and innovative technology, but merely forcing the incumbent to subsidize the proliferation of a number of so-called "competitors" all using the same underlying facilities. [8]

18 *Cf.* Hon. Stephen G. Breyer, *Antitrust. Deregulation, and the Newly Liberated Marketplace,* 75 Calif. L. Rev. 1005, 1018 (1987) (explaining the "special policy risk inherent in deregulation that regulators will "protect competitors instead of protecting

competition and that the "consequence of misdirect ed] protection is to threaten to deprive the consumer of the very benefits deregulation seeks).

***44 2. The Act Cannot Be Read To Permit Hatfield Prices Because, As the SCC's Own Staff Conceded, the Prices Will Result in an Unconstitutional Taking.**

The statute, moreover, cannot reasonably be construed to permit Hatfield prices, because the SCC's own Staff has *conceded* that the Hatfield prices will not cover even GTE's actual forward-looking costs in providing network elements (not to mention historical costs). *See* J.A. 1586 (Tr. 1357). That result would plainly accomplish a taking. Nor can the below-cost Hatfield prices be salvaged on the theory that GTE will earn sufficient revenues on other operations to receive a sufficient return overall. Such appeals to the "total effect" test are misplaced. In the competitive environment ushered in by the Act, an incumbent cannot be required to operate any segment of its business at a loss. *See Brooks-Scanlon,* 251 U.S. at 399.

C. The District Court Erred By Approving Wholesale Rates Based on the Assumption that GTE Would Exit the Retail Market Entirely.

Section 252(d)(3) straightforwardly commands that a "State commission shall determine wholesale rates on the basis of retail rates ... excluding the portion thereof attributable to any marketing, billing, collection and other costs that *will be avoided* by the local exchange carrier" (emphasis added). Under that standard, only the costs ***45** GTE can reasonably avoid when it begins wholesaling should be excluded from wholesale rates. Not *all* retailing costs can automatically be deemed to evaporate, because GTE will, in fact, continue its retail business.

Despite the plain command of the Act, however, the SCC set wholesale rates by interpreting § 252(d)(3) to exclude all costs "that would be reasonably avoidable by a local exchange company furnishing *only* wholesale service." J.A. 1759 (emphasis added). In other words, the SCC excluded *all* of GTE's retailing costs by assuming that GTE will exit the retail market entirely. As Professor Kahn has explained, that approach is "obviously very different" from the standard set by Congress, "which can mean only the costs that [incumbents] would *actually* avoid in selling the services at wholesale." Kahn 97 (emphasis in original). The SCC's assumption is not only counter to the statutory text, it is also demonstrably counterfactual. It is undisputed that GTE will continue retailing, as AT&T's own witness acknowledged, *see* J.A. 1314 (Tr. at 275), and as required by state law, *see* Va. Code Ann. § 56-234 (1995 Replacement Vol.).

The SCC's counterfactual assumption necessarily overstated the costs GTE can possibly avoid. The only way the false retail-exit assumption could accurately reflect the costs that "will be avoided" by GTE would be if all of GTE's retailing expenses were perfectly variable and declined in a straight line in direct proportion to its loss ***46** of retail customers. In fact, the District Court, without citing any evidence, apparently jumped to that assumption, as it asserted that the "only revenue GTE loses by providing wholesale services will be offset by reductions in cost." J.A. 327. But that is false. Many of GTE's retailing costs are fixed or "lumpy" and will not be reduced significantly, much less proportionately, as GTE begins to lose retail customers. [9] Even if GTE loses 10% of its market share, for example, its costs for computer software to generate bills will not decline one bit. *See, e.g. MCI v. GTE,* 1999 WL 151039, at *14 (attached at Addendum 2).

19 Professor Kahn has made the same point: "The costs that an incumbent] will avoid by selling *some portion* of a service at wholesale rather than at retail ... will undoubtedly be smaller, on a per unit basis, than if it were to abandon retailing entirely .... Kahn 97 (emphasis in original).

Lacking any basis in fact or the statutory text, the retail-exit assumption derives its only support from a wholly extra-textual policy rationale. According to AT&T and MCI, the guiding principle should be that it would be "inappropriate" for wholesale rates to reflect *any* retailing expenses. *See e.g.,* MCI's Resp. to GTE's Mot. for Summ. J. at 26. Apparently accepting that view, the District Court justified the "wholesale only model" on the ground that under another approach

"wholesale purchasers would be forced to subsidize GTE's retail services in violation of § 252(d)(3)." J.A. 327. But that rationale simply reads terms into § 252(d)(3) that ***47** appear nowhere in the Act. Section 252(d)(3) says nothing about insulating wholesale purchasers from real costs that GTE continues to incur.

Nor does applying the statutory standard "subsidize" GTE's retail operations. Rather, as Professor Kahn has explained, discounts greater than the incumbent's actual avoided costs would create a form of subsidy *for entrants* and promote inefficient entry. Simply put, "it [would] encourage the entry of resellers whose additional costs of performing [the retailing] function exceed the costs society will save by having the incumbents cease to perform it." Kahn 97.

III. EVEN IF THE FCC'S RULES COULD APPLY RETROACTIVELY, A REMAND WOULD BE REQUIRED FOR THE SCC TO APPLY THOSE RULES IN THE FIRST INSTANCE.

If the Court concludes that the FCC's pricing rules *can* be applied retroactively, the case must be remanded for the SCC to apply the rules in the first instance. As the District Court recognized, it is axiomatic that "[a] court may only uphold agency actions on the basis articulated by the agency itself." J.A. 325 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.,* 463 U.S. 29, 50 (1983)). *See also SEC v. Chenery Corp.,* 318 U.S. 80, 88 (1943).

At this point, this Court cannot affirm the SCC's decisions on the theory that they comply with the FCC's rules for the simple reason that the SCC did not apply those rules. Instead - since the FCC's pricing guidelines had never gone into effect ***48** - the SCC used a pricing methodology *devised by its own staff. See* J.A. 111. Even if this Court were inclined to wade into the facts of this case and the details of the FCC's rules, the Court could not now declare that the SCC's prices fully complied with the FCC's rules without impermissibly supplying a rationale for the SCC's ruling that differs from the one actually relied on by the SCC. *See SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947).

The *Chenery* rule applies with special force here, moreover, because, as the FCC itself recently argued in defending its rules, applying the pricing rules involves substantial agency expertise and discretion. *See* Opening Brief for the Federal Petitioners at 26-27, in *FCC v. Iowa Utilities Bd.,* No. 97-831 (companion case to *AT&T Corp. v. Iowa Utilities Bd.*) (included in GTE's Separate Addendum) ("[I]n arbitrating specific interconnection disputes, state commissions may exercise their considerable discretion to establish actual carrier-to-carrier rates in light of carrierand region-specific variables ...."). *See also ICC v. Brotherhood of Locomotive Eng'rs,* 482 U.S. 270, 283 (1987) (a court "may not affirm on a basis containing any element of discretion ... that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court").

Indeed, the FCC has expressly acknowledged that, even where it has originally defended a state agency's prices as valid under the Act, where the state agency did ***49** not apply the FCC's rules in the first instance, "the proper course is for [a reviewing court] to remand the pricing issues to the state commission with an order directing it to reconsider its pricing decisions in light of the FCC's rules." *See, e.g.,* Supp. Br. of the FCC as *Amicus Curiae,* at 7, in *AT&T Comms. v. Southwestern Bell Tel. Co.,* Civ. No. 97-1573-CV-W-5 (W.D. Mo. Mar. 12, 1999) (included in GTE's Separate Addendum).

IV. IN ANY EVENT, BEFORE THIS COURT COULD APPLY THE FCC'S PRICING RULES, IT WOULD FIRST HAVE TO DETERMINE WHETHER THE RULES ARE CONTRARY TO THE ACT.

A. The Court Has Jurisdiction To Assess Whether the FCC's Pricing Methodology Is Contrary to the Act.

Before it could simply enforce the FCC's pricing rules against GTE in this case, or apply them as an authoritative interpretation of the Act, this Court would first have to entertain GTE's arguments that the FCC's pricing methodology is contrary to the Act. It has long been the background presumption of federal common law that, when an agency rule is applied to a party, a reviewing court has jurisdiction to entertain challenges to the agency rule. *See, e.g.,* Hon. Stephen G.

Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy* 1110-11 (1992); 2 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 15.12, at 361 (3d ed. 1994).

***50** The mere fact that the Hobbs Act, 28 U.S.C. § 2342, provides for *direct* pre-enforcement review of FCC rules [20] does not eliminate the default rule and oust this Court of its ordinary jurisdiction in a case such as this where application of the rules is sought.

20 The Hobbs Act provides that " t]he court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. 28 U.S.C. § 2342.

It is settled that a statute - like the Hobbs Act - that provides for pre-enforcement review but is silent on the availability of review at the time the rules are applied "does not foreclose subsequent examination of a rule where properly brought before this court for review of further agency action applying it." *NLRB v. FLRA,* 834 F.2d 191,195-96 (D.C. Cir. 1987) (quotation omitted). [2] That principle applies whether review of rules is sought as a defense to an enforcement action or upon judicial review of an agency adjudication, for "[i]t is well established that a rule may be reviewed when it is applied." *AT&T v. FCC,* 978 F.2d 727, 734 (D.C. Cir. 1992); *see also American Scholastic TV Programming Found. v. FCC,* 46 F.3d 1173, 1178 n.2 (D.C. Cir. 1995); *Cronin v. FAA,* 73 F.3d 1126, 1131 n.3 (D.C. Cir. 1996); *Wind* ***51** *River Mining Corp. v. United States,* 946 F.2d 710, 714-15 (9th Cir. 1991). Indeed, specifically in the context of the Hobbs Act it is clear that "indirect challenges to [a] rule brought when the rule is applied to a particular individual are within the court's jurisdiction." *Commonwealth Edison Co. v. NRC,* 830 F.2d 610,614 (7th Cir. 1987); *see also Tri-State Motor Transit Co. v. ICC,* 739 F.2d 1373, 1375 n.2 (8th Cir. 1984); *Texas v. United States,* 749 F.2d 1144, 1146 (5th Cir. 1985).

21 *Cf. generally* Breyer, *supra,* at 1111 (distinguishing between statutes like the Hobbs Act that are silent on this point and others, mostly in environmental areas, that expressly prohibit review at the time of enforcement).

The Court's power here, moreover, is particularly clear because the 1996 Act expressly grants a reviewing court broad authority. Section 252(e)(6) provides, without limitation, that a court reviewing a state arbitration decision must "determine whether the [arbitration agreement] *meets the requirements of Section 251 and this section.*" (emphasis added). If a state commission decision must be based on binding FCC rules, then the reviewing court necessarily must assess the rules (even if indirectly) to determine whether the state decision "meets the requirements of Section 251 and this section."

The primary argument against review of the FCC's rules here is not an argument at all, but a solitary fact: some district courts have concluded that they cannot question FCC interpretations of the Act in § 252(e)(6) actions, whereas only ***52** one has found that it can. [22] But the district courts reaching an overly constrained view of their authority have not only failed to address the above-listed cases and principles, they have erroneously relied on *FCC v. ITT World Comms., Inc.,* 466 U.S. 463 (1984). In that case, a party sought direct review in the court of appeals of the FCC's denial of a rulemaking petition, yet also brought a virtually identical action in district court. The Supreme Court found that the court of appeals had exclusive jurisdiction to consider a *direct* challenge to an FCC rule. *Id.* at 468. Because the agency had not yet attempted to apply the rule to a party - rather, the party's district court action simply represented an impermissible second bite at *direct* review - *ITT* has no relevance whatsoever to the issue presented here.

22 *Compare AT&T Comms. Inc. v. BellSouth Telecomms., Inc.,* 7 F. Supp. 2d 661, 674 (E.D.N.C. 1998) (rules unreviewable), *with U S WEST Comms., Inc. v. AT&T Comms., Inc.,* 31 F. Supp. 2d 839, 851 (D. Or. 1998) (rules reviewable).

B. Judicial Economy Favors Staying This Case.

While this Court has the *authority* to address the FCC's rules, considerations of judicial economy favor declining to exercise that authority now and instead staying this case to await the Eighth Circuit's decision on direct review. Were this Court to proceed, it would be addressing exactly the same questions of statutory construction that are being presented to the Eighth Circuit. But the Eighth Circuit is uniquely well positioned to address those issues in the first instance since it has virtually the entire ***53** telecommunications industry before it in the nationwide, consolidated review of *all* petitions for direct review from the FCC's rulemaking. Indeed, by proceeding now, rather than staying this case, the Court would not only be duplicating effort, it would also be raising a risk of conflicting judgments. While there is no statutory bar to preclude this Court's jurisdiction in this unusual situation where the progress of an enforcement proceeding has outstripped the case on direct review of the rules, proceeding to judgment here on the same issues that are before the Eighth Circuit would plainly still run counter to the policy objectives behind the statute that provided for consolidation of the direct review proceedings in the first place. *See e.g., Westinghouse Elec. Corp. v. Nuclear Reg. Comm'n,* 598 F.2d 759, 766 (3d Cir. 1979) (the "purpose of [28 U.S.C.] § 2112(a)" is "to avoid confusion and duplication by the courts").

Not surprisingly, the ordinary course where agency rules are still under direct challenge is to stay other cases pending the result of direct review. *See. e.g., Goldstein v. Time Warner New York City Cable Group,* 3 F. Supp. 2d 423, 439 (S.D.N.Y. 1998) (staying case involving FCC pricing rules that were under direct review because the D.C. Circuit "will either uphold the new price regulation or order that the FCC establish a new one; either way, resolution of that appeal should guide this Court").

***54 C. Even if the Court Lacks Jurisdiction, That Provides All the More Reason To Stay the Case.**

Even stronger considerations warrant staying this case if the Court believes it *lacks* jurisdiction to address the FCC's rules. When a case necessarily requires resolving a party's challenge to an agency rule, but a court believes it lacks jurisdiction to resolve that issue, the proper route is not simply to apply the agency rule without question - thereby denying the party its right to judicial review of the rule - but rather to *stay* the proceedings until the party can complete a challenge to the agency rule in the appropriate forum. *See City of Peoria v. General Elec. Cablevision Corp.,* 690 F.2d 116, 122 (7th Cir. 1982).

For this Court to resolve this case conclusively by applying the FCC's rules against GTE before GTE has been afforded any judicial consideration of whether the rules are contrary to the Act - even though GTE has done everything within its power to obtain direct review - would flout the presumption of judicial review of agency action that underpins our administrative law system. *See Abbott Labs. v. Gardner,* 387 U.S. 136, 141 (1967). GTE is not aware of any precedent that would approve such a scenario, in which an agency rule would be conclusively enforced by a federal court without permitting GTE review of the rule in any judicial forum. [23]

23 Failure to allow judicial review of a rule at least at the time it is *judicially enforced* against a party not only would be inconsistent with elementary principles of administrative law, it would violate due process. *Cf. Adamo Wrecking Co. v. United States,* 434 U.S. 275, 289 91 (1978) (Powell, J., concurring); *Oestereich v. Selective Serv. Sys.,* 393 U.S. 233, 243 44 (1968) (Harlan, J., concurring).

***55 D. The FCC's Pricing Rules Are Contrary to the Act.**

1. Forward-Looking TELRIC Prices Based on a Hypothetical, Most-Efficient Network Conflict with the Command that Prices for Network Elements Be Based on Cost.

The same arguments set out above demonstrating that the SCC violated the terms of § 251(d)(2) by ignoring both GTE's historical costs and GTE's actual forward-looking costs, *see supra* pp. 22-44, apply equally to show that the FCC's TELRIC methodology also conflicts with the Act by ignoring recovery of the same costs. [24]

[24] Because GTE's arguments are based on the requirements of the plain language of the Act, potential deference to the FCC's construction of ambiguous terms does not apply here. *Cf. Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984). In particular, it is settled that on the first step of *Chevron* analysis, all traditional canons of statutory construction must be applied. *See id.* at 843 n.9; *INS v. Cardoza Fonseca,* 480 U.S. 421, 446 48 (1987); *Cabbell Huntington Hosp. v. Shalala,* 101 F.3d 984,990 (4th Cir. 1996). Here, for the reasons outlined above, the presumption against construing a statute so as to create an unconstitutional taking forecloses the FCC's approach to the Act.

The FCC's approach to pricing, indeed, not only conflicts with the statutory text, it also conflicts with the Act's basic purposes and objectives. *See, e.g,* ***56** *Securities Indus. Ass'n v. Board of Governors,* 468 U.S. 137, 143 (1984) ("A reviewing court must reject administrative constructions of [a] statute ... that frustrate the policy Congress sought to implement."). As Justice Breyer has explained, "[t]he competition that the Act seeks is a process, not an end result." *AT&T Corp.,* 19 S. Ct. at 751 (Breyer, J., concurring in part and dissenting in part). By mandating through regulation the prices that it believes will "mimic" the end result of competition, the FCC has simply not promoted the process Congress envisioned.

Indeed, as Professor Kahn has explained, "the FCC's pricing rules would omnisciently short-circuit" the process the Act was designed to foster. Kahn 96. Contrary to the FCC's claim that prices based on an incumbent's *actual* costs would somehow distort incentives for entry, such prices preserve incentives for efficient entry and "give challengers the proper target at which to shoot." *Id.* at 96. If entrants "can achieve costs lower than that, they will enter and *in the process* ... beat prices down to efficient levels." *Id.* (emphasis in original). The FCC, however, has fundamentally rejected the premise of the Act - that competition among different network providers should be allowed to run its course - and, continuing in the mindset of an all-powerful regulator, has attempted instead to leap-frog to the results ***57** *it* believes competition would achieve by simply decreeing lower prices for use of one underlying network. [25]

[25] Professor Kahn explained the FCC's overweening "presumption : "The Commission has in effect declared: '*We* will determine not what your costs are or will be but what we think they *ought to be.* Why should we bother to let the messy and uncertain competitive process determine the outcome when *we* can determine at the very outset what those results would be and prescribe them now? Kahn 92.

The same fundamental mismatch between the Act's competitive objectives and the FCC's pricing theory also demonstrates the incoherence of the FCC's only stated rationale for its approach. The FCC based its resort to TELRIC entirely on its view that it could promote competition *only* if it required prices based on the forward-looking costs of a hypothetical, most-efficient network and that prices based on actual costs would somehow derail competition. *See, e.g.,* First Report & Order ¶ 705 (only forward-looking pricing will promote competitive entry); ¶ 706 (including historical costs in prices "would interfere with the development of efficient competition"). But for all the reasons outlined above, that view is economic nonsense. Indeed, Justice Breyer has already soundly rejected precisely these FCC explanations as an irrational basis for thinking that the Act favors the FCC's pricing approach over any other: "[A] regulatory system that imposes through administrative mandate a set of prices that tries to mimic those that competition would have set does not thereby become any the less a regulatory process, nor any the more a competitive ***58** none." *AT&T Corp.,* 119 S. Ct. at 751 (Breyer, J., concurring in part and dissenting in part). The FCC's approach, in short, far from being the only approach that could promote competition, has no relation to the competition the Act seeks to promote. [26]

[26] Indeed, another federal agency addressing identical issues has recognized that permitting recovery of stranded historical costs is perfectly consistent with moving a regulated industry toward competition. In moving the electric power transmission industry toward competition, the Federal Energy Regulatory Commission (FERC) explained that, far from *preventing* competition, recovery of stranded costs *promotes* competition. *See* Order No. 888, 61 Fed. Reg. 21540, 21633 (Apr. 24, 1996)

("The stranded cost recovery mechanism that we direct here is a necessary step to achieve pro competitive results. In the long term, the Commission's rule will result in more competitive prices and lower rates for consumers.); *see also id.* at 21630.

Even worse, the FCC itself recognized that basing prices on a *wholly* hypothetical network would actually *frustrate* the Act's objectives by "discourag[ing] facilities-based competition." First Report & Order ¶ 683. *Cf. also* Universal Service Order ¶ 231 (acknowledging that "discouraging facilities-based competition" would "contraven[e] Congress's explicit goals"). But TELRIC's sole concession to reality - using current wire center locations - does not solve that problem. After all, basing prices for use of the *actual* network on costs projected for a *mostly hypothetical,* most-efficient network will still guarantee entrants a better price - with *no risk* - than anything entrants could hope to build for themselves. Yet the FCC nowhere provided a word of reasoning to explain how projecting an overwhelmingly hypothetical ***59** network would somehow avoid adverse effects in discouraging facilities-based competition.

In short, the FCC failed even to provide a rational explanation for adopting TELRIC and thus did not even satisfy the minimum dictates of reasoned decision-making. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). The fundamental premise underlying TELRIC - that the FCC could promote competition only with a pricing scheme that would "omnisciently short-circuit" the very process of competition - does not withstand the barest scrutiny.

2. The FCC's Counterfactual Retail-Exit Assumption Is Contrary to the Act.

The same arguments presented in Part II.C above demonstrate that the FCC's pricing methodology is contrary to the Act to the extent it mandates wholesale rates based on the counterfactual premise that an incumbent will "cease retail operations and instead provide all of its services through resellers." First Report & Order ¶ 911.

***60 V. IF THE COURT PROCEEDS TO APPLY THE FCC'S RULES, THE SCC'S DECISIONS STILL MUST BE REVERSED, BECAUSE THEY ARE INCONSISTENT WITH THOSE RULES.**

Finally, even if the Court crossed each of the successive hurdles discussed above and determined to apply the FCC's pricing rules retroactively itself, the SCC's decision still would have to be reversed, because the SCC's Hatfield prices do not even comply with the FCC's detailed TELRIC methodology. The FCC itself, indeed, has already provided the conclusive determination on this point, since it has rejected even a significantly updated and improved version of Hatfield for use in determining the costs of universal service on the ground that flaws in the model fail to comply with the FCC's requirements for a forward-looking TELRIC study. *See* Fifth Report and Order ¶¶ 3, 60, 6. The FCC has determined that, among other flaws, faulty assumptions in the model "create an apparent systematic downward bias in the required amount of distribution plant that is constructed in less dense areas," *id.* ¶ 60, thereby debarring the model from compliance with the FCC's TELRIC requirements.

Moreover, the FCC has specified that, under its methodology, "[w]ire center line counts should equal actual [incumbent] wire center line counts," and that the "model's average loop length should reflect the incumbent carrier's actual average loop length." Universal Service Order ¶ 250(1). But to reduce costs artificially, the SCC's Hatfield Model redistributed customers to different wire centers - necessarily ***61** altering line counts - and also repudiated the use of any Virginia-specific data on loop length - thereby not only failing to reflect "*actual* average loop length" but even *concededly* constructing an imaginary network with loop plant too short to reach GTE's real-world customers. J.A. 1522 (Tr. 1237).

In short, the FCC's own determination of the flaws still plaguing even an updated version of Hatfield conclusively demonstrates that - even if the FCC's rules could apply here - the SCC's use of an earlier and even more flawed version of Hatfield must be reversed and the case remanded for reconsideration in light of the FCC's rules.

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***62 CONCLUSION**

For the foregoing reasons, the judgment of the District Court granting summary judgment against GTE should be reversed.

Appendix not available.

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1999 WL 33613571 (C.A.4) (Appellate Brief)
United States Court of Appeals,
Fourth Circuit.

GTE SOUTH INCORPORATED, Appellant,

v.

Theodore V. MORRISON, Jr., Hullihen Williams Moore, and I. Clinton Miller (in their official capacities as commissioners of the virginia state corporation commission), Cox Fibernet Commercial Services, Inc., MCI Telecommunications Corporation; MCI Metro Access Transmission Services, Inc., and AT&T Communications of Virginia, Inc., Appellees.

No. 98-1887.
May 26, 1999.

Appeal from the United States District Court for the Eastern District of Virginia

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***1 I. THE FCC'S PRICING RULES CANNOT BE APPLIED RETROACTIVELY.**

Because the FCC's pricing rules were stayed before they ever went into effect and subsequently were vacated, when (and if) they go into effect for the first time as a result of the Supreme Court's decision, they cannot be applied retroactively to the arbitration in this case. Appellees' effort to distinguish the governing rule from *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208 (1988), is unavailing. According to appellees, *Bowen* limits solely an agency's ability to *issue* rules with retroactive effect; thus, it places no constraint on what appellees seek here - a post hoc judicial effort to give the rules retroactive sweep even though they were intended to be prospective when promulgated. But that misstates the law. *Bowen* rested on a fundamental limitation on the power of an agency to create new legal obligations in rules that could be applied to conduct before their effective date. *See id.* at 208-09. Indeed, if anything, the FCC's decision to give its rules a specific prospective effective date makes it even clearer that, because that effective date was judicially postponed, the rules cannot now be applied retroactively, contrary to the agency's intention. *See id.* at 209-11.

[1] As GTE has explained, *see* GTE Br. at 16 n. 10, the Court has ordered the parties to brief this case on the assumption that the Eighth Circuit will release its prior mandate vacating the FCC's pricing rules. As of this date, May 26, 1999, however, the Eighth Circuit has not released its mandate.

***2** Appellees claim that applying the FCC's rules would involve simply giving effect to the Supreme Court's construction of the Act. But the Supreme Court established merely that the Act permits the FCC to promulgate rules concerning pricing. *See AT&T Corp. v. Iowa Utils. Bd.,* 119 S. Ct. 721, 726-733 (1999). That says nothing about the distinct question whether the rules that were stayed before they went into effect should now be applied retroactively to arbitrations concluded while they were stayed and vacated. As far as GTE is aware, the only three decisions expressly to address *that* question have squarely held that the FCC's rules *cannot* be applied retroactively.[2] *See MCI Telecomms. Corp. v. GTE Northwest. Inc.,* No. 97-1687-JE, 1999 WL 151039, at *1-*7 (D. Or. Mar. 17, 1999) ("*MCI v. GTE*"); *U S WEST Comms. v. AT&T Comms.,* No. 97-1575-JE, 1999 WL 274112, at *2-*6 (D. Or. May 3, 1999) (attached as Addendum 4); *U S WEST Comms. v. Jennings,* Nos. 97-26-PHX-RGS-OMP *et al.,* 1999 WL 284888, at *2 (D. Ariz. May 4, 1999) (attached as Addendum 5) ("*US WEST v. Jennings*").

[2] While appellees cite several cases that have applied the pricing rules since the Supreme Court's decision, *see* Appellees' Br. 21 n.11, none of those courts paused to consider whether it was proper to apply the rules retroactively.

The further cases appellees cite are also inapposite. As the District of Oregon has explained, *United States v. Kincaid,* 898 F.2d 110 (9th Cir. 1990), is irrelevant because it involved applying a court's ruling on the constitutional validity of a statute ***3** - it did not purport to address a situation in which an agency's rules had been expressly stayed before ever going into effect. *See MCI v. GTE,* at *6.

Similarly, *NRDC v. EPA,* 683 F.2d 752 (3d Cir. 1982), involved a court's determination that an agency order suspending the effective date of certain rules was unlawful and thus ineffective in staying the effective date. As a result, the rules were deemed operative as of their originally declared effective date. *See id.* at 768. That says nothing about the effect of the Eighth Circuit's order. A court order, even if later determined to be erroneous, does not retroactively lose its effect for the period it was in force. To the contrary, the Eighth Circuit's order was fully operative in postponing the effective date of the FCC's rules and the Supreme Court's decision does not wipe it out as if it had never existed. [3]

[3] The FCC itself has acknowledged the effectiveness of such a judicial stay of its rules even when the rules are eventually upheld. *See, e.g.,* In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 40 FCC 2d 293 (1973).

Finally, appellees note that the arbitrated agreement here will govern conduct into the future - at least until it expires on May 1, 2000. *See* Appellees' Br. 24. But that in no way alters the impermissible retroactive effect that applying the FCC's rules would have. For example, if the rules were applied and part of the agreement were struck down, then one party might be liable for shortfalls in past payments, even though the payments were lawful in the absence of the FCC's rules. Despite ***4** appellees' claims, moreover, recognizing that the FCC's rules cannot be applied retroactively here does not mean that the "Eighth Circuit's erroneous construction" of the Act will be applied into the future. *Id.* Instead, it simply acknowledges that even if the Supreme Court's understanding of the FCC's authority is given full effect immediately, it can only bring the FCC's stayed and vacated rules into force after the date on which the rules are first put into operation by the Eighth Circuit on remand.

II. THE SCC'S PRICING DECISIONS VIOLATE THE ACT.

A. Prices for Network Elements Must Be Based on GTE's Actual Costs.

1. The Plain Terms of the Act Require Prices Based on *All* of GTE's Actual Costs.

Section 252(d)(1) of the Act provides that prices for network elements must be "based on the cost ... of providing" the elements and "may include a reasonable profit." That straightforward command requires that prices take into account all the actual costs GTE has incurred in constructing its network.

Appellees cannot point to any basis in the text for precluding recovery of historical costs. Instead, they claim that in this context "cost" is really a term of art - but a peculiar term of art that is deliberately ambiguous. Appellees' Br. 36-37. That counterintuitive gloss on the word provides no basis for departing from its plain ***5** and ordinary meaning - which is necessarily the amount GTE has expended in constructing its network.

Moreover, section 252(d)(1)'s provision that prices "may include a reasonable profit" makes sense only if cost-based prices already mandate the recovery of all of an incumbent's actual costs. After all, a firm cannot recover a profit without first recovering its outlays. [4] Appellees' assertions that forward-looking costs can provide for a so-called "profit" by taking into account the forward-looking cost of capital are beside the point. Because they ignore the costs that a real-life firm has actually expended, forward-looking costs are not calibrated to provide that real-life firm a return on its actual investments.

[4] The suggestion that GTE would read the Act to guarantee recovery of all costs, no matter how imprudently incurred, is a red herring. *See* Appellees' Br. 40 41. Nothing prevents a state commission from applying a prudent investment rule in determining the cost of providing network elements.

