February 8, 2023

To Whom It May Concern,

I highly recommend Jospeh Ulloa as an addition to your program. I have had the privilege of working with Joseph when he enrolled in my Legal Writing III – Appellate Drafting class at the University of North Texas-Dallas College of Law.

As his Professor, I reviewed Joseph's writing on four different assignments in our class. He was required to draft a Notice of Appeal, Motion to Extend Time, and two mock Briefs of the Merits for the Supreme Court of Texas. The briefs themselves exceeded twenty pages. In all of these assignments, Joseph was a very diligent student who produced high quality work.

Joseph's most notable quality is his persistence. He is a tenacious researcher who regularly analyzed and re-analyzed every issue. I believe that these qualities will serve him well in a judicial clerkship.

Overall, I believe that Joseph will make a fine addition to your program and a fine lawyer one day/

You are welcome to contact me should you need any additional information.

Respectfully,

Robert D. Ranen
(214) 726-6529

I drafted the attached document for Judge Kathleen Cardone during my internship in her chambers. The Judge has given me permission to use this as a sample of my writing. Information revealing the identity of the parties has been changed, and the document has been edited by her law clerk.

To: Law Clerk

From: Joseph Ulloa

Re: — Intracorporate Conspiracy Doctrine

Date: July 26, 2022

QUESTION: Assuming that Officers Houston and Austin conspired to bring false charges against Plaintiff, does the intracorporate conspiracy doctrine mean that Officer Austin cannot be liable for conspiracy in this case?

SHORT ANSWER: No. The doctrine does not apply to this case because Officers Austin and Houston conspired to conceal Officer Houston's misconduct, and that conspiracy falls under the exception to the doctrine.

STANDARDS:

The intracorporate conspiracy doctrine states that members of an organization cannot be liable for conspiring with each other because they are part of the same entity, and a single entity "cannot conspire with itself." *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994). The doctrine originally applied to corporations; but it now also applies to a legal entity such as a police department. *Thompson v. City of Galveston*, 979 F. Supp. 504, 511 (S.D. Tex. 1997). However, there is an exception to this doctrine that applies to members of an entity acting on

behalf of "private interests." *LaFleur v. McClelland*, No. 4:13-CV-425, 2013 WL 5148181, at *3 (S.D. Tex. Sept. 11, 2013). The exception is supported by the Fifth Circuit, where liability is not barred by the doctrine, when an institution's employee acts for their own interests. *Benningfield v. City of Houston*, 157 F.3d 369, 379 (5th Cir. 1998). Multiple courts in the Western District of Texas have recognized the exception in cases involving officers employed by a police department. *Villegas v. City of El Paso*, No. EP-15-CV-00386-FM, 2020 WL 981878, at *19 (W.D. Tex. Feb. 28, 2020); *Bright v. City of Killeen*, 532 F. Supp. 3d 389, 398 (W.D. Tex. 2021). Under this exception, when an agent of an organization, acts in a way that is on their own behalf and conspires with another to pursue those "personal interests," then liability is no longer barred by the intracorporate conspiracy doctrine. *Villegas*, 2020 WL 981878, at *18. As a result, where the agent exploits their authority or engages in "unauthorized acts", their co-conspirators incur liability. *Collins v. Bauer*, No. 3:11-CV-00887-B, 2012 WL 443010, at *8 (N.D. Tex. Jan. 23, 2012), *R. & R. adopted by* 2012 WL 444014 (N.D. Tex. Feb. 10, 2012). For instance, falsifying a police report and tampering with evidence to conceal misconduct are unauthorized acts. *Cornett v. Ward*, 2020 WL 906290, at *4 (N.D. Tex. Feb. 25, 2020).

APPLICATION:

The Plaintiff, Dallas, is claiming excessive force, false charges, and conspiracy to bring false charges. The claims are against police officer Defendants, Austin and Houston, who were on site where the incident occurred. Plaintiff claims that Houston used excessive force against him, and then concealed his excessive force by fabricating evidence in order to bring false charges against Dallas. Plaintiff further claims that Austin conspired with Houston to bring false

charges for the purpose of concealing Houston's use of excessive force.[1] Officer Austin moved for summary judgement on the conspiracy claim, arguing, in part, that the intracorporate conspiracy doctrine barred his liability. The Report and Recommendation of the Magistrate Judge did not reach Austin's argument about the doctrine.

I found three cases from the Fifth Circuit, with similar facts to this case, in which the court found that the exception applied. Read together, these three cases—*Bright*, *Cornett*, and *Collins*—stand for the proposition that the exception applies when officers conspire to tamper with or falsify evidence for the purpose of concealing their own wrongdoing. Because this case involves very similar circumstances as *Bright*, *Cornett*, and *Collins*, those three cases can guide the Court's analysis, and point to the conclusion that the intracorporate conspiracy is no bar to liability here.

***Bright* comparison**

The first case that can guide the Court's analysis is *Bright*. *Bright*, 532 F. Supp. 3d at 402. In *Bright*, the plaintiff pled that the deceased's rights were violated when an officer allegedly concealed and altered evidence in the death of the deceased after the police raid. *Id.* at 395. A SWAT officer executed a search warrant and during the raid, the officer tampered with evidence. *Id.* at 394-95. The other officers allegedly conspired with him to conceal their use of excessive force for shooting an individual. *Id.* at 402. The court held that the plaintiff's allegations were sufficient to plead the exception to the intracorporate conspiracy doctrine because the first officer engaged in unauthorized acts when he tampered with evidence. *Id.* The reasoning was that tampering with evidence and depriving the plaintiff of his constitutional

[1] For purposes of this memo, I assume that Plaintiff's allegations of conspiracy are true.

rights would be, an agent of an entity, engaging in unauthorized acts pursuant to the exception and thus the doctrine would not bar liability. *Id.*

The facts of this case are strikingly similar to *Bright*. Like *Bright*, in which the officer engaged in a conspiracy with another to conceal misconduct related to a shooting, here Austin conspired with another officer to conceal excessive force. *Id.* 402. Violating the plaintiffs' rights and concealing those violations through evidence tampering or false charges are not authorized acts within the scope of an officer's employed duties. *Id.* In summary, the officers reached an understanding to cover up their actions for the shooting and death of an unarmed individual, to then frame a narrative to conceal their misconduct. *Id.* Similarly, Austin conspired with Houston to cover up the excessive force used against Dallas. *Id.* 402. Houston's falsification of evidence was not within the scope of his employment and therefore the intracorporate conspiracy doctrine will not apply here.

***Cornett* comparison**

The second case that can guide the Court's analysis is *Cornett*. *Cornett*, 2020 WL 906290, at *4. In *Cornett*, the plaintiff brought an action against a defendant police officer for excessive force, false arrest, and conspiracy. *Id.* at *1. The plaintiff alleged that the defendant police officer used excessive force, and then acted in concert with another to conceal that force by fabricating evidence in a police report and claiming their body cameras malfunctioned. *Id.* at *3. The police officers argued that the intracorporate conspiracy doctrine barred their liability. *Id.* The court refused to apply the doctrine to a conspiracy to conceal the misconduct of a police officer, and reasoned that the doctrine does not apply when an officer exceeds the boundaries of their authority to cover up their unauthorized conduct. *Id.* at *4.

Like *Cornett*, in which the officer acted in concert with another to conceal their use and justification of a taser, here Austin acted in concert with Houston to conceal Houston's excessive force against Dallas. *Id.* at *3. Moreover, the purpose of the conspiracy in both cases is fabricating evidence—in *Cornett*, falsifying a police report about malfunctioned body cameras, here, Austin's report in favor of Houston, which was supported by the fabrication of evidence. *Id.* The exception likely applies when an officer fabricates evidence in either their own interest to conceal misconduct or in order to protect another officer. *Id.* at *4. In summary, tampering with evidence and falsifying a police report to conceal misconduct, are unauthorized acts in the personal interest of the reporting agent—for oneself—or on behalf of another officer. *Id.* Therefore, Houston's fabrication of evidence to cover up his own misconduct will likely be an unauthorized act, and so the exception will apply to Austin's conspiracy to participate in that cover up. *Id.*

***Collins* comparison**

The third case that can guide the Court's analysis is *Collins*. *Collins*, 2012 WL 443010, at *8. In *Collins*, the two officers conspired to deprive the plaintiff of their rights to be free from excessive force. *Id.* While the officers conspired to use excessive force, the purpose of the conspiracy was to conceal the force used against the plaintiff. *Id.* The court held that the plaintiff's complaint was sufficient for the exception to the intracorporate conspiracy doctrine to apply. *Id.* at *9. The reasoning was that the officers conspired to cover up their illegal acts of constitutional violations against the plaintiff. *Id.*

Like *Collins*, in which the officers conspired to cover up these unauthorized acts of excessive force, here Austin conspired to bring false charges against Plaintiff to cover up Houston's excessive force. *Id.* at *8. Moreover, where there is excessive force, the officers are

exceeding their capacities as officers and are consequently participating in illegal acts, in addition to conspiring to conceal these illegal acts. *Id.* For that reason, the conspiracy to conceal these acts—which advances the interest of oneself rather than the entity—are situations where the exception applies. *Id.* Hence, conspiring to conceal illegal acts such as excessive force are illustrations for unauthorized acts.

In summary, these three cases—*Bright*, *Cornett*, and *Collins*—are cases when the exception applies, where officers conspire to tamper with or falsify evidence for the purpose of concealing their own wrongdoing. Additionally, I did not find any cases stating the exception would not apply to the facts of this case. As this present case has a strong correlation to *Bright*, *Cornett*, and *Collins*, these cases strongly support the conclusion that the intracorporate conspiracy does not bar liability here.

CONCLUSION:

The intracorporate conspiracy doctrine does not bar Plaintiff's conspiracy claim against Austin because the exception to the doctrine applies in the present case. Accordingly, Austin conspired with another officer with the purpose to bring false charges in order to conceal misconduct of excessive force.