In part, appellees claim that the parenthetical in section 252(d)(1) prohibiting a "rate-of-return or other rate-based proceeding" somehow precludes the use of historical costs. Appellees' Br. 38. But the mere fact that state commissions

typically used rate-of-return proceedings to determine historical costs in the past does not mean, as appellees attempt to suggest, that determining historical costs somehow necessarily *requires* resorting to that same full panoply of procedures. Rather, Congress's decision to foreclose the use of a particularly cumbersome *procedure* in ***6** no way precludes the use of historical costs. Indeed, even the FCC (an ardent opponent of historical costs) specifically agrees with GTE on this point. *See* In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report & Order,* ¶ 704, 11 FCC Rcd. 15,499 (Aug. 8, 1996) ("*First Report & Order*").

Appellees attempt to dismiss the fact that in the next subsection of the Act Congress called for prices based on the "additional costs" of certain functions; they claim the relevance of this language is "puzzling." Appellees' Br. 39 n.25. But its relevance is transparent: where Congress intended to restrict the term "cost" in the Act, it did so explicitly - in section 252(d)(2)(A)(ii) by specifying an incremental measure of cost. It did not do so in section 252(d)(1).

Appellees have less difficulty attempting to tie together wholly unrelated statutory provisions. Thus, they defend the District Court's error in relying on section 224 of the Communications Act to construe section 252(d)(1). The District Court focused on the phrase "actual capital costs" in section 224 and - based on the mistaken assumption that the phrase actually appeared in section 254 (part of the Telecommunications Act) - concluded that the absence of the same language in section 252(d)(1) meant that section 252(d)(1) must *not* be referring to historical costs. Appellees claim that it makes no difference that section 224 was part of a different enactment. But neither of the cases they cite remotely addresses application ***7** of the particular rule of construction invoked by the District Court. Instead, appellees' cases stand only for the most generalized proposition that "a court should, if possible, construe statutes harmoniously," *Anderson v. FDIC,* 918 F.2d 1139, 1143 (4th Cir. 1990) - a canon that in no way justifies making the construction of section 252(d)(1) turn on language in an unrelated provision enacted over two decades ago.

Appellees also repeatedly rely on a string cite of state commission and district court decisions holding that section 252(d)(1)'s cost-based standard permits forward-looking costs. But those decisions provide no sound basis for that result. To the contrary, state commissions facing multiple arbitrations were typically influenced by the FCC's pricing rules even though the rules were stayed and later vacated, *cf. U S WEST v. Jennings,* at *2 (noting that "the FCC has pressured state public utilities commissions to adopt" its TELRIC method). Similarly, on district court review, a few initial decisions endorsing forward-looking costs were instantly cited to other courts as precedent and district judges, confronted with dozens of complex issues under the Act, frequently adopted with little or no independent analysis decisions reached only weeks before in another district. Indeed, in some cases cited by appellees, the issue was not even *contested:* the parties had agreed to use forward-looking costs. *See e.g., MCI Telecomms. v. U S WEST Comms.,* No. C97-1508R, slip op. at 16-18 (W.D. Wash., July 21, 1998). Such cases have no persuasive value for determining the meaning of the Act.

***8** Unable to point to any basis in the text for excluding historical costs, appellees predictably resort to policy rationales. They claim that historical costs will somehow block competition and that competition can only emerge if forward-looking costs are imposed as a "surrogate for competition." Appellees' Br. 43-44. But these claims are economic nonsense. Requiring entrants to pay prices that reflect the actual costs GTE has incurred in constructing its network requires them to do nothing more than bear the actual costs of the equipment they are using. That does not retard competition; rather, it preserves incentives for entrants to deploy new facilities if they believe they can be more efficient. The Act, moreover, does not envision a market in which regulators must provide a "surrogate" for competition, but rather one in which competition itself would be unleashed to bring new and more innovative services to consumers.

Recognizing that it would run counter to the Act to tout forward-looking prices as a "surrogate" for competition, appellees claim that forward-looking prices will somehow initiate a competitive "dynamic." Appellees' Br. 43-44. But the only "dynamic" appellees identify is that new entrants will have a choice about how much of the below-cost discount created by the SCC's hypothetical prices they will pass on to consumers. Contrary to appellees' suggestion, that has nothing to do with allowing *competition* to "erod[e] retail prices," *id.* at 44, or with bringing consumers the benefits of true competition.

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***9** Competition brings benefits by spurring innovation that yields cheaper ways to provide service and newer and better services. The SCC's system of selling off the existing network based on the forward-looking costs of a most-efficient, imaginary carrier only stifles that process. Rather than allowing competition to run its course, it instead attempts to leap-frog today to the end result that a regulator believes competition *would* produce. That creates only the illusion of competition by providing the windfall of immediately lower prices without requiring anyone actually to build a more efficient network to justify the rate reductions being offered to consumers.

Lastly, appellees note that the SCC's prices preserve incentives for entrants to deploy redesigned networks because they do not reflect a *perfectly* hypothetical, efficient network and instead incorporate the locations of existing switches. Appellees' Br. 47 & n.26. But this argument proves GTE's point. By pointing to the *one* concession the SCC made to the reality of the existing network as the source of incentives for rival facilities, appellees confirm the inherent flaw in hypothetical, forward-looking costs: offering today's network at prices based on imaginary efficiencies eliminates incentives for entrants to develop facilities of their own.

***10 2. Precluding Consideration of GTE's Actual, Historical Costs Would Result in an Unconstitutional Taking.**

To avoid the constitutional infirmities with the SCC's prices, appellees claim that the Supreme Court has upheld rate orders that "do not provide recovery of *all* historical costs." Appellees' Br. 52 (emphasis added). None of the cases they cite, however, addresses the issue here: a rate that would ignore *any* recovery of historical costs. Thus, for example, while the rate order in *Duquesne* did not recover *all* historical costs, the Court made it clear that the costs excluded amounted to only roughly 2% of the rate base. *See Duquesne Light Co. v. Barasch,* 488 U.S. 299, 312 (1989). The Court, moreover, pointed out that in determining whether a regulated entity was being allowed a fair return, the amount of investment upon which the return should be gauged would have "constitutional overtones," *id.* at 310, and three Justices concluded that "all prudently incurred investment may well have to be counted" for that purpose. *Id.* at 317 (Scalia, J., concurring). Appellees' other case is even more inapposite, since it addressed the *sui generis* situation of a railway doomed to bankruptcy -- its assets could not be operated at a profit. *See Market St. Ry. v. Railroad Comm'n,* 324 U.S. 548, 566-67 (1945). [5]

5 Appellees' effort to cast GTE's arguments as if they rest solely on claims about past depreciation, Appellees' Br. 51, is misplaced. The defect at issue does not hinge simply on past depreciation rates, but on the complete failure of the SCC's prices to take into account historical costs.

***11** Appellees also repeatedly claim -- without any rationale -- that the "total effect" test from *Duquesne* should apply here. But their arguments readily demonstrate why that test cannot apply. The total effect test depends on the theory that shortfalls in one part of a rate proceeding "may well be canceled out by countervailing errors or allowances" elsewhere. *Duquesne,* 488 U.S. at 314. Where a partially regulated entity faces competition, however, it is impossible for the regulator to calibrate returns on different parts of the business. As a result, the company cannot lawfully be required to operate a part of its business at a loss on the theory that it will recover the shortfalls from competitive lines of business. *See Brooks-Scanlon Co. v. Railroad Comm'n,* 251 U.S. 396, 399 (1920).

In part, appellees also claim that a narrowing construction should be used only where application of a statute will necessarily result in a taking. Appellees' Br. 50. But here, under the *Brooks-Scanlon* rule, there is no question that the interpretation of the Act applied below will necessarily result in a taking. The SCC's staff itself admitted that the SCC's prices will not cover even the actual forward-looking costs of providing elements of GTE's network, not to mention GTE's actual, historical costs. *See* J.A. 1586 (Tr. 1357).

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Lastly, appellees' half-hearted effort to discredit *Brooks-Scanlon* with dictum from a footnote in a lower court opinion is futile. *See* Appellees' Br. 53 (citing *In re* ***12** *Valuation Proceedings,* 439 F. Supp. 1351, 1357 n. 12 (Special Court 1977)). A lower court's dictum cannot rob a Supreme Court decision of its force.

Nor does the footnote even present a persuasive analysis: the only Supreme Court decision it cites for sounding the death knell of *Brooks-Scanlon* - *Fort Smith Light & Traction Co. v. Bourland,* 267 U.S. 330 (1925) - did nothing to reject the teaching of that case. Rather, the *Fort Smith* Court cited *Brooks-Scanlon* approvingly and simply concluded that where a regulated company continued to enjoy a franchise *protecting it from competition,* it could not complain if it were forced to operate one segment of its business at a loss. *See id.* at 333.

3. GTE Did Not Waive Its Claim for Historical Costs.

Appellees relegate to a footnote their defense of the erroneous ruling that GTE waived its claim to historical costs, *see* Appellees' Br. 36 n.22, and provide no response to evidence showing that their *own witnesses* understood that GTE was seeking recovery of historical costs, *see* GTE Br. 34 & n.15. Instead, plucking out a snippet from one of GTE's pleadings in which GTE said its "cost studies" were "'forward looking,'" Appellees' Br. 36 n.22 (quoting GTE Post-Hearing Br. 9-10 (JA 1613-14)), they would like to pretend that GTE's overall *pricing proposal* failed to include historical costs. But as GTE has explained, GTE's forward-looking cost study was just one part of an overall proposal designed to recover historical costs. ***13** Simply because GTE defended that sub-part of its pricing proposal as a *proper* forward-looking cost study does not mean that GTE waived its claim to historical costs.

Appellees also claim that GTE sought historical costs solely through an end-user surcharge. But GTE made clear that the end-user charge was an *alternative* to be used *if* prices did not recover all historical costs. Thus, GTE argued that entrants "should have to *either* pay for an appropriate share of (and return on) those historic costs *or* GTE should otherwise be made whole through ... [an] end user charge." GTE's Resp. to AT&T's Pet. for Arb. Sect. IV, part X, at 32-33 (J.A. 690-91) (emphasis added). GTE's overall pricing proposal, by looking to 1995 revenues as the measure of joint and common costs, would recover historical costs and did not segregate those costs for recovery solely through the end-user charge.

B. Even If Forward-Looking Costs Could Be Used, Prices Still Must Reflect the Costs of *GTE's Network,* Not a Wholly Imaginary Network.

Even if the Act did permit forward-looking costs, it plainly requires prices based on the forward-looking costs *GTE* will incur in making elements of its network available. It is *GTE's* cost that is the "cost ... of providing" the network elements under section 252(d)(1) - not the cost of some imaginary network that does not exist. Appellees, of course, are fond of citing district court decisions holding that the Act ***14** permits *some form* of forward-looking costs. But those cases provide no support on this question. The courts that have expressly considered the distinction between *hypothetical* forward-looking costs and an incumbent's *actual* forward-looking costs have concluded that "the language of the Act contemplates that the touchstone of permissible pricing rules will be the *actual costs* an [incumbent LEC] will incur in providing network elements." *AT&T Comms. v. BellSouth Telecomms.,* 20 F. Supp. 2d 1097, 1101 (E.D. Ky. 1998) (emphasis added). *See also MCI Telecomms. v. BellSouth Telecomms.,* No. 97-76, 1999 WL 166183, at *3-*5 (E.D. Ky. Mar. 11, 1999) ("*MCI v. BellSouth*") (also noting expressly that the Hatfield Model "has generated much criticism for failing to take into account the reasonable costs facing ILECs") (attached as Addendum 6); *U S WEST Comms. v. Thoms,* No. 4-97-CV-70082, slip op. at 69-70 (S.D. Iowa Jan. 25, 1999);[6] *MCI Telecomms. v. Pacific Bell,* No. C-97-0670, slip op. at 12-13 (N.D. Cal. Sept. 29, 1998) (attached as Addendum 7).

6 In a later opinion, this district court concluded, without analysis, that in the wake of the Supreme Court's decision the FCC's rules should be applied, but it reiterated its original conclusion that the state commission's rejection of hypothetical cost studies

was "consistent with the general code language. *U S WEST Comms. v. Thoms,* No. 4 97 CV 70082, slip op. at 4 (S.D. Iowa Apr. 19, 1999) (attached as Addendum 8).

In part, appellees claim that forward-looking costs that take into account GTE's network are somehow not forward-looking. *See* Appellees' Br. 49. Not only do the ***15** cases cited immediately above reject that notion, *see. e.g., MCI v. Pacific Bell,* slip op. at 13 (rejecting claim that "simply because the pricing methodology was based upon an analysis of Pacific Bell's actual network, as opposed to a hypothetical network using the most current and efficient technology, that the methodology is not necessarily 'forward-looking"'), but in the amicus brief it originally filed in this case, the FCC itself acknowledged that such costs were the relevant economic concept, and noted that a potential competitor considering whether to enter the market must compare its forward-looking costs to the "existing market participants' forward-looking costs." *See* Brief of the FCC as Amicus Curiae at 18 (filed 9/21/98). Eminent economists, moreover, have explained that it is precisely the *actual* forward-looking costs of the incumbent that provide the proper touchstone for prices if a forward-looking methodology is to be used. *See* Alfred E. Kahn, *Letting Go* 92 (Mich. State Univ. 1998) ("Kahn").

Remarkably, appellees also provide no response to the SCC's decisive concession that its hypothetical prices will not allow GTE to recover even its forward-looking costs. *See* JA 1586. Their only rejoinder is that this failure does not matter. Appellees' Br. 19 n.8.

Lacking any basis in the text for the SCC's hypothetical pricing, appellees resort again to their policy theory that projecting the costs that might be achieved in a perfectly competitive market is somehow necessary to promote competition in the ***16** first place. But pricing with that theory will simply exacerbate the problems with forward-looking costs outlined above by eliminating incentives for entrants to risk deploying facilities of their own. *See supra* pp. 8-9.

Appellees attempt to salvage Hatfield's imaginary projections with insistent claims that they are "based on *real* costs." Appellees' Br. 48 (emphasis in original) But that is obviously false. The SCC projected imaginary costs based on a network that does not exist and never will exist. [7] And for precisely that reason, its prices distort incentives. As Professor Kahn has explained, "[t]he economic purpose of prices set at incremental cost is to inform buyers - and make them pay - the cost that society will *actually* incur if they purchase more." Kahn 96 (emphasis in original). It is indisputable that "[t]hese can only be the costs of the supplier whose prices are being set, not some hypothetical ideal producer." *Id.* Setting prices based on fantasy efficiencies projected for a hypothetical network simply masks the costs actually incurred in using GTE's real-world network and provides entrants a windfall of lower prices justified solely by government diktat - not any actual efficiency gains. This ***17** system of discounts-by-decree plainly does not implement the vision of robust competition Congress intended.

[7] *Cf. U S WEST v. Jennings,* at *2 (explaining the defect in hypothetical costs: "Because TELRIC focuses on a mythical network instead of the] existing network, each party was free to offer its own vision of this mythical network, limited only by the party's audacity and its ability to procure an expert witness willing to endorse that party's vision.).

Despite appellees' protests, therefore, *see* Appellees' Br. 44, Justice Breyer's criticism of hypothetical costs is precisely on point. Competition "is a process," and "a regulatory system that imposes through administrative mandate a set of prices that tries to mimic those that competition would have set does not thereby become any the less a regulatory process, nor any the more a competitive one." *AT&T Corp.,* 119 S. Ct. at 751 (1999) (Breyer, J., concurring in relevant part).

C. Wholesale Rates Based on the False Assumption That GTE Will Exit the Retail Market Violate the Act.

Appellees amply confirm that setting wholesale rates based on the false assumption that GTE will exit the retail market finds no basis in the text of the Act, but instead derives solely from an extra-textual policy rationale. Section 252(d)(3) commands that wholesale rates be set based on retail rates less the "costs that *will be avoided* by the local exchange

carrier" (emphasis added) when it begins wholesaling. Avoiding the plain meaning of that text, appellees insist that the "only sensible approach" for determining avoided costs is to adopt the distinct principle that "only retail customers should pay the costs of GTE's retailing activities," Appellees' Br. 56, and thus that *all* retailing costs - whether GTE can reasonably avoid them or not - must be excluded from wholesale rates.

***18** But that is not the standard Congress enacted. The Act says nothing about insulating entrants from rates that include any costs associated with retailing. Instead, it requires straightforwardly examining the costs that "will be avoided" - a test that necessarily requires recognizing that GTE will not avoid *all* costs associated with retailing when it begins wholesaling.

Appellees attempt to bolster their policy rationale with a further policy appeal to "Congress's procompetitive goals," Appellees' Br. 56, on the theory that the retail-exit assumption is needed to avoid a subsidy to incumbents. But as Professor Kahn has explained, it is the *SCC's approach* that would create an inefficient subsidy for *entrants.* If the discount used for the wholesale rate is greater than the retailing costs the incumbent will actually avoid when it begins wholesaling, the wholesale rate will prompt inefficient entry by encouraging "the entry of resellers whose additional costs of performing [the retailing] function exceed the costs society will save by having the incumbents cease to perform it." Kahn 97.

Lastly, appellees do not even address the evident misunderstanding underlying the decision below. The District Court thought it could reconcile the SCC's counterfactual assumption with the terms of the Act on the theory that "[t]he only revenue GTE loses by providing wholesale services will be offset by reductions in cost for the same." J.A. 327. But that is flatly mistaken. Appellees do not seriously dispute that GTE's retailing costs will not decline in direct proportion to its loss of ***19** retail customers and that the retail-exit assumption therefore will not accurately reflect the costs that GTE avoids. And their self-contradictory assertion that when an incumbent begins wholesaling it somehow "avoids *all* costs associated solely with retail sales, even if [it] continues to incur those retailing costs," Appellees' Br. 56 (emphasis in original), is simply doubletalk. The court below thus based its decision on a plain error.

III. EVEN IF THE FCC'S RULES COULD APPLY RETROACTIVELY, A REMAND WOULD BE REQUIRED FOR THE SCC TO APPLY THEM IN THE FIRST INSTANCE.

If the Court concludes that the FCC's rules *can* be applied retroactively, appellees provide no basis for avoiding a remand to allow the SCC to apply the FCC's rules in the first instance. Any other result would improperly require the Court to supply a rationale for the SCC that the SCC itself did not consider. *See SEC v. Chenery Corp.,* 318 U.S. 80, 88 (1943).

Appellees' grab-bag of theories for avoiding *Chenery* is misplaced. First, appellees start with the erroneous proposition that the SCC would face simply a binary decision on remand: either accept all of GTE's original arguments and the precise pricing method that GTE originally proposed, or reject them. *See* Appellees' Br. 24-25 & n.14. That is mistaken. On remand, the SCC will have to consider for the first time the full range of issues involved in applying the FCC's pricing rules to ***20** devise rates - a task that involves applying legal standards GTE had no need to address while the rules were stayed. Appellees' suggestion that the SCC had no discretion but to impose exactly the result it did - and that it will have no choice on remand but to reach *exactly* the same conclusion - is thus facially absurd.

Second, appellees misstate the law with their sweeping suggestion that a court may affirm an agency whenever it can develop its own "legal rationale" for the agency's action. *Massachusetts Trustees v. United States,* 377 U.S. 235 (1964), held only that where an agency failed to cite the proper statutory section as authority for a particular action, the Court could uphold the agency action under authority from a different section. *See id.* at 248. That in no way suggests substituting a different *substantive rationale* for the agency's action. Indeed, the Court emphasized that the alternative section on which it relied imposed no substantive standards other than requiring action "consistent with the policies of this Act." *Id.* at 247 (quotation omitted). The agency had already concluded that standard was satisfied; thus, it would

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not have reached any different result if it had looked to the proper section. [8] Here, in contrast, the FCC's rules provide substantive pricing standards quite distinct from (and far more detailed than) the text of the Act itself, and if it is given a chance ***21** to consider those rules, the SCC will likely have to modify some of its pricing decisions.

8 Similarly, in *ARA Servs. v. NLRB,* 71 F.3d 129 (4th Cir. 1995), the Court held only that a remand for the NLRB to determine whether to apply a new rule retroactively was unnecessary because the Court could determine itself that such retroactive application would be impermissible. *See id.* at 136 n.4.

Finally, the suggestion that *Chenery* does not apply because the SCC had no obligation to explain its decision is utterly misplaced. *See* Appellees' Br. 26-27. In the first place, the SCC *did* explain its decision, and *Chenery* therefore applies to ensure that only the agency's stated rationale can support its decision. More importantly, the supposed principle appellees invoke is irrelevant because here the SCC *was* expressly required by statute to explain its decision. Indeed, in the very case appellees cite to suggest there was no such requirement, this Court pointed out that section 252(e)(1) expressly requires a state commission approving an arbitrated agreement to make "written findings as to any deficiencies," 47 U.S.C. § 252(e)(1), and held that language out as demonstrating that "Congress knows how to demand findings and explanations." *AT&T Wireless PCS, Inc. v. City Council,* 155 F.3d 423, 429-30 (4th Cir. 1998).

IV. IN ANY EVENT, BEFORE APPLYING THE FCC'S RULES, THE COURT WOULD HAVE TO DETERMINE WHETHER THEY ARE CONTRARY TO THE ACT.

A. The Court Has Jurisdiction To Assess Whether the FCC's Pricing Methodology Is Contrary to the Act.

As explained in our opening brief, it is settled that, merely by providing for pre-enforcement review of agency rules, the Hobbs Act "does not foreclose ***22** subsequent examination of a rule where properly brought before this court for review of further agency action applying it." *NLRB v. FLRA,* 834 F.2d 191, 195-96 (D.C. Cir. 1987) (quotation omitted).

In contending otherwise, appellees rely principally on a single *vacated* case, *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n,* 738 F.2d 901, 906 (8th Cir. 1984), *vacated,* 476 U.S. 1167 (1986). But that case involved a declaratory judgment action that a private party filed to require a state commission to follow existing FCC rules. The court did not even address the situation here, in which a private party seeks to challenge indirectly a rule being applied against it. As GTE has explained, the situation here is governed by the "established" principle that "a rule may be reviewed *when it is applied,*" *AT&T v. FCC,* 978 F.2d 727, 734 (D.C. Cir. 1992) (emphasis added)- a principle grounded in basic considerations of due process and the presumption of judicial review underpinning our administrative law system. *See Abbott Labs. v. Gardner,* 387 U.S. 136, 141 (1967). [9]

9 Other cases cited by appellees involved parties who sought two chances at *direct* review of a rule. Those cases simply do not implicate the principle we invoke here that a rule may be reviewed when it is applied.

Only a page after citing *Southwestern Bell,* moreover, appellees abruptly concede that in certain circumstances, the circuit court reviewing an "enforcement order can directly review the underlying order as well." Appellees' Br. 30. ***23** According to appellees, however, this rule is inapplicable here: in their view a party *can* challenge an agency rule upon its application if the governing statute provides for *court of appeals* review of an order applying the rule, but where, as here, the statute provides for both *district court and court of appeals* review, review of the rule is somehow foreclosed. *See id.*

This tailored-for-the-occasion interpretation has no support in law, policy, or logic. To be sure, the Hobbs Act cases GTE has cited involved statutory schemes that bypass the district courts and assign the courts of appeals to review agency orders applying a rule to a party. But this is only because such statutory schemes are more common than schemes like that in the 1996 Act. Where - as here - Congress adds an *extra layer* of judicial review for orders applying agency rules,

it does not simultaneously and silently eliminate the courts' ordinary ability to examine the validity of the underlying rule. No less than in the more common schemes, therefore, this Court thus has the authority and the duty to examine the validity of FCC rules when it assesses the SCC's application of those rules to GTE.

Finally, appellees contend that the same party cannot challenge an FCC rule both in a pre-enforcement proceeding and later upon application of the rule. *See* Appellees' Br. 30. That is not an argument for how to interpret the Hobbs Act; it is simply a reminder that preclusion doctrines might come into play after one court has ruled on the validity of the FCC's regulations (although those doctrines will not bar ***24** review, at a minimum, of purely legal issues resolved by this Court or the Eighth Circuit). [0]

10 Appellees also cite 28 U.S.C. § 2112, but that statute simply provides for consolidation of direct, pre enforcement challenges to agency rules. It says nothing about the availability of indirect review when a rule is applied.

B. Judicial Economy Favors Staying This Case Pending the Eighth Circuit's Decision.

To proceed to judgment in this case now, the Court would have to address the same questions of statutory construction that will be presented to the Eighth Circuit on direct review of the FCC's rules. Proceeding here thus not only would involve duplicating effort, it would also raise a risk of conflicting judgments. In such a case, the preferable course is plainly for the Court to hold this case in abeyance until the Eighth Circuit rules.

Appellees assert, without citation, that it would be "unsound policy" to delay this case. But it is well settled that federal courts may stay proceedings where another pending case may directly determine the applicable law. *See, e.g., Landis v. North Am. Co.,* 299 U.S. 248, 254-55 (1936). And in situations exactly analogous to this, courts routinely stay proceedings to await the resolution of direct review of FCC orders. *See, e.g.,* ***25** *Goldstein v. Time Warner NYC Cable Group,* 3 F. Supp. 2d 423, 439 (S.D.N.Y. 1998); *MidAmerican Comms. v. U S WEST Comms.,* 857 F. Supp. 772, 775 (D. Colo. 1994).

C. Even If the Court Lacks Jurisdiction To Address the Rules, It Should Stay This Case.

Appellees do not even attempt to dispute - nor could they - that if the Court lacks jurisdiction to address the FCC's pricing rules, proceeding to judgment in this case now would raise grave due process concerns: it would mean judicially enforcing the rules against GTE without permitting GTE an opportunity for review of the rules. *See* GTE Br. 55 n.23. And appellees' self-serving assurance that it is "extremely likely" that the Eighth Circuit will uphold the rules anyway, Appellees' Br. 27, can provide no better justification for finally enforcing the rules here without ever subjecting them to judicial scrutiny. If the Court believes it lacks jurisdiction to address the FCC's rules, the proper course, as the Seventh Circuit has ruled in an analogous case, would be to wait to allow GTE to complete its challenge in the Eighth Circuit. *See City of Peoria v. General Elec. Cablevision Corp.,* 690 F.2d 116, 122 (7th Cir. 1982).

11 The afterthought suggestion that if the Eighth Circuit later strikes down the FCC's rules, GTE could seek review of this case in the Supreme Court, *see* Appellees' Br. 28 n.16, hardly provides an adequate alternative: *certiorari* review is always speculative and, more importantly, any chance for seeking *certiorari* here would depend entirely on the timing of the Eighth Circuit's decision in relation to this Court's judgment.

***26 D. The FCC's Pricing Rules Are Contrary to the Act.**

1. The FCC's Hypothetical TELRIC Methodology Violates the Command That Prices for Network Elements Be Based On Cost.

The same arguments set out above demonstrating that the SCC both violated section 252(d)(1) and frustrated the purposes of the Act by ignoring GTE's historical costs and GTE's actual forward-looking costs apply equally to show that the FCC's TELRIC rule is contrary to the Act. Appellees provide no defense of the FCC other than a string cite of district court decisions and a citation to *Chevron. See* Appellees' Br. 32-35. As explained above, however, those decisions are devoid of reasoning and have no persuasive force - particularly because they do not even address the distinction between *hypothetical* forward-looking costs and an incumbent's *actual* forward-looking costs. The courts to address that precise question have rejected claims for hypothetical costs. *See supra* pp. 7, 13-14.

Moreover, appellees can provide no coherent defense of the FCC's inadequate rationale for TELRIC, which was based entirely on the nonsensical view that *only* forward-looking prices based on a hypothetical, most-efficient network could promote competition. But projecting the prices that might be achieved at the *end-point* of competition is not required to *promote* competition. Rather, "considerations of economic efficiency and efficient competition alone *require* that the prices charged ***27** to competitors be based upon the LECs' *actual* costs." Kahn 94 (emphases in original).

2. The FCC's Counterfactual Retail-Exit Assumption Is Contrary to the Act.

The arguments above demonstrating that the SCC's false assumption that GTE will exit the retail market violates the Act, *see supra* pp. 17-19, also show that the FCC's use of the same assumption is contrary to the Act.

V. THE SCC'S DECISIONS ARE INCONSISTENT WITH THE FCC'S RULES.

If the Court proceeds to apply the FCC's rules, the SCC's Hatfield prices still must be reversed because the FCC itself has concluded that the Hatfield Model violates the FCC's requirements. Appellees complain that GTE's arguments on this score occupy only a "single-page." But it does not take much space to make the decisive point: the FCC itself considered Hatfield and concluded it could not be reconciled with the FCC's approach to forward-looking costs. *See* In re Federal-State Joint Board on Universal Service, *Fifth Report and Order,* ¶ ¶ 3, 60, FCC No. 98-279 (Oct. 28, 1998).

To divert attention from that inescapable fact, appellees seize on irrelevant distinctions, noting that the FCC rejected Hatfield in a different proceeding (one addressing universal service costs rather than network-element prices) and that it was ***28** considering a "different version" of Hatfield. Appellees' Br. 17. But the FCC has made clear that the same standards for determining costs should apply both for universal service and for network elements, *see* In re Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, ¶ 251 (May 8, 1997), and it is undisputed that the FCC rejected an *improved* version of Hatfield designed to remedy the evident flaws in the model that had been exposed through state arbitrations. As one court recently explained in upholding a decision rejecting Hatfield prices, by January 1998 "the defects in Version 2.2.2 of the Hatfield Model [- the version used in this case -] were well known within the industry." *U S WEST v. Jennings,* 1999 WL 284888, at *3; *see also MCI v. BellSouth,* 1999 WL 166183, at *3. [2] The FCC's rejection of the updated model because it contained the same flaws GTE pointed out in this case (such as a "systematic downward bias in the amount of distribution plant that is constructed in less dense areas," *Fifth Report and Order* ¶ 60) demonstrates *a fortiori* that the earlier version used by the SCC does not comply with the FCC's requirements. [3]

12 Appellees vaguely assert that the SCC "significantly adjusted the Hatfield prices, Appellees' Br. 12, but the SCC made only two minor adjustments (to the fill factor and the cost of capital, J.A. 964), and neither addressed the defects identified by the FCC.

13 Appellees suggest that the FCC thought Hatfield would *overcompensate* incumbents. *See* Appellees' Br. 17 n.6. To the contrary, in one of the very paragraphs appellees cite, the FCC concluded that Hatfield's impractical cost minimization projections "may lead to significantly *lower* cost estimates than are practicable in reality. *Fifth Report and Order* ¶ 62 (emphasis added).

***29** Unable to respond on the merits, appellees resort to attacking *GTE's* pricing proposals. Appellees' Br. 18. But their arguments are irrelevant; whether or not the SCC thought that GTE's prices complied with the Act, it was still obligated to set rates that met the Act's commands. Next, appellees suggest that the SCC could properly rely on Hatfield as the "best information available." 47 U.S.C. § 252(b)(4)(B). The SCC itself, however, never relied on that rationale; rather, appellees are reduced to citing the SCC Staff's partisan brief for that theory. *See* Appellees' Br. 19. In any event, nothing in section 252(b)(4)(B) would remotely allow the SCC to set prices that violate the FCC's rules.

***30 CONCLUSION**

The judgment of the District Court should be reversed.

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1998 WL 34089739 (C.A.4) (Appellate Brief)
United States Court of Appeals,
Fourth Circuit.

MEINEKE DISCOUNT MUFFLER SHOPS, INC.; New Horizons Advertising, Inc.; GKN Parts Industries Corp.; GKN plc; Ronald Smythe; Gene Zhiss; Ted Pearce, Appellants/Cross-Appellees,

v.

Kelly BROUSSARD; Jim Stephens; Mark Zuckerman; Arnold Fischthal; John Hagar; Vincent Matera; Denis Wickham; Mary Ann Wickham; Kenex Corp.; Ralph Yarusso, Appellees/Cross-Appellants.

Nos. 97-1808, 97-1848.
January 23, 1998.

Appeal from the United States District Court for the Western District of North Carolina

Reply and Answering Brief of Appellants/Cross-Appellees

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***1** INTRODUCTION AND SUMMARY OF ARGUMENT

The named plaintiffs strive mightily to portray this appeal as a routine sufficiency-of-the-evidence review of a routine judgment. Those efforts are in vain. This action is wholly unprecedented in law and fact. Never before has Rule 23 been stretched to permit certification of a single non-opt-out class so manifestly divided with respect to the appropriate relief, substantive claims, and damages. Never before has North Carolina law been construed to permit corporate veil-piercing under remotely similar circumstances. Never before has a franchise dispute -- or *any* dispute in North Carolina -- been parlayed into an award of $390 million in damages (more than ten times Meineke's annual gross revenue). To top it all off, the named plaintiffs now seek (1) to recover punitive damages in *addition* to treble damages, and (2) to invalidate releases to which they were not parties and which were specifically upheld by the jury. The cross-appeal, which would hike the damages award to more than *$700 million,* only underscores that the named plaintiffs are living in a legal dream world.

Indeed, plaintiffs' entire description of this case is divorced from reality. The question here is whether Meineke was entitled to pay advertising commissions (either to in-house or outside agencies) from the funds in the Weekly Advertising Contribution ("WAC") account. Defendants believe that Meineke was so entitled; plaintiffs believe that it was not. Even

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if the franchise agreements were ambiguous on this score -- and they are not -- the underlying dispute is a pedestrian business disagreement between a franchisor and franchisees. Plaintiffs' references to "cheating on a grand scale" and "skimm[ing]," Pls.' Br. 2, 10, are nothing but empty rhetoric -- indeed, plaintiffs themselves acknowledge that their contract claims "formed the basis for all the other claims" in the case, *id.* at 42 n.64. Plaintiffs distort the record not only with respect to Meineke's administration of the WAC account, but also with respect to the involvement of Meineke's corporate parents, GKN and PIC. In the final analysis, however, plaintiffs' *factual* distortions cannot obscure the manifest *legal* errors underlying the judgment below.

I. THE DISTRICT COURT ERRED BY CERTIFYING THE CLASS.

The named plaintiffs essentially argue that class certification was proper in light of their

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***5** franchisees "effectively" opted out of the class, or (2) the releases are invalid, in which case the EDP franchisees can share in the rich bounty of damages. *Id.* at 14. These arguments reveal a fundamental misunderstanding of representative litigation.

The legitimacy of a class action depends on the validity of the named plaintiffs' claims to represent *all* class members. *See, e.g., Amchem,* 117 S. Ct. at 2251 (named plaintiffs serve "as representative for the whole, not for a separate constituency"). Such claims are necessarily untenable where, as here, self-proclaimed class "representatives" purport to sue on behalf of persons who have expressly relinquished their right to participate in the lawsuit. This point "is not a novel one": as the D.C. Circuit explained when addressing this precise issue, it is settled that "proposed class members who have executed releases can not be represented by individuals who have not executed a release." *Melong v. Micronesian Claims Comm'n,* 643 F.2d 10, 13 (D.C. Cir. 1980); *see also Greeley v. KLM Royal Dutch Airlines,* 85 F.R.D. 697, 700-01 (S.D.N.Y. 1980); *Aamco Auto. Transmissions v. Tayloe,* 407 F. Supp. 430, 433 (E.D. Pa. 1976); *Ingenito v. Bermec Corp.,* 376 F. Supp. 1154, 1171 (S.D.N.Y. 1974). The EDP dealers' decision to relinquish their claims, based on a fundamentally different perspective on this lawsuit, created an irreconcilable conflict of interest with the named plaintiffs. *See* Brief *Amici Curiae* of Salvatore LoBello *et al.* [4]

[4] Contrary to plaintiffs' insinuation, defendants do not suggest that a court must "'deny class certification if any number of members of the class, however small, object s] to the relief sought by the named plaintiffs. Pls.' Br. 15 (quoting *A.H. Robins,* 880 F.2d at 746). A potential class member who has expressly *released* the claims at issue in a particular lawsuit is in a wholly different position than a potential class member who retains those claims but merely *objects* to the relief requested. Claims that have been released simply cannot be characterized as "typical of claims that have not. *See, e.g., Melong,* 643 F.2d at 14. Thus, a proper class must exclude those persons who have previously relinquished their claims. *See id.* Here, in any event, a *majority* of current franchises (hardly a "small number) released their claims by accepting the EDP offer.

The named plaintiffs cannot negate this conflict by challenging the validity of the releases. An individual who has not signed a release is manifestly not an appropriate representative for one who has. *See, e.g., Melong,* 643 F.2d at 15-16. Indeed, an individual who has not signed a release lacks *standing* to challenge its validity. *See infra* at p. 43. [5] The inadequacy of representation is ***6** particularly egregious where, as here, the would-be representatives lobbied strenuously against the releases but were rebuffed by a majority of the very class they purported to represent. *See infra* at pp. 44-45.

[5] Plaintiffs' reliance on *Bittinger v. Tecumseh Prods. Co.,* 123 F.3d 877 (6th Cir. 1997), is misplaced. The named plaintiff there *had* signed a release, *see id.* at 884, and the lawsuit sought primarily declaratory and injunctive relief, *see id.* at 883, which might not be affected by the releases. Even more important, that case (unlike this one) was in a preliminary posture, and

> the Sixth Circuit stressed the possibility of creating subclasses on remand to address intraclass differences relating to relief. *See id.* at 884 85; *cf.* H. Newberg & A. Conte, *Newberg on Class Actions* § 3.25 at 3 138 (3d ed. 1992) (intraclass differences relating to relief "may be resolved ... by the formation of subclasses at the relief stage). Because the district court below did not create any such subclasses, the question whether it might thus have validated class certification is irrelevant in evaluating the judgment entered below on behalf of a single undifferentiated class.

The named plaintiffs respond that the inclusion of the EDP franchisees in the class was at most a harmless error that can be cured on appeal by simply carving them out of the class. *See* Pls.' Br. 14-16. That response underscores the utter irregularity of this proceeding. The named plaintiffs asserted below -- and *continue* to assert on appeal -- that they represent the EDP franchisees. That assertion cannot be squared with the argument that the EDP franchisees "effectively" opted out below and should now be officially carved out of the class. Again, the named plaintiffs cannot have it both ways -- either they represent the interests of the EDP franchisees or they do not.

The named plaintiffs' harmless-error argument also lacks any basis in law. Where, as here, a class has not been "properly certified" under Rule 23, it is a nullity without legal status. *Kremens v. Bartley,* 431 U.S. 119, 132-33 (1977) (quoting *Board of Sch. Comm'rs v. Jacobs,* 420 U.S. 128, 130 (1975) (*per curiam*)); *see also Bishop v. Committee on Prof'l Ethics,* 686 F.2d 1278, 1285-90 & n.14 (8th Cir. 1982). Whether the claims of inadequately represented class members ultimately fail on the merits is irrelevant. *See Falcon,* 457 U.S. at 160 (propriety of class certification cannot be "judge [d] ... by hindsight" by reference to trial result). Thus, "where initial certification was improper or decertification prior to trial appropriate, a judgment on the merits cannot be upheld." *Ekanem v. Health & Hosp. Corp.,* 724 F.2d 563, 573 (7th Cir. 1983), *cert. denied,* 469 U.S. 821 (1984). Plaintiffs' suggestion that a judgment rendered on behalf of an improperly certified class

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***8** franchisees to the stand to put that evidence in context (some of the tapes, for example, were made before New Horizons was created). *See* J.A. 3301-02; *see generally infra* at pp. 14-15. In addition, the trial court refused to bifurcate plaintiffs' challenge to the validity of the EDP releases from the underlying liability issues, *see id.* at 2808-15, 3196-213, thereby forcing defendants to reveal to the jury at the liability stage that they had offered to settle the claims at issue here in exchange for a more attractive franchise package. It is common knowledge that jurors tend to misconstrue such offers as tacit admissions of wrongdoing. *See* Fed. R. Evid. 408.

2. Differences Regarding Substantive Claims.

The manifest intraclass differences regarding substantive claims provide a separate and independent ground for reversing the class certification under Rule 23(a). *First,* the named plaintiffs reiterate the trial court's assertion that the differences among the contracts were not "'material"' to their contract claims, and insist that they relied below on language common to the contracts of all class members. Pls.' Br. 16 (quoting J.A. 2696). But, as defendants have explained (and the record confirms), plaintiffs relied critically on language ("in consideration for the payment of Franchisee's initial license fee") included *only* in contracts signed between 1989 and 1991 -- less than a quarter of the contracts at issue. *See* Defs.' Br. 28-32; J.A. 3217-18 (plaintiffs' opening statement); *id.* at 3236-38 (direct examination of named plaintiff Broussard); *id.* at 3651-55 (cross-examination of defendant Pearce); *id.* at 4926-29 (plaintiffs' closing argument). Differences among contracts may not be "material" where class representatives rely on common provisions, but such differences unquestionably *are* material where (as here) the plaintiffs rely *on the very provisions that differ.*

Second, plaintiffs have no answer to the point that certification was inappropriate with respect to those claims (like fraud and misrepresentation) that necessarily entail an individualized assessment of defendants' communications with each class member and the extent of reasonable reliance on such communications. Rather, plaintiffs simply assert that "[o]f course" this is not the law, and that this Court has "rejected this very argument." Pls.' Br. at 17 (citing *Teague v. Bakker,* 35 F.3d 978, 995 (4th Cir. 1994), *cert. denied,* 513 U.S. 1153 (1995)). Not so. *Teague* does not purport to address whether the inherently individualized nature of fraud and misrepresentation ***9** claims precludes class certification; to

the contrary, the Court stressed that the defendant there "*does not contest the certification of the class.* " 35 F.3d at 995 n.24 (emphasis added; internal quotation omitted). Indeed, it is well-settled that individualized claims like fraud and misrepresentation are generally unsuited for class litigation. *See, e.g.,* Defs.' Br. 18-19; *see also Andrews v. AT&T,* 95 F.3d 1014, 1025 (11th Cir. 1996); *Clark v. Watchie,* 513 F.3d 994, 999-1000 & n.13 (9th Cir.), *cert. denied,* 423 U.S. 841 (1975); Rule 23 Advisory Committee Note, 39 F.R.D. 69, 103 (1966).

Third, plaintiffs have no answer to the point that class certification was inappropriate in light of the "highly individualized questions of fact" inherent in the decision whether to toll the relevant statutes of limitations. *Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp.,* 62 F.R.D. 381, 390 (S.D. Ohio 1973); *cf. Ocean Acres Ltd. Partnership v. Dare Cty. Bd. of Health,* 707 F.2d 103, 105 (4th Cir. 1983) (tolling appropriate only where plaintiff proves that defendant's fraud actually precluded plaintiff "from discovering facts which are the basis of [its] cause of action despite the exercise of due diligence on [its] part") (internal quotation omitted). Rather, plaintiffs declare that "this Court has stated that '[c]ourts passing upon motions for class certification have generally refused to consider the impact of such affirmative defenses as the statute of limitations on the potential representative's case.'" Pls.' Br. 18 (quoting *International Woodworkers of Am. v. Chesapeake Bay Plywood Corp.,* 659 F.2d 1259, 1270 (4th Cir. 1981)). But plaintiffs wrest that quotation wholly out of context. The *Woodworkers* case does not hold that intraclass differences with respect to statutes of limitations are immaterial to certification, but merely that the failure of a would-be representative's claim on statute-of-limitations grounds does not necessarily preclude certification of a class represented by *other* named plaintiffs whose claims are *not* time-barred. *Id.* at 1270. Accordingly, the case in no way contradicts the many cases holding that certification is inappropriate where (as here) the class claims are time-barred unless the applicable statutes of limitations are tolled. [7] Finally, it is not true that defendants waived this argument below. *See* J.A. ***10** 304-05. [8]

[7] *See, e.g., Hall v. Burger King Corp.,* 1992 Trade Cas. ¶70,042, at 69,149 & n.8 (S.D. Fla. 1992); *Township of Susquehanna v. H and M, Inc.,* 98 F.R.D. 658, 668 69 (M.D. Pa. 1983); *In re Anthracite Coal Antitrust Litig.,* 78 F.R.D. 709, 719 (M.D. Pa. 1978); *Krehl v. Baskin Robbins Ice Cream Co.,* 78 F.R.D. 108, 123 24 (C.D. Cal. 1978); *Chevalier v. Baird Sav. Ass n,* 72 F.R.D. 140, 153 54 (E.D. Pa. 1976); *In re Transit Co. Tire Antitrust Litig.,* 67 F.R.D. 59, 74 (W.D. Mo. 1975); *Bill Minnielli,* 62 F.R.D. at 390; *cf. Sprague v. General Motors Corp.,* 1998 WL 3382, at *8 (6th Cir. Jan. 6, 1998) (*en banc*) ("Because each plaintiff's claim depend s] upon facts and circumstances peculiar to that plaintiff, class wide relief is] not appropriate.).

[8] Nor is it true, on a related note, that defendants waived their objection to the various trial errors enumerated at the end of their opening brief. *See* Pls.' Br. 10 n.6. Defendants expressly raised those additional errors in this appeal to make clear their disagreement with the district court's rulings on those points, and to preserve their ability to pursue their objections "in any further proceedings that might arise in light of this Court's disposition of the case. *See* Defs.' Br. 48. Had defendants neglected to raise those points entirely, they would have faced a danger that the district court's original rulings could be deemed the binding "law of the case in any such proceedings, even if defendants prevailed in this appeal. This Court surely has no interest in forcing litigants to adopt a "scattershot approach in appeals involving as many issues as this one to protect themselves against any possible adverse law of the case consequences. Plaintiffs and their *amici* are thus mistaken to suggest that defendants acquiesce in the trial court's rulings on the points listed at the end of the opening brief, including, *inter alia,* the existence of a fiduciary relationship.

3. Differences Regarding Damages.

A third separate and independent ground for reversing the class certification under Rule 23(a) is that lost-profits damages are inherently individualized and thus inappropriate in class actions. This is not, as plaintiffs would have it, merely a challenge to the "allocation" of damages within the plaintiff class, *see* Pls.' Br. 18; rather, it is a challenge to the use of a "global lost profits" theory to avoid "the difficulties inherent in proving individual damages." *Windham,* 565 F.2d at 72. Plaintiffs' rhetoric cannot obscure the fact that they fail to cite *a single case* holding that lost-profits damages may be awarded on a classwide basis.

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The crux of plaintiffs' argument is that a "global" calculation of lost profits is necessarily *more* accurate than an individualized calculation. *See* Pls.' Br. 19 (making the blanket assertion that "[t]he accuracy of any analysis seeking to determine the extent of a causal relationship increases as the sample size increases"). That is simply not so. Although it may be true that the accuracy of a *statistical* analysis increases as sample size increases, it is not true that a statistical analysis is more accurate than an individualized investigation into the facts of particular cases -- especially where, as here, the statistical analysis is itself fundamentally flawed, *see infra* at pp. 32-34. (Under ***11** plaintiffs' peculiar perspective, the causation of a particular car crash could be more accurately determined by reference to national traffic statistics than by examination of the accident scene.) The law, in North Carolina as elsewhere, is that lost profits cannot be assessed without careful examination of individual business circumstances. *See, e.g., Iron Steamer, Ltd. v. Trinity Restaurant, Inc.,* 431 S.E.2d 767, 770-771 (N.C. App. 1993); *see also* Defs.' Br. 20-21. Plaintiffs complain that they would have faced an "insurmountable burden" in establishing the lost-profits damages of each member of the class, Pls.' Br. 19, but that is simply an acknowledgment that the substantive requirements of North Carolina law cannot be met on a classwide basis. The upshot of that acknowledgment is not that those requirements should be ignored in federal class actions (which would violate both the Rules Enabling Act and *Erie R.R. v. Tompkins,* 304 U.S. 64, 78 (1938)), but that such lawsuits are not suitable vehicles for pursuing lost-profits claims.

Finally, plaintiffs attempt to evade this Court's opinion in *Windham* by positing a distinction between "fluid" and "global" damages. *See* Pls.' Br. 19-20. According to plaintiffs, *Windham* stands only for the proposition that individuals who have not been injured cannot recover damages. *See id.* at 19 & n.24. But that asserted distinction fails on its own terms -- plaintiffs here, as in *Windham,* failed to prove that *all* (or even *any*) class members were in fact injured by the alleged wrongdoing. There is no basis for assuming that additional advertising expenditures from the WAC account would have resulted in increased profits for *all* Meineke franchisees -- for example, additional advertising may have been ineffective, some advertising markets may already have been saturated, or some franchisees may already have been operating at full capacity. The fact that plaintiffs called their theory of damages "global" rather than "fluid" is immaterial. Their "global damages" theory, like the "fluid damages" theory in *Windham,* allowed them to pursue classwide damages on a wholly theoretical level, and thereby to circumvent difficult and individualized issues of proof. *Windham* forbids this very abuse of class actions. *See* 565 F.2d at 70-72.

B. The Class Does Not Satisfy the Requirements of Rule 23(b).

Even assuming, *arguendo,* that this class met the threshold requirements for certification under Rule 23(a), it plainly does not meet the additional requirements for non-opt-out certification

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***15** *Phelps v. Spivey,* 486 S.E.2d 226, 228 (N.C. App. 1997). Plaintiffs' use of the tapes was equally inappropriate in light of the integration clause in each contract. *See* Defs.' Br. 30. Whether an alleged misrepresentation was made to an absent class member, moreover, is not relevant to whether such a misrepresentation was made to a named plaintiff. *See* Fed. R. Evid. 401, 403, 404; *cf. Sprague,* 1998 WL 3382, at *7-8; *Jones v. Southern Pac. R.R.,* 962 F.2d 447, 449 (5th Cir. 1992). [2]

12 Plaintiffs' assertion that defendants failed to object below to the admission of the "final review tapes on these grounds is also incorrect. *See, e.g.,* J.A. 1806 13, 9540 47. And plaintiffs' attempt to characterize the error as harmless, *see* Pls.' Br. 25 (tapes "largely supplemental to other evidence), cannot be squared with their assertion that the tapes were "highly relevant, *id.* at 24, and indeed the "most persuasive evidence at trial, Defs.' Br. 25.

III. THE CONTRACTS UNAMBIGUOUSLY AUTHORIZED PAYMENT OF THE DISPUTED ADVERTISING COMMISSIONS.

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Plaintiffs' brief confirms that the contract claims are at the heart of this case. *See* Pls.' Br. 42 n.64 ("Plaintiffs' case below was clearly predicated on defendants' ongoing breach of their contractual duties," which "formed the basis for all the other claims."). Yet the brief also reveals that plaintiffs' contract claims are untenable. Because the interpretation of an unambiguous contract is a question of law, the trial court's refusal to enter judgment as a matter of law in defendants' favor on those claims is entitled to no deference on appeal. "Where a case turns simply upon a reading of the document itself, there is no reason to believe that a district court is in any better position to decide the issue than is an appellate court," which accordingly "exercise[s] plenary review over the lower court's interpretation of the contract." *Bailey v. Blue Cross & Blue Shield,* 67 F.3d 53, 56 (4th Cir. 1995), *cert. denied,* 116 S. Ct. 1043 (1996).

Notwithstanding plaintiffs' attempts at obfuscation, the contract issue in this case is straightforward. Plaintiffs contend that the franchise agreements "plainly" prohibited Meineke from paying commissions from the WAC account to *any and all* agencies engaged in procuring franchisee advertising (*i.e.,* Berry, Corinthian, or New Horizons). Pls.' Br. 26. That contention is plainly wrong.

First, Section 7.17 of all of the franchise agreements required franchisees to pay "the cost" of "such advertising program or programs as MEINEKE may from time to time direct" through ***16** weekly contributions (generally 10% of gross revenues) to the WAC account. *See post* Addendum. Section 3.1(d) of those agreements, in turn, provided that Meineke would fund franchisee advertising from that account, rather than from its own general accounts. Indeed, the latter provision *required* Meineke to spend "an amount equal to the total of all sums collected from all franchisees, under and pursuant to Section 7.17 hereof" for the "costs" of advertising. *See id.*

Second, Section 3.1(d) authorized Meineke to delegate some or all responsibility for organizing the centralized franchisee advertising program, choosing particular advertising content, and selecting advertising media. In particular, that provision specified that "all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection of the particular media and advertising content, shall be within the sole discretion of Meineke *and such agencies or others as it may appoint.*" *Id.* (emphasis added). Over the years, Meineke has relied both on outside agencies (M&N, Berry, and Corinthian), and on an in-house agency (New Horizons) to perform such advertising procurement services.

Third, from 1982 to 1989 (when the majority of the disputed contracts were signed), Section 3.1(d) *explicitly* granted Meineke authority to use the WAC account to pay "media costs, commissions and fees" and "other costs" of advertising. *See id.* This provision, as defendants have explained, *see* Defs.' Br. 28, broadly authorized payment from the WAC account of *all* costs of advertising, consistent with the ordinary meaning of the term "costs" in Section 7.17. The payment of a commission to an agency that procures advertising is part and parcel of the "cost" of advertising. [3]

13 Plaintiffs seek to circumvent the explicit reference in Section 3.1(d) to "media costs, commissions, and fees and "other costs by quoting trial testimony by defendant Pearce (Meineke's General Counsel) that he dropped the sentence containing that language from the franchise agreements after 1990 as "'extraneous. Pls.' Br. 27 (quoting J.A. 3670, 3675). But Pearce by no means suggested that this language is not *relevant* to the contract dispute. To the contrary, he explained that he viewed the language as "extraneous precisely because he believed that the franchise agreements *already* gave Meineke "the right to appoint agencies and agencies would receive commissions. J.A. 3670; *see also id.* at 3660, 3668 69.

Plaintiffs now base their contrary argument squarely on the initial clause in Section 3.1(d), which required Meineke "[t]o purchase and place from time to time advertising promoting the

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17 ?? of plaintiffs' contract claims would at the very least require a retrial on *damages,* as the damages verdict is not allocated among the multiple theories of liability. *See* Defs.' Br. 32 (citing *Barber v. Whirlpool Corp.,* 34 F.3d 1268, 1278 (4th Cir. 1994)). Again, plaintiffs have not challenged this settled principle of appellate procedure.

*20 IV. THERE IS NO LEGAL BASIS FOR IMPOSING LIABILITY ON MEINEKE'S CORPORATE PARENTS.

Plaintiffs try to recast defendants' challenge to the *legal* sufficiency of the claims against Meineke's corporate parents as a challenge to the *factual* sufficiency of the evidence. *See* Pls.' Br. 29. Those efforts are futile: even assuming Meineke can be held liable, there is no basis *as a matter of law* to impose either vicarious or direct liability on either GKN or PIC. This is not even a close question. Plaintiffs have failed to identify *any case in the annals of American law* in which liability was imposed on corporate parents under circumstances remotely similar to those here. To affirm the judgment against either GKN or PIC would be to place the law of North Carolina squarely outside the mainstream on this issue of immense legal and practical importance -- a point not lost on, among others, the State of North Carolina. *See* Brief *Amicus Curiae* of the Secretary of Commerce of the State of North Carolina.

A. There Is No Legal Basis for Imposing Vicarious Liability on GKN.

Plaintiffs' description of the legal standard for piercing the corporate veil under North Carolina law is misleading at both the general and specific levels. At the general level, plaintiffs fail to acknowledge that in North Carolina, as elsewhere, veil-piercing is a "drastic remedy [to] be invoked only in an extreme case." *Dorton v. Dorton,* 336 S.E.2d 415, 419 (N.C. App. 1985); *see* Defs,' Br. 33. Veil-piercing is a narrow *exception* to the general rule of limited liability. Indeed, it is "one of the first principles of American law that those who own shares in corporations, whether such shareholders are individuals or are themselves corporations, normally are not liable for the debts of their corporations." Stephen B. Presser, *Piercing the Corporate Veil* § 1.01 at 1-1 (1991); *see also Perpetual Real Estate Servs., Inc. v. Michaelson Properties, Inc.,* 974 F.2d 545, 548 (4th Cir. 1992) (limited liability "supports a vital economic policy ... on which large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted") (internal quotations ***21** omitted). Because only the most extraordinary circumstances warrant application of this exception, appellate courts (including this one) have not hesitated to reverse veil-piercing verdicts in cases (like this one) that do not involve such extraordinary circumstances. *See, e.g., Birbara v. Locke,* 99 F.3d 1233, 1237-41 (1st Cir. 1996); *Perpetual,* 974 F.2d at 547-51; *American Protein Corp. v. AB Volvo,* 844 F. 2d 56, 57-60 (2d Cir.), *cert. denied,* 488 U.S. 852 (1988); *Craig v. Lake Asbestos of Quebec, Ltd.,* 843 F.2d 145, 149-52 (3d Cir. 1988). Plaintiffs thus err by characterizing the issue as a routine jury question. *See* Pls.' Br. 31. [8]

18 Plaintiffs also err by asserting that the applicable standard for appellate review is "clearly erroneous rather than *de novo. See* Pls.' Br. 31 n.38. That assertion rests on the mistaken premise that defendants are challenging the existence of certain facts, rather than the legal sufficiency of those facts in satisfying the requirements of a particular theory of liability. *See, e.g.,* J.A. 2403 09, 2927 28, 9576 77 (denying motions for summary judgment and judgment as a matter of law on veil piercing); *Redman v. John D. Brush & Co.,* 111 F.3d 1174, 1177 (4th Cir. 1997) (appellate court reviews *de novo* trial court's denial of motion for judgment as a matter of law); *Henson v. Liggett Group, Inc.,* 61 F.3d 270, 274 (4th Cir. 1995) (appellate court reviews *de novo* trial court's denial of motion for summary judgment); *United States v. Fidelity Capital Corp.,* 933 F.2d 949, 950 (11th Cir. 1991) (ultimate question whether veil piercing warranted on facts presented is question of law subject to plenary review).

At the specific level, plaintiffs provide a misleading description of the legal requirements for veil-piercing in North Carolina. They characterize the critical threshold requirement as nothing more than "control." *Id.* That bob-tailed description of the requirement differs markedly from the one set forth by the North Carolina Supreme Court: "Control, *not mere majority or complete stock control,* but *complete domination,* not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time *no separate*

mind, will or existence of its own." *Glenn v. Wagner,* 329 S.E.2d 326, 330 (N.C. 1985) (quoting *B-W Acceptance Corp. v. Spencer,* 149 S.E.2d 570, 576 (N.C. 1966)) (emphasis added).

Contrary to plaintiffs' suggestion, "control" or ownership alone is unquestionably not enough to satisfy even the threshold requirement for piercing the corporate veil. Indeed, the North Carolina Supreme Court has emphasized that ordinary parent-subsidiary relationships do not involve the "complete domination" necessary to warrant veil-piercing:

> ***22** The fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity; and, ordinarily, no liability may be imposed upon the latter for the torts of the subsidiary corporation. The facts that corporations have common officers, occupy common offices, and to a certain extent transact business for each other do not make the one corporation liable for the action of the other ... [T]he mere fact that one corporation owns all the capital stock of another corporation, and the further fact that the members of the board of directors of both corporations are the same, nothing else appearing, is not sufficient to render the parent corporation liable for the contracts of its subsidiary.

B-W Acceptance Corp., 149 S.E.2d at 574 (internal quotations omitted); *see also Huski-Bilt, Inc. v. First-Citizens Bank & Trust,* 157 S.E.2d 352, 358 (N.C. 1967). The evidence on which plaintiffs base their veil-piercing claim here is, if anything, even weaker than the evidence described as legally insufficient in *B-W Acceptance* and *Huski-Bilt. See* 149 S.E.2d at 574; 157 S.E.2d at 358.

The case on which plaintiffs primarily rely, *Glenn,* could not be more readily distinguished. That case did not involve a parent-subsidiary relationship at all, but rather two closely held corporations owned by the same persons. *See* 329 S.E.2d at 328. Those corporations, the Court held, "functioned as a single business enterprise in substance, if not in form." *Id.* at 333; *see also id.* at 331 ("[F]rom its inception, [the one corporation] had no separate identity and was never anything other than a tool of [the other]."). In the course of its analysis, the *Glenn* Court listed "numerous" factors that courts have considered in deciding whether veil-piercing was warranted in particular cases. *Id.* at 332. The Court stressed, however, that "[i]t is not the presence or absence of any particular factor that is determinative," but rather "a combination of factors ... suggest[ing] that the corporate entity attacked had no separate mind, will or existence of its own and was therefore the mere instrumentality or tool of the dominant corporation."' *Id.* at 332 (internal quotation omitted).