Joseph Ulloa Writing Sample

PSTM5838FA22

No. 22-0970

In the
Supreme Court of Texas

Dixie B. Herbster,
Petitioner,

v.

The University of South-Central Texas,
Respondent.

From the Fifteenth District Court of Appeals, Cause No. 2022-16-6789,
and the 82nd District Court for Luna County,
Cause No. DC-22-12345, Honorable Grace Bouquett

Petition for Review

Dixie Herbster Counsel:
Awesome Associate
Goldburg, Hayman & Leisnar
316 Main Street, Suite 200
Dallas, Texas 75220

PSTM5838FA22

IDENTITY OF PARTIES AND COUNSEL

The following constitutes a list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

Petitioner	Dixie B. Herbster
Petitioner's trial counsel	(Dixie Lawyer)
Petitioner's appellate counsel	Dixie Herbster Counsel: Awesome Associate Goldburg, Hayman & Leisnar 316 Main Street, Suite 200 Dallas, Texas 75220
Respondent	The University of South-Central Texas
Respondent's trial counsel	(USCT Lawyer)
Respondent's appellate counsel	USCT Counsel: Lesser Associate Big Law Firm 987 Jones Road, Suite 1000 Dallas, Texas 75220
Other parties	Not applicable
Counsel for other parties	Not applicable

PSTM5838FA22

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL 1

INDEX OF AUTHORITIES..... 3

STATEMENT OF THE CASE..... 4

STATEMENT OF JURISDICTION..... 4

ISSUES PRESENTED..... 5

Issue 1: The ramp without handrails posed an unreasonable risk of harm where injuries arose out of the uninspected ramp provided by the law school.

Issue 2: The law school's sovereign immunity will be waived where they are liable for personal property injury so caused by a condition or use of the ramp.

STATEMENT OF FACTS 5, 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT AND AUTHORITIES..... 8

PRAYER FOR RELIEF 25

CERTIFICATE OF SERVICE 26

PSTM5838FA22

INDEX OF AUTHORITIES

Cases **Page**

City of Dallas v. Thompson, 210 S.W.3d 601 (Tex. 2006) …… 8, 15, 16

County of Cameron v. Brown, 80 S.W.3d 549 (Tex. 2002) ……... 14, 15

Dallas Cnty. Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339 (Tex. 1998) …….. 19, 23, 24

Kerrville State Hosp. v. Clark, 923 S.W.2d 582 (Tex. 1996) …… 9, 10

Lowe v. Texas Tech Univ., 540 S.W.2d 297 (Tex. 1976) …….. 8, 9

Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528 (Tex. 1975) …...12

Robinson v. Central Texas MHMR Center, 780 S.W.2d 169 (Tex. 1989) ……. 10, 11

Salcedo v. El Paso Hospital District, 659 S.W.2d 30 (Tex.1983) ……. 7, 8

Sampson v. Univ. of Tex. at Austin, 500 S.W.3d 380 (Tex. 2016) …. 7, 16, 17

Scott & White Mem'l Hosp. v. Fair, 310 S.W.3d 411 (Tex. 2010) … 8, 17, 18, 19

United Supermarkets, LLC v. McIntire, 646 S.W.3d 800 (Tex. 2022) ……. 8, 13, 14

Univ. of North Texas. v. Harvey, 124 S.W.3d 216 (Tex. App.-Fort Worth 2003, pet. denied) ……. 19, 21, 22

Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones, 485 S.W.3d 145 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) …… 19, 22, 23

University of Tex. M.D. Anderson Cancer Ctr. v. McKenzie, 578 S.W.3d 506 (Tex. 2019) ……. 19, 20, 21

University of Texas Medical Branch v. York, 871 S.W.2d 175 (Tex. 1994) ……. 8

Statutes and other authorities

Tex. Civ. Prac. & Rem. Code Ann. § 101.021 ……... 7, 19

Tex. Gov't Code Ann. § 22.001(a)(6) …… 4

PSTM5838FA22

STATEMENT OF THE CASE

Nature of the case:	This is a suit for negligence arising from a defective ramp on University grounds.
Trial Court:	The Honorable Grace Bouquett, 82nd Judicial District Court, Luna County, entered a final summary judgment in favor of defendant's motion to dismiss.
Court of Appeals:	Fifteenth Court of Appeals, Toyahville
Parties in the Court of Appeals:	Appellant[s]: Dixie B. Herbster Appellee[s]: The University of South-Central Texas
Disposition:	Kelly, J., Rudnicki, J., and Vogelsang, CJ. Vogelsang, Chief Justice, in which Rudnicki, J. authored the court's opinion. Justice Kelly provided a separate opinion. The court of appeals affirmed the judgment below.
Status of opinion:	The court's opinion is unpublished. Dixie B. Herbster v. University of South-Central Texas, 123 S.W.3d 123, 124 (Tex. App. – Toyahville 2022, pet. filed).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to section 22.001(a)(6) of the Texas Government Code.

PSTM5838FA22

ISSUE PRESENTED

Issue 1: Unreasonable Risk of Harm

The court of appeals erred in affirming the district court's judgment because Dixie's injuries arose out of a dangerous ramp provided by the law school. The petitioner will surpass the school's immunity in which they are liable—as the ramp posed an unreasonable risk of harm.

Issue 2: Sovereign immunity

The court of appeals affirming the district court's judgment to waive the law school's sovereign immunity under the Texas Tort Claims Act shall not be reversed, because a governmental unit in the state is liable for personal property injury so caused by a condition or use of tangible personal property.

STATEMENT OF FACTS

The Honorable Grace Bouquett, 82nd Judicial District Court, Luna County, entered a final summary judgment in favor of defendant's motion to dismiss. The Fifteenth Court of Appeals affirmed the judgment.

A. The school encouraged students to study during the break and use school facilities in a winter storm.

Though there was a winter storm with frozen precipitation, the day the Herbsters studied at the library-the school left the law school doors unlocked for students to study. Exhibit 1, Dixie Herbster Deposition. 2:4,11. To get into the school, the sign next to the ramp encouraged Dixie Herbester to use the ramp instead of the stairs because the sign reassured her of its safe, slip-resistant ramp. Ex. 1, Herbster Dep. 3:15-18.

B. Willie, a University employee, designed a ramp without rails to be used for the ice storm even though he was in charge of resolving unsafe hazards on school grounds.

Willie, the head groundskeeper, is responsible for the school grounds and should have known safe procedures with his experience-seven years as staff groundskeeper and four years as maintenance on campus. Exhibit 2, Willie Redbeard Deposition 1:4,8-11. Willie designed the ramp, for its sole purpose, to be used for the ice storm. Ex. 2, Redbeard Dep. 2:21-23.

C. Willie lacked an engineering background to build a ramp for pedestrian use and the Dean knew the ramp would be used on school grounds.

Willie lacked an engineering background to build the ramp and the Assistant Dean knew Willie built the ramp for it to be used for the storm. Ex. 2, Redbeard Dep. 3:4-5, 3:12-16.

D. Willie placed a ramp without handrails for pedestrian use that was made from abrasive material, yet he added sand to the ramp.

The ramp Willie built did not have any handrails for proper safety and was tall enough to cover the entire staircase. Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. Willie said that the ramp had great surface material for traction. Ex. 2, Redbeard Dep. 4:1-2. Willie sanded the ramp the night before even though the ramp was already coated with a sandpaper abrasive material. Ex. 2, Redbeard Dep. 4:4-5, 9-10.

E. Willie, with the Dean's support, set out the ramp for its first time use without an inspection test and created a sign to encourage pedestrians to use the ramp.

Willie did not sand the stairs for the storm because he wanted to encourage people to test the hazardous ramp. Ex. 2, Redbeard Dep. 4:11-12. Willie tested the ramp for the first time, without proper safety trials, the night of the storm. Ex. 2, Redbeard Dep. 4:13-15. Willie, with the Assistant Dean's support, set out the ramp for students to use because the school knew students would study over the break. Ex. 2, Redbeard Dep. 4:23-25. Willie posted a sign next to

the ramp to encourage people to use it, instead of another walkway during the storm. Ex. 2, Redbeard Dep. 4:15, 5:2-5.

F. Dixie suffered injuries from the school's personal property, the ramp without rails.

Dixie trusted the ramp to be safe because the school allowed the encouragement sign to stay up. Ex. 1, Herbster Dep. 3:20-21. As Dixie was stepping off the ramp, she slipped, fell, and hit her head. Ex. 1, Herbster Dep. 4:10-11. As a result, Dixie was hospitalized for a concussion and neck herniation, which risks her future brain health. Ex. 1, Herbster Dep. 4:12-16, 24.

SUMMARY OF ARGUMENT

The law school claimed that it was immune under the Texas Tort Claims Act because Dixie's injuries were not caused by "the condition or use of tangible personal property," however her injuries did arise out of the "condition" and "use" of the ramp. Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). First, the ramp had no rails which is a condition of tangible personal property because a ramp without rails is property that's in a "defective condition." *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30, 32 (Tex.1983). Second, the law school did not exercise reasonable care because they negligently provided an uninspected ramp that involved "some condition or some use" of the ramp for pedestrians. *Id.* at 33. And third, the placement of the ramp on school grounds created a condition of real property, a "premises defect," that resulted in a slip and fall. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 391 (Tex. 2016). Further, the added sand on top of the ramp's abrasive surface created another condition that posed an unreasonable risk of harm for a pedestrian, and therefore proximately caused Dixie to slip and fall. *Id.* The Court should reverse the judgment of the court of appeals and remand this case to the trial court, because the ramp's use and condition posed an unreasonable risk of harm for Dixie that created an issue of material fact that precludes summary judgement.

ARGUMENT

I. This Court should reverse and remand because the ramp posed an unreasonable risk of harm for Dixie and caused her slip and fall injuries.