Plaintiffs here have done precisely what the *Glenn* Court warned against: they have focused on isolated "factors" to suggest that Meineke's corporate veil could be pierced notwithstanding the underlying fact that Meineke can in no way be characterized as a "sham" corporation. *See* Pls.' Br. 31-32 & n.37. The *Glenn* factors have no independent legal significance; they are merely indicia of whether a corporation is a "mere instrumentality" of another corporation or person. Because plaintiffs cannot seriously contend that Meineke has no "separate mind, will or existence" of its own,

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***24** noted above, the undisputed record evidence flatly contradicts them. Needless to say, unsupported assertions in a court order denying summary judgment are not "evidence support[ing] the jury's finding." *Id.* at 31.

Plaintiffs also state that "GKN named numerous influential directors to Meineke's board of directors, including its chairman." Pls.' Br. 31. It is not clear what plaintiffs mean by "influential"; in any event, North Carolina law is clear that veil-piercing is inappropriate even where a subsidiary's board of directors is composed *entirely* of the parent's directors. *See B-W Acceptance,* 149 S.E.2d at 574; *see also Hassinger v. Tideland Elec. Membership Corp.,* 622 F. Supp. 146, 150 (E.D.N.C. 1985) (noting that "identical boards of directors ... do not make one corporation liable for the action of the other" under North Carolina law). It is entirely routine for shareholders, whether individuals or parent corporations, to nominate board members. *See e.g., Johnson v. Flowers Indus.,* 814 F.2d 978, 982 (4th Cir. 1987); *Whitehurst v. FCX*

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Fruit & Veg. Serv., 32 S.E.2d 34, 40 (N.C. 1944). Here, GKN did not nominate "numerous" Meineke directors, or even a majority of the board at any given time. *See* J.A. 9391.

In addition, plaintiffs assert that "[d]uring the class period, not a single dividend has gone from Meineke to GKN." Pls.' Br. 32. This assertion (which apparently seeks to suggest that Meineke was an empty shell) is highly misleading. Meineke *did* pay dividends, but necessarily paid them to its stockholder, PIC, not to GKN. *See* J.A. 9587. Moreover, as one GKN official explained (in testimony that plaintiffs inexplicably find incriminating, *see* Pls.' Br. 32), whether PIC (or any other of GKN's North American subsidiaries) paid dividends was essentially a "bookkeeping" matter without financial impact because GKN would benefit from an increase in value in its North American subsidiaries regardless of whether dividends were paid. J.A. 4237; *see also Perpetual,* 974 F.2d at 549 n.3. [9]

19 Plaintiffs suggest that the corporate structure of GKN's North American operations revealed excessive fragmentation, *see* Pls.' Br. 31 32, but provide no evidence to support that suggestion. The structure plaintiffs describe is, of course, standard in the multinational corporate context, and in no way establishes that Meineke is a sham corporation.

Curiously, plaintiffs next attack from the opposite direction by arguing that veil-piercing is ***25** warranted because "Meineke's profits ... went directly to GKN's 'bottom line.'" Pls.' Br. 32 (quoting J.A. 3750). Again, that assertion is highly misleading. The quoted testimony refers to the consolidated financial statements that GKN, like any other parent corporation, prepares pursuant to generally accepted accounting principles. *See, e.g.,* Financial Accounting Standards Board (FASB), *Accounting Standards, Current Text* § C51 (1997); *Gibraltar Sav. v. LDBrinkman Corp.,* 860 F.2d 1275, 1283 & n.8, 1287, 1289-92 (5th Cir. 1988), *cert. denied,* 490 U.S. 1091 (1989). Those consolidated statements reflected the profits and losses not only of Meineke, but of *all* GKN's subsidiaries. As noted above, Meineke prepared its own independently audited financial statements every year wholly apart from the consolidated statements of the GKN group. The mere preparation of consolidated financial statements by a parent company does not negate its subsidiaries' independent existence. *See, e.g., Birbara,* 99 F.3d at 1235, 1237-41; *United States v. Fidelity Capital Corp.,* 920 F.2d 827, 833, 836-40 (11th Cir. 1991). Indeed, if such consolidated statements were a valid ground to pierce the corporate veil in the parent/subsidiary context, then veil-piercing would be the rule rather than a rare exception.

Plaintiffs also refer in passing to the fact that various of GKN's North American subsidiaries participated in a cash-management system whereby the companies placed cash in a common account to reduce their short-term borrowing costs. *See* Pls.' Br. 32. As explained in defendants' opening brief, such accounts are common among affiliated companies, and provide no basis for veil-piercing. *See* Defs.' Br. 34. Participation in the account does not affect any company's net assets. *See* J.A. 4650-51. Contrary to plaintiffs' assertion that account money would "'roll up automatically' to GKN," Pls.' Br. 32 (quoting J.A. 4229), the "top company" participating in the account was GKN North America, J.A. 4229. GKN (located in Great Britain) did not even participate in the account.

Plaintiffs also suggest that Meineke was inadequately capitalized, relying solely on defendants' observation that the company has nowhere near the assets to satisfy the judgment in this case. *See* Pls.' Br. 32 (citing Defs.' Br. 32 & n.17). There is irony in that argument: the very purpose of the corporate form is to limit investor liability, but plaintiffs now argue that an investor should be forced to pay precisely because the liability is so overwhelming. The fact that Meineke ***26** might be driven into bankruptcy by the record-shattering judgment in this case in no way establishes that the company is a sham; *most* companies in the United States would be driven into bankruptcy by this judgment. Indeed, the undisputed evidence establishes that Meineke was adequately capitalized. *See, e.g.,* J.A. 5663, 6337, 6618. It also goes without saying that investors are entitled to worry about their potential liability; indeed, "[t]he doctrine of limited liability is intended precisely to protect a parent corporation whose subsidiary goes broke. That is the whole purpose of the doctrine, and those who have the right to decide such questions, that is, legislatures, believe that the doctrine, on the whole, is socially reasonable and useful." *Radaszewski v. Telecom Corp.,* 981 F.2d 305, 311 (8th Cir. 1992), *cert. denied,* 508 U.S. 908 (1993).

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Finally, plaintiffs strive to buttress their claims of *vicarious* liability against GKN with a cross-reference to the evidence on which they base their claims of *direct* liability against GKN. *See* Pls.' Br. 31. As explained below, that evidence is legally insufficient to support the latter claims. For present purposes, it suffices to note that none of that evidence establishes that Meineke was a sham without any existence independent of GKN.

The preceding discussion has been devoted entirely to plaintiffs' failure to establish the "complete domination" that is a prerequisite for veil-piercing in North Carolina. Plaintiffs' failure to satisfy this threshold requirement dooms their claim against GKN. It bears noting, however, that plaintiffs also failed to satisfy the *separate* requirement that the defendant use its domination to proximately cause injury to a third party. *See Glenn,* 329 S.E.2d at 330. Plaintiffs have no answer to the point that they "made no showing that GKN used its ostensible 'control' over Meineke to carry out the alleged misdeeds at issue in this case." Defs.' Br. at 34-35. GKN played no role in the establishment or administration of the WAC account or New Horizons, and certainly did not direct Meineke to pay the disputed advertising commissions from the WAC account. *See id.*

B. There Is No Legal Basis for Imposing Direct Liability on GKN.

Plaintiffs inexplicably contend (1) that defendants have "[l]argely ignored" the various theories of direct liability against GKN, Pls.' Br. 29, and (2) that "[d]efendants' sole claim with regard to these [theories] is that the evidence was insufficient," *id.* Those contentions are baseless. ***27** Defendants challenged the legal underpinnings of each theory of direct liability against GKN. *See* Defs.' Br. 35-39. Indeed, plaintiffs make no attempt to defend most of those theories: they fail to write *a single word* in response to defendants' legal challenges to the imposition of direct liability on GKN for (1) intentional interference with contractual relations, [20] (2) violation of the North Carolina Unfair Trade Practices Act, [2] and (3) fraud and misrepresentation. [22] Rather, plaintiffs simply list the evidence allegedly adverse to GKN and then suggest, in a single conclusory sentence, that this "wealth of evidence" is sufficient to sustain liability for aiding and abetting a breach of fiduciary duty. Pls.' Br. 30.

20 There can be no liability for intentional interference with contractual relations because (1) GKN did not induce Meineke to breach any contractual obligation, and (2) none of GKN's actions were motivated by "a malicious wish to injure the plaintiff s], as opposed to "legitimate business concerns. *See* Defs.' Br. 37 38.

21 There can be no liability under the North Carolina Unfair Trade Practices Act because (1) none of the factual predicates on which plaintiffs based their statutory claims involved conduct by GKN, and (2) plaintiffs failed in any event to make the requisite additional showing of "substantial aggravating circumstances. *See* Defs.' Br. 38 39.

22 There can be no liability for fraud or misrepresentation because GKN (1) made no representations of any kind to plaintiffs, and (2) had no disclosure duty to plaintiffs as a matter of law. *See* Defs.' Br. 35 n.20. (And, in any event, plaintiffs conceded below that their fraud and misrepresentation claims were based on a theory of vicarious, not direct, liability. *See id.*)

As an initial matter, plaintiffs' failure even to defend most of the theories of direct liability at the very least requires vacatur of the damages award against GKN. *See, e.g., Barber,* 34 F.3d at 1278 (failure of any one of multiple theories of liability requires vacatur of general damages award not allocated among such theories). The upshot of this point (which plaintiffs do not challenge) is that GKN's liability for damages in this case cannot rest on any theory of direct liability, but rests *entirely* on the veil-piercing theory. (GKN's liability under the latter theory, moreover, is *$60 million* less than its liability under the former in light of the trial court's holding that some of the non-EDP releases applied to Meineke but not GKN. *See* Defs.' Br. 9 & n.1.)

The sole theory on which plaintiffs now defend the imposition of direct liability on GKN -- "aiding and abetting a breach of fiduciary duty" -- also fails on the merits. The threshold question, of course, is whether any such cause of action exists at all. The North Carolina Supreme Court has ***28** never recognized it, and this Court has stressed that federal courts

sitting in diversity should not create or expand state-law causes of action.[23] Plaintiffs' arguments are based wholly on a decision by the intermediate North Carolina Court of Appeals, *Blow v. Shaughnessy,* 364 S.E.2d 444 (N.C. App. 1988), holding that aiding and abetting a tort could itself be a cognizable tort. The decision of an intermediate state court, however, is not binding on a federal diversity court if there is "persuasive" reason to believe that the State's highest court would not follow it. *United States v. Little,* 52 F.3d 495, 498 (4th Cir. 1995). The subsequent decision of the United States Supreme Court in *Central Bank of Denver v. First Interstate Bank,* 511 U.S. 164 (1994), provides just such a reason, for it knocked out *Blow*'s precedential underpinnings.

23 *See, e.g., St. Paul Fire & Marine Ins. Co. v. Jacobson,* 48 F.3d 778, 783 (4th Cir. 1995) (federal court "should not create or expand a] State's public policy "); *Burris Chem., Inc., v. USX Corp.,* 10 F.3d 243, 246 (4th Cir. 1993) (federal courts are "not to] surmise or suggest ... expansion of state law); *Walk v. B&O R.R.,* 847 F.2d 1100, 1108 (4th Cir. 1988) ("Absent more authoritative guidance from a State's] highest court, ... it is not for this court, sitting in diversity, to extend state law in the manner suggested. ").

The *Blow* Court acknowledged the novelty of a civil cause of action for aiding and abetting, but relied on the fact that "a cause of action on this theory has been recognized by federal courts in securities fraud cases based on violations of section 10(b) of the Securities Exchange Act of 1934." 364 S.E.2d at 447. The line of federal cases on which *Blow* relied, however, was overruled by *Central Bank of Denver. See* 511 U.S. at 169. The latter decision thoroughly analyzed the law and policy of civil liability for aiding and abetting, and set forth persuasive arguments against the recognition of any such cause of action. *See id.* at 180-191. In light of *Central Bank of Denver,* the North Carolina Court of Appeals is likely to reconsider *Blow.* More to the point, the North Carolina Supreme Court is most unlikely to embrace such a discredited cause of action, or in any event to extend it beyond the securities-law context. Plaintiffs' only response to this point is to cite *Blow* and *Boykin v. Bennett,* 118 S.E.2d 12 (N.C. 1961), a case that in no way purported to recognize a cause of action for aiding and abetting. *See* Pls.' Br. at 29 n.36.

In any event, even assuming *arguendo* that the North Carolina Supreme Court would recognize such a cause of action, there is no basis for holding GKN liable for aiding and abetting ***29** the breach of fiduciary duty alleged here. Even those courts that have authorized civil aiding-and-abetting liability have carefully limited its scope to situations in which the alleged aider-and-abetter (1) "knows that the other's conduct constitutes a breach of duty," and (2) "gives substantial assistance or encouragement" to the primary tortfeasor in carrying out that breach. *Blow,* 364 S.E.2d at 447 (quoting Restatement (Second) of Torts § 876(b) (1977)). Plaintiffs failed as a matter of law to satisfy either of these elements.

The evidence on which plaintiffs rely, *see* Pls.' Br. 30, 32, establishes at most that GKN (like any parent company) encouraged Meineke to keep costs down and profits up. Plaintiffs presented no evidence that GKN *knew* that Meineke had breached any fiduciary duties with respect to the WAC account, much less that any such breach was "at the behest" of GKN. Pls.' Br. 2. Actual -- not "constructive" -- knowledge of such a breach is necessary. *See, e.g., In re TMJ Implants Prods. Liab. Litig.,* 113 F.3d 1484, 1495-96 (8th Cir. 1997); *Kolbeck v. LIT America, Inc.,* 939 F. Supp. 240, 246-47 (S.D.N.Y. 1996) (collecting cases). As the Restatement emphasizes, the alleged aider-and-abetter must be aware not only of the challenged conduct, but also of the fact that such conduct "constitutes a breach of duty." Restatement (Second) of Torts § 876(b); *see also id.* cmt. d (civil aiding and abetting liability appropriate only "if the act encouraged is known to be tortious."). None of the evidence cited by plaintiffs, *see* Pls.' Br. 30, demonstrates awareness by GKN that Meineke's actions constituted a breach of fiduciary duty. To the contrary, GKN's periodic audits of Meineke identified no problem with expenditures from the WAC account. *See, e.g.,* J.A. 9585, 9624-53, 9654-85. References to "fiduciary" or "trust" in documents sent to or from GKN officials could at most establish knowledge of a *duty,* but not a *breach.* Accordingly, plaintiffs failed to establish aiding and abetting as a matter of law. *See, e.g., TMJ Implants,* 113 F.3d at 1495-97.

Plaintiffs also failed to establish that GKN rendered "substantial assistance" to Meineke in any breach of fiduciary duty by Meineke. The evidence on which plaintiffs rely, *see* Pls.' Br. 30, fails to establish "substantial assistance" as a matter of law. A memorandum from Marcus Beresford, a GKN director and incoming chairman of Meineke's board of directors,

to Meineke's president expressing "hop[e] that you can find some way to tease-up the surplus for Budget 1993," ***30** J.A. 6982, is entirely routine -- directors are *supposed* to encourage budget surpluses. Plaintiffs engage in a shameless game of cut-and-paste by asserting that this memorandum "directed Meineke to 'tease up the surplus' by increasing 'advertising management fees,' and Meineke did so." Pls.' Br. 5 (quoting J.A. 6982). The memorandum did not "direct" Meineke to do anything, and referred to "advertising management fees" in the context of a question regarding the amount of such fees and their inclusion in the annual budget. *See* J.A. 6982; *see also id.* at 4655-60; 9614-15. Indeed, plaintiffs themselves introduced evidence from Meineke's records establishing that the last increase in New Horizons' commission rates took place months *before* this memorandum. *See id.* at 6927-28, 9616. There is simply nothing in the record to suggest that this memorandum (written in 1992, almost ten years *after* Meineke began paying advertising commissions from the WAC account, *see id.* at 3739, 6662, 6982, 9586) in any way caused or advanced the alleged breach of fiduciary duty.

Similarly, another memorandum from Beresford to Meineke's president characterizing New Horizons' income from Yellow Pages commissions as a "point of vulnerability" in ongoing franchise contract negotiations, *id.* at 6796-97, is advice on how best to negotiate with franchisees on the verge of filing this lawsuit. Plaintiffs assert that this memorandum "expressly instructed Meineke to 'delay publishing' New Horizons' profits and "exaggerat[e]' its general overhead because those profits were a 'point of vulnerability.'" Pls.' Br. 5 (quoting J.A. 6796). That memorandum did not "instruct" Meineke to do anything, but simply provided comments on a draft letter to the franchisees. *See* J.A. 6796-97. There is no evidence that this draft was ever even sent. *See id.* at 4668. Those comments suggested ways to defuse franchisee unhappiness over New Horizons' commissions, such as pointing out that those commissions compared favorably with "those of a third party agency," and ensuring that New Horizons' financial summary adequately reflected its overhead. *Id.* at 6796. There is nothing in the record to suggest that this memorandum (which was written in July 1993, well *after* the franchisees concededly knew about the payment of advertising commissions from the WAC account and indeed after talk of a "possible future Court action" had begun, *id.* at 6797; *see also id.* at 4662-68), in any way caused or advanced Meineke's alleged breach of fiduciary duty.

***31** That plaintiffs rely on these two memoranda as the primary record support for the $390 million judgment against GKN only underscores the legal impropriety of that judgment. It is telling that plaintiffs have failed to cite *a single case* upholding the imposition of civil aiding and abetting liability on facts remotely similar to these. To allow a corporate parent to be held liable for "aiding and abetting" a subsidiary on these facts would be to do away with the principle of limited liability by the back door (and to render the veil-piercing doctrine a dead letter), as all but the most disengaged parents could thus be held directly liable for the acts of their subsidiaries. [24]

24 Aiding and abetting liability, moreover, is flatly inconsistent with veil piercing liability. If Meineke and GKN were indeed a single corporate entity, then GKN could not have "aided and abetted Meineke's torts as a matter of law. *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).

C. There Is No Legal Basis for Imposing Vicarious or Direct Liability on PIC.

Plaintiffs make no real attempt to defend the imposition of either vicarious or direct liability on PIC, which is jointly and severally liable for the damages award. Indeed, other than the fact that GKN is the ultimate owner of PIC and PIC is the direct owner of Meineke, the only facts plaintiffs cite in support of PIC's liability is that PIC's chief financial officer was a Meineke director and once wrote a letter using the word "fiduciary" in connection with the WAC account. *See* Pls.' Br. 30. These facts in no way warrant the imposition of either vicarious or direct liability on PIC. [25]

25 As defendants have noted, *see* Defs.' Br. 36 n.21, the legal arguments in this section apply with equal force to the three individual defendants. Plaintiffs have not contested this point.

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V. THE UNPRECEDENTED DAMAGES AWARD MUST BE VACATED.

Plaintiffs meticulously avoid responding to defendants' legal arguments with respect to the unprecedented damages award (which is more than ten times Meineke's annual gross revenue, *see, e.g.,* J.A. 5664, 6338, 6619), and instead attempt to hide behind the asserted "reasonableness" of the jury's findings and the claimed "sufficiency" of the evidence. This failure to grapple with (much less negate) the underlying errors of law requires vacatur of the damages award in its entirety.

A. Plaintiffs' Key Expert Testimony Should Have Been Excluded Under Rule 702.

Plaintiffs' most critical evidence of lost profits was the crude regression analysis performed ***32** by their damages expert Marc Sherman. The district court erred by refusing to exclude Sherman's testimony under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993), since that testimony was based on a patently flawed and unreliable methodology. *See General Elec. Co. v. Joiner,* 118 S. Ct. 512, 518-19 (1997) (approving exclusion under *Daubert* of scientific studies that failed to provide sufficient support for expert's conclusions). Plaintiffs fail to step up to the *Daubert* challenge. Tellingly, they have buried their responses to the *Daubert* points in the midst of an argument proclaiming the overall sufficiency of their lost profits evidence under North Carolina law. *See* Pls.' Br. 32, 34-39. But the question of sufficiency of evidence presupposes its admissibility. [26]

26 Indeed, plaintiffs attempt to avoid *Daubert* altogether by suggesting that defendants waived their objection to the admission of Sherman's testimony by failing to repeat that objection frequently enough at trial. *See* Pls.' Br. 34 35 n.50 (relying on *McEwen v. City of Norman,* 926 F.2d 1539, 1542 44 (10th Cir. 1991)). That suggestion is baseless; the record shows that defendants fully preseryed the objection at trial. *See* J.A. 3834 54. In any event, the settled (and sensible) rule in *this* Circuit is that an unsuccessful motion *in limine* preserves an objection for appeal where, as here, the issue was fully briefed in the motion and the court ruling rejecting the motion was definitive and left no suggestion that the court would reconsider the ruling at trial. *See, e.g., United States v. Williams,* 81 F.3d 1321, 1325 (4th Cir. 1996).

Dismissing the *Daubert* issue as a "narrow challenge," Pls.' Br. 34, plaintiffs assert that defendants "agree" with Sherman's formula for measuring lost profits, *id.,* and are merely "attacking the *data* upon which Sherman relied," *id.* at 36 (emphasis in original). They could not be more wrong. Defendants' argument goes entirely to methodology. Sherman's effort to measure a causal link between advertising and sales was hopelessly corrupted by his failure to account for (1) the "feedback" resulting from the contract provision that set advertising contributions at a fixed and constant percentage of sales (with some lag time between advertising contributions and expenditures in specific quarters, which explains why the correlation was not a perfect 10-to-1), and (2) any other possible explanatory variables, which could have been isolated through multiple regressions. *See* Defs.' Br. 40-43. [27]

27 Plaintiffs defend Sherman's failure to perform multiple regressions by arguing that in a "retrospective analysis, where the objective is to estimate the effect of a particular variable on "historical sales numbers, the effect of all other major variables "is *directly* reflected in the *actual* sales numbers for the time period studied and need not be "included in the regression. Pls.' Br. 38 (emphasis in original). That is clearly incorrect: the fact that other variables affected sales in no way explains the effect of *advertising* on sales. Plaintiffs cite an example of a simple regression involving advertising and sales that was included in an appendix to I. Gleim & T. Campbell, *Managerial Accounting* 632 (4th ed. 1992), *see* Pls.' Br. 35, but this example is merely illustrative and not meant to prove anything. Indeed, the text accompanying that illustration recognizes that sales depend on *many* variables, only one of which is advertising. *See* J.A. 9618.

***33** Plaintiffs insist that Sherman's analysis measured *only* the relevant correlation between advertising expenditures and sales, not the perfectly linear counter-correlation that admittedly existed (by virtue of the contracts) between sales and advertising contributions. *See* Pls.' Br. 36-37. Their only support for that argument is the *ipse dixit* of their expert:

Sherman said he measured the right correlation and not the wrong one, and that should be enough. *See id.* at 36. "But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner,* 118 S. Ct. at 519. Plaintiffs have no answer to the two core methodological flaws described above, which rendered Sherman's analysis quite meaningless. [28]

28 The fact that Sherman's regression analysis displayed an apparent relationship between advertising and sales that was so extraordinarily consistent over time only underscores that he was simply measuring the constant contractual relationship of sales to advertising rather than any real world cause and effect relationship of advertising to sales. If his analysis had been driven by the effect of advertising, it would certainly have revealed fluctuations from year to year due to the varying success of the different advertising campaigns. For example, Meineke's recent national campaign featuring boxer George Foreman has been much more successful than were previous campaigns during the relevant period. Indeed, plaintiffs themselves emphasized at trial that "before George Foreman, Meineke had many campaigns that were not quite so successful, including one campaign (the "just dumb campaign featuring monkeys) that "was a total failure and cost franchisees "millions. J.A. 9003 04, 9013; *see also id.* at 3257, 9578 80, 9595 96.

Plaintiffs also suggest that Sherman's analysis satisfies *Daubert* because certain cherry-picked Meineke documents appeared to estimate a range of projected sales returns from advertising that encompassed Sherman's final result. *See* Pls.' Br. 33. *Daubert,* however, is not a rule of estoppel. As plaintiffs themselves emphasize, "[u]nder *Daubert,* what matters is the *methodology* employed, not the results of any particular expert's analysis." Pls.' Br. 35 (emphasis in original). ***34** The apparent corroboration of an expert's results does not validate the expert's methodology. Even a coin flip may reach the right result in some cases, but that does not make it a sound methodology. [29]

29 The Meineke documents cited by plaintiffs, moreover, were hypothetical sales projections prepared by an accountant who picked "a number out of the air. J.A. 9613. In fact, the only *empirical* evidence in the record concerning the effect of advertising on sales that is, evidence based on actual customer survey data (from more than 700,000 customer responses collected by franchisees) rather than opinion evidence or guesswork demonstrates that $1 in additional Meineke advertising produces about $1 in additional sales. *See* J.A. 8569A. This evidence does not suggest that the value of advertising is negligible: at least in the muffler business, advertising pays off because it gets customers in the door who might later return for repeat business if they are satisfied with the product and services they receive. *See id.*

In any event, plaintiffs concede that the lost profits damages the jury "actually assessed" were "based on $8.16 in additional sales per dollar of advertising," Pls.' Br. 33 -- *precisely* the figure produced by Sherman's analysis, *not* any rough and varied guesses found in a Meineke document. Sherman himself testified, moreover, that he prepared his regression analysis without knowledge of or reference to any Meineke document. *See* J.A. 3900. Because the jury's award of lost profits concededly was based on Sherman's testimony, that award must fall if Sherman's analysis was improperly admitted under Rule 702.

B. Plaintiffs Failed To Prove Lost Profits Damages To a Reasonable Certainty.

The methodological flaws in Sherman's regression analysis also mean that his testimony, even if admissible under Rule 702, did not *as a matter of law* provide a sufficient basis for the jury to calculate lost-profits damages with the reasonable certainty required in North Carolina. *See* Defs.' Br. 43-44 (citing, *inter alia, Olivetti Corp. v. Ames Bus. Sys.,* 356 S.E.2d 578, 586 (N.C. 1987)). In addition, Sherman's reliance on a 34% global profit margin lacked reasonable certainty since profits are a function of inherently individualized factors. *See* Defs.' Br. 44. Plaintiffs' only response is to string-cite cases where lost profits were proved with sufficient evidence. *See* Pls.' Br. 32-33, 38-39 & n.57. None of those cases, however, addressed a *global* recovery of lost profits for hundreds of disparate businesses, like the class recovery awarded below, and none involved the peculiar shortcomings of plaintiffs' evidence.

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Plaintiffs rely on ***35** *Mosley & Mosley Builders, Inc. v. Landin Ltd.,* 361 S.E.2d 608 (N.C. App. 1987), *cert. dismissed,* 370 S.E.2d 416 (N.C. 1988), and *Lexington Prods. Ltd. v. B.D. Communications, Inc.,* 677 F.2d 251 (2d Cir. 1982), and, in particular, hold out *Lexington Products* as a case where lost profits from reduced advertising were held to be adequately proved without any regression analysis or even expert testimony. *See* Pls.' Br. 32, 38-39. But both cases involved the estimation of lost profits for a *single business* with an extensive or specific track record from which to judge the certainty of the estimate. That is a world away from the mass averaging of global profits for 900 different franchises. (As one of the named plaintiffs acknowledged at trial, there is "a great deal of variance" in the performance of different Meineke franchises. J.A. 3271. *See also id.* at 4209-11, 9701.)

In response to the utter lack of proof supporting their damages for commissions paid to Berry and Corinthian, *see* Defs.' Br. 44, plaintiffs declare that "[d]efendants ... *themselves* introduced into evidence the precise amount of th[ose] commissions." Pls.' Br. 34 n.47 (emphasis in original) (citing J.A. 9539). But their cite is simply to the testimony of defendants' damages expert, who was merely restating the figures previously introduced by plaintiffs' expert Sherman. He was *not* purporting to vouch for those numbers, which remain completely unsupported (notwithstanding the fact that they account for fully *43%* of the damages awarded below, *see* Defs.' Br. 44).

C. Plaintiffs Received an Inconsistent and Improper Double Recovery.

The district court also erred by allowing the jury to award plaintiffs as compensatory damages *both* the disputed advertising commissions themselves *and* the lost profits that plaintiffs allegedly would have earned had those commissions been spent on advertising. Plaintiffs cite the Restatement (Second) of Agency § 407(1) (1957) and *United Labs., Inc. v. Kuykendall,* 437 S.E.2d 374 (N.C. 1993), in defense of their asserted right to this double recovery (which, after trebling, interest, and adjustment for releases, accounts for approximately *$90 million* of the damages award). Neither authority, however, supports plaintiffs' position.

The fact that North Carolina courts from time to time have cited the Restatement in addressing certain issues of agency law (none, by the way, involving damages), *see* Pls.' Br. 40 & n.60, does not establish that the agency principle of restitution reflected in § 407(1), or indeed *any* ***36** *principle of agency law,* applies here. In agency cases, the funds in question are given to an agent and intended to generate interest (or an interest-like return). In such cases, the principal anticipates that he will receive both the invested money and the interest at some future date. The appropriate remedy, thus, is both the money misappropriated and the interest that would have accrued. This case is entirely different. The advertising contributions were meant to be spent by Meineke (never to be returned to the franchisees), *see* Defs.' Br. 46, and thus the only return anticipated by the franchisees was profit generated by the advertising purchased with the funds. Regardless of whether Meineke was a "fiduciary," therefore, plaintiffs here cannot recover *both* the disputed commissions and their asserted lost profits. And, in any event, even if a restitutionary remedy were appropriate, the only possible form of restitution would be restitution *to the WAC account itself,* not to plaintiffs, who relinquished all rights and interest in the money once it was paid. *See id.*

The only relevant authority cited by plaintiffs, *Kuykendall,* strongly supports the conclusion that plaintiffs' double recovery was wrong as a matter of law. That case holds that a party may not recover two different remedies that *either* (1) are mutually "inconsistent," like damages for breach of contract and rescission, *or* (2) provide redress for the same course of conduct. 437 S.E.2d at 379. Each defect is present here. Both the district court and plaintiffs' own expert acknowledged that lost profits damages and restitution of commissions were "mutually exclusive" remedies in this case, since the recovery of the franchisees' hypothetical lost profits *necessarily presumes* the expenditure of the disputed commissions and is conceptually inconsistent with restitution -- just as damages for breach of contract necessarily presumes a valid contract and is inconsistent with rescission. *See* Defs.' Br. 45-46. Further, both remedies received by plaintiffs were aimed at redressing the very same course of conduct: the allegedly improper payment of advertising commissions from the WAC account. Plaintiffs' double recovery is thus in clear contrast to the punitive damages and attorney's fees at issue in *Kuykendall,* which involved proof of entirely different conduct -- the commission of "willful or oppressive" acts for

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purposes of punitive damages and "an unwarranted refusal" by the defendant to settle the case for purposes of attorney's fees. *See* 437 S.E.2d at 379-80 (internal quotes omitted). Whether plaintiffs could have recovered lost profits damages for breach of contract ***37** alone, as distinguished from the alleged breach of fiduciary duty underlying their recovery of the disputed commissions, *see* Pls.' Br. 41, is irrelevant, since here plaintiffs claimed that *the same course of conduct* constituted both breaches. *Kuykendall* prohibits such double recoveries.

D. The Award of Prejudgment Interest Was Excessive and Improperly Trebled.

Finally, plaintiffs cannot justify the erroneous and improperly trebled award of prejudgment interest.

The legal rate of interest in North Carolina is 8% "and no more." N.C. Gen. Stat. § 24-1. Plaintiffs contend that N.C. Gen. Stat. § 24-5(a), the section of the interest statute applicable to contract actions, authorizes juries to ignore the legal rate and award prejudgment interest at *any* rate (unless specified by contract). *See* Pls.' Br. 42-43. Section 24-5(a) provides, in relevant part, that interest "after judgment" shall be awarded at the legal rate unless otherwise specified by contract. Plaintiffs contend that the negative implication of this provision is that interest *before* judgment can be awarded at *any* rate unless otherwise specified by contract. That interpretation is preposterous -- which presumably explains why plaintiffs never advanced it below and cannot now cite *a single case* in which it has been adopted. Section 24-5 does not purport to override § 24-1, which sets forth the default legal interest rate of 8%. Under plaintiffs' interpretation, the legal rate of interest applies *only* to post-judgment interest or not at all. They thus make the common mistake of reading too much into "what the statute does *not* provide." Pls.' Br. 42 (emphasis in original). *See, e.g., Burns v. United States,* 501 U.S. 129, 136 (1991) ("Not every silence is pregnant.") (internal quotation omitted); *INS v. FLRA,* 4 F.3d 268, 272 (4th Cir. 1993) ("*[E]xpressio unius* should be applied warily."). There is abundant case law applying the statutory rate to prejudgment interest in contract actions, thus refuting plaintiffs' theory that North Carolina allows juries free rein to award prejudgment interest. *See, e.g., Middleton v. Russell Group, Ltd.,* 483 S.E.2d 727, 741 (N.C. App.), *rev. denied,* 488 S.E.2d 805 (N.C. 1997); *Members Interior Constr., Inc. v. Leader Constr. Co.,* 476 S.E.2d 399, 402 (N.C. App. 1996), *rev. denied,* 485 S.E.2d 56 (N.C. 1997); *Parker v. Lippard,* 359 S.E.2d 492, 496 (N.C. App. 1987); *Interstate Equip. Co. v. Smith,* 234 S.E.2d 599, 602 (N.C. 1977); ***38** *see also Hardy-Latham v. Wellons,* 415 F.2d 674, 679 (4th Cir. 1968). [30]

30 Plaintiffs' historical argument also misses the point: whatever the nineteenth century common law of prejudgment interest, there is no question that the statutory interest rate today governs awards of prejudgment interest in the courts of North Carolina. The two modern cases cited by plaintiffs, *Dailey v. Integon Gen. Ins. Corp.,* 331 S.E.2d 148, 159 (N.C. App. 1985), and *Taha v. Thompson,* 463 S.E.2d 553, 556 57 (N.C. App. 1995), actually refute their argument both cases emphasize that juries are *not* authorized to award prejudgment interest.

But even assuming, for argument's sake, that plaintiffs were free to pursue some non-statutory rate of prejudgment interest, there was no basis in law or fact for the inflated rate awarded here. As plaintiffs put it, the jury "apparently found" that the "best measure" of prejudgment interest was the prime rate plus 3% compounded monthly, the penalty rate that Meineke was allowed by contract to charge franchisees for delinquent payments. Pls.' Br. 44. Plaintiffs coyly acknowledge that in choosing to apply this penalty rate (which Meineke never in fact used, *see* J.A. 4562), the jury "might have relied upon" the "fundamental precept of equity" urged by plaintiffs' expert Sherman -- "what's good for the goose is good for the gander." *Id.* at 44 n.68. That "precept of equity," and the three cases plaintiffs cite in support of it, *see id.,* have nothing to do with, and provide no basis for, an award of interest on money damages at law. [3]

31 *See Holland Elec., Heating & Plumbing Co. v. Holland Heating & Air Conditioning, Inc.,* 379 S.E.2d 404 (Ga. 1989) (holding merely that equity will not enforce a covenant not to compete on behalf of one partner to a business against the other partner where both partners were equally engaged in competing with the business); *Passanisi v. Merit McBride Realtors, Inc.,* 190 Cal. App. 3d 1496, 1509 n.9 (1987) (applying California civil *statute* providing that a contractual attorney's fees clause must be construed to be mutual); *Complete Interiors, Inc. v. Behan,* 558 So. 2d 48, 52 (Fla. App.) (*reversing* trial court's reliance on

> "sauce for the goose maxim and holding that unilateral attorney's fees clause in contract is not contract of adhesion and will not be construed as mutual), *rev. denied,* 570 So. 2d 1303 (Fla. 1990).

With respect to the trebling of interest, plaintiffs assert that the plain language of N.C. Gen. Stat. § 75-16 ("judgment shall be rendered ... for treble the amount fixed by the verdict") requires trebling of an interest award whenever the interest happens to be set forth on the jury's verdict form, even where (as here) the interest is set forth separately from the principal amount of damages. That is a nonsensical reading of § 75-16 that would arbitrarily reward plaintiffs where (as here) the trial court (whether properly or improperly) permitted the jury to calculate prejudgment interest rather ***39** than performing the clerical calculation itself or directing the clerk to do so. [32]

32 Where, as here, application of the appropriate interest rate involves merely a clerical calculation, plaintiffs' own cases hold that the trial court (rather than the jury) should make that calculation. *See Lea Co. v. North Carolina Bd. of Transp.,* 345 S.E.2d 355, 360 (N.C. 1986); *Dailey v. Integon Gen. Ins. Corp.,* 331 S.E.2d 148, 159 (N.C. App. 1985).

In any event, the law of North Carolina is clear that prejudgment interest may not be trebled under the Unfair Trade Practices Act. *Sampson-Bladen Oil Co. v. Walters,* 356 S.E.2d 805 (N.C. App.), *rev. denied,* 361 S.E.2d 597 (N.C. 1987), held that it was error to treble the plaintiff's damages award under § 75-16 and then "add[] interest on that [trebled] amount at 8% ... to the day judgment was entered." *Id.* at 809. The court held that such prejudgment interest should have run only on the untrebled amount. *See id.* Applying prejudgment interest to trebled damages, of course, is no different from trebling the prejudgment interest along with the principal damages. It is the same error either way. Similarly, in *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.,* 991 F.2d 141, 148 (4th Cir. 1993), this Court recognized that it would be error to calculate prejudgment interest on trebled damages under the North Carolina Unfair Trade Practices Act:

> We would be concerned had the Tribunal added 7% pre-award interest to the damages trebled under the NCUTA but this did not occur. Damages are trebled under the NCUTA, not to compensate the wronged party, but to deter unwanted trade practices. Adding 7% pre-award interest to these trebled damages, therefore, would not be necessary to make Peoples Security whole. Upon careful inspection of the award, however, it is clear that the Tribunal only added 7% pre-award interest to the compensatory portions of the award.

Plaintiffs argue that *Custom Molders, Inc. v. American Yard Prods., Inc.,* 463 S.E.2d 199 (N.C. 1995), "called into question" *Sampson-Bladen* and *Peoples Security* by disavowing the holding in *Love v. Keith,* 383 S.E.2d 674, 679 (N.C. App. 1989). Pls.' Br. 45. Not so. In fact, it is fairer to say that *Custom Molders* confirmed the holding in *Sampson-Bladen* by specifically disavowing *Love only* "to the extent that it precludes the recovery of *postjudgment* interest on the full amount of the [trebled] judgment." 463 S.E.2d at 203 (emphasis added). Precluding the trebling of prejudgment interest while allowing post-judgment interest to run on a trebled award is not inconsistent. Contrary to plaintiffs' suggestion, Pls.' Br. 45, there is a world of difference between ***40** prejudgment and post-judgment interest. Prejudgment interest compensates the plaintiff for the time value of the dollar amount he is actually out-of-pocket as a result of the defendant's conduct. Once judgment is rendered, however, the total amount of the judgment, even where trebled, becomes a judgment debt owed by the defendant to the plaintiff, and post-judgment interest may properly run on the total amount of that debt.

Plaintiffs' reliance on *Baxley v. Nationwide Mut. Ins. Co.,* 430 S.E.2d 895 (N.C. 1993), and *Quate v. Caudle,* 381 S.E.2d 842 (N.C. App.), *rev. denied,* 388 S.E.2d 462 (N.C. 1989), is also misplaced. *Baxley* held that an award of prejudgment interest in an underlying tort action brought by an insured against an uninsured motorist is part of the "damages" covered by the insured's uninsured motorist policy. *See* 430 S.E.2d at 900. *Quate* involved financing costs on a loan the plaintiff was forced to take out because of the defendant's breach of contract. The court held that such financing costs should be included along with the principal of the loan as part of the damages proximately caused by the breach, and *for that reason* could be trebled under § 75-16. *See* 381 S.E.2d at 847. Here, in contrast, plaintiffs never claimed (let alone proved)

that they incurred any such financing costs, costs of capital, or other such interest expenses as a result of defendants' alleged violation of the Unfair Trade Practices Act. To the contrary, plaintiffs expressly acknowledge that they seek "prejudgment interest," plain and simple, *see* Defs.' Br. 42-46, and *not* damages for actual interest costs incurred.

VI. PLAINTIFFS ARE NOT ENTITLED TO BOTH PUNITIVE AND TREBLE DAMAGES.

In light of the $390 million treble-damages award, plaintiffs' cross-appeal seeking an *additional* recovery of punitive damages is a "wonderful exampl[e] of chutzpah." *In re A.H. Robins Co.,* 86 F.3d 364, 377 (4th Cir.), *cert. denied,* 117 S. Ct. 483 (1996). North Carolina law is clear that "a party may not recover punitive damages for tortious conduct and treble damages for a violation of [the Unfair Trade Practices Act] based on that same conduct." *Kuykendall,* 437 S.E.2d at 379. [33] ***41** That rule is based on a sensible desire to "prevent double redress for a single wrong." *Id.* (internal quotation omitted). The district court correctly applied that rule below, holding that plaintiffs could not recover both punitive and treble damages because they failed to request a jury instruction distinguishing between discrete courses of conduct underlying each type of damages. *See* J.A. 2878. In the absence of such an instruction, it is impossible to determine whether the award of punitive damages is based on the same conduct underlying the award of treble damages. *Cf. Medina v. Town & Country Ford, Inc.,* 355 S.E.2d 831, 837 (N.C. App. 1987) (both punitive and treble damages may be recovered where jury given "detailed instructions" distinguishing between "wholly separate" conduct underlying each award), *aff'd,* 364 S.E.2d 140 (N.C. 1988).

33 *See also Murray v. National Mut. Ins. Co.,* 472 S.E.2d 358, 368 69 (N.C. App. 1996), *rev. denied,* 483 S.E.2d 172 (N.C. 1997); *Ellis v. Northern Star Co.,* 388 S.E.2d 127, 132 (N.C. 1990); *Mapp v. Toyota World, Inc.,* 344 S.E.2d 297, 301 (N.C. App.), *disc. rev. denied,* 347 S.E.2d 464 (N.C. 1986); *Bicycle Transit Auth. v. Bell,* 333 S.E.2d 299, 306 (N.C. 1985); *Marshall v. Miller,* 268 S.E.2d 97, 103 (N.C. App. 1980), *modified and aff d,* 276 S.E.2d 397 (N.C. 1981).

Plaintiffs attempt to circumvent the district court's holding (which they do not contest) by arguing that they may recover both punitive and treble damages for the same conduct where (as here) multiple defendants are involved. *See* Pls.' Br. 46-47. That argument has no basis in North Carolina law. To the contrary, most of the cases in which the "single conduct" rule has been applied involve multiple defendants, *see, e.g., Murray v. National Mut. Ins. Co.,* 472 S.E.2d 358, 368-69 (N.C. App. 1996), *rev. denied,* 483 S.E.2d 172 (N.C. 1997); *Ellis v. Northern Star Co.,* 388 S.E.2d 127, 132 (N.C. 1990); *Bicycle Transit Auth. v. Bell,* 333 S.E.2d 299, 306 (N.C. 1985); *Marshall v. Miller,* 268 S.E.2d 97, 103 (N.C. App. 1980), *modified and aff'd,* 276 S.E.2d 397 (N.C. 1981), and no North Carolina court has ever suggested the existence of any "multiple defendant" exception. Such an exception, of course, would quickly swallow up the rule, as a plaintiff could always recover both punitive and treble damages for a single course of conduct by simply suing more than one defendant. It is no surprise, thus, that plaintiffs fail to cite *a single case* supporting their theory that the "single conduct" rule does not apply in cases involving multiple defendants. (Nor, for that matter, do plaintiffs cite a single case supporting their assumption that the rule would not apply in *successive* lawsuits challenging a single course of conduct by multiple defendants, *see* Pls.' Br. 47 ***42** n.70.)

In any event, plaintiffs' theory that North Carolina law authorizes an election between punitive and treble damages on a defendant-by-defendant basis makes no sense because liability for treble damages under the Unfair Trade Practices Act is joint and several, not individual. [34] Plaintiffs, accordingly, are entitled to just *one* treble-damages award, not one treble-damages award per defendant. Plaintiffs have never argued otherwise; to the contrary, they successfully *objected* below to defendants' request to allocate compensatory damages (the predicate for treble damages) on a defendant-by-defendant basis, *see* J.A. 4911 -- presumably in order to obtain the largest possible damages award against the deepest pocket. [35] In the absence of individual liability for the entire treble-damages award (or some fixed portion thereof), there is simply no basis for plaintiffs to make an "election" between punitive and treble damages on a defendant-by-defendant basis.

34 *See, e.g., Ellis,* 388 S.E.2d at 132 (upholding imposition of single treble damages award against multiple defendants); *Post & Front Properties, Ltd. v. Roanoke Constr. Co.,* 449 S.E.2d 765, 767 (N.C. App. 1994) (same); *Pinehurst, Inc. v. O Leary Bros. Realty, Inc.,* 338 S.E.2d 918, 925 (N.C. App.) (same), *rev. denied,* 342 S.E.2d 896 (N.C. 1986); *Borders v. Newton,* 315 S.E.2d 731, 731 (N.C. App. 1984) (same); *Baylor v. Brown,* 266 S.E.2d 9, 11 (N.C. App. 1980) (same); *cf. Burlington Indus., v. Milliken & Co.,* 690 F.2d 380, 391 92 (4th Cir. 1982) (applying joint and several liability to treble damages under federal antitrust laws), *cert. denied,* 461 U.S. 914 (1983).

35 Plaintiffs' current suggestion that *each defendant* is separately liable for the entire trebled portion of the damages award (some *$260 million*) would lead to the absurd result (which plaintiffs, until now, have never even dared suggest) that the record shattering damages award entered below should be hiked to almost *$2 billion.* It is hardly surprising that plaintiffs waived such an outlandish argument below: they sought a *single* treble damages award, not *separate* treble damages awards against each defendant. *See, e.g.,* J.A. 9562 65, 9567 70. Nor is it surprising that the single case plaintiffs now cite in support of their argument (a case involving Massachusetts law) *expressly distinguishes* the North Carolina statutory scheme at issue here. *See International Fidelity Ins. Co. v. Wilson,* 443 N.E.2d 1308, 1316 17 & n.18 (Mass. 1983).

VII. THE JURY PROPERLY UPHELD THE VALIDITY OF THE RELEASES.

Finally, the named plaintiffs mount a fleeting challenge to the jury verdicts upholding the validity of both EDP and non-EDP releases. *See* Pls.' Br. 47-48. According to the named plaintiffs, those verdicts must be reversed because *all* the releases "were, *as a matter of law,* obtained by fraud." *Id.* at 47 (emphasis added). This argument is frivolous.

As an initial matter, the named plaintiffs do not even have *standing* to challenge the validity ***43** of the EDP releases, since none of them is a party to such a release. It is axiomatic that the named plaintiffs in a class action are entitled only to challenge conduct by which they have been "personally aggrieved." *Doctor v. Seaboard Coast Line R.R.,* 540 F.2d 699, 711 (4th Cir. 1976). They cannot "merely allege that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Central Wesleyan College v. W.R. Grace & Co.,* 6 F.3d 177, 188 (4th Cir. 1993) (internal quotation omitted); *see also* Defs.' Br. 15. In particular, only persons who have signed a release are "proper plaintiffs" to challenge its validity. *Melong,* 643 F.2d at 16.

In any event, plaintiffs' challenge to the jury verdicts upholding the releases readily fails on the merits. Plaintiffs fail to cite *a single North Carolina case* holding a release invalid as a matter of law. Rather, they assert that the releases here are invalid because the jury concluded "that Meineke and New Horizons were fiduciaries with respect to the WAC fund." Pls.' Br. 47; *see also* J.A. 2907. But plaintiffs do not (because they cannot) contend that claims against a fiduciary can *never* be released, as long as the release is knowing and voluntary. *See, e.g.,* Restatement (Second) of Contracts § 173 (1981); *Leavitt v. Northwestern Bell Tel. Co.,* 921 F.2d 160, 162 (8th Cir. 1990). Rather, plaintiffs argue that the standard for releasing a fiduciary is very demanding, and that the releases at issue here do not satisfy that standard. *See* Pls.' Br. 48.

The threshold problem with that argument is that the trial court gave the jury the very description of the law requested by plaintiffs. Plaintiffs' proposed jury instruction with respect to the releases provided in relevant part as follows:

> [I]f you find that a fiduciary relationship existed between defendants and plaintiffs relating to the franchise advertising program and administration of the WAC Fund, you should then consider whether defendants failed to disclose all material facts relating to the claims allegedly covered by the releases. If you find that defendants did fail to disclose all material facts in procuring the releases from class members, then such conduct constitutes constructive fraud.

J.A. 9559-60. The trial court gave the jury this proposed instruction verbatim. *See* J.A. 4994-95. Plaintiffs even highlighted the instruction in their closing argument: "[T]he Judge will instruct you that a fiduciary must disclose all material facts, even when obtaining a release. This means Meineke ***44** was obligated to tell the dealers everything it

was doing before it made them sign a release. It didn't, and, therefore, the releases are invalid." J.A. 9149. Although plaintiffs now describe the legal standard in more stringent terms, *see* Pls.' Br. 47-48, they cannot ask this Court to review the jury verdict under a more stringent standard than the one they successfully advanced below. *See, e.g., AG Sys., Inc. v. United Decorative Plastics Corp.,* 55 F.3d 970, 972 (4th Cir. 1995).

In any event, it would be incongruous to hold that Meineke acted as a fiduciary in connection with the EDP releases -- the franchisees obviously did not repose any "special trust" in Meineke with respect to the matters involved in this pending litigation. *See, e.g., Avriett v. Avriett,* 363 S.E.2d 875, 877 (N.C. App.) (even all-purpose fiduciary relationship between husband and wife terminates with litigation), *aff'd,* 368 S.E.2d 377 (N.C. 1988); *Murphy v. Murphy,* 239 S.E.2d 597, 599-600 (N.C. App. 1977) (same), *modified on other grounds,* 245 S.E.2d 693 (N.C. 1978); *cf. Mackey v. Judy's Foods, Inc.,* 654 F. Supp. 1465, 1472 & n.14 (M.D. Tenn. 1987), *aff'd,* 867 F.2d 325 (6th Cir. 1989). [36]

36 Indeed, plaintiffs neither contended nor proved below that Meineke and New Horizons (much less *all* defendants) were *all purpose* fiduciaries with respect to the Meineke franchisees; rather, plaintiffs made (and continue to make) the more limited argument that Meineke and New Horizons were fiduciaries *only with respect to the management of their contributions to the WAC account. See, e.g.,* Pls.' Br. 24 n.29; J.A. at 841 51 & 842 n.21; 9549 57 & 9549 n.5; 9572 73. Indeed, plaintiffs' current suggestion that all defendants acted as fiduciaries with respect to the releases makes no sense, because " a] franchise relationship is inherently a business relationship, not a fiduciary relationship. *Picture Lake Campground, Inc. v. Holiday Inns, Inc.,* 497 F. Supp. 858, 869 (E.D. Va. 1980); *see also* Brief *Amici Curiae* of ATL Int'l *et al.* 11 16 & n.2; *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.,* 130 F.3d 1009, 1021 (11th Cir. 1997). Thus, courts routinely uphold releases procured by franchisors from franchisees. *See, e.g., Williams v. Stone,* 109 F.3d 890, 893 n.4 (3d Cir.), *cert. denied,* 118 S. Ct. 383 (1997); *Brock v. Entre Computer Ctrs., Inc.,* 933 F.2d 1253, 1260 61 (4th Cir. 1991); *Hall v. Burger King Corp.,* 912 F. Supp. 1509, 1520 26 (S.D. Fla. 1995).

In the final analysis, plaintiffs' quarrel is with the jury's decision to uphold the releases on the facts of this case. But, as the district court concluded, *see* J.A. 2935-36, the evidence fully supports that decision. Franchisees who signed the EDP releases made a deliberate decision (over the named plaintiffs' vigorous -- albeit largely unsuccessful -- opposition, *see, e.g., id.* at 7529-34, 7541-43) to forgo the *possibility* of a damages recovery in this lawsuit in favor of the *certainty* of ***45** enhanced franchise terms. *See id.* at 7500-28 (EDP package). Those releases specified that the franchisee "has had an opportunity to speak with his attorney or other business advisor and is fully aware of the rights and obligations arising out of this Agreement," *id.* at 7527, *see also id.* at 7521, and expressly referenced "the claims alleged in that one certain cause of action entitled *Broussard, et al v. Meineke Discount Muffler Shops, Inc.;* Civil Cause of Action No.3:94-CV-255 (the "Litigation") on file in the United States District Court for the Western District of North Carolina, Charlotte Division," *id.* at 7526. [37] Franchisees who signed releases upon events such as the termination, withdrawal, or renewal of a franchise in the ordinary course of business, for their part, obtained in return a release of Meineke's claims against them. [38] Such mutual releases (which were also part of the EDP package, *see* J.A. at 7504, 7507, 7513-14) were valuable to the franchisees, who otherwise might have faced claims of underpayment of royalties based on audits of past practices, and other possible infringements of the franchise agreements. *See, e.g., id.* at 4550-57, 4560, 9600-10. Such mutual releases are both routine and routinely upheld. *See, e.g., Jaff v. Cal-Maine Foods, Inc.,* 774 F.2d 1314, 1317 (5th Cir. 1985); *Virginia Impression Prods. Co. v. SCM Corp.,* 448 F.2d 262, 264-66 (4th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972); 76 C.J.S. *Releases* § 16 at 542 (1994); *cf. Brock,* 933 F.2d at 1261. If anything, thus, the trial court erred by denying *defendants*' motion for summary judgment with respect to the validity of both the EDP and non-EDP releases. *See* J.A. 1114-23, 2383-86.

37 The EDP releases broadly released Meineke "and its parent, subsidiaries, affiliates, and all of their officers, directors, employees, agents, representatives, successors and assigns of and from any and all rights, duties, responsibilities, claims, or causes of action whatsoever, whether in contract or in tort, existing by common law or by statute, known or unknown ... which may have accrued or which may accrue on account of, arising from or in any manner growing out of or resulting from

the franchise relationship and the Meineke Franchise and Trademark Agreement governing that relationship, including, but not limited to, the claims alleged in this case]. J.A. 7526.

38 The non EDP releases (although their terms varied in non material ways) broadly released Meineke "and its officers, directors, stockholders, employees, agents, representatives, successors and assigns, from any and all rights, duties, responsibilities, and claims which they have or may have arising out of the franchise agreement. J.A. 1511, *see also id.* at 1529, 9687 97.

Although plaintiffs duly repeat their arguments that the releases were procured by fraud or duress, there is no basis for this Court to overturn the jury verdicts on these intensely factual issues. ***46** Specifically, plaintiffs reiterate four arguments that they lost below.

First, they again argue that the EDP releases are invalid on the ground that defendants "denied that the WAC fund was paying commissions" when those releases were obtained. *See* Pls.' Br. 48; J.A. 9149. But the EDP package sent out by Meineke expressly stated that "the overall commission rate charged by New Horizons will be changed from an average of 8.4% to an across-the-board 4.1%" if enough franchisees enrolled in the program (as in fact occurred)?? *Id.* at 7512; *see also id.* at 7539. Plaintiffs' current argument that Meineke "denied" the payment of commissions from the WAC account, *see* Pls.' Br. 48 (citing J.A. 4522-23), is nothing but an attempt to distort the trial testimony of defendant Zhiss, and is flatly contradicted by the record. Indeed, the named plaintiffs specifically attacked the EDP offer on the ground that New Horizons was not entitled to *any* commissions from the WAC account, and that even the new commission rate would be too high. *See, e.g., id.* at 7532, 7541-42.

Second, plaintiffs again argue that the EDP releases were procured by fraud because a letter sent by Meineke to the franchisees stated that the releases would not "affect your future rights," but the releases precluded the EDP franchisees from obtaining injunctive relief or damages in this case. *See* Pls.' Br. 48 (citing J.A. 7535); J.A. 4524-31, 9150-51. But the cited letter obviously did not suggest that the releases would not limit the EDP franchisees' future rights *in this lawsuit* (which is clear on the face of the releases, *see id.* at 7526); rather, the letter underscored that the release "covers only your relationship with Meineke prior to the date of th[e] agreement" and "does not affect your future relationship with Meineke." *Id.* at 7535. There is no question that the EDP franchisees were well aware that the releases would affect their "future rights" to relief in this lawsuit. Indeed, the named plaintiffs specifically attacked the EDP offer on the ground that it "asks franchisees to trade legal rights for too little change." *Id.* at 7529; *see also.id.* (EDP "attempts to strip us of our legal rights to proceed in court with our class action lawsuit"); *id.* at 7543 ("You are signing away your rights to be in the class.").

Third, plaintiffs again argue that the releases are invalid because Meineke stated that the EDP dealers would benefit from any replenishment of the WAC account. *See* Pls.' Br. 48 (citing ***47** J.A. 7266, 7535); J.A. 9150. But that statement is absolutely true (and a key part of defendants' class-action argument, *see* Defs.' Br. 13-16): the EDP dealers *would* have benefitted from restitution to the WAC account, as opposed to money damages. *See id.* at 7535 ("If the outcome of the pending Association lawsuit involves any replenishment of money to the WAC, it will benefit all dealers."); *see also id. at* 9597-99. It was the named plaintiffs' decision to pursue only money damages (rather than restitution) that prevented the EDP franchisees from benefitting from this lawsuit, notwithstanding the named plaintiffs' ongoing insistence that they fully represented the EDP franchisees' interests. Indeed, the named plaintiffs carried out a classic "bait and switch" on this point, insisting before trial that they were seeking "restoration of proceeds that have been improperly disbursed" from the WAC account (in part to justify non-opt-out certification), *id.* at 391 (citing Amended Complaint), and then seeking only money damages. *See also id.* at 9686 (the named plaintiffs stated, as part of their opposition to the EDP offer, that they were seeking "[a] significant repayment by MEINEKE into the WAC fund of those funds which are the subject of the class action lawsuit.").

Fourth, plaintiffs again argue that the releases are invalid because Meineke "present[ed] the EDP on a non-negotiable basis and requir[ed] the dealers to decide once-and-for-all within 30 days" whether to participate in the program. Pls.' Br. 48. But that does not even support a finding of coercion or duress, much less *compel* a finding of coercion or duress as a matter of law. The named plaintiffs specifically attacked the EDP offer as "a pressure tactic," and urged franchisees

to reject the offer because it "doesn't give us enough time to think before we sign their 'release of claims.'" J.A. 7533; *see also id.* at 7529 ("It asks for a hurried decision, which is never a good way to make a business decision that will affect your future and your family's well-being."). The franchisees, all of whom were advised to consult with an attorney, are adult businesspersons. In no way were they "deprive[d] ... of the exercise of free will" by being asked to decide within 30 days whether to exchange participation in a lawsuit for enhanced franchise terms. *Adder v. Holman & Moody, Inc.,* 219 S.E.2d 190, 194 (N.C. 1975); *see also Reynolds v. Reynolds,* 442 S.E.2d 133, 136-37 (N.C. App. 1994). To top it off, the named plaintiffs failed to call *a single witness* at trial to testify that he or ***48** she had acted under duress by accepting the EDP.

Because the validity of the releases is amply supported by the evidence, the verdicts in this respect should be affirmed.

CONCLUSION

Plaintiffs' case is a house of cards. Their arguments, which attempt to obscure the wholly unprecedented nature of this action, are based on a patchwork of misleading snippets from judicial opinions and from the record. On inspection, those arguments quickly collapse.