OMITTED FOR BREVITY

II. This Court should affirm the law school's waiver of sovereign immunity under the Texas Tort Claims Act (TTCA) because as a state entity, they are liable for personal property injury so caused by a condition of use of tangible personal property.

Under Section 101.021(2) of the TTCA, state entities will waive immunity for particular tort claims involving personal injury caused by the use or condition of real property "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). Governmental immunity will be waived when the injury is "immediate and directly" related to the condition or use of property. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998). Immunity is waived when a state entity employee "improperly uses" otherwise non-defective property to cause injury or provides "property in a defective or inadequate condition" causing injury. *University of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 513 (Tex. 2019). When a tangible personal property is in a "inadvertent state, i.e., a condition," —which makes the property less safe from missing an integral safety component—and causes injury, then a state entity will waive immunity. *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 223 (Tex.App.-Fort Worth 2003, pet. denied). To activate a waiver of immunity, there must be a "reasonable inference" that the use of tangible personal property proximately caused the party's injuries. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones*, 485 S.W.3d 145, 152 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

When an employee provides property in an inadequate or defective condition causing harm, then there is state actor liability. *McKenzie*, 578 S.W.3d at 513. In *UT M.D. Anderson v.*

McKenzie, the Court held that the state entity's negligent use of tangible personal property caused harm, as required for a state entity to waive sovereign immunity from suit. *Id.* at 518. The injured party alleged that the state entity was negligent in misusing a fluid, a tangible physical property, to administer chemotherapy. *Id.* at 510. This posed a significant risk of harm to the patient. *Id.* As a result of the misuse of that tangible physical property, the patient died. *Id.* The court reasoned that the injured party presented evidence that the state entity used property that should not have been used and caused the injury. *Id.* at 514. Thus, immunity is waived when an employee "improperly uses" otherwise non-defective property to cause injury or provides "property in a defective or inadequate condition" causing injury. *Id.* at 513.

In connection with *McKenzie*, where the Court found a nexus between the injury and the state entity's use of a tangible property, a certain carrier agent, here there is a link between Dixie's injury and the University's use of a hazardous ramp. *McKenzie*, 578 S.W.3d at 515; Ex. 1, Herbster Dep. 4:10-11. The Court found that without the use of the carrier agent, then the injury would not have occurred. *Id.* at 516. Similarly, in *McKenzie*, where the state entity used tangible property that should not have been used, here the University used the ramp, tangible property, that should not have been used under the circumstances because it had no rails, no inspection, and sand added to it. *Id.* at 514; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2, 4:13-15. The ramp's material was made from an abrasive material, so there was no reason to add sand to it. Ex. 2, Redbeard Dep. 4:4-5, 9-10. First, if Dixie had not used the ramp, then she would have used the stairs, yet the ramp was implemented and as a result she suffered an injury. Ex. 1, Herbster Dep. 4:10-16, 24. Second, the ramp is abrasive material, yet sand was added, and if sand would not have been added, then the abrasive material could have assisted her not to slip. Ex. 2, Redbeard Dep. 4:1-2, 4-5, 9-10. Third, there were no handrails to balance herself and

lastly no inspection test. Ex. 2, Redbeard Dep. 4:13-15. The actual use of the ramp—with no rails, no inspection test, and sand added—altogether linked to Dixie's injuries because the University created an unreasonable risk of harm for pedestrians to only use the hazardous ramp. Ex. 1, Herbster Dep. 4:12-16, 24; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2, 4:4-5, 4:9-10, 4:13-15. Therefore, the University, as a state entity, waived their sovereign immunity under *McKenzie*. *Id.* at 518.

Providing a condition-of-tangible-personal-property that cause injuries will constitute liability. *Univ. of N. Tex.*, 124 S.W.3d at 224. In *Univ. of N. Tex. v. Harvey*, the Court of Appeals held that a negligence action against a university arising from a case of food poisoning —based on lack of an ice scoop for ice barrels—properly invoked waiver of sovereign immunity. *Id.* at 220. Harvey, the injured party, contends that the state university provided defective tangible personal property, the ice barrels, when the barrels lacked an integral safety component, a scoop, which then caused the injured party's poisoning. *Id.* at 223. The Court found the lack of a scoop for the ice barrels was an "intentional or inadvertent state, i.e., a condition," which made the barrels less safe, because the bacteria on hands gets on ice, which will then cause food poisoning. *Id.* at 224. Thus, where evidence and facts activates a condition-of-tangible-personal-property and that condition of the barrels is the proximate cause of a party's injuries, then the state actor will be liable. *Id.* at 224.

With respect to *Univ. of N. Tex.*, where negligence arises from a defective tangible property that a university provided, here the University was negligent when they provided a defective ramp without handrails. *Univ. of N. Tex.*, 124 S.W.3d at 224; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. In *Univ. of N. Tex.*, the university provided defective personal property when they provided an ice barrel without a scoop, an integral safety component. *Id.* at 224. Similarly, in the

present case, the University provided defective property when they provided a ramp without handrails, an integral safety component for pedestrians to balance themselves walking the ramp. *Univ. of N. Tex.*, 124 S.W.3d at 224; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. Moreover, the University needlessly added sand to the ramp when the surface was already abrasive and as a result Dixie slipped and fell. Ex. 1, Herbster Dep. 4:10-16; Ex. 2, Redbeard Dep. 4:4-5, 9-10. The rails are a condition of the tangible ramp, because the rails provide support to pedestrians. Without them, the ramp is inadequate which makes the ramp less safe to walk on, especially during an ice storm. Therefore, the condition-of-tangible-personal-property like a ramp without handrails is the proximate cause of Dixie's injuries because the defective ramp lacked rails for her to walk safely during the ice storm. *Univ. of N. Tex.*, 124 S.W.3d at 224; Ex. 1, Herbster Dep. 4:10-16; Ex. 2, Redbeard Dep. 3:23-25, 4:1-2. The Court should find the University waived immunity for using a defective ramp that led to injuries in a slip and fall. *Id.* at 224.

In *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones*, the Court of Appeals held that a state university provided a drug to the participant, that was sufficient use of a tangible property to which the drug caused injuries, to find waiver of immunity. *Jones*, 485 S.W.3d at 152. The injured party participated in a study where the state entity negligently provided the injured party a drug, which should not have been administered due to the injured party's depression. *Id.* at 152. The Court found that there was a nexus between the state entity's use of tangible property and the injuries suffered. *Id.* Thus, there must be a reasonable inference that the use of tangible personal property proximately caused the party's injuries to activate a waiver of immunity. *Id.*

In correlation with *Jones*, the court held that there must be a nexus between the state entity's use of tangible property and the injuries suffered, similarly here a student suffered injuries when they fell off a ramp the University provided which had no rails and sand added to

its abrasive surface. *Jones*, 485 S.W.3d at 152; Ex. 1, Herbster Dep. 4:10-11; Ex. 2, Redbeard Dep. 3:23-25, 4:1-5, 9-10. There is no other reasonable inference other than the use of tangible property of the University's ramp that could have caused her injuries because she was still on the ramp as she slipped and fell. Ex. 1, Herbster Dep. 4:10-11; Ex. 2, Redbeard Dep. 2:21-23. Furthermore, the employee, Redbeard, added sand to the ramp which builds to the nexus between use of the ramp and Dixie's slip and fall injuries. *Id.* at 152; Ex. 1, Herbster Dep. 4:10-11; Ex. 2, Redbeard Dep. 4:4-5, 9-10. Hence, the use of tangible property—such as a ramp without handrails and sand on it —proximately caused Dixie's injuries to trigger a waiver of the University's immunity. *Id.* at 152; Ex. 1, Herbster Dep. 4:12-16, 24; Ex. 2, Redbeard Dep. 4:1-5, 9-10.

An injury must be directly correlated to the property missing an integral safety component. *Bossley*, 968 S.W.2d at 343. In *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, the Supreme Court of Texas held that the injured party's death, with the Hillside center's unlocked interior doors, was not caused by the condition or use of property. *Id.* at 343. The entity's employees failed to restrain the patient and he escaped from the Hillside center. *Id.* As a result, he ran in front of a truck. *Id.* at 343. The Court found that the death was distant from the doors temporally, geographically, and causally. *Id.* Nonetheless, the injury must be "immediate" and "directly related" to property lacking an integral safety component. *Id.* Thus, a state entity's immunity is waived only when injuries are "immediate" and "directly related" to property lacking an integral safety component. *Id.*

The Respondent's reliance on *Bossley* is misplaced. The Respondent relies on *Bossley* to argue that the injuries are distant and not caused by the ramp. *Bossley*, 968 S.W.2d at 343. Unlike *Bossley*, where the injuries and death were distant temporally, geographically, and

casually, here Dixie's injuries from her slip and fall were "immediate" and "directly related" to the ramp without handrails. *Bossley*, 968 S.W.2d at 343; Ex. 1, Herbster Dep. 4:10-11. In *Bossley*, the employees left the doors unlocked and the injured party was far from the doors, however, here Dixie was proximate to the ramp after her fall. *Id.* at 343. She testified that she was still on the ramp as she slipped, fell, and hit her head. Ex. 1, Herbster Dep. 4:10-11. Thus, Dixie's injuries were proximate to the ramp that had been sanded even though the ramp is an abrasive surface. Ex. 2, Redbeard Dep. 4:1-5. Therefore, Dixie's injuries must be "immediate and directly related" to the ramp lacking handrails—an integral safety component—for pedestrians to keep balance walking the ramp. *Bossley*, 968 S.W.2d at 343. The Court should distinguish *Bossley* from the present case because Dixie's injury was "immediate" and directly connected to a missing integral safety component. *Id.* at 343. The Court should therefore find the University waived their sovereign immunity through the ramp that created an issue of material fact that precludes summary judgement. *Id.*

PSTM5838FA22

PRAYER FOR RELIEF

Petitioner respectfully prays that this Court reverse the judgment of the court of appeals and remand this case to the trial court for additional proceedings.

_____

Respectfully submitted,
Awesome Associate

Dixie Herbster Counsel:
Awesome Associate
Goldburg, Hayman & Leisnar
316 Main Street, Suite 200
Dallas, Texas 75220

PSTM5838FA22

CERTIFICATE OF SERVICE

I certify that a copy of this Petition for Review was served on Respondent the University of South-Central Texas, through counsel of record, Lesser Associate, 987 Jones Road, Suite 1000 Dallas, Texas 75220, by US. Mail on [date mailed].

_____
Awesome Associate

PSTM5838FA22

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this Petition for Review contains 7,473 words. This is a computer-generated document created in Microsoft Word, using 12-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

_____
Awesome Associate

Applicant Details

First Name	**William**
Last Name	**Ulrich**
Citizenship Status	**U. S. Citizen**
Email Address	**wulrich@nd.edu**
Address	**Address** Street **2708 River Ridge Dr.** City **Waukesha** State/Territory **Wisconsin** Zip **53189** Country **United States**
Contact Phone Number	**4145873681**

Applicant Education

BA/BS From	**St. Norbert College**
Date of BA/BS	**May 2021**
JD/LLB From	**Notre Dame Law School** **http://law.nd.edu**
Date of JD/LLB	**May 18, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Notre Dame Journal on Emerging Technologies**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Gallagher, Kari
kgallag1@nd.edu
Kozel, Randy
rkozel@nd.edu
574-631-6749
Duffy, John
jfduffy@law.virginia.edu
(434) 243-8544

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William J. Ulrich
2708 River Ridge Drive
Waukesha, WI 53189
(414) 587-3681
wulrich@nd.edu

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a third-year student at Notre Dame Law School. I am writing to apply for a position as a law clerk in your chambers for the 2024–25 term.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. Also enclosed are letters of recommendation from the following people:

Prof. John Duffy	Prof. Kari Gallagher	Prof. Randy Kozel
UVA School of Law	Notre Dame Law School	Notre Dame Law School

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

William Ulrich

WILLIAM J. ULRICH

2708 River Ridge Dr. | Waukesha, WI | (414) 587-3681 | wulrich@nd.edu

EDUCATION

University of Notre Dame Law School — Notre Dame, IN
Juris Doctor Candidate — August 2021 – May 2024
GPA: 3.630

Honors: Honor Roll (Fall 2022)
Activities: *Notre Dame Journal on Emerging Technologies*, Executive Editor, Vol. 5; Intellectual Property Law Society
Note: *The Price of Competition: Analyzing Anticompetitive Tactics in Pharmaceutical Markets in the Hatch-Waxman Era*, 4 NOTRE DAME J. EMERGING TECHS. (forthcoming 2023)

St. Norbert College — De Pere, WI
Bachelor of Science in Biochemistry, summa cum laude, with Minor in Mathematics — August 2017 – May 2021
GPA: 3.98

Coursework: Chemistry, Organic Chemistry, Biochemistry, Physical Chemistry, Genetics, Physics, Microbiology

EXPERIENCE

Foley & Lardner, LLP — Milwaukee, WI
Summer Associate — May 2023 – July 2023

- Intellectual Property Litigation group

Elkhart County Prosecuting Attorney's Office — Elkhart, IN
Legal Intern — May 2022 – July 2022

- Researched and summarized case law in memorandums on topics including the Confrontation Clause and third-party consent to searches to assist Deputy Prosecutors in preparation for trials
- Attended five criminal trials to observe courtroom behavior when addressing the jury, questioning witnesses on direct and cross examination, and arguing evidentiary matters before the judge

Michael Best & Friedrich, LLP — Milwaukee, WI
Firm and Practice Management Intern — May 2021 – August 2021

- Compiled, analyzed, and presented data regarding law firms in foreign jurisdictions involved in conducting foreign patent prosecution to identify high-performing firms and areas for business consolidation and expansion
- Designed and tested Matter Management software used to automate budget and profitability tracking for large matters

St. Norbert College, Department of Chemistry — De Pere, WI
Teaching Assistant to Professor Matthew Sprague — August 2019 – May 2021

- Prepared, administered, and explained weekly labs to twenty-four general chemistry students
- Hosted office hours to help students understand and master general chemistry subject matter

St. Norbert College, Department of Mathematics — De Pere, WI
Poss Wroble Fellowship — May 2020 – August 2020

- Conducted research to expand and further develop the mathematics concept of Lanchester's Combat Model, using principles of multi-variable calculus, ultimately forming an improved model using differential equations to describe decreasing army sizes during battle
- Presented the research results to department faculty and students as part of a colloquium series in such a manner as to allow an audience with varying levels of mathematic proficiency to appreciate the results

ADMISSIONS

United States Patent and Trademark Office (USPTO)

INTERESTS

Golf (played competitively through high school and continue to play recreationally); Cheering on the Green Bay Packers

UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Ulrich, William J.
Student ID: XXXXX1870

Birth Date: 08-18-XXXX

Date Issued: 01-JUN-2023
Page: 1

Issued To: William Ulrich
Parchment DocumentID: TWB5KLCJ
wulrich@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA	OVERALL TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:													
Fall Semester 2021													
Law School													
LAW	60105	Contracts	4.000	B+	13.332								
LAW	60302	Criminal Law	4.000	B+	13.332								
LAW	60703	Legal Research	1.000	A-	3.667								
LAW	60705	Legal Writing I	2.000	A-	7.334								
LAW	60901	Torts	4.000	B	12.000								
			Total		49.665	15.000	15.000	15.000	3.311	15.000	15.000	15.000	3.311
Spring Semester 2022													
Law School													
LAW	60307	Constitutional Law	4.000	A-	14.668								
LAW	60308	Civil Procedure	4.000	B+	13.332								
LAW	60707	Legal Resrch & Writing II-MC	1.000	A-	3.667								
LAW	60906	Property	4.000	A-	14.668								
LAW	70318	Legislation & Regulation	3.000	A-	11.001								
			Total		57.336	16.000	16.000	16.000	3.584	31.000	31.000	31.000	3.452
Fall Semester 2022													
Law School													
LAW	70101	Business Associations	4.000	A-	14.668								
LAW	70102	Accounting for Lawyers	2.000	A	8.000								
LAW	70137	Trademark & Unfair Comp	3.000	A-	11.001								
LAW	70507	Trusts and Estates	3.000	A-	11.001								

CONTINUED ON PAGE 2

This PDF document may be validated. A printed copy cannot be validated. See attached cover page for additional information.

UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Ulrich, William J.
Student ID: XXXXX1870

Birth Date: 08-18-XXXX

Date Issued: 01-JUN-2023
Page: 2

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA	OVERALL TOTALS ATTEMP HRS	EARNED HRS	GPA HRS	GPA
University of Notre Dame Information continued:													
LAW	70807	Professional Responsibility	3.000	A	12.000								
LAW	75750	Journal Emerging Technologies	1.000	S	0.000								
			Total		56.670	16.000	16.000	15.000	3.778	47.000	47.000	46.000	3.558
Honor Roll													
Spring Semester 2023													
Law School													
LAW	70117	Antitrust Law	3.000	A	12.000								
LAW	70439	Intl and Comparative IP Law	3.000	A	12.000								
LAW	70909	Patent Law	3.000	A	12.000								
LAW	75709	Trial Advocacy Comprehensive	4.000	S	0.000								
LAW	75750	Journal Emerging Technologies	1.000	S	0.000								
			Total		36.000	14.000	14.000	9.000	4.000	61.000	61.000	55.000	3.630
Fall Semester 2023													
IN PROGRESS WORK													
LAW	70201 M	Evidence	3.000	IN PROGRESS									
LAW	70203 M	Remedies	3.000	IN PROGRESS									
LAW	70311 M	Federal Courts	3.000	IN PROGRESS									
LAW	73909 M	Patent Litigation	3.000	IN PROGRESS									
LAW	75715 M	Deposition Skills	3.000	IN PROGRESS									
LAW	75750 M	Journal Emerging Technologies	1.000	IN PROGRESS									

In Progress Credits 16.000

********** TRANSCRIPT TOTALS **********

NOTRE DAME	Ehrs:	61.000	QPts:	199.671
	GPA-Hrs:	55.000	GPA:	3.630
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	61.000	QPts:	199.671
	GPA-Hrs:	55.000	GPA:	3.630

********** END OF TRANSCRIPT **********

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CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.
The most frequently used codes are:

AF	Angers, France
DC	Washington, DC
FA	Fremantle, Australia
IA	Innsbruck, Austria
IR	Dublin, Ireland
LA	London, England (Fall/Spring)
LE	London, England (Law-JD)
LG	London, England (Summer EG)
LS	London, England (Summer AL)
PA	Perth, Australia
PM	Puebla, Mexico
RE	Rome, Italy
RI	Rome, Italy (Architecture)
SC	Santiago, Chile
SP	Toledo, Spain

For a complete list of codes, please see the following website:
http://registrar.nd.edu/pdf/campuscodes.pdf

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:
http://registrar.nd.edu/students/gradefinal.php

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.
I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S	Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V	Auditor (Graduate students only).
W	Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P	Pass in a course taken on a pass-fail basis.
NR	Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC	No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

TRANSCRIPT NOT OFFICIAL IF WHITE SIGNATURE AND BLUE SEAL ARE DISTORTED

CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:
http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).
The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX = Pre-College course
ENGL 1 X - XXX = Freshman Level course
ENGL 2 X - XXX = Sophomore Level course
ENGL 3 X - XXX = Junior Level course
ENGL 4 X - XXX = Senior Level course
ENGL 5 X - XXX = 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX = 1st Year Graduate Level Course
ENGL 7 X - XXX = 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX = 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX = Upper Level Graduate Level Course

TO TEST FOR AUTHENTICITY: This transcript was delivered through Parchment, Inc. The original transcript is in electronic PDF form. The authenticity of the PDF document may be validated. Please see the attached cover letter for more information. A printed copy cannot be validated.