For the foregoing reasons, and those stated in the opening brief, the judgment should be reversed, except with respect to the issues raised in the cross-appeal. The case should be remanded with directions to dismiss the class claims and, with respect to the named plaintiffs' individual claims, to enter judgment in defendants' favor on the contract claims and the claims against PIC and GKN. In addition, all orders from the original trial should be vacated so that any new proceedings can begin on a clean slate.

*1A MEINEKE FRANCHISE & TRADEMARK AGREEMENTS [*]

[*] This Appendix contains the two principal contract clauses related to advertising, § 3.1(d) (or, in some cases, (e)) and § 7.17, for each contract starting from 1982, when Meineke's contracts were transformed from the former License Agreements to the current Franchise and Trademark Agreements. Each of these contracts is included in the Joint Appendix. For ease of reference, these sections have been excerpted and reprinted in redlined format.

***2a** 3.1 *Services to be Rendered by MEINEKE.* MEINEKE agrees that it will perform the following services for the benefit of the FRANCHISEE:

> (d) To purchase and place from time to time advertising promoting the products and services sold by FRANCHISEE. Subject to the provisions hereafter set forth, all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection of the particular media and advertising content, shall be within the sole discretion of MEINEKE and such agencies or others as it may appoint. MEINEKE agrees that it will expend for media costs, commissions and fees, production costs, creative and other costs of such advertising, with respect to MEINEKE franchisees, an amount equal to the total of all sums collected from all franchisees under and pursuant to Section 7.17 hereof. Such amounts, as so computed, shall be expended for advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are collected by MEINEKE, during the immediately preceding or following calendar year. Nothing herein shall be deemed to prohibit FRANCHISEE from engaging in any advertising or promotion of his shop or business, in addition to the advertising expended by MEINEKE, provided such advertising or promotion shall be at the sole cost of FRANCHISEE without deduction or credit against those sums due under and pursuant to Section 7.17 hereof, or other amounts owed by FRANCHISEE to MEINEKE. Such advertising shall be subject to

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the provisions of Section 7.17 and shall be submitted to, and have the prior written approval of MEINEKE before placement as provided in Section 7.6.

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.* FRANCHISEE shall (a) participate in such advertising program or programs as MEINEKE may from time to time direct, the cost of which shall not exceed Twelve (12%) percent of the shop's Gross Revenue as hereinabove defined, (b) use only such lineage, layout, copy, and content in such advertising as shall be approved by MEINEKE, (c) share the cost of all local advertising with other franchisees of shops in adjoining or over-lapping trade areas based upon a formula or formulas to be provided by MEINEKE from time to time, and (d) not place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of MEINEKE, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding, FRANCHISEE understands and

***3a** § 3.1 *Services to be Rendered by MEINEKE.* MEINEKE agrees that it will perform the following services for the benefit of the FRANCHISEE:

(e) to purchase and place from time to time advertising promoting the products and services sold by FRANCHISEE. Subject to the provisions hereafter set forth, all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection of the particular media and advertising content, shall be within the sole discretion of MEINEKE and such agencies or others as it may appoint. MEINEKE agrees that it will expend for media costs, commissions and fees, production costs, creative and other costs of such advertising, with respect to MEINEKE franchisees, an amount equal to the total of all sums collected from all franchisees under and pursuant to Section 7.17 hereof. Such amounts, as so computed, shall be expended for advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are collected by MEINEKE, or during the immediately preceding calendar year. Nothing herein shall be deemed to prohibit FRANCHISEE from engaging in any advertising or promotion of his or her shop or business, in addition to the advertising expended by MEINEKE, provided such advertising or promotion shall be at the sole cost of FRANCHISEE without deduction or credit against those sums due under and pursuant to Section 7.17 hereof, or other amounts owed by FRANCHISEE to MEINEKE, and shall be subject to the provisions of Section 7.17.

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AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.* FRANCHISEE shall (a) participate in such advertising program or programs as MEINEKE may from time to time direct, the cost of which shall be Twelve (12%) percent of the shop's Net Revenue as hereinabove defined, (b) use only such lineage, layout, copy, and content in such advertising as shall be approved by MEINEKE, (c) share the cost of all local advertising with other franchisees of shops in adjoining or over-lapping trade areas based upon a formula or formulas to be provided by MEINEKE from time to time, and (d) not place or use any other advertising and not to engage or participate in any other advertising program with respect to the shop without the express prior written approval of MEINEKE, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding, FRANCHISEE understands and acknowledges that Five (5%) percent of Net Revenue collected by MEINEKE under this and other applicable ***4a** sections of this Agreement may be used by MEINEKE, in its sole and unfettered discretion, to develop

such program or programs which it may create for the benefit of all franchisees nationwide. FRANCHISEE agrees that for the first Six (6) weeks of operation only, FRANCHISEE's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or a percentage of sales equal to Twelve (12%) percent of Net Revenue, whichever amount is greater. FRANCHISEE agrees to pay to M&N Advertising Agency, Inc., or to such other advertising agency or entity as MEINEKE may direct from time to time during the term of this Agreement direct, at its office in Houston, Texas on or before Wednesday of each week, by check or money order, the advertising contributions called for by this Section 7.17. FRANCHISEE hereby irrevocably appoints MEINEKE as his or her agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other FRANCHISEES in the system.

***5a** § 3.1 *Services to be Rendered by MEINEKE.* MEINEKE agrees that it will perform the following services for the benefit of the FRANCHISEE:

(d) To purchase and place from time to time advertising promoting the products and services sold by FRANCHISEE. Subject to the provisions hereafter set forth, all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection of the particular media and advertising content, shall be within the sole discretion of MEINEKE and such agencies or others as it may appoint. MEINEKE agrees that it will expend for media costs, commissions and fees, production costs, creative and other costs of such advertising, with respect to MEINEKE franchisees, an amount equal to the total of all sums collected from all franchisees under and pursuant to Section 7.17 hereof. Such amounts, as so computed, shall be expended for advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are collected by MEINEKE, or during the immediately preceding or following calendar year. Nothing herein shall be deemed to prohibit FRANCHISEE from engaging in any advertising or promotion of his shop or business, in addition to the advertising expended by MEINEKE, provided such advertising or promotion shall be at the sole cost of FRANCHISEE without deduction or credit against those sums due under and pursuant to Section 7.17 hereof, or other amounts owed by FRANCHISEE to MEINEKE. Such advertising shall be subject to the provisions of Section 7.17 and shall be submitted to, and have the prior written approval of MEINEKE before placement as provided in Section 7.6.

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***6a** § 3.1 (d) [unchanged]

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

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§ 7.17 *Participation in Advertising Programs.* FRANCHISEE shall (a) participate in such advertising program or programs as MEINEKE may from time to time direct, the cost of which shall not exceed Twelve (12%) percent of the Shop's Gross Revenue as hereinabove defined, (b) use only such lineage, layout, copy, and content in such advertising as shall be approved by MEINEKE, (c) share the cost of all local advertising with other franchisees of shops in adjoining or over-lapping trade areas based upon a formula or formulas to be provided by MEINEKE from time to time, and (d) not place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of MEINEKE, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding, FRANCHISEE understands and acknowledges that Five (5%) percent of the advertising contributions collected by MEINEKE under this and other applicable sections of this Agreement maybe used by MEINEKE, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all franchisees nationwide. FRANCHISEE agrees that for the first Six (6) weeks of operation only, FRANCHISEE's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or a percentage of sales not to exceed to Twelve (12%) percent of Gross Revenue, whichever amount is greater. FRANCHISEE agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as MEINEKE may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be transmitted by check or money order to MEINEKE at its corporate offices in Houston, Texas, on or before Wednesday of each week. Such payment must be postmarked no later than Monday of the week in which it is due. FRANCHISEE hereby irrevocably appoints MEINEKE as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other FRANCHISEES in the MEINEKE System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the prime rate of the Chase Manhattan Bank to begin ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less. In addition, the FRANCHISEE shall pay to MEINEKE the amount of Fifteen and No/100 ($15.00) Dollars per day for each day that the ***7a** FRANCHISEE is late in making his advertising contribution payment. Such additional payment is necessary to cover additional administrative costs of having to monitor and collect this delinquency.

In the event that FRANCHISEE remits a check to MEINEKE which is returned due to insufficient funds, FRANCHISEE shall be charged by MEINEKE a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each check. In the event that Franchisee fails to make payments to MEINEKE for his advertising contributions for a period of three (3) consecutive weeks, Meineke shall have the right to report said FRANCHISEE to his local credit bureau for his delinquency.

***8a** § 3.1(d) [unchanged]

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.* FRANCHISEE shall (a) participate in such advertising program or programs as MEINEKE may from time to time direct, the cost of which shall not exceed Twelve (12%) percent of the shop's Gross Revenue as hereinabove defined, (b) use only such lineage, layout, copy, and content in such advertising as shall be approved by MEINEKE, (c) share the cost of all local advertising with other franchisees of shops in adjoining or over-lapping trade areas based upon a formula or formulas to be provided by MEINEKE from time to time, and (d) not place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of MEINEKE, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding, FRANCHISEE understands and acknowledges that Five (5%) percent of the advertising contributions collected by MEINEKE under

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this and other applicable sections of this Agreement may be used by MEINEKE, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all franchisees nationwide. FRANCHISEE agrees that for the first Six (6) weeks of operation only, FRANCHISEE's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or a percentage of sales not to exceed to Twelve (12%) percent of Gross Revenue, whichever amount is greater. FRANCHISEE agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as MEINEKE may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be transmitted by check or money order to MEINEKE at its corporate offices in Charlotte, North Carolina, on or before Wednesday of each week. Such payment must be postmarked no later than Monday of the week in which it is due. FRANCHISEE hereby irrevocably appoints MEINEKE as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other FRANCHISEES in the MEINEKE System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the [prime rate of the] * Chase Manhattan Bank to begin ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less. In addition, the FRANCHISEE shall pay to MEINEKE the amount of Fifteen and No/100 ($15.00) Dollars per day for each day that the FRANCHISEE is late in making his ***9a** advertising contribution payment. Such additional payment is necessary to cover additional administrative costs of having to monitor and collect this delinquency.

* The bracketed phrase did not appear in the 1986 contract.

In the event that FRANCHISEE remits a check to MEINEKE which is returned due to insufficient funds, FRANCHISEE shall be charged by MEINEKE a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each check. In the event that FRANCHISEE fails to make payments to MEINEKE for his advertising contributions for a period of three (3) consecutive weeks, MEINEKE shall have the right to report said FRANCHISEE to his local credit bureau for his delinquency.

***10a** § 3.1 *Services to be Rendered by MEINEKE.* In consideration for the payment of Franchisee's initial license fee as described in Section 1.3 of this Agreement, MEINEKE agrees that it will perform the following services for the benefit of the FRANCHISEE:

(d) To purchase and place from time to time advertising promoting the products and services sold by FRANCHISEE. Subject to the provisions hereafter set forth, all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection of the particular media and advertising content, shall be within the sole discretion of MEINEKE and such agencies or others as it may appoint. MEINEKE agrees that it will expend for media costs, commissions and fees, production costs, creative and other costs of such advertising, with respect to MEINEKE franchisees, an amount equal to the total of all sums collected from all franchisees under and pursuant to Section 7.17 hereof. Such amounts, as so computed, shall be expended for advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are collected by MEINEKE, during the immediately preceding or following calendar year. Nothing herein shall be deemed to prohibit FRANCHISEE from engaging in any advertising or promotion of his shop or business, in addition to the advertising expended by MEINEKE, provided such advertising or promotion shall be at the sole cost of FRANCHISEE without deduction or credit against those sums due under and pursuant to Section 7.17 hereof, or other amounts owed by FRANCHISEE to MEINEKE. Such advertising shall be subject to the provisions of Section 7.17 and shall be submitted to, and have the prior written approval of MEINEKE before placement as provided in Section 7.6;

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.* FRANCHISEE shall (a) participate in such advertising program or programs as MEINEKE may from time to time direct, the cost of which is Ten (10%) percent of the shop's Gross Revenue as hereinabove defined, (b) use only such lineage, layout, copy, and content in such advertising as shall be approved by MEINEKE, (c) share the cost of all local advertising with other franchisees of shops in adjoining or over-lapping trade areas based upon a formula or formulas to be provided by MEINEKE from time to time, and (d) not place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of MEINEKE, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding, FRANCHISEE understands and acknowledges that Five (5%) percent of the ***11a** advertising contributions collected by MEINEKE under this and other applicable sections of this Agreement maybe used by MEINEKE, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all franchisees nationwide. FRANCHISEE agrees that for the first Six (6) weeks of operation only, FRANCHISEE's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or ten (10%) percent of Gross Revenue, whichever amount is greater. FRANCHISEE agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as MEINEKE may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be transmitted by electronic transfer of funds as described in Section 4.1 (b) of this Agreement. Such payment shall be deemed late if the funds necessary to meet this expenditure are not made available for withdrawal by Tuesday following the end of the business on the previous Saturday. FRANCHISEE hereby irrevocably appoints MEINEKE as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other FRANCHISEES in the MEINEKE System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the prime rate of the Chase Manhattan Bank to begin ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less. In addition, the FRANCHISEE shall pay to MEINEKE the amount of Fifteen and No/100 ($15.00) Dollars per day for each day that the FRANCHISEE is late in making his advertising contribution payment. Such additional payment is necessary to cover additional administrative costs of having to monitor and collect this delinquency.

Depending upon the market that Franchisee plans to open his center, at Meineke's sole discretion, Franchisee shall participate in an initial advertising and promotional campaign for the opening of its center. The fee for this initial advertising campaign is Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars which is used to purchase advertising and promotional activities, and shall be paid to Franchisor no later than the third day of Franchisee's initial training described in paragraph 6.1 of this Agreement.

In the event that FRANCHISEE remits payment to MEINEKE which is returned due to insufficient funds, FRANCHISEE shall be charged by MEINEKE a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each transfer. In the event that FRANCHISEE fails to make payments to MEINEKE for his advertising contributions for a period of three (3) consecutive weeks, MEINEKE shall have the right to report said FRANCHISEE to his local credit bureau for his delinquency.

***12a** § 3.1 *Services to be Rendered by MEINEKE.* In consideration for the payment of Franchisee's initial license fee as described in Section 1.3 of this Agreement, MEINEKE agrees that it will perform the following services for the benefit of the FRANCHISEE:

> (d) To purchase and place from time to time advertising promoting the products and services sold by FRANCHISEE. Subject to the provisions hereafter set forth, all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection

of the particular media and advertising content, shall be within the sole discretion of MEINEKE and such agencies or others as it may appoint. Such amounts, as so computed, shall be expended for advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are collected by MEINEKE, during the immediately preceding or following calendar year. Nothing herein shall be deemed to prohibit FRANCHISEE from engaging in any advertising or promotion of his shop or business, in addition to the advertising expended by MEINEKE, provided such advertising or promotion shall be at the sole cost of FRANCHISEE without deduction or credit against those sums due under and pursuant to Section 7.17 hereof, or other amounts owed by FRANCHISEE to MEINEKE. Such advertising shall be subject to the provisions of Section 7.17 and shall be submitted to, and have the prior written approval of Meineke before placement as provided in Section 7.6;

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.* FRANCHISEE shall (a) participate in such advertising program or programs as MEINEKE may from time to time direct, the cost of which is Ten (10%) percent of the shop's Gross Revenue as hereinabove defined, (b) use only such lineage, layout, copy, and content in such advertising as shall be approved by MEINEKE, (c) share the cost of all national and/or local advertising with other franchisees of shops nationally or in adjoining or over-lapping trade areas based upon a formula or formulas to be provided by MEINEKE from time to time, and (d) not place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of MEINEKE, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding, FRANCHISEE ***13a** understands and acknowledges that Five (5%) percent of the advertising contributions collected by MEINEKE under this and other applicable sections of this Agreement may be used by MEINEKE, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all franchisees nationwide. FRANCHISEE agrees that for the first Six (6) weeks of operation only, FRANCHISEE's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or ten (10%) percent of Gross Revenue, whichever amount is greater. FRANCHISEE agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as MEINEKE may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be transmitted by electronic transfer of funds as described in Section 4.1 (b) of this Agreement. Such payment shall be deemed late if the funds necessary to meet this expenditure are not made available for withdrawal by Tuesday following the end of the business on the previous Saturday. FRANCHISEE hereby irrevocably appoints MEINEKE as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other FRANCHISEES in the MEINEKE System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the prime rate of the Chase Manhattan Bank to begin ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less. In addition, the FRANCHISEE shall pay to MEINEKE the amount of Twenty Five and No/100 ($25.00) Dollars per week for each week that the FRANCHISEE is late in making his advertising contribution payment. Such additional payment is necessary to cover additional administrative costs of having to monitor and collect this delinquency.

Depending upon the market that Franchisee plans to open his center, at Meineke's sole discretion, Franchisee shall participate in an initial advertising and promotional campaign for the opening of its center. The fee for this initial advertising campaign is Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars which is used to purchase

advertising and promotional activities, and shall be paid to Franchisor no later than the third day of Franchisee's initial training described in paragraph 6.1 of this Agreement.

In the event that Franchisee remits payment to Meineke which is returned due to insufficient funds, Franchisee shall be charged by Meineke a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each transfer. In the event that Franchisee fails to make payments to Meineke for his advertising contributions for a period of three (3) consecutive weeks, Meineke shall have the right to report said Franchisee to his local credit bureau for his delinquency.

***14a** § 3.1(d) [unchanged].

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.* Franchisee shall (a) participate in such advertising program or programs as Meineke may from time to time direct, the cost of which is Ten (10%) percent of the shop's Gross Revenue as hereinabove defined, (b) use only such lineage, layout, copy, and content in such advertising as shall be approved by Meineke, (c) share the cost of all national and/or local advertising with other Franchisees of shops nationally or in adjoining or over-lapping trade areas based upon a formula or formulas to be provided by Meineke from time to time, and (d) not place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of Meineke, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding, Franchisee understands and acknowledges that Five (5%) percent of the advertising contributions collected by Meineke under this and other applicable sections of this Agreement may be used by Meineke, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all Franchisees nationwide. Franchisee agrees that for the first Six (6) weeks of operation only, Franchisee's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or ten (10%) percent of Gross Revenue, whichever amount is greater. Franchisee agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as Meineke may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be remitted to Meineke in the same manner as the continuing royalty described in Section 4.1 (b) of this Agreement. Such payment shall be deemed late if the funds necessary to meet this expenditure are not received by Meineke on or before the Wednesday following the end of the business on the previous Saturday. Franchisee hereby irrevocably appoints Meineke as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other Franchisees in the Meineke System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the prime rate of the Chase Manhattan Bank to begin ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less.?? In addition, the ***15a** Franchisee shall pay to Meineke the amount of Twenty Five and No/100 ($25.00) Dollars per week for each week that the Franchisee is late in making his advertising contribution payment. Such additional payment is necessary to cover additional administrative costs of having to monitor and collect this delinquency.

Depending upon the market that Franchisee plans to open his center, at Meineke's sole discretion, Franchisee shall participate in an initial advertising and promotional campaign for the opening of its center. The fee for this initial advertising campaign is Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars which is used to purchase advertising and promotional activities, and shall be paid to Franchisor no later than the third day of Franchisee's initial training described in paragraph 6.1 of this Agreement.

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In the event that Franchisee remits payment to Meineke which is returned due to insufficient funds, Franchisee shall be charged by Meineke a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each transfer. In the event that Franchisee fails to make payments to Meineke for his advertising contributions for a period of three (3) consecutive weeks, Meineke shall have the right to report said Franchisee to his local credit bureau for his delinquency.

***16a** § 3.1 *Services to be Rendered by MEINEKE.* During the term of this Agreement, Meineke agrees that it will perform the following services for the benefit of the Franchisee:

> (d) To purchase and place from time to time advertising promoting the products and services sold by Franchisee. Subject to the provisions hereafter set forth, all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection of the particular media and advertising content, shall be within the sole discretion of Meineke and such agencies or others as it may appoint. Advertising Contributions as defined by Article 7.17 of this Agreement shall be expended for advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are collected by Meineke, during the immediately preceding or following calendar year. Nothing herein shall be deemed to prohibit Franchisee from engaging in any advertising or promotion of his shop or business, in addition to the advertising expended by Meineke, provided such advertising or promotion shall be at the sole cost of Franchisee without deduction or credit against those sums due under and pursuant to Section 7.17 hereof, or other amounts owed by Franchisee to Meineke. Such advertising shall be subject to the provisions of Section 7.17 and shall be submitted to, and have the prior written approval of Meineke before placement as provided in Section 7.6.

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.*

(a) Franchisee shall participate in such advertising program or programs ("Program") as Meineke may from time to time direct, and pay to the Weekly Advertising Account Fund ("Fund") on a weekly basis Ten (10%) percent of the shop's Gross Revenue as defined by Article 4.1 of this Agreement.

(b) Franchisee understands and acknowledges that all advertising and promotion undertaken as part of the Program is intended to maximize general public recognition and acceptance of the System for the benefit of all of the franchisees of Meineke including the Franchisee, and while advertising is generally placed on an ADI basis, Meineke undertakes no obligation to ensure that any particular ADI or individual franchisee will ***17a** benefit directly from the placement or conduct of such advertising and promotion.

(c) Franchisee will share the cost of all national and/or local advertising with other Franchisees of shops nationally or in adjoining or over-lapping trade areas based upon a formula or formulas devised by Meineke from time to time.

(d) Franchisee understands and acknowledges that Five (5%) percent of the advertising contributions collected by Meineke under this and other applicable sections of this Agreement ("NCL") may be used by Meineke, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all Franchisees nationwide.

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(e) The Franchisee agrees that the NCL portion of the Fund may be used to meet any and all costs of maintaining, directing and preparing national, regional, or local advertising materials, programs and public relations activities, including the costs of preparing and conducting television, radio, newspaper, and other media programs employing advertising agencies and the like to assist therewith.

(f) The Fund shall be accounted for separately from other accounts of Meineke and shall not be used to defray any of Meineke's general operating expenses, except for such reasonable administrative costs as Meineke may incur in activities reasonably related to the administration of the Fund and the advertising Program.

(g) Franchisee agrees that for the first Six (6) weeks of operation only, Franchisee's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or ten (10%) percent of Gross Revenue, whichever amount is greater.

(h) Franchisee agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as Meineke may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be remitted to Meineke in the same manner as the continuing royalty described in Section 4.1 (b) of this Agreement. Such payment shall be deemed late if the funds necessary to meet this expenditure are not received by Meineke on or before the Wednesday following the end of the business on the previous Saturday. Franchisee hereby irrevocably appoints Meineke as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other Franchisees in the Meineke System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the prime rate of the Chase Manhattan Bank to begin ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less. ***18a** In the event that Franchisee remits payment to Meineke which is returned due to insufficient funds, Franchisee shall be charged by Meineke a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each transfer. In the event that Franchisee fails to make payments to Meineke for his advertising contributions for a period of three (3) consecutive weeks, Meineke shall have the right to report said Franchisee to his local credit bureau for his delinquency.

(i) Franchisee agrees to use only such lineage, layout, copy, and content in such advertising as shall be approved by Meineke, and agrees not to place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of Meineke, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding.

(j) Depending upon the market that Franchisee plans to open his center, at Meineke's sole discretion, Franchisee shall participate in an initial advertising and promotional campaign for the opening of its center. The fee for this initial advertising campaign is Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars which is used to purchase advertising and promotional activities, and shall be paid to Meineke no later than the third day of Franchisee's initial training described in paragraph 6.1 of this Agreement.

(k) An audit of the operations of the Fund shall be prepared annually by an independent certified public accountant or auditor and shall be made available to the Franchisee on an annual basis. The cost of the audit shall be paid by the Fund. Except as provided in this Section 7.17, Meineke assumes no direct or indirect liability or obligation to Franchisee with respect to the maintenance, direction or administration of the Fund.

***19a** § 3.1 (d) [unchanged]

ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.*

(a) Franchisee shall participate in such advertising program or programs ("Program") as Meineke may from time to time direct, and pay to the Weekly Advertising Account Fund ("Fund") on a weekly basis Ten (10%) percent of the shop's Gross Revenue as defined by Article 4.1 of this Agreement.

(b) Franchisee understands and acknowledges that all advertising and promotion undertaken as part of the Program is intended to maximize general public recognition and acceptance of the System for the benefit of all of the franchisees of Meineke including the Franchisee, and while advertising is generally placed on an ADI basis, Meineke undertakes no obligation to ensure that any particular ADI or individual franchisee will benefit directly from the placement or conduct of such advertising and promotion.

(c) Franchisee will share the cost of all national and/or local advertising with other Franchisees of shops nationally or in adjoining or over-lapping trade areas based upon a formula or formulas devised by Meineke from time to time.

(d) Franchisee understands and acknowledges that Five (5%) percent of the advertising contributions collected by Meineke under this and other applicable sections of this Agreement ("NCL") may be used by Meineke, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all Franchisees nationwide.

(e) The Franchisee agrees that the NCL portion of the Fund may be used to meet any and all costs of maintaining, directing and preparing national, regional, or local advertising materials, programs and public relations activities, including the costs of preparing and conducting television, radio, newspaper, and other media programs employing advertising agencies and the like to assist therewith.

(f) The Fund shall be accounted for separately from other accounts of Meineke and shall not be used to defray any of Meineke's general operating expenses, except for such reasonable administrative costs as Meineke may incur in activities reasonably related to the administration of the Fund and the advertising Program. The accounting of the Fund shall be such that advertising expenditures will be made first from interest accrued in the Fund, if any, with the remainder of the expenditures from the franchisee contributions.

(g) Franchisee agrees that for the first Six (6) weeks of operation only, Franchisee's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or ten (10%) percent of Gross Revenue, whichever amount is greater. This provision shall not apply if the Franchisee purchased his Shop as a resale or the Franchisee signed this Agreement in conjunction with the renewal of his franchise.

***20a** (h) Franchisee agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as Meineke may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be remitted to Meineke in the same manner as the continuing royalty described in Section 4.1 (b) of this Agreement. Such payment shall be deemed late if the funds necessary to meet this expenditure are not received by Meineke on or before the Wednesday following the end of the business on the previous Saturday. Franchisee hereby irrevocably appoints Meineke as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other Franchisees in the Meineke System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning on ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is

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to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the prime rate of the Chase Manhattan Bank to begin on ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less. In the event that Franchisee remits payment to Meineke which is returned due to insufficient funds, Franchisee shall be charged by Meineke a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each transfer. In the event that Franchisee fails to make payments to Meineke for his advertising contributions for a period of three (3) consecutive weeks, Meineke shall have the right to report said Franchisee to his local credit bureau for his delinquency.

(i) Franchisee agrees to use only such lineage, layout, copy, and content in such advertising as shall be approved by Meineke, and agrees not to place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of Meineke, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding.

(j) Depending upon the market that Franchisee plans to open his center, at Meineke's sole discretion, Franchisee shall participate in an initial advertising and promotional campaign for the opening of its center. The fee for this initial advertising campaign is Three Thousand Five Hundred and 00/100 ($3,500.00) Dollars which is used to purchase advertising and promotional activities, and shall be paid to Meineke no later than the third day of Franchisee's initial training described in paragraph 6.1 of this Agreement. This provision shall not apply if Franchisee is purchasing his Shop as a resale of this Agreement is being executed in conjunction with Franchisees' renewal of his Franchise.

(k) An audit of the operations of the Fund shall be prepared annually by an independent certified public accountant or auditor and shall be made available to the Franchisee on an annual basis. The cost of the audit shall be paid by the Fund. Except as provided in this Section 7.17, Meineke assumes no direct or indirect liability or obligation to Franchisee with respect to the maintenance, direction or administration of the Fund.

(l) In the event the Franchisee's account is assigned to a collection agency for collection then Franchisee shall pay to Meineke the costs charged to it by the collection agency for the collection of the account.

***21a** § 3.1 *Services to be Rendered by MEINEKE.* During the term of this Agreement, Meineke agrees that it will perform the following services for the benefit of the Franchisee:

> (d) To cause to be purchased and place from time to time advertising promoting the products and services sold by Franchisee. Subject to the provisions hereafter set forth, all decisions regarding whether to utilize national, regional or local advertising, or some combination thereof, and regarding selection of the particular media and advertising content, shall be within the sole discretion of Meineke and such agencies, or others as it may appoint. Advertising Contributions as defined by Article 7.17 of this Agreement shall be expended for media costs, commissions, fees, production costs, and other costs of all advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are collected by Meineke, or during the immediately preceding or following calendar year. Furthermore, the Advertising Contributions shall also be used to pay fees or other charges assessed by any advertising agency as Meineke may designate for the placement of such advertisements, whether the advertising agency is in-house or otherwise. Nothing herein shall be deemed to prohibit Franchisee from engaging in any advertising or promotion of his shop or business, in addition to the advertising expended by Meineke, provided such advertising or promotion shall be at the sole cost of Franchisee without deduction or credit against those sums due under and pursuant to Section 7.17, or other amounts owed by Franchisee to Meineke. Such advertising shall be subject to the provisions of Section 7.17 and shall be submitted to, and have the prior written approval of Meineke before placement as provided in Section 7.6.

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ARTICLE SEVEN

AGREEMENTS OF FRANCHISEE WITH RESPECT TO OPERATION OF SHOP

§ 7.17 *Participation in Advertising Programs.*

(a) Franchisee shall participate in such advertising program or programs ("Program") as Meineke may from time to time direct, and pay to the Weekly Advertising Account ("WAC") on a weekly basis Ten (10%) percent of the shop's Gross Revenue as defined by Article 4.1 of this Agreement.

(b) Advertising Contributions as defined by Article 7.17(a) above shall be expended for media costs, commissions, fees, production costs, and other cost of all advertising which is published, broadcast, displayed, or otherwise disseminated either during the calendar year within which such sums are ***22a** collected by Meineke, or during the immediately preceding or following calendar year. Meineke may appoint any advertising agency, whether in-house or outside, as it deems appropriate for the placement of such advertising. Furthermore, the Advertising Contributions shall also be used to pay fees or other charges assessed by any advertising agency as Meineke may designate for the placement of such advertisements, whether the advertising agency is in-house or otherwise. Meineke may, in its sole discretion, suspend the placement of advertising for Franchisee if any payments due Meineke under this Agreement are not paid the date upon which the payments are due. The suspension in advertising may continue until Franchisee has paid current all monies owed Meineke. Franchisee is not relieved of any obligation to make Advertising Contributions during the term of any suspension.