The document cannot be released to a third party without the written consent of the student. This is in accordance with the Family Educational Rights and Privacy Act of 1974. ALTERATION OF THIS DOCUMENT MAY BE A CRIMINAL OFFENSE!

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St. Norbert College
De Pere, WI 54115

Date Issued:01-MAY-2023OFFICIAL

Record of : William Joseph Ulrich

** Warning - No Address **

Course Level : Undergraduate

Current Program
Degree : Bachelor of Science
Major:
Chemistry Biochemistry
Maj/Concentration:
Biochemistry
Minor:
Mathematics

Degree Information:
Degree Awarded Bachelor of Science 16-MAY-2021

Primary Degree
Major:
Chemistry Biochemistry
Maj/Concentration:
Biochemistry
Minor:
Mathematics
Inst. Honors:
Graduate of the Honors Program
Summa Cum Laude

Subj	No.	Title	Cred	Grade	Pts	R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

AP Exam Advanced Placement (AP)

CHEM	100	Applications of Chemistry +L	4.00	AW
MATH	131	Calculus + Analytic Geometry 1	4.00	AW
SSCI	224	Basic Statistics	4.00	AW

Earned Hrs	GPA-Hrs	QPts	GPA
12.00	0.00	0.00	0.00

IB Exam International Baccalaureate

BIOL	193	Biology Elective	4.00	AW
ECON	100	Fundamentals of Economics	4.00	AW
ENGL	149	Intro to Literary Studies	4.00	AW
SPAN	101	Elementary Spanish 1	4.00	AW
SPAN	102	Elementary Spanish 2	4.00	AW

Earned Hrs	GPA-Hrs	QPts	GPA
20.00	0.00	0.00	0.00

Subj	No.	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:

Fall Semester 2017

BIOL	120	General Biology 1 +L	4.00	A	16.00
CHEM	105	General Chemistry 1 +L	4.00	A	16.00
HONR	101	Introduction to Honors	4.00	A	16.00
MATH	132	Calculus + Analytic Geometry 2	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Spring Semester 2018

BIOL	121	General Biology 2 +L	4.00	AB	14.00
CHEM	107	General Chemistry 2 +L	4.00	A	16.00
MATH	203	Linear Algebra	4.00	A	16.00
PHIL	120	Honors:Phil Fndtns Humn Nature	4.00	A	16.00

Subj	No.	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	62.00	3.88

Dean's List
GPA Progression OK

Fall Semester 2018

BIOL	244	Genetics +L	4.00	A	16.00
CHEM	220	Organic Chemistry +L	4.00	A	16.00
HONR	3331	Tutorial	2.00	A	8.00
MATH	250	Advanced Foundations Math	4.00	A	16.00
THRS	117	Honors:Theological Foundations	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
18.00	18.00	72.00	4.00

Dean's List
GPA Progression OK

Winter Semester 2019

HONR	3332	Tutorial	2.00	A	8.00

Earned Hrs	GPA-Hrs	QPts	GPA
2.00	2.00	8.00	4.00

GPA Progression OK

Spring Semester 2019

CHEM	211	Analytical Chemistry	4.00	A	16.00
CHEM	232	Organic Chem Research Emph +L	4.00	A	16.00
MATH	303	Advanced Linear Algebra	4.00	A	16.00
THRS	333	Christian Ethics	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Fall Semester 2019

CHEM	350	Biochemistry 1 +L	4.00	A	16.00
MATH	233	Calculus + Analytic Geometry 3	4.00	A	16.00
PHYS	121	General Physics 1 +L	4.00	A	16.00
PSYC	100	General Psychology	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Spring Semester 2020

AMER	324	Honors: Poverty, Charity + Welfare	4.00	A	16.00
CHEM	310	Organic Chemistry Advanced	4.00	A	16.00
CHEM	351	Biochemistry 2 +L	4.00	A	16.00
PHYS	122	General Physics 2 +L	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Fall Semester 2020

BIOL	350	Microbiology +L	4.00	A	16.00
CHEM	330	Physical Chemistry 1 +L	4.00	A	16.00
HONR	289	The Foster Care System	2.00	S	0.00

Lauren Gaecke, Registrar

COPY COPY COPY COPY

St. Norbert College
De Pere, WI 54115

Date Issued:01-MAY-2023OFFICIAL

Subj	No.	Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
MATH	306	Abstract Algebra	4.00	A	16.00	
PHIL	265	Asian Philosophy + Religion	4.00	A	16.00	

Earned Hrs	GPA-Hrs	QPts	GPA
18.00	16.00	64.00	4.00

Dean's List
GPA Progression OK

Spring Semester 2021

BUAD	390	Business Law	4.00	A	16.00
CHEM	332	Physical Chemistry 2 +L	4.00	A	16.00
POLI	342	Con Law: Civ Rghts + Liberties	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
12.00	12.00	48.00	4.00

Dean's List
GPA Progression OK

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	130.00	128.00	510.00	3.98
TOTAL TRANSFER	32.00	0.00	0.00	0.00
OVERALL	162.00	128.00	510.00	3.98

----------END OF TRANSCRIPT----------

Lauren Gaecke, Registrar

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to submit this recommendation on behalf of William ("Will") Ulrich. Will was a student in my first-year legal writing course during the 2021-22 school year. Legal writing is unlike many first-year courses in that it is taught in small sections of approximately twenty-four students. Because it is a practical course, it provides opportunities for the instructor to observe how students work with small groups of classmates and with partners. Thus, I had the opportunity to work with Will personally and to observe his interactions with his classmates. I also got to know Will during office hours and through casual, hallway conversations. Will is a clear thinker and writer, with a calm, business-like demeanor. He will make an outstanding law clerk.

The first semester of legal writing consists of several informal written assignments, a midterm objective memo, and a final persuasive brief. From his first assignment, Will demonstrated an ability to identify the critical elements of a legal analysis and apply those elements adeptly to the relevant facts. Will's objective memo continued this trend; it contained a clear recitation of the facts, succinctly set forth the most apt cases, and came to a conclusion in which the reader had confidence. This strong legal analysis was coupled with meticulous editing. Will's persuasive brief also was professionally done. Again, he demonstrated an ability to distill complex legal concepts into straightforward, readable prose. Will's efforts during the first semester earned him an A-, and placed him in the top twenty percent of a very talented group of writers.

The second semester of legal writing is dedicated to writing an appellate brief and presenting an oral argument with a partner. Will's portion of the brief addressed the reliability of an out-of-court identification. Both his facts and argument were clear, logical, and compelling. Will's oral argument also was a professional-quality performance. His argument was well organized, his manner was respectful, and his answers reflected a command of the law and the facts. Will received an A-, and again was in the top twenty percent of a highly competitive class.

Beyond his achievements during first year, Will has continued to develop as a writer and a scholar. Will has written a note for the Journal of Emerging Technologies, and serves as the Journal's Executive Editor. He also passed the patent bar. This is especially impressive given that, during his second year, he earned a 3.778 (first semester) and a 4.0 (second semester) while taking a course load laden with difficult doctrinal classes.

As a career law clerk to a federal appeals court judge, I see many qualities in Will that I value in a co-clerk. Will consistently produces excellent work. Will also has a calm, even-keeled manner; he is not easily flustered or frustrated. He works steadily and plans his work well, so there is no rush when a project is due. Additionally, Will pays attention to detail; any work that he produces will be nit-free. And, finally, Will is genuinely kind and easy to be around.

I recommend Will enthusiastically and without reservation. He will be a welcome addition to any judicial chambers. Please do not hesitate to contact me (574 315 3731 (mobile) or kgallag1@nd.edu) if I can provide additional information that may assist you in making your decision.

All the best,

Kari A. Gallagher
Adjunct Professor of Law

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Will Ulrich, a member of the Notre Dame Law School Class of 2024, who has applied for a clerkship.

I met Will during the fall of his 2L year, when he enrolled in my course on Trademarks and Unfair Competition. Will was an excellent student in my course, both in terms of his exam performance and on a day-to-day basis as a participant in classroom discussions. He is extremely bright, engaged, and amiable, making him both intellectually impressive and a pleasure to speak with.

Will and I have also had many conversations outside the classroom (spurred in part by the fact that we both hail from Wisconsin). We've spoken about law school, professional plans, clerkships, and beyond. In conversations about law and about other topics, Will is invariably bright and thoughtful.

Indeed, his intellectual gifts are undeniable. Will combined his undergraduate degree in Biochemistry with a minor in Mathematics. And he has continued to excel academically at Notre Dame Law School. His cumulative grade point average is impressive on its own, but more remarkable is how Will has managed to raise his GPA every semester during his law school career, most recently earning a perfect 4.0 during the Spring 2023 semester.

In sum, based on my personal experience with Will as well as my admiration of his scholarly achievements, I believe he would excel as a law clerk.

Thank you for receiving this letter, and please let me know if there are any questions I might answer about Will's candidacy.

Sincerely,

Randy J. Kozel

Randy Kozel - rkozel@nd.edu - 574-631-6749

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Will Ulrich as an excellent candidate for a judicial clerkship. Please consider this letter in connection with his application to your chambers.

In the spring semester of 2023, I taught Mr. Ulrich in my patent law class while I was visiting at Notre Dame Law School. The class was a three-credit course that was broadly similar to the four-credit course that I was teaching during the same semester at the University of Virginia School of Law (I was commuting weekly between the two schools). Based on my experience teaching Mr. Ulrich, I can without hesitation recommend him as a top candidate for a judicial clerkship. He would be an especially good candidate for a court with a significant number of patent cases on its docket.

During the semester of my patent law course, Mr. Ulrich was a very frequent participant in class and made very insightful comments. I always had the sense that he wasn't speaking just to hear the sound of his own voice. He was genuinely interested in that material, and he also kept a sense of humor throughout the class. His questions identified (the many!) points where the legal doctrine isn't so clear, and he could form questions that were difficult even for his professor to answer. He was pretty much the perfect student in class: He didn't try to dominate discussions, but he was inevitably involved with excellent comments.

His exam answer did not disappoint. He wrote one of the few "A" answers in the class, and in my subjective comments on the answer (notes I write to myself while I'm blind-grading the answer), I noted that his answer was especially "well written" even for an A answer (I'm quoting from my own notes done while scoring the exam blindly). In the portion of the exam requiring short-answers to more specific questions (a portion of the exam that is easier to grade objectively)—his answers were the best the class by a good margin. In sum, his overall performance made the case for an "A" quite easy.

I can also say with confidence that Mr. Ulrich would also be a top student at other schools too. As I mentioned above, I was simultaneously teaching the same patent law course at UVa, and the exam I used for both classes was identical in parts. (Because the UVa course was a four-credit course that covered additional topics, the UVa exam had an additional question and afforded student more time and more words to answer the exam.) Despite the differences between the UVa and Notre Dame exams, the two were similar enough that I could be certain Mr. Ulrich would have been one of the top students in the UVa class as well. In short, he is an excellent law student by any measure.

Mr. Ulrich has also compiled a distinguished record at Notre Dame generally, but he's really begun to shine in his second year. In his first year of school, he was a B+/A- student, which is well above average given Notre Dame's strict B+ curve. In his second year, however, he's done even better. His grades in the spring semester were all As, not even a single A-, and his grades over the whole year were exclusively A- or A, with a majority of As. I've seen such a pattern in many students who, like Mr. Ulrich, majored in the hard sciences during their undergraduate career. Such students often have a bit of an adjustment to make between the sciences and the law, but once they've made that adjustment, they are terrific. That's what I think you'd get if you hire Mr. Ulrich as a law clerk: He's now much more of an A student than he was in his first year of law school. He'd be even better by the time he would start work in your chambers.

I can also assure you that Mr. Ulrich is a very personable and friendly individual, with a good sense of humor. He relates easily both to his professors and to his classmates and lacks any sense of arrogance or entitlement. In sum, I am confident that he has the personal qualities that will make him a great clerk and lawyer.

If you have any questions regarding Mr. Ulrich or this recommendation, please feel free to contact me at (434) 243-8544 (office) or (202) 669-7987 (cell). Thank you for taking the time to consider his application to your chambers.

Sincerely,

John F. Duffy
Samuel H. McCoy II Professor of Law
Paul G. Mahoney Research Professor of Law
University of Virginia School of Law

Visiting Professor of Law, Spring Semester 2023
Notre Dame Law School

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WRITING SAMPLE

Attached is a draft of my Note which was prepared during 2022–23 academic year. The Note is currently in the publication process and will appear in the second issue of Volume 4 of the *Notre Dame Journal on Emerging Technologies*, expected later this year. The Note is solely my work.

THE PRICE OF COMPETITION: ANALYZING ANTICOMPETITIVE TACTICS IN PHARMACEUTICAL MARKETS DURING THE HATCH-WAXMAN ERA

WILLIAM ULRICH*

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE HATCH-WAXMAN SYSTEM 3

A. Before the Hatch-Waxman Act *3*

B. Background and Goals of the Hatch-Waxman Act *5*

III. TACTICS FOR DELAY 8

A. Pay-for-Delay *9*

B. Citizen's Petitions *13*

C. Product Hopping *16*

D. Authorized Generics *20*

IV. MOVING FORWARD 22

A. Disclosure as the First Step *24*

B. Limitations *27*

V. CONCLUSION 27

I. INTRODUCTION

For nearly forty years, the Hatch-Waxman system for expediting approval of generic drugs has brought increased levels of competition to the pharmaceutical markets, lowering drug prices for all consumers. On its face, the Hatch-Waxman Act has enjoyed extraordinary success.

* J.D. Candidate, University of Notre Dame Law School Class of 2024.

Today, nearly 90% of prescriptions are filled with generic pharmaceuticals, with around 80% of all brand-name pharmaceuticals having a generic competitor.[1] Yet, despite this success, anecdotal evidence in recent years suggests that new forms of strategic behaviors designed to block generic entry are on the rise.[2]

From highly publicized congressional hearings to high profile press articles and outrage from various presidential candidates on the topic, the rising price of pharmaceuticals has led to public outcry. For example, Turing CEO Martin Shkreli and his company riveted the nation after increasing the price of a drug from $13.50 a tablet to $750 a tablet, an action that eventually led to congressional hearings on the topic.[3] Additionally, pharmaceutical manufacturers' tactics relating to specialty pharmacies and price increases have drawn notice from federal prosecutors, further underscoring the rise of new forms of strategic, anticompetitive behaviors.[4]

It is not difficult to understand the motivation behind such behavior. If a brand-name pharmaceutical manufacturer can delay generic entry for a blockbuster drug—even by just a mere month or two—it stands to earn hundreds of millions of dollars in additional revenue.[5] With a significant amount of dollars at stake, brand-name manufacturers have a powerful incentive to keep searching for new methods of delaying generic entry into the market. From society's standpoint, this is directly contrary to what one would prefer: instead of brand-name manufacturers using their resources in search of new pathways for treating disease, they instead

[1] *See* Robin Feldman, *Captive Generics: The Wolf in Sheep's Clothing*, 59 HARV. J. LEG. 383, 384 (2022) [hereinafter Feldman, *Captive Generics*].
[2] *See, e.g.*, Robin Feldman & Evan Frondorf, *Drug Wars: A New Generation of Generic Pharmaceutical Delay*, 53 HARV. J. LEGIS. 499, 524–54 (2016) [hereinafter Feldman, *Drug Wars*] (pointing out various anticompetitive tactics, including use of the administrative process, regulatory schemes, and drug modification to block or delay generic entry into market).
[3] *See* Robin Feldman, Evan Frondorf, Andrew K. Cordova & Connie Wang, *Empirical Evidence of Drug Pricing Games—A Citizen's Pathway Gone Astray*, 20 STAN. TECH. L. REV. 39, 42 (2017) [hereinafter Feldman, *Citizen's Pathway Gone Astray*]; *see also* Feldman, *Drug Wars*, *supra* note 2, at 536–38.
[4] *See* Feldman, *Drug Wars*, *supra* note 2, at 538–39.
[5] *Id.* at 503 n.23 (highlighting examples of the revenue generated by blockbuster drugs).

search for new pathways of blocking competition.[6] Thus, in order to keep the generic system on track, it is critical to expose the various avenues of generic delay.

Part I of this Note briefly describes the generic entry process as prescribed by the Hatch-Waxman Act. Part II details four well-known tactics used by brand-name manufacturers to block or delay the entry of generic competition, highlighting how the tactics are successful. Part III concludes by examining the nature of the various problems and arguing that the first step towards ending the different forms of anticompetitive behavior is through increased disclosure requirements.

II. THE HATCH-WAXMAN SYSTEM

Since 1984, the United States prescription drug market has been governed by the Drug Price Competition and Patent Term Restoration Act, more commonly known as the Hatch-Waxman Act.[7]

A. Before the Hatch-Waxman Act

Prior to 1984, a pharmaceutical manufacturer that sought to sell a new prescription drug looked to the 1962 Kefauver-Harris Amendments to the Food, Drug, and Cosmetic Act (FDCA) for guidance, the most significant piece of federal legislation affecting the pharmaceutical market at the time.[8] Giving power to the Food and Drug Administration (FDA) to require pharmaceutical manufactures to prove that their drugs were safe and efficacious,[9] the Kefauver-Harris Amendments thrust the FDA into the gatekeeper role responsible for verifying the effectiveness of new prescription drugs.[10] From the requirements of multiple premarket clinical

[6] *See* Feldman, *Citizen's Pathways Gone Astray*, *supra* note 3, at 43.
[7] Pub. L. No. 98-417, 98 Stat. 1585 (1984).
[8] Aaron S. Kesselheim & Jonathan J. Darrow, *Hatch-Waxman Act Turns 30: Do We Need a Re-Designed Approach for the Modern Era?*, 15 Yale J. Health, Pol'y, L. & Ethics 293, 297 (2015).
[9] *See* S. Rep. No. 87-1744 (1962).
[10] Kesselheim, *supra* note 8, at 298.

trials of the drug[11] to the submission of a New Drug Application (NDA) following a successful clinical trial process,[12] the FDA's approval procedure created an expensive endeavor for any pharmaceutical manufacturer looking to sell a new prescription drug.[13]

While the FDA's process ensured the safety of new drugs, from a competition perspective, the process had a significant flaw: generic manufacturers could not easily enter the market once a drug's patent expired. Because the full clinical trial process was also applicable to any new generic prescription, it resulted in significant investment for a generic manufacturer to bring its own drug to market.[14] Further, courts failed to recognize the experimental use defense to patent infringement liability with respect to pharmaceuticals.[15] By requiring generic manufacturers to either wait until the patents on the brand-name drug expired before starting the clinical trial process or risk liability by conducting clinical trials during the term of the patent,[16] the courts had effectively extended the exclusivity periods for brand-name manufacturers, dampening the market for generics even further.[17] By the late 1970s, about 150 brand-name drugs lacked generic counterparts despite being off-patent, with generics accounting for only nineteen percent of all prescriptions.[18]

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[11] Part 130—New Drugs: Procedural and Interpretive Regulations; Investigational Use, 28 Fed. Reg. 179 (Jan. 8, 1963) (codified at 21 C.F.R. pt. 130.3).
[12] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 335(b) (2021).
[13] *See* Kesselheim, *supra* note 8, at 298.
[14] *Id.*
[15] *Id.* at 299.
[16] *See* Roche Prods., Inc. v. Bolar Pharm. Co., 733 F.2d 858, 863 (Fed. Cir. 1984) (holding that pre-expiration testing of patent-protected brand-name drugs was not covered under any experimental use defense to liability for infringement because of the definite, cognizable, and not insubstantial commercial purposes of Bolar's actions); *see also* Pfizer, Inc. v. Int'l Rectifier Corp., 545 F. Supp. 486 (C.D. Cal. 1980) (rejecting the use of patented doxycycline tablets without authorization of the patent holder for purposes of gaining FDA approval).
[17] *See* Kesselheim, *supra* note 8, at 300.
[18] *Id.*; *see also* Gerald J. Mossinghoff, *Overview of the Hatch-Waxman Act and Its Impact on the Drug Development Process*, 54 FOOD & DRUG L.J. 187, 187 (1999).