(c) Franchisee understands and acknowledges that all advertising and promotion undertaken as part of the Program is intended to maximize general public recognition and acceptance of the System for the benefit of all of the franchisees of Meineke including the Franchisee, and while advertising is generally placed on a Designated Marketing Area ("DMA") basis, Meineke undertakes no obligation to ensure that any particular DMA or individual franchisee will benefit directly from the placement or conduct of such advertising and promotion.

(d) Franchisee will share the cost of all national and/or local advertising with other franchisees of shops nationally or in adjoining or over-lapping trade areas based upon a formula or formulas devised by Meineke from time to time. On a quarterly basis Franchisee shall be eligible to receive a Local Advertising Credit equal to ten (10%) percent of Franchisee's Weekly Advertising Contributions for the preceding calendar quarter. The receipt of each quarterly Local Advertising Credit is conditioned upon Franchisee being current in the payment of all of his continuing franchise fees and weekly advertising contributions. Franchisee may use the Local Advertising Credit in the succeeding calendar quarter to purchase local advertising purchased by him upon Franchisee providing to Meineke invoices for all local advertising purchased within that particular calendar quarter. Local Advertising Credits are not cumulative, and any Local Advertising Credit that is earned in a particular calendar quarter that is not spent in the succeeding calendar quarter will revert back to the Weekly Advertising Account. All local advertising purchased by Franchisee is subject to Meineke's prior approval.

(e) Franchisee understands and acknowledges that Five (5%) percent of the advertising contributions collected by Meineke under this and other applicable sections of this Agreement ("NCL") may be used by Meineke, in its sole and unfettered discretion, to develop such program or programs which it may create for the benefit of all Franchisees nationwide.

(f) The Franchisee agrees that the NCL portion of WAC may be used to meet any and all costs of maintaining, directing and preparing national, regional, or local advertising materials, programs and public relations activities, including the

costs of preparing and conducting television, radio, newspaper, and ***23a** other media programs employing advertising agencies and the like to assist therewith.

(g) The WAC shall be accounted for separately from other accounts of Meineke. WAC's accounting shall be such that advertising expenditures will be made first from interest accrued in WAC, if any, with the remainder of the expenditures from the franchisee contributions.

(h) Franchisee agrees that for the first Six (6) weeks of operation only, Franchisee's advertising expense will be a minimum of Two Hundred Fifty ($250.00) Dollars per week or ten (10%) percent of Gross Revenue, whichever amount is greater. This provision shall not apply if the Franchisee purchased his Shop as a resale or the Franchisee signed this Agreement in conjunction with the renewal of his franchise.

(i) Franchisee agrees to account and pay to the Weekly Advertising Contributions account, or to any other entity or account as Meineke may direct from time to time during the term of this Agreement. Such advertising contributions called for by this Section 7.17 must be remitted to Meineke in the same manner as the continuing royalty described in Section 4.1 (b) of this Agreement. Such payment shall be deemed late if the funds necessary to meet this expenditure are not received by Meineke on or before the Wednesday following the end of the business on the previous Saturday. Franchisee hereby irrevocably appoints Meineke as his agent for the purpose of insuring compliance with the terms of this Section 7.17 by all other Franchisees in the Meineke System. The Advertising Contribution, if not paid when due, bears interest at an annual rate of three (3) points above the prime rate of the Chase Manhattan Bank beginning ten (10) days after the date due. In the event that the laws of any state in which the Franchise and Trademark Agreement is to be performed prohibits the late penalty described herein, then, in that event the late penalty shall be three (3) points above the prime rate of the Chase Manhattan Bank to begin ten (10) days after the date due or the maximum interest rate allowed by law, whichever is less. In the event that Franchisee remits payment to Meineke which is returned due to insufficient funds, Franchisee shall be charged by Meineke a Twenty-five and No/100 ($25.00) Dollar service charge per check to cover the costs of redepositing each transfer. In the event that Franchisee fails to make payments to Meineke for his advertising contributions for a period of three (3) consecutive weeks, Meineke shall have the right to report said Franchisee to his local credit bureau for his delinquency.

(j) Franchisee agrees to use only such lineage, layout, copy, and content in such advertising as shall be approved by Meineke, and agrees not to place or use any other advertising and not to engage or participate in any other advertising program with respect to the Shop without the express prior written approval of Meineke, provided that such approval shall not be unreasonably withheld. Anything contained in any other provision in this Agreement to the contrary notwithstanding.

***24a** (k) An audit of the operations of the Fund WAC shall be prepared annually by an independent certified public accountant or auditor and shall be made available to the Franchisee on an annual basis. The cost of the audit shall be paid by WAC. Except as provided in this Section 7.17, Meineke assumes no direct or indirect liability or obligation to Franchisee with respect to the maintenance, direction or administration of WAC. Meineke does not undertake a fiduciary responsibility with respect to the maintenance, direction, or administration of WAC.

(l) In the event the Franchisee's account is assigned to a collection agency for collection then Franchisee shall pay to Meineke the costs charged to it by the collection agency for the collection of the account.

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92-8438

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 11 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES OF AMERICA,

Appellee

v.

ALFONSO MORA,
JESUS MEDINA,
JUAN TORRES SOSA,
and RICARDO REYES LIRA,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with appellants Mora, Medina, and Lira that oral argument may be of assistance to the court. We believe that oral argument with respect to appellant Sosa's case may also be of assistance to the court.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8438

UNITED STATES OF AMERICA,

Appellee

v.

ALFONSO MORA,
JESUS MEDINA,
JUAN TORRES SOSA,
and RICARDO REYES LIRA,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal case under 18 U.S.C. § 3231. Judgment was entered in the district court on August 21, 1992. All four appellants filed timely notices of appeal in the district court. Mora filed a notice of appeal on August 20, 1992. Medina filed a notice of appeal on August 25, 1992. Sosa and Lira filed notices of appeal on August 26, 1992. This court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the government disclosed all materials to which the defendants were entitled.

2. Whether the district court acted within its discretion in preventing Mora and Medina from conducting cross-examination about an irrelevant matter.

3. Whether the evidence was sufficient for a reasonable jury to find that Mora and Medina were not entrapped.

4. Whether the district court correctly rejected Mora and Medina's claim of outrageous government conduct.

5. Whether the evidence was sufficient for a reasonable jury to find Sosa and Lira guilty on the possession and conspiracy counts.

6. Whether the evidence was sufficient for a reasonable jury to find that Sosa used a gun during and in relation to the crime.

7. Whether the district court properly sentenced Mora and Medina.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the District Court

On April 1, 1992, an indictment was filed against defendants Mora, Medina, Sosa, and Lira. Count One charged that the defendants conspired to possess marijuana with intent to

distribute it in violation of 21 U.S.C. § 846. 1 R. at 97.[1] Count Two charged the four defendants with possessing marijuana with intent to distribute it in violation of 21 U.S.C. 841(a)(1). Id. at 97-98.[2] Count Three charged that Sosa "use[d]" a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). Id. at 98.

On April 10, 1992, Judge Bunton issued a standing discovery order (it was a form order with the dates and names inserted) that effectively ordered the government to disclose all materials required to be disclosed under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. § 3500), and Fed. R. Crim. P. 16. 1 R. at 81-85. On April 21, 1992, Medina moved for additional discovery relating to confidential informant Roger

---

[1] There are four record folders on appeal -- one for each appellant. Volume 1 (1 R.) contains the record for Mora; Volume 2 (2 R.) Medina; Volume 3 (3 R.) Sosa; Volume 4 (4 R.) Lira. Where an identical document is contained in more than one record folder, we will refer to the first volume of the record in which the document is contained.

Pursuant to Fed. R. App. P. 10, appellants have included in the record on appeal the transcripts of the March 12, 1992, preliminary hearing; the July 1 and 2, 1992, trial proceedings; and the August 17, 1992, sentencing proceedings.

Judge Bunton sealed and made part of the record the materials he examined in camera on July 1, 1992. See Tr. July 1, 1992, Vol. II, at 82 ("I'm going to take these, seal them. They'll be part of the record if it ever goes up."). Those sealed materials are currently in the possession of the district court.

[2] Count Two also charged the defendants with aiding and abetting. 1 R. at 98. Judge Bunton dismissed that charge at the close of evidence. Tr. July 2, 1992, Vol. III, at 5. Thus, Sosa and Lira's argument concerning aiding and abetting, see Sosa Brief at 10-11, Lira Brief at 8-9, is moot and need not be considered on appeal.

Russell. 2 R. at 104. On April 30, Magistrate Judge Ruesch granted this motion. Id. at 95-96. On May 8, the government filed a motion to modify the April 30 discovery order, arguing that "any further information relating to Roger Russell be restricted to his involvement with the case at hand or Defendant Jesus Medina. * * * The Order requires the Government to reveal any information relating not only to the Defendant, but information which may be the subject of current or future narcotics investigations." Id. at 84-85. On June 8, after reviewing in camera the material the government did not wish to disclose, Judge Bunton granted the government's motion for modification of the April 30 discovery order. Id. at 50.

On April 22, 1992, Medina moved for a subpoena requiring the presence of confidential informant Roger Russell at trial. 2 R. at 101. Judge Bunton granted the motion on April 23, 1992. Id. Russell never appeared for trial, however.

The trial began on July 1, 1992, before Judge Bunton. On the first day of trial, the defendants argued that field notes taken by government agents during conversations they had with confidential informant Russell had not been provided to the defense as allegedly required by the discovery orders. Tr. July 1, 1992, Vol. I, at 172-180. Because there was some confusion whether field notes were subject to the discovery orders, Judge Bunton requested that the government submit to the court the agents' notes, as well as the entire DEA file pertaining to Russell. Id. at 179. The government did so. Id., Vol. II, at

7, 82. Judge Bunton reviewed the agents' notes in camera and stated that the notes were not discoverable:

> I have gone through these notebooks and these notes. They're not matters that I think are necessarily sensitive about anything. There are some names mentioned in here that are not, obviously, defendants in this case. There's jillions of telephone numbers, license plates, addresses, all sorts of things, but I don't think anything that's really necessary. I'm going to take these, seal them. They'll be part of the record if it ever goes up.

Id. at 82. As to the files pertaining to Russell, Judge Bunton stated that some of the information was irrelevant to the case at hand, and indeed "might compromise the investigation as to someone else." Id. at 83. Judge Bunton informed defense counsel that the file revealed that Russell had received two payments of $300 each for his services as a confidential informant, one payment on March 2 and another on March 12. Id. at 82. Judge Bunton also noted that the file showed that a debriefing of Russell had occurred on April 6. Id. at 83. He stated that the file contained two photographs of Russell as well as a cooperating individual agreement that had been signed by Russell. Id. Judge Bunton concluded that the information in the Russell file "[d]oesn't say anything different from what we have already heard in the trial." Id.

The trial concluded on July 2, 1992, and the jury returned guilty verdicts on all counts the same day. Tr. July 2, 1992, Vol. III, at 100-101.

On July 20, 1992, Judge Bunton denied post-trial motions for judgments notwithstanding the verdict, new trials, and judgments

of acquittal. 1 R. at 44-47. Judge Bunton concluded that "[f]rom the evidence, a rational jury could find beyond a reasonable doubt each Defendant committed the crimes for which he was charged of committing in the three-count indictment." Id. at 46-47. He further concluded that "the Government sufficiently rebutted Defendant JESUS MEDINA's prima facie entrapment and duress defenses." Id. at 47. Also, "the Government's conduct was not a 'textbook example of outrageous government conduct' as Defendant JESUS MEDIA [sic] opines." Id. Judge Bunton stated that "the Government complied with the discovery orders in this case * * * [and] [d]efendants received all essential discovery materials." Id.

On August 17, Judge Bunton sentenced Mora to 72 months' imprisonment, 1 R. at 4; Medina to 72 months' imprisonment, 2 R. at 9; Sosa to 24 months' imprisonment on Counts One and Two, and five years' imprisonment (to run consecutively) on Count Three, 3 R. at 19; and Lira to 48 months' imprisonment, 4 R. at 8. As to Mora and Medina, Judge Bunton agreed with the conclusion in the presentence report that 500 pounds was the object of the conspiracy and that the sentences should be calculated accordingly. Tr. August 17, 1992, at 12; 1 R. at 7; 2 R. at 4.

B. Statement of Facts

1. Mora and Medina

a. The 11:30 a.m. Meeting on March 5, 1992, Between DEA Agent Geller, Confidential Informant Russell, and Defendants Mora and Medina

On March 5, 1992, Agent Jack Geller of the Drug Enforcement

Administration, posing as a drug buyer, had a meeting scheduled for 11:30 a.m. with defendants Mora and Medina. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 30. (Mora and Medina were roommates and cousins. Testimony of Medina, Tr. July 1, 1992, Vol. II, at 102-103.) The meeting was scheduled to occur at the Carrows Restaurant on Gateway in El Paso, Texas. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 30.

Agent Geller arrived at the meeting at approximately 11:40 a.m. accompanied by Roger Russell, a confidential informant, who was acting as a broker with Geller the purchaser of marijuana and Mora and Medina the sellers. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 30-31. Mora and Medina arrived at the location a few minutes later in a white VW driven by Medina. Id. Medina got out of the car while Mora stayed inside. Id. at 32. Medina took Agent Geller aside and apologized to Geller for failing to complete an approximately 600-pound marijuana deal that had been scheduled to occur in February 1992. Id. Medina said nothing to Geller about the fact that Russell was at the meeting. Id. at 32-33.

Mora then got out of the car, and Medina introduced Mora to Agent Geller. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 33. At that point, the four men began to "discuss the mechanics of how the transaction was going to occur." Id. at 34. The men "were talking about 500 pounds of marijuana on this deal." Id. at 35. Agent Geller told Mora and Medina that he would provide a vehicle, just as he had for the scheduled prior transaction with

Medina. Id. at 36. Geller "assumed [Medina] and Mr. Mora would take the vehicle, load it with marijuana and bring it back to [Geller] at a later time. Mr. Medina, with Mr. Mora standing there, really thought that sounded like a good idea." Id.

Mora then asked to see Geller's driver's license. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 36. Geller showed him a driver's license that verified Geller's identity. Id.

"[B]ecause of the prior attempt back in February that did not go," Geller "repeatedly asked Mr. Medina if this was a done deal." Medina "kept saying, 'Yes, it's going to happen. I've seen the marijuana. In fact, I've seen 3,000 pounds of it at a warehouse.'" Testimony of Geller, Tr. July 1, 1992, Vol. I, at 37. Geller "told them repeatedly that * * * it was [his] understanding that this was going to be one transaction, meaning one delivery of 500 pounds of marijuana." Id. at 38. Geller "stated that several times to Mr. Medina, and Mr. Medina kept agreeing, 'Yes, yes,' that he understood it was one transaction." Id. Geller was concerned that it be one transaction because "the more times you have to be around any kind of drugs and/or money, it's dangerous" and if "you give them money, * * * [y]ou're obligated to do a lot of things because there's now government money at risk." Id. at 38-39. In this case, Geller had no intention of actually providing money to Mora and Medina. Id. at 39.

At the conclusion of the meeting, the men agreed they "would meet back at the Carrows around 3:00 to do the exchange of the

vehicles." Testimony of Geller, Tr. July 1, 1992, Vol. I, at 40. Geller gave Medina his pager number in case there were any problems. Id.

b. The 3:00 p.m. Meeting Between Geller and Defendants Mora and Medina

Agent Geller, no longer accompanied by Russell, arrived back at the Carrows around 3:00 p.m. and met Mora and Medina. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 41. Medina told Geller that the exchange had to be postponed because "his people * * * couldn't get off work until around 3:30." Id. Geller was upset, but Medina assured him that "it's going to happen." Id. at 42. When Geller mentioned that he might back out, Mora told Geller, "you have to do this" and stated something to the effect that "we've worked too hard" to back out now. Id. at 42.

Then Geller gave Medina the keys to the Ryder van that was to be used for loading the marijuana. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 42. Mora checked to make sure the keys worked. Id. at 43. Medina "suggested that [the men next] meet at a place on Yarbrough and I-10, a Chinese restaurant." Id. Geller was "supposed to be from out of town * * *, and [he] asked for directions." Id. Medina "wrote down a small map on how I could get there." Id. at 43-44. (The map is Government Exhibit 15 contained in the record on appeal.) The meeting broke up at about 3:30 p.m., and Geller told the men he would wait to be contacted. Id. at 44-45.

c. The 5:10 p.m. Phone Conversation between Geller and Defendant Medina

"At about 5:10, Mr. Medina paged [Geller] on [Geller's] pager number." Testimony of Geller, Tr. July 1, 1992, Vol. I, at 45. Geller returned the call to (915) 593-9954, the pay phone at a Diamond Shamrock at Lee Trevino and I-10. Id. at 45. Medina said he "just wanted to let [Geller] know, as a courtesy, that the deal was still on, that the people [were] running late." Id. Geller again expressed concern, but Medina told him, "Don't worry. You've got to trust me on this. It's going to go, just that the people are running late." Id.

d. The 7:00 p.m. Phone Calls

At about 7:00 p.m. Agent Geller received a call from confidential informant Russell. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 45-46. Russell had just talked on the phone to Medina, and Medina wanted Geller to call him at the same number Geller had earlier called. Id. at 46. Geller called Medina. Id. Medina said, "The deal's on." Id. Medina told Geller that his "people want to do 50 pounds first." Id. Medina stated, "We'll do 50 pounds, you'll pay, we'll go get the other 450 pounds and we'll have to do it that way." Id. Geller objected: "There's no way. That wasn't what was discussed. That's not in the game plan. That's not going to happen." Id. Medina suggested they meet at the Diamond Shamrock. Id.

e. The Subsequent Meeting Between Geller and Defendant Medina

Geller drove to the Diamond Shamrock to meet Medina.

Testimony of Geller, Tr. July 1, 1992, Vol. I, at 46. Medina was alone. Id. at 47. Geller again indicated his opposition to conducting the transaction in two separate deals. Id. at 48. Medina stated that the 3,000 pounds of marijuana in the warehouse were owned by members of the Mexican Federal Judicial Police and that they insisted on arranging the transaction that way. Id. at 48-49. Geller and Medina then discussed their options and "finally came up with a solution whereby when the 50 pounds were delivered, that [they] could put the 50 pounds in [Medina's] car." Id. at 50. Medina "could give his people, whoever they were, the keys to the car, and that way, the owners of the marijuana would be happy and content knowing [Geller] couldn't get to it. And [Geller] would stay with Mr. Medina while they went and got the other 450 pounds, and when the entire 500 pounds was there, I would give them one single payment." Id. Medina agreed to try it. Id.

f. The Meeting at the Stadium Lounge

At around 9:00 p.m., Medina again paged Geller. Testimony of Geller, Tr. July 1, 1992, Vol. I, at 50-51. Geller returned the call, and Medina told him to come to the Stadium Lounge at George Dieter and Vista Del Sol. Id. at 51. The Stadium Lounge was part of a strip mall. Id. at 50. (Government Exhibits 27 and 28 are pictures of the strip mall and the Stadium Lounge.) When Geller arrived, Medina took Geller to the Ryder van, which was parked nearby. Id. at 51. Geller "saw a box" in the van and Medina told Geller "that was the marijuana." Id. (Government

Exhibit 9 is a picture of the Ryder van; Government Exhibit 12 is a picture of the box with the marijuana inside.) Medina then went inside the Stadium Lounge and brought Mora outside. Id. at 52. Mora had the keys to the van and "opened it up." Id. Geller "stepped inside. [He] saw the box. [He] could smell the marijuana as soon as [he] opened the door, and * * * inside the box was the marijuana." Id. The box "wasn't sealed." Id. The marijuana was in a "rectangular shape" and "[t]hin." Id. At that point, Mora asked for the money for the 50 pounds before the remaining 450 pounds would be delivered. Id. at 53. Geller again explained that he would not go along with such a deal. Id. "When [Geller] realized that the other 450 pounds were not going to be forthcoming [without an initial payment], that [the group] had reached a stalemate, [Geller] went ahead and gave the arrest signal." Id. "At that time, the agents moved in and arrested all the subjects." Id.

2. Sosa and Lira

Appellants Sosa and Lira did not negotiate with Agent Geller. They were involved, however, in the overall operation.

In the early evening of March 5, 1992, DEA surveillance teams spotted the Ryder van that Agent Geller had given to Mora and Medina for loading the marijuana. The van was parked "on Kessler Street facing the freeway in front of a lounge called the Avante Lounge." Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 33. Agent Ayers "noticed a pickup truck, an older pickup truck, glide up behind the van and kill its lights." Id. Agent

Ayers saw three men at the scene. Id. (Agent Ayers was using binoculars to view the scene. Id.) Ayers saw that "[o]ne of the men went to the side of the van, opened the door, and another individual walked over to the pickup truck, the older truck, opened the door and took something out of the front seat of the vehicle." Id. at 34. That man "walked over to the van, put it inside the van, they closed the door, they came back between the vehicles, met for a brief period of time." Id. Then, "[t]he one man got back into the van, drove away. The other two men got into the pickup truck, delayed maybe a minute or two, and then followed the van out." Id. Agent Ayers was able to see the license plate on the truck; "[i]t was a New Mexico plate and I believe it was 005 ASG." Id. at 35.

Ayers followed the truck, which soon caught up to the van at "the stoplight at Zaragosa and Gateway." Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 36. At that point, Ayers ended up "right next to the Ryder rental van. And the window was down and [Ayers] got a good look at Mora's face at that time." Id. Mora was driving the van. Id.

Ayers followed the vehicles into "a strip shopping center on George Dieter." Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 36. He did not lose sight of the truck during the trip from the Kessler Street meeting point to the strip center. Id. at 36, 44.

Agent Zimmerly picked up surveillance when the van and truck entered the strip center. Testimony of Zimmerly, Tr. July 1,

1992, Vol. II, at 20. Agent Zimmerly saw two men "getting out of the vehicle, meeting with Mr. Mora, going back by the van, trying the door, and then returning to the vehicle. They were the ones arrested in that vehicle [Sosa and Lira] when the arrest went down." Id. at 21.

Detective Figueroa was also at the strip center and saw the truck. Testimony of Figueroa, Tr. July 1, 1992, Vol. I, at 119. He "noticed the subject, that I later identified as Mr. Juan Sosa, get out of the vehicle and Mr. Lira get out of the vehicle also." Id. at 120.

When Agent Ayers resumed surveillance, he saw "Lira and Sosa walking back to the older model pickup truck and get in the truck and position themselves at an angle to a parking space, looking toward where the van had been parked by Mora. * * * They got into the truck, drove it over, positioned themselves where they had a clear view toward the marijuana-loaded rental van." Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 37-38.

When questioned by defense counsel about the possibility that the two men who were in the truck when the marijuana was transferred to the van at Kessler Street were not the two men -- Lira and Sosa -- who were seen getting out of and back into the truck (and were later arrested) at the strip center, Agent Ayers responded: "No one got into those vehicles. We had a continuous surveillance from the moment they left Kessler until the time they got to the shopping center. I had a good view of Mora at the stoplight. The only two men in the Chevrolet pickup was Sosa

and Lira. So it's Sosa and Lira. No one else had an opportunity to even get in the truck or get out of the truck." Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 43.

When the arrest signal was given, Detective Figueroa arrested Sosa. Testimony of Figueroa, Tr. July 1, 1992, Vol. I, at 124. Sosa "was in the gray pickup truck, in the driver's seat." Id. Lira was also in the truck, and "he was arrested by [Figueroa's] partner, Detective Marquez." Id. Detective Figueroa "took a quick glance inside the [truck] in case there was any significant guns, narcotics or anything just sitting there. I look [sic] down, I noticed there was a weapon sitting at the edge of the -- underneath the seat but right at the edge, like it had fallen forward." Id. at 124-125. (Government Exhibit 11 is a picture of the truck with New Mexico license plate 005 ASG.) The gun was loaded with 11 rounds. Id. at 127. Agent Olmos of the Bureau of Alcohol, Tobacco, and Firearms, test-fired the firearm and found it to be "functional as a firearm." Testimony of Olmos, Tr. July 1, 1992, Vol. II, at 11. No latent fingerprints were found on the weapon. Id.

SUMMARY OF ARGUMENT

1. The government complied with its disclosure requirements under the discovery orders and Fed. R. Crim. P. 16, the Jencks Act, and the Due Process Clause. Judge Bunton correctly concluded that the government was not required to turn over rough notes taken by agents during their conversations with confidential informant Russell.

2. Mora and Medina's rights under the Confrontation Clause were not violated when Judge Bunton prevented them from cross-examining Agent Geller about an irrelevant issue. The Confrontation Clause does not authorize defendants to engage in irrelevant interrogation.

3. The jury found that Mora and Medina were predisposed to commit the crimes and thus were not entrapped. The jury did not believe Mora and Medina's testimony that they were not predisposed. Appellants have given no reason to justify overturning the jury's credibility judgments.

4. Similarly, Mora and Medina have failed to prove outrageous government conduct. They have failed to prove the factual predicate necessary to sustain such a claim.

5. The evidence was sufficient for the jury to find Sosa and Lira guilty on the possession and conspiracy counts. The evidence showed that Sosa and Lira were involved in the transfer of the marijuana from the truck to the Ryder van; that they followed the van to the strip center; and that, once at the strip center, they positioned themselves so as to provide protection for the transaction with Agent Geller.

6. The evidence was sufficient for the jury to find that Sosa used a gun during and in relation to the crime. The gun was found under the seat of Sosa's truck, and it was loaded and ready to fire. A reasonable jury could find that Sosa had the gun as protection in case anything went wrong during the transaction with Geller. Also, Sosa was properly convicted of "use" of the

gun, as the indictment charged.

7. Judge Bunton properly sentenced Sosa and Lira. The evidence was sufficient for him to find that 500 pounds was the object of the conspiracy, and he resolved the factual dispute over the amount of marijuana involved in the proposed transaction, both at the sentencing hearing itself and in the written judgment.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE GOVERNMENT DISCLOSED ALL MATERIALS TO WHICH DEFENDANTS WERE ENTITLED.

A. During the course of the proceedings in this case, the government disclosed many materials to the defense and submitted many other materials to the court for in camera review. Judge Bunton concluded that "the Government complied with the discovery orders in this case" and that "[d]efendants received all essential discovery materials." 1 R. at 47.

Appellants Mora, Medina, and Sosa nevertheless contend that the discovery orders and other legal principles required the government to disclose notes taken by government agents during their interviews and conversations with Roger Russell, the confidential informant. See Mora Brief at 18-19; see also Tr. July 1, 1992, Vol. I, at 180 (Counsel for Mora: "Your Honor, clarification. Field notes are what I'm interested in, 20 contacts, the Marquez notes, Figueroa notes, any notes when [Russell] was taken into the program."). Appellants' contention

is without merit.[3]

First of all, the district judge "holds great latitude in the management of the discovery process." United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991). Judge Bunton presided over discovery and was obviously knowledgeable about the meaning and scope of the discovery orders. Thus, his conclusion, reached after in camera review of all materials, that "the Government complied with the discovery orders in this case," 1 R. at 47, is entitled to great deference. See United States v. Singer, 970 F.2d 1414, 1418 (5th Cir. 1992) (abuse of discretion standard); Ellender, 947 F.2d at 756 (same). Second, contrary to appellants' contention, see Mora Brief at 21, the discovery orders did not specifically require the government to disclose notes taken by agents during their discussions with confidential informant Russell.[4] Third, the discovery orders did not purport to augment the discovery available under Fed. R. Crim. P. 16, the Jencks Act (see 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2), and the Due Process Clause (as interpreted in Brady v. Maryland, 373

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[3] Appellants complain that the notes should have been turned over to the court earlier than the first day of trial. Mora Brief at 19-20. That contention would become relevant at this stage of the case only if the district court had erred (which it did not) in refusing to order the government to disclose the notes. The government does not disagree, however, with the district court's suggestion, 1 R. at 47, that it would have been better to submit the notes to the court at an earlier date for in camera review.

[4] Nor did the district court do what the district court did in United States v. Ramirez, 954 F.2d 1035, 1038 (5th Cir. 1992): "Prior to trial, the district court ordered the Government to preserve the rough notes of its agents."

U.S. 383 (1963), and Giglio v. United States, 405 U.S. 150 (1972)). (The April 10 standing discovery order was a form order with names and dates inserted.) And with the exception of alibi-defense cases where Fed. R. Crim. P. 12.1 applies, those are the only sources of authority under which the federal courts can order the government to disclose materials to the defense.[5] As a result, the discovery orders should not be interpreted to require disclosure of the agents' notes in this case because, as explained below, neither Fed. R. Crim. P. 16 nor the Jencks Act nor the Due Process Clause requires disclosure.

B. Appellants have not contended that the agents' notes are discoverable under Fed. R. Crim. P. 16. With good reason: The agents' notes clearly fall within an exemption from Rule 16's general discovery provisions:

> Except [with regard to statements of the defendant, the defendant's prior record, and reports of examinations and tests], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case * * * .

Fed. R. Crim. P. 16(a)(2) (emphasis added).

The Jencks Act requires the government to disclose "statement[s]" of its witnesses who testify at trial. 18 U.S.C.

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[5] Cf. Palermo v. United States, 360 U.S. 343, 351 (1959) ("The purpose of the [Jencks] Act, its fair reading and its overwhelming legislative history [show] that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. § 3500 cannot be produced at all."); United States v. Campagnuolo, 592 F.2d 852, 858 (5th Cir. 1979).

§ 3500; see also Fed. R. Crim. P. 26.2 (same rule, but applicable to defense witnesses as well). The relevant portion of Section 3500(e)(1) defines "statement" to include "a written statement made by said witness and signed or otherwise adopted or approved by him."

This court has held that a government's agent's notes are generally not "statements" of the agent under 18 U.S.C. § 3500. See, e.g., United States v. Ramirez, 954 F.2d 1035, 1038 (5th Cir. 1992) ("The notes destroyed by Bryant consisted of odd pieces of paper on which Bryant jotted down names, addresses, and license plate numbers. We find that the scattered notes taken by Bryant over the course of the investigation do not fit within the Act's purview."); see also United States v. Pacheco, 489 F.2d 554, 566 (5th Cir. 1974) ("Nothing in the Jencks Act requires that notes made in the course of an investigation be preserved after the notes have served their purpose of assisting in the preparation of interview reports."). This conclusion follows from the fact that an agent's notes are often sketchy and incomplete, made in a hurry, and at different times. An agent's notes are thus considered "statements" of the agent when they are complete and formalized, and thus of the same or similar reliability as an agent's prepared report. See Ramirez, 954 F.2d at 1038; United States v. Roemer, 703 F.2d 805, 807 (5th Cir. 1983) ("the roughness of the notes may be relevant to a finding

that they were not adopted by the author as a statement").[6]

On the first day of trial, the government submitted the agents' notes to the district court for in camera review. That is the proper procedure "when it is doubtful whether the production of a particular statement is compelled by the statute." Palermo v. United States, 360 U.S. 343, 354 (1959); see United States v. Fragoso, 978 F.2d 896, 899 (5th Cir. 1992); United States v. Pierce, 893 F.2d 669, 675 (5th Cir. 1990). "It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." Palermo, 360 U.S. at 354. After reviewing the notes, Judge Bunton stated:

> I have gone through these notebooks and these notes. They're not matters that I think are necessarily sensitive about anything. There are some names mentioned in here that are not, obviously, defendants in this case. There's jillions of telephone numbers, license plates, addresses, all sorts of things, but I don't think anything that's really necessary. I'm going to take these, seal them. They'll be part of the record if it ever goes up.

Tr. July 1, 1992, Vol. II, at 82.

When a district court reviews materials in camera, its determination whether "written materials constitute a statement under the Jencks Act * * * may not be disturbed unless clearly erroneous." Fragoso, 978 F.2d at 899; see United States v. Hogan, 763 F.2d 697, 704 (5th Cir. 1985). The government submits

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[6] Courts have also held that notes taken during interviews are generally not statements of the interviewee. See Palermo, 360 U.S. at 350-351; United States v. Welch, 810 F.2d 485, 490 (5th Cir. 1987).

that, after reviewing the notes in camera, this court should find that Judge Bunton did not err, much less clearly err. See Ramirez, 954 F.2d at 1038; Roemer, 703 F.2d at 807 ("Given the trial court's proper reliance on the roughness and abbreviations of the notes, its finding that the notes were not a statement is not clearly erroneous and must be affirmed."). The notes were not statements under the Jencks Act.[7]

"The defendants' inability to obtain the [notes] under the Jencks Act, however, does not end the matter." United States v. Jackson, 978 F.2d 903, 909 (5th Cir. 1992). As noted above, the Supreme Court has held that the Due Process Clause requires the government to disclose evidence that either is exculpatory or is likely to be valuable in impeaching government witnesses. Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963). As with the Jencks Act, when it is uncertain whether material falls within the rule of Brady and Giglio, the government should submit the material to the district court for the court to review the material in camera. Pennsylvania v. Ritchie, 480 U.S. 39, 59-60 (1987). "Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." Id at 59; see also United States v. Davis, 752 F.2d 963, 976 (5th Cir. 1985) (defendant not entitled to conduct "fishing expedition" in government's files). After

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[7] If this court were to find that the district court erred in concluding that the notes were not statements, this court would then have to determine if appellants have shown "prejudice to [their] substantial rights." Singer, 970 F.2d at 1418; see Ellender, 947 F.2d at 756. They have not. See infra note 8.

reviewing the material in camera, the court must make the determination whether the information is exculpatory or might be valuable in impeaching government witnesses. See Ritchie, 480 U.S. at 60.

In this case, the government complied with its obligations under Brady. As noted above, Judge Bunton conducted an in camera review of the government's files relating to this case, including the agents' notes and the DEA files pertaining to Russell; after conducting that review, he concluded that the agents' notes did not contain information favorable to the defense. Tr. July 1, 1992, Vol. II, at 82. Judge Bunton informed defense counsel of all other relevant information he found in the government's files. Id. at 83-84. Judge Bunton's conclusion that the notes did not contain material subject to the Brady/Giglio disclosure requirements is clearly correct and should be upheld.[8]

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[8] This court has not definitively decided the standard of review of a district court's determination, after in camera examination, that materials are not exculpatory or impeachment evidence under Brady and Giglio. Some cases suggest that the standard is abuse of discretion. See United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991); United States v. Marrero, 904 F.2d 251, 261 (5th Cir. 1990); see also United States v. Dweck, 913 F.2d 365, 372 (7th Cir. 1990). Other cases suggest that review is de novo. See United States v. Greer, 939 F.2d 1076, 1097 (5th Cir. 1991), aff'd in relevant part, 968 F.2d 433 (5th Cir. 1992) (en banc). At least one case suggests that there is no appellate review so long as the district court examines the material in camera. See United States v. Jackson, 978 F.2d 903, 909 (5th Cir. 1992); cf. United States v. Streit, 962 F.2d 894, 900 (9th Cir. 1992) (rejecting government's argument that no appellate review if district court examined materials in camera and defendant cannot otherwise demonstrate that materials contain exculpatory information).

The standard of review question need not detain the court in this case, for the court should affirm the district court's

II. MORA AND MEDINA'S RIGHTS UNDER THE CONFRONTATION CLAUSE WERE NOT VIOLATED WHEN JUDGE BUNTON PREVENTED THEM FROM CROSS-EXAMINING AGENT GELLER ABOUT AN IRRELEVANT MATTER.

Mora and Medina argue that Judge Bunton infringed their rights under the Sixth Amendment's Confrontation Clause when he prevented them from asking certain questions of Agent Geller on cross-examination. See Tr. July 1, 1992, Vol. I, at 100.

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315 (1974) (internal quotation omitted). But "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). Thus, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'

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decision no matter what standard of review it utilizes. Moreover, were this court to find that the district court erred, it would then have to determine whether defendants were prejudiced by the failure to disclose such material. The convictions must stand unless there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Ellender, 947 F.2d at 756 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)); see United States v. Gordon, 876 F.2d 1121, 1126 (5th Cir. 1989) (any Brady error harmless because "overwhelming evidence in the record supports [the] convictions."). In this case, we submit that the evidence against defendants was so strong that any error in the discovery process was harmless.

safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). As a result, "[t]his court regards limits placed upon the scope or extent of cross-examination to be a matter committed to the sound discretion of the trial judge, and the decision is reviewed under a standard of clear abuse of discretion." United States v. Barksdale-Contreras, 972 F.2d 111, 115 (5th Cir. 1992).

The precise amount of marijuana negotiated by Geller, Mora, and Medina -- and why Agent Geller agreed to a particular amount -- were irrelevant to the jury's consideration of guilt. Appellants now recognize as much, although they did not at trial. See Mora Brief at 23 ("As it turned out, the Court was the fact finder on the issue of the amount of drugs which were the object of the conspiracy."); cf. Tr. July 1, 1992, Vol. II, at 217 (Mora's Counsel: "Can the Court direct a verdict on enhancement?" Court: "No direct verdict on the enhancements. It's not going to go to the jury on the enhancements."). Appellants' contention thus reduces to the claim (for which they cite no case law support) that Judge Bunton clearly abused his discretion by not permitting them to cross-examine Agent Geller on a totally irrelevant issue. See Tr. July 1, 1992, Vol. I, at 100 (Mora's Counsel: "Your Honor, permission to impeach this witness with respect to matters outside of the course of proper inquiry on cross-examination."). Stating the claim resolves it. Judge Bunton did not err, and thus did not clearly abuse his discretion, in refusing to allow such an inquiry. See Van

Arsdall, 475 U.S. at 679. The Confrontation Clause was not violated.

III. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JURY TO FIND THAT MORA AND MEDINA WERE NOT ENTRAPPED.

Where a jury has been instructed on the entrapment defense and "has rejected [it], the standard of review is whether, when viewing the evidence in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." United States v. Morris, 974 F.2d 587, 588 (5th Cir. 1992); see United States v. Arditti, 955 F.2d 331, 343 (5th Cir. 1992) ("On appeal from a conviction wherein the jury has rejected the entrapment defense, the standard of review is the same as that which applies to the sufficiency of the evidence."); United States v. Johnson, 872 F.2d 612, 621 (5th Cir. 1989) (same).

At trial, Mora and Medina conceded that they possessed marijuana with intent to distribute it and conspired to possess marijuana with intent to distribute it. But they testified at great length about how they were not predisposed to do so, that they were instead forced into this transaction by confidential informant Roger Russell. Medina testified that Russell threatened to kill him if he did not participate in drug transactions. Testimony of Medina, Tr. July 1, 1992, Vol. II, at 102. He stated that, after the deal scheduled with Geller for late February fell through, Russell threatened to have Medina "taken care of." Id. at 110. Mora testified that he had never before participated in drug trafficking. Testimony of Mora, Tr.

July 1, 1992, Vol. II, at 183. He felt that Russell posed a threat of violence to him. Id. at 186.

In light of that testimony, the attorneys for Mora and Medina argued to the jury that the jurors should believe the stories Mora and Medina were telling -- that Mora and Medina were not predisposed and had, in fact, been entrapped and coerced into committing these crimes. For example, counsel for Medina told the jury: "Because in order to believe that Jesse Medina was entrapped, all you have to believe is that Roger Russell took a person who did not have the previous intent to commit a drug-trafficking crime and persuaded him to commit a drug-trafficking crime. * * * Is there any evidence in this case, any evidence that he was predisposed to do this thing." Tr. July 2, 1992, Vol. III, at 38-39. Counsel for Mora stated to the jury: "[Mora] was not predisposed to do that crime. He really wasn't. And if you even think there is a reasonable doubt about that * * * you got to return the verdict of not guilty for Alfonso Mora." Tr. July 2, 1992, Vol. III, at 50.

Government counsel by contrast argued that the jury should not believe Mora and Medina's stories. Counsel pointed to the lack of corroborating evidence for their claims and also noted that inconsistencies and holes in their testimony undercut their credibility. For example, Medina disputed testimony of Agent Geller as to the substance of their conversations on the day of the transaction. See Testimony of Medina, Tr. July 1, 1992, Vol. II, at 137 (Question: "So Agent Geller is lying?" Medina:

"Yes, apparently. I never discussed anything with Jack Geller, ma'am."). And despite the alleged threats against him, Medina inexplicably never called his own brother, a Chief of Police in New Mexico, to ask his help in coping with the alleged threats from Russell. Id. at 129. Mora never adequately explained why he joined Medina in the drug transaction; and, according to his own testimony, he was never personally threatened by Russell.

The jury heard all of the testimony, and the attorneys' arguments, and then Judge Bunton, pursuant to defendants' request, instructed the jury on the defenses of entrapment and coercion. Tr. July 2, 1992, Vol. III, at 92-94. Judge Bunton allowed the jury to be the "ultimate discipline" for Mora and Medina's argument. United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984).[9]

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[9] Judge Bunton instructed the jury:

> If, then, you should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, either Defendant Jesus Medina or Alfonso Mora was ready and willing to commit such a crime such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then you should find that defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether either Defendant Jesus Medina or Alfonso Mora had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find that defendant not guilty.

Tr. July 2, 1992, Vol. III, at 93. He also instructed on the elements of "duress or coercion" and stated: "If the Government

If the jury had believed the testimony of Mora and Medina, it would have found that Mora and Medina were not predisposed to commit the offense, and were thus entrapped and not guilty. The jury found Mora and Medina guilty; obviously, therefore, the jury did not believe their stories. The upshot is that Mora and Medina are arguing to this court exactly what they argued to the jury. Compare Mora Brief at 25-28 and Medina Brief at 21-24 with Tr. July 2, 1992, Vol. III, at 36-41 and id. at 50. But their arguments would require this court to overrule the jury's credibility judgments. This court does not, of course, reweigh the credibility of witnesses. United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992) ("Determining the weight and credibility of the evidence is within the sole province of the jury. An appellate court will not supplant the jury's determination of credibility with that of its own."); see also United States v. Greenwood, 974 F.2d 1449, 1458 (5th Cir. 1992) ("whether judges doubt the credibility of a witness * * * is beside the point in reviewing a sufficiency claim such as this -- with the exception of cases where a witness' testimony is so incredible or insubstantial that, as a matter of law, we may discredit it. Such cases, however, are extremely rare. They typically involve testimony about an event that could not have occurred 'under the laws of nature.'"); United States v. Barksdale-Contreras, 972 F.2d 111, 114 (5th Cir. 1992) ("An

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fails to prove the absence of duress beyond a reasonable doubt with respect to the defendant asserting the offense, then you must find that defendant not guilty." Id. at 94.

appellate court will not supplant the jury's determination of credibility with that of its own.").

Because the jury did not believe the testimony of Medina and Mora and because "the ready commission of the criminal act amply demonstrates the defendant[s'] predisposition," Jacobson v. United States, 112 S. Ct. 1535, 1541 (1992),[10] a reasonable jury could find that Mora and Medina were predisposed and not entrapped.

Defendants cite the Supreme Court's recent decision in Jacobson v. United States, 112 S. Ct. 1535 (1992), but that case does not support their argument. In Jacobson, the question was whether, under the established facts, defendant had proved entrapment as a matter of law. Here, if the facts were undisputed and consistent with Mora and Medina's testimony, the jury would no doubt have found that Mora and Medina were entrapped. And in any event, the defendants likely would have

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[10] Mora and Medina's activities on the day of the crime (as detailed in Agent Geller's testimony, see Tr. July 1, 1992, Vol. I, at 30-60) were those of people ready and willing to commit crime. Mora and Medina were dealing with, and able to obtain the drugs from, members of the Mexican Federal Judicial Police; at a meeting with Geller, Medina apologized for a previous deal that had fallen through; in conversation with Geller, Medina referred to his "people"; at one meeting, Mora checked Geller's license, presumably to ensure he was who he said he was, and not a government agent; Mora and Medina readily agreed to the van arrangement to load the drugs; Mora and Medina called the shots as to the timing and location of the drug transfer; on more than one occasion, Mora and Medina pleaded with Geller not to back out of the deal. These activities confirm what commission of the crime suggests: that Mora and Medina were predisposed. Cf. Arditti, 955 F.2d at 343 (lack of resistance and active participation can convince reasonable jury that defendant was predisposed).

established, as in Jacobson, entrapment as a matter of law. But the factual predicate for the jury to find entrapment, or for this court to find entrapment as a matter of law, is absent. The jury simply disbelieved Mora and Medina.

This court should not disturb the jury's guilty verdicts against Mora and Medina.

IV. MORA AND MEDINA FAILED TO PROVE OUTRAGEOUS GOVERNMENT CONDUCT.

Mora and Medina claim (based on the Due Process Clause) that this court should reverse the convictions because of outrageous government conduct. To succeed on such a claim, a defendant at a minimum "must prove not only government overinvolvement in the charged crime, but also that he has not been an active participant in the criminal activity which gave rise to his arrest." United States v. Arditti, 955 F.2d 331, 343 (5th Cir. 1992) (internal quotations omitted) (emphasis added). If Mora and Medina's stories about confidential informant Russell were true, they might be able to sustain an outrageous government conduct claim (although it is quite difficult for a defendant to meet the exacting standard for such a claim). See United States v. Allibhai, 939 F.2d 244, 248-250 (5th Cir. 1991); United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981); see also United States v. Russell, 411 U.S. 423, 431-432 (1973); cf. Hampton v. United States, 425 U.S. 484, 490 (1976) (plurality opinion of Rehnquist, J.); United States v. Miller, 891 F.2d 1265, 1273 (7th Cir. 1989) (Easterbrook, J., concurring) ("Inability to describe in general terms just what makes tactics too outrageous to

tolerate suggests that there is no definition -- and 'I know it when I see it' is not a rule of any kind, let alone a command of the Due Process Clause.").

Judge Bunton presided over this trial and, like the jury, heard all of the evidence; he had an opportunity to make his own credibility judgments. Yet when presented with Mora and Medina's outrageous government conduct claim (which was dependent solely upon the testimony of Mora and Medina), Judge Bunton summarily dismissed it. 1 R. at 47. Judge Bunton was obviously no more persuaded by the testimony of Mora and Medina than was the jury. Judge Bunton's credibility judgment is not clearly erroneous; as a result, this court should affirm the district court's decision that Mora and Medina failed to "prove," see Arditti, 955 F.2d at 343, that the government acted in an outrageous manner.[11]

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[11] Mora suggests that the fact that Russell did not appear at trial means the court must accept Mora and Medina's testimony at face value in connection with the outrageous government conduct claim. Mora Brief at 25. Mora cites no support for such a proposition; nor could he. As noted in the text, the burden is on Mora to "prove" outrageous government conduct.

Mora also hints that the government is somehow responsible for Russell's disappearance. Mora Brief at 24. There is absolutely no evidence of that. Indeed, the most logical inference to draw from Russell's disappearance is that he was afraid of reprisals from persons involved in the drug trafficking business -- and left to avoid such reprisals. Moreover, the government undertook reasonable steps to find Russell, checking his home and business, which were found vacant with no sign of where Russell had gone. See Testimony of Figueroa, Tr. July 1, 1992, Vol. I, at 158. The district court subpoenaed Russell to appear for trial, but Russell still did not appear. Russell's lover also had no idea where Russell was. See Testimony of Gonzalez, Tr. July 1, 1992, Vol. II, at 174. And Russell was deactivated as a confidential informant on April 6, 1992, and thus was not associated with the government after that date. Testimony of Figueroa, Tr. July 1, 1992, Vol. II, at 179.

V. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JURY TO FIND SOSA AND LIRA GUILTY BEYOND A REASONABLE DOUBT ON THE POSSESSION AND CONSPIRACY COUNTS.

"The standard of review for sufficiency of evidence is whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Martinez, 975 F.2d 159, 160-161 (5th Cir. 1992) (emphasis in original).

"Possession with intent to distribute requires proof that the defendant had knowing possession of marihuana with intent to distribute it." United States v. Rojas-Martinez, 968 F.2d 415, 420 (5th Cir. 1992); see also United States v. Martinez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989).

To convict of drug conspiracy, the government must prove the existence of an agreement to possess with intent to distribute marijuana, the defendants' knowledge of that agreement, and their voluntary participation in it. Martinez, 975 F.2d at 161. "An express, explicit agreement is not required, a tacit agreement will suffice." United States v. Greenwood, 974 F.2d 1449, 1457 (5th Cir. 1992). Furthermore, "the elements of the offense may be established solely by circumstantial evidence." Id.

Lira contends that "[t]he record only shows that [he] happened to be at the scene of the arrest, and for that reason and that reason alone, the Government agents arrested him." Lira Brief at 7. He further contends that "[t]here is no other evidence that places [him] in any place other tha[n] the Stadium Bar parking lot on the day of the arrest." Id. at 8. Sosa

similarly contends that "[t]here was no other testimony that linked [him] to possession of the marijuana" and that "not an iota" of evidence was presented to prove that he "knew a conspiracy existed and that he voluntarily joined it." Sosa Brief at 9-10. These contentions are erroneous.

DEA Agent Ayers testified that he saw individuals who turned out to be Sosa and Lira at Kessler Street in front of the Avante Lounge. Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 33. A man who turned out to be Mora was also there. Id. At that time, the marijuana was transferred from a pickup truck into the Ryder van supplied by Geller. Id. at 34. Agent Ayers followed the vehicles from that meeting place into a strip shopping center. Id. at 34-36. He did not lose sight of the truck during the trip from the meeting point to the strip center. Id. at 36, 44. At the strip center, Ayers broke off surveillance briefly, but two other agents picked up surveillance as the truck entered the strip center. Agent Zimmerly saw two men "getting out of the vehicle, meeting with Mr. Mora, going back by the van, trying the door, and then returning to the vehicle. They were the ones [Sosa and Lira] arrested in that vehicle when the arrest went down." Testimony of Zimmerly, Tr. July 1, 1992, Vol. II, at 31. Detective Figueroa "noticed the subject, that I later identified as Mr. Juan Sosa, get out of the vehicle and Mr. Lira get out of the vehicle also." Testimony of Figueroa, Tr. July 1, 1992, Vol. I, at 120.

When Agent Ayers resumed surveillance, he saw "Lira and Sosa

walking back to the older model pickup truck and get in the truck and position themselves at an angle to a parking space, looking toward where the van had been parked by Mora." Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 37-38.

When questioned by defense counsel about the possibility that the two men who were with Mora when the marijuana was moved from the truck to the Ryder van were not the two men -- Lira and Sosa -- who were seen getting out of and back into the truck (and were later arrested) at the strip center, Agent Ayers responded: "No one got into those vehicles. We had a continuous surveillance from the moment they left Kessler until the time they got to the shopping center. I had a good view of Mora at the stoplight. The only two men in the Chevrolet pickup was Sosa and Lira. So it's Sosa and Lira. No one else had an opportunity to even get in the truck or get out of the truck." Id. at 43.

When the arrest signal was given, Detective Figueroa arrested Sosa. Sosa "was in the gray pickup truck, in the driver's seat." Testimony of Figueroa, Tr. July 1, 1992, Vol. I, at 124. Lira was also in the vehicle, and "he was arrested by [Figueroa's] partner, Detective Marquez." Id. Detective Figueroa found a gun on the floor of the truck under the driver's seat. Id. at 124-125. The gun was loaded with 11 rounds. Id. at 127. Agent Olmos of the Bureau of Alcohol, Tobacco, and Firearms, test-fired the firearm and found it to be "functional as a firearm." Testimony of Olmos, Tr. July 1, 1992, Vol. II, at 11.

A reasonable jury could find: that Sosa and Lira possessed a large amount of marijuana at the Kessler Street meeting place when they met Mora and transferred the marijuana into the Ryder van; that, while driving Sosa's truck, they followed the van to the strip center; and that they then parked near the van and the site of the anticipated drug transfer -- with a loaded weapon under the driver's seat -- to ensure that everything went smoothly in the transaction with Geller, and to provide backup in the event it did not. From this evidence, a reasonable jury could find that Sosa and Lira possessed marijuana with intent to distribute it and were part of the conspiracy to sell the marijuana to Geller. See United States v. Ivy, 973 F.2d 1184, 1188-1189 (5th Cir. 1992).

VI. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JURY TO FIND THAT SOSA "USED" A GUN DURING AND IN RELATION TO THE CRIME.

Sosa argues that the evidence was insufficient to convict him under Section 924(c)(1). As noted above, "[i]n evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in support of the verdict." United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992) (citing Glasser v. United States, 315 U.S. 60, 80 (1942)). "[J]uries * * * need not dispense with their common-sense understanding of the natural tendencies and inclinations of human behavior." United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990).

Section 924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * * , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.

This court "ha[s] interpreted section 924(c) broadly." Ivy, 973 F.2d at 1189. Conviction for using a firearm "does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," but only that "the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." Id.

In this case, as in Ivy, the gun "was clearly being 'used' in the sense of being available to provide protection during [Sosa's] drug trafficking activities." Id. The agents testified that Sosa was parked in a truck near the site of the transaction between Geller, Mora, and Medina. See Testimony of Ayers, Tr. July 1, 1992, Vol. II, at 37-38; Testimony of Zimmerly, Tr. July 1, 1992, Vol. II, at 30-31. The gun was under the driver's seat of the truck and was loaded and ready to fire. Testimony of Figueroa, Tr. July 1, 1992, Vol. I, at 124-125. Sosa's wife was the registered owner of the truck, but she did not drive the truck; in fact, she could not drive the truck. Testimony of Andrea Sosa, Tr. July 1, 1992, Vol. II, at 210. She had looked in the truck a week before -- including under the driver's seat -- and had not seen a gun. Id. at 209.

A jury could rationally conclude from this evidence that Sosa knew the gun was under the driver's seat, and that Sosa was

present at the strip center to ensure that the transaction proceeded smoothly and to act as a backup in case anything went awry -- i.e., that "the gun was used to safeguard and facilitate [the] drug transactions." United States v. Smith, 978 F.2d 171, 174 (5th Cir. 1992); see United States v. Featherson, 949 F.2d 770, 776 (5th Cir. 1991) (gun concealed under mattress could have been used to protect narcotics); United States v. Beverly, 921 F.2d 559, 563-564 (5th Cir. 1991) (two revolvers found under mattress in room where officers found cocaine is sufficient to convict for use); United States v. Molinar-Apodaca, 889 F.2d 1417, 1424 (5th Cir. 1989) (guns in house, marijuana and drug paraphernalia found in barn, sufficient to convict for use); United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989) (unloaded gun found in rear of car containing marijuana is sufficient to convict for use); United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988) ("the jury here could reasonably have concluded that Robinson 'used' at least one of the firearms found in his house as a means of safeguarding and facilitating illegal transactions and as an integral means of protecting his possession of the cocaine.").[12]

"[T]he evidence [i]s sufficient to sustain [Sosa's]

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[12] The fact that no latent fingerprints were found on the gun does not advance Sosa's argument. As the Ninth Circuit recently observed in Scott v. Henrich, 978 F.2d 481, 485 (9th Cir. 1992): "It's true that, in the popular mythology, people leave telltale fingerprints on everything they touch. But in real life that's just not so."

conviction on the firearms charge." Smith, 978 F.2d at 174.[13]

VII. THE DISTRICT COURT CORRECTLY SENTENCED MORA AND MEDINA.

Appellant Mora claims that "[t]he finding of the District Court that Alfonso Mora entered into an agreement to transport 500 pounds of marijuana is wholly without support in the Record." Mora Brief at 28. Appellant Medina makes a slightly different argument -- and one somewhat contradictory to Mora's: that Judge Bunton failed to resolve the dispute regarding the amount of

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[13] The indictment charged Sosa with "use" of a firearm, 1 R. at 98, but the court instructed the jury -- consistently with the language of the statute -- that it should convict if it found that Sosa "used or carried a firearm during and in relation to the defendant's commission of the crime." Tr. July 2, 1992, Vol. III, at 89. Sosa did not object to that instruction, nor has he has raised it as an issue on appeal. The variance between indictment and charge can thus be reviewed only for plain error, which Sosa cannot establish.

In United States v. Pineda-Ortuno, 952 F.2d 98, 103-104 (5th Cir. 1992), the evidence showed that the defendant carried a gun, and the indictment charged "carrying." However, the instruction stated that "using or carrying" was sufficient to convict. The court of appeals stated that, in that case, the variance between indictment and charge was harmless. Similarly, in United States v. Blankenship, 923 F.2d 1110, 1116 (5th Cir. 1991), the evidence showed that the defendant used the gun, and the indictment charged "use." However, the instruction stated that "using or carrying" was sufficient to convict. The court of appeals concluded that, in that case, the variance between indictment and charge was harmless. In these cases, it was "immaterial" that there might have been sufficient evidence to convict the defendant under the prong of Section 924(c) other than the one the indictment charged. Pineda-Ortuno, 952 F.2d at 104.

Here, the evidence clearly showed "use" (the broader of the two prongs of Section 924(c)), and Judge Bunton emphasized the "use" prong in his instruction to the jury. See Tr. July 2, 1992, Vol. III, at 89-90. Moreover, given the current interpretation of "use" in the courts, one is hard-pressed to think of a scenario in which a defendant "carried" the gun during and in relation to the crime but did not "use" the gun during and in relation to the crime. This is certainly not such a case.

marijuana involved in this case, and that the case should therefore be remanded for resentencing. Medina Brief at 24. Neither contention has merit.

"A district court's factual findings on the relevant quantity of drugs are protected by the clearly erroneous rule." United States v. Montes, 976 F.2d 235, 240 (5th Cir. 1992). Moreover, "a presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial court in making the factual determinations required by the Guidelines. And it is proper for the district court to rely on a presentence report's construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts." United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992).

Under Section 2D1.4 of the Sentencing Guidelines (as it read at the time of sentencing), "[i]f a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed." U.S.S.G. § 2D1.4 (Nov. 1, 1991). "In a drug conspiracy case, quantities and types of drugs not specified in the count of conviction are to be grouped in determining the offense level -- if they were part of the same course of conduct or common scheme or plan as the offense of conviction." Robins, 978 F.2d at 889.

Agent Geller testified at trial that the amount of marijuana on which the parties agreed was 500 pounds. Testimony of Geller,

Tr. July 1, 1992, Vol. I, at 35-52. The presentence reports for Medina and Mora concluded: "[T]he base offense level is determined on the negotiated amount of 500 pounds of marijuana (226.8 kilograms)." Mora Presentence Report at 7; Medina Presentence Report at 7. After hearing arguments at sentencing, Judge Bunton concluded: "I heard the testimony in this case, about the fifty-some-odd pounds and the five-hundred-and-some-odd pounds, and I do not believe that there should be any reduction." Tr. Aug. 17, 1992, at 12 (emphasis added). The judgments of conviction stated that "[t]he court adopts the factual findings and guideline application in the presentence report." 1 R. at 17; 2 R. at 4.

Mora argues that Judge Bunton's conclusion had no support in the record, but Agent Geller's testimony provides sufficient support for the conclusion that 500 pounds was the object of the conspiracy.

Furthermore, contrary to Medina's assertion, Judge Bunton resolved the factual dispute consistently with the requirements of Fed. R. Crim. P. 32(c)(3)(D). Judge Bunton stated that, on the basis of the trial testimony, no reduction was warranted -- that is, 500 pounds was the appropriate amount to use as a basis for calculating the offense level. Also, in the judgment (which Medina does not mention in his brief), Judge Bunton indicated that he adopted the factual findings of the presentence report -- namely, that 500 pounds was the object of the conspiracy. 2 R. at 4. Judge Bunton resolved the factual dispute; remand is

therefore unnecessary.

This court should affirm the judgments of sentence for Mora and Medina.

CONCLUSION

The judgments of the district court should be affirmed.

Respectfully submitted.

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