B. Background and Goals of the Hatch-Waxman Act

It is against this backdrop that the Hatch-Waxman Act came into force. Looking to bolster both the brand-name and generic drug industries, the Hatch-Waxman Act intended to make low-cost generics more widely available while—arguably more important—maintaining proper incentives for innovation.[19] To achieve this end, the Act contained four major subcategories of provisions:

> (1) creation of a separate abbreviated FDA approval pathway for generic drugs proven to be pharmaceutically equivalent and bioequivalent to their brand-name counterparts; (2) a system to adjudicate generic manufacturers' challenges to brand-name drug manufacturers' market exclusivity; (3) assurance of competition-free periods for innovative drug approvals; and (4) extensions of brand-name market exclusivity.[20]

Title I of the Hatch-Waxman Act eliminated the long and expensive clinical trial requirement for generic manufacturers looking to launch new generics on the market, instead creating the Abbreviated New Drug Application (ANDA) pathway: the formalized and expedited system granted FDA approval upon proof that the generic drug was both pharmaceutically equivalent and bioequivalent to the brand-name counterpart.[21] By allowing generic manufacturers to focus on making their drugs as inexpensively and high-quality as possible, the clear intention of the Act was to lower drug prices for consumers.[22] Additionally, the Act eliminated brand-name manufacturers' ability to sue for patent infringement while generic manufacturers tested their drugs for bioequivalence before the expiration of the brand-name

[19] *See* Kesselheim, supra note 8, at 301; *see also* Alfred B. Engelberg, *Special Patent Provisions for Pharmaceuticals: Have They Outlived Their Usefulness?*, 39 IDEA 389, 389 (1999).
[20] *See* Kesselheim, *supra* note 8, at 301.
[21] Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98–417, § 101, 98 Stat. 1585, 1585–92 (1984) (codified as amended at 21 U.S.C. § 3550) (2012)).
[22] H.R. REP. NO. 98–857(11), at 29–32 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2686, 2713–16.

manufacturers' patent, allowing for ANDAs to be prepared and submitted to the FDA without additional delay.[23]

The second requirement of the Act—legal certification regarding the status of the patents protecting the brand-name drug—created a system where generic manufacturers could challenge brand-name manufacturers' patents.[24] Known as a "Paragraph IV" certification, a generic manufacturer seeking to market its drug must certify with the FDA that its version does not infringe the patents of the brand-name drug, or that the brand-name drug's patents are invalid.[25] Interestingly, an ANDA submission containing a Paragraph IV certification is deemed an act of patent infringement statute, giving the brand-name manufacturer forty-five days to initiate a lawsuit for alleged infringement.[26] If initiated, the brand-name manufacturer's lawsuit generates an automatic thirty-month stay of the ANDA proceeding, preventing the generic drug from obtaining FDA approval.[27] If patent litigation is not completed by the end of the thirty months, the generic manufacturer becomes eligible again to obtain FDA approval, albeit at risk depending on the outcome of the litigation.[28] Upon a successful determination that the brand-name manufacturer's patents are invalid or not infringed, the generic manufacturer is awarded a six-month period of market exclusivity, the key incentive that promotes generic manufacturers to challenge brand-name manufacturers' patents.[29]

While the Hatch-Waxman Act incentivized the challenging of brand-name manufacturers' patents by the granting of the six-month period of market exclusivity for a successful challenger, it still provided assurance that brand-name manufacturers would enjoy

[23] 35 U.S.C. § 271(e)(1) (2012).
[24] *See* Kesselheim, *supra* note 8, at 302–03.
[25] *Id.* at 303.
[26] 35 U.S.C. § 271(e)(2) (2012).
[27] 21 U.S.C. § 355(j)(5)(B)(iii) (2012).
[28] *Id.*
[29] § 355(j)(5)(B)(iv); *see* Kesselheim, *supra* note 8, at 304.

guaranteed minimum periods of exclusivity.[30] By mandating that the ANDA process for specific types of pharmaceuticals called new molecular entities (NMEs)[31] not start until five years after FDA approval of the NME, the Act guarantees manufacturers—even without a patent—at least the five years of market exclusivity to recoup research and development costs and obtain profits.[32] For non-NME pharmaceuticals, like applications for new uses or new formulations of previously approved drugs, the manufacturers receive three years of market exclusivity.[33] Coupled with the thirty-month stay on Paragraph IV certifications, most NMEs can expect at least seven-and-a-half years of market exclusivity while other non-NME pharmaceuticals can expect at least five-and-a-half years of market exclusivity.[34]

To further incentive new development by brand-name manufacturers, Title II of the Hatch-Waxman Act grants "patent term restoration" to approved pharmaceuticals, additional time that is added to the term of the patent to account for the time lost during the clinical testing phases and FDA review period.[35] By calculating the time between the various filings with the FDA and the time during which the FDA reviewed the NDA, the patent term is extended accordingly.[36] Overall, the brand-name manufacturer can extend the patent term for a maximum of fourteen years from the date of the drug's FDA approval, depending on the length of the approval process.[37]

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[30] *See* Kesselheim, *supra* note 8, at 305.
[31] A new molecular entity is a pharmaceutical that contains active parts that have not previously been approved by the FDA. *Id.*
[32] *Id.*; 21 U.S.C. § 355(j)(5)(F)(ii) (2012).
[33] § 355 (j)(5)(F)(iii).
[34] § 355 (j)(5)(F)(ii).
[35] *See* 35 U.S.C. § 154(a) (2012). Because the patent term today runs twenty years from the date of filing the patent application, a large portion of the patent term is lost when brand-name manufacturers seek to bring a new drug to market. *See* Kesselheim, *supra* note 8, at 306.
[36] 35 U.S.C. § 156(c)(2).
[37] § 156(c)(3) & (g)(6).

In sum, by providing a method for generic manufacturers to challenge brand-name manufacturers' patents and by providing for a six-month period of exclusivity in certain circumstances for the first generic company to file for FDA approval, the Hatch-Waxman Act greatly incentivized generic drug competition. Today, approximately 90% of all prescribed non-biologic[38] drugs are generics, with the average generic costing upwards of 90% less than its branded counterpart.[39] Considering these numbers, it is easily said that the Hatch-Waxman Act directly contributed to a revolution in United States pharmaceutical markets, transforming the environment from a brand-name dominated market in the early 1980s to the present day where the vast majority of prescriptions are filled by generic drugs.

III. TACTICS FOR DELAY

By greatly incentivizing generic drug competition in the pharmaceutical industry, the obvious goal of the Hatch-Waxman Act is to lower prescription drug prices. Because the entry of a generic greatly reduces the price of the brand-name counterpart, brand-name manufacturers stand to lose billions of dollars whenever a generic manufacturer seeks to challenge their patents through Paragraph IV certifications.[40] Not surprisingly, this has led brand-name manufacturers to try everything and anything to get the competitive, or what some might say, anticompetitive, edge: pay-for-delay, citizen petitions, product hopping, and "authorized" generics are all

[38] Non-biologic drugs are those composed of small molecules made from chemicals in a lab. Conversely, biologic drugs are those composed of large molecules produced in living organisms. *See* Feldman, *Captive Generics*, *supra* note 1, at 384.

[39] *Id.*; *Implementation of the Generic Drug User Fee Amendments of 2012 (GDUFA): Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 1 (chart 1) (2016) (statement of Janet Woodcock, Dir., Ctr. for Drug Evaluation & Rsch., U.S. Food & Drug Admin.).

[40] *See* Feldman, *Captive Generics*, *supra* note 1, at 384–85. It has been estimated that brand-name manufacturers lose out on over $1 trillion in revenue over the course of a decade. *See* Evan Hoffman, *Competitive Dynamics of the Generic Drug Manufacturing Industry*, 52 BUS. ECON. 68, 69 (2017).

strategies employed by brand-name manufacturers to keep generic competitors out of the market for as long as possible.[41]

A. Pay-for-Delay

The first, and rather simple, tactic employed by brand-name pharmaceutical manufacturers is to "pay" the generic manufacturer to abstain from releasing the generic drug onto market. Known as "pay-for-delay" agreements, by offering the competing generic manufacturer something of value in exchange for a promise to not enter the market, the brand-name manufacturer essentially pays off the competition to maintain its exclusive position in the market.[42] From the generic manufacturer's viewpoint, pay-for-delay agreements are mutually advantageous. By receiving an immediate financial benefit—while also avoiding costly patent infringement litigation—the generic manufacturer receives an instantaneous and sizable return while avoiding significant costs in the process.[43] Further, depending on the agreement, the generic manufacturer may still retain most of the benefits granted by the Hatch-Waxman scheme.[44]

Because both the generic and brand-name manufacturers stand to gain in pay-for-delay agreements, it is not hard to see why the agreements are successful. A simple example underscores this point: take an agreement in which the generic manufacturer is compensated in

[41] *See* Feldman, *Captive Generics*, *supra* note 1, at 385. The result on drug prices has been felt by consumers: based on analysis of Medicare patients, it was found that the average dosage-unit price of common brand-name drugs increased by 313% between 2010 and 2017, even accounting for rebates. *See* Robin Feldman, *The Devil in the Tiers*, 8 J.L. & BIOSCIENCES 1, 19 (2021).
[42] *See* Robin Feldman, *The Pricetag of "Pay-for-Delay"*, 23 COLUM. SCI. & TECH. L. REV. 1, 4 (2022) [hereinafter Feldman, *Pricetag*]. *See generally* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1153 (2006).
[43] *See* Feldman, *Pricetag*, *supra* note 42, at 10.
[44] *Id*.

exchange for the promise not to file a Paragraph IV certification with the FDA.[45] Assuming there is not a second generic manufacturer looking to file with the FDA during the term of delay, the generic manufacturer still maintains the 180-day first-to-file market exclusivity period when it does enter the market at the expiration of the pay-for-delay agreement.[46] Thus, not only does the generic manufacturer reap the rewards of the first-filer status under the Hatch-Waxman regime, but it also is able to cash in on a serious payday in the meantime.[47]

Normally, payments in exchange to refrain from entering a given market are considered clear antitrust violations.[48] However, when one party to the agreement holds a valid patent, the analysis is different: patent holders generally have a "lawful right to exclude others from the market" until the patent expires, thus exempting the patent holder from antitrust scrutiny.[49] Free from the fear of antitrust scrutiny, the law prior to 2013 enabled brand-name manufacturers—who almost always held patents over their drugs—with the freedom to negotiate agreements with generic manufacturers, ensuring they remained the sole supplier in the given market. However, in 2013, the legal landscape surrounding pay-for-delay agreements and patent holders changed when the Supreme Court weighed in on the issue.[50]

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[45] It is important to note that the deal set out in this example highly is simplified. In reality, pay-for-delay agreements are structured in much more complex ways. Straight money in exchange for a promise to not enter the market faces significant legal obstacles, which are later discussed in this section.
[46] *Id.*
[47] Additionally, because the generic manufacturer still maintains its 180-day first-filer market exclusivity period during the term of the pay-for-delay agreement, it can be argued that a bottleneck is created for any subsequent generic manufacturers, further disincentivizing additional generic entry into the market. *Id.*
[48] *Id.* at 12; *see also* 15 U.S.C. §1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").
[49] FTC v. Actavis, Inc., 570 U.S. 136, 146 (2013) (quoting FTC v. Watson Pharms., Inc. 667 F.3d 1298, 1307 (11th Cir. 2012), *rev'd and remanded sub nom.* FTC v. Actavis, Inc. 570 U.S. 136 (2013)). This view is not without critics: because both the brand-name and generic manufacturer hold direct control over the market for a particular drug, with the powerless consumer bearing the cost, some commentators have argued that pay-for-delay settlements are clear infringements of Section I of the Sherman Act and should be consider a form of illegal monopolization. *See* Hemphill, *supra* note 42, at 1596.
[50] *See* FTC v. Actavis, Inc. 570 U.S. 136 (2013).

In addressing whether pay-for-delay agreements are contestable under antitrust principles, even when one party is the holder of a valid patent, the Supreme Court opened the door in *FTC v. Actavis, Inc.*[51] After filing a New Drug Application in 1999, Solvay Pharmaceuticals, a brand-name manufacturer, received FDA approval in 2000 to sell AndroGel, its brand-name topical testosterone drug. A patent over the drug was later obtained in 2003, granting the company exclusive rights set to expire in 2021.[52]

It was not long until Solvay faced threat of competition: Actavis, Inc., Paddock Laboratories, and Par Pharmaceuticals—all generic manufacturers—each filed their own Abbreviated New Drug Applications with the FDA in 2003, the same year Solvay received patent protection over its branded drug.[53] In standard Hatch-Waxman fashion, Solvay initiated Paragraph IV litigation against the generic manufacturers, triggering the thirty-month stay in the generic approval process. Rather interestingly, after the thirty-month stay expired in 2006, but before the Paragraph IV patent litigation ended, Solvay settled with the generic manufacturers.[54] With each generic manufacturer agreeing to promote Solvay's brand-name drug in exchange for a yearly cash payment, the settlements were structured as mere marketing contracts.[55] However, each settlement contained a key condition: each manufacturer was not to release its generic drug into the market.[56]

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[51] *Id.*
[52] *Id.* at 145.
[53] *Id.* at 144.
[54] *Id.* Following the expiration of the thirty-month stay in the generic approval process in 2006, Actavis's generic had been approved by the FDA. Had Solvay's patent been found to either be invalid, unenforceable, or not infringed, Actavis would have been free to launch its generic into the market. Thus, given that the IV Paragraph patent litigation was still in progress and Solvay's status as sole manufacturer of AndroGel was in jeopardy, Solvay faced great pressure to settle. *See id.*
[55] *Id.* at 145. Specifically, Actavis agreed to not enter the market with its generic until August 31, 2015—just shy of five-and-a-half-years before Solvay's patent expired—and to promote Solvay's AndroGel to doctors in exchange for $19 million to $30 million per year for nine years. Paddock Laboratories agreed to not enter the market and to promote AndroGel for $12 million per years, and Par Pharmaceuticals agreed to not enter the market and to promote AndroGel for $60 million per year. *Id.*
[56] *Id.*

In response to the settlement, in January 2009, the FTC launched a lawsuit against Solvay, Actavis, Paddock, and Par, alleging that the companies violated Section 5 of the FTC Act prohibiting unfair or deceptive practices.[57] In affirming the district court's dismissal of the complaint, the Court of the Appeals for the Eleventh Circuit relied on Solvay's status as a patent holder to conclude it had the lawful right to exclude others from the market until the patent expired.[58] While the appellate court did apply the law at the time, the Supreme Court did not agree: in a 5–3 decision written by Justice Breyer, the Court of Appeals for the Eleventh Circuit was reversed. Ultimately finding that pay-for-delay settlements are open to antitrust scrutiny,[59] the majority held that the Rule of Reason test should be employed to determine whether such settlements between brand-name and generic pharmaceutical manufacturers violate antitrust law.[60] Stressing that it was not necessary for courts to determine whether a patent was valid to assess whether a settlement had anticompetitive effects, the Court clearly articulated that reverse payment settlements were not immune from antitrust scrutiny even when they fell within the scope of the exclusionary potential of the patent.[61] Thus, in holding the way it did, the Supreme Court opened the door to future antitrust allegations against pharmaceutical manufacturers engaging in pay-for-delay agreements.

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[57] *Id.; see also* Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a) (2006) (prohibiting "unfair or deceptive business practices in or affecting commerce").
[58] *Id.* at 146. Recall, this is not the norm when it comes to anticompetitive actions taken by businesses. Without the presence of the patent, the settlement reached between Solvay and the three generic manufacturers would be in clear violation of the Sherman Act.
[59] *Id.* at 147.
[60] *Id.* at 159. The Rule of Reason formulation is best described in the 1918 *Board of Trade of City of Chicago v. United States* case: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." Board of Trade v. U.S., 246 U.S. 231, 238 (1918).
[61] Actavis, 570 U.S. at 159.

B. Citizen's Petitions

Brand-name pharmaceutical manufacturers stand to reap sizable gains during their time of market exclusivity. Therefore, at the threat of competition from generic manufacturers, brand-name manufacturers are greatly incentivized to delay competition from entering the market as long as possible, even if that delay is only a couple months.[62] With pay-for-delay agreements being subject to increased levels of scrutiny, brand-name manufacturers have expanded their arsenal when it comes to gaining a competitive edge through use of citizen's petitions.

Mandated by Congress' passage of the Administrative Procedure Act, citizen's petitions require federal agencies to create formal routes for the public to petition an agency to change, amend, or repeal an agency rule.[63] As applied to the FDA—the agency tasked with drug approval—the petitions may "request the Commissioner of Food and Drugs to . . . (issue, amend, or revoke a regulation or order to take or refrain from any other form of administrative action)."[64] In communicating all the factual and legal grounds for the petition and providing all the relevant information—including environmental and economic impact sections if necessary—the citizen's petition process, in theory, is a useful method for the public to communicate its concerns to the FDA.[65] However, this process can be, and has been, used for ulterior motives: the stifling of competition via brand-name pharmaceutical manufacturers as "concerned citizens" challenging generic manufacturers' Abbreviated New Drug Applications.[66] While it can be difficult to distinguish between petitions that raise important and necessary issues from those that

[62] *See* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 43. For example, the top-selling drug in the United States in 2014, Gilead's Hepatitis C Drug, Sovaldi, earned about $1.98 billion in sales every three months. In the event of a generic competitor, even a modest 10% price drop would be worth $198 million for three months. *Id.*
[63] *Id.*; 5 U.S.C. § 553(e) (2012 & Supp. III 2015).
[64] 21 C.F.R § 10.30 (2016).
[65] *See* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 52.
[66] *Id.* (explaining that the brand-name manufacturer commonly employs a variety of different arguments, ranging from direct attacks against the generic manufacturer's application and its bioequivalence or clinical data to appeals to safety, calls to preserve or add new exclusivities for the brand-name drug, and more).

carry anticompetitive underpinnings, the result is generally beneficial to the brand-name manufacturer: the stopping or delay of approval of the generic manufacturer's drug.[67]

As an example of a questionable citizen's petition, consider one filed by Mutual Pharmaceuticals in 2007. As a generic manufacturer itself, Mutual was the first to receive FDA approval in 2004 to sell its generic version of felodipine, a blood pressure medicine.[68] Then, in the first quarter of 2007, Mylan, another generic manufacturer, sought FDA approval to sell its own version of generic felodipine.[69] Only a few months later, Mutual filed a citizen's petition that sought to delay other generic manufacturers from gaining FDA approval for other versions of generic felodipine.[70] Citing concerns with the current product label, Mutual's petition was based on a 2001 study that examined the effects of certain types of orange juice on the absorption of the drug.[71] Ultimately denying Mutual's petition for the study's failure in raising serious safety concerns, the FDA's response was laced with skepticism towards Mutual's claims, and even towards its motives.[72]

At face value, Mutual's petition does not appear concerning because it was swiftly exposed and discarded. Relative to the aforementioned pay-for-delay agreements, this seems

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[67] *Id.*
[68] *Id.* at 53.
[69] *Id.* It is important to consider that Mylan was the second generic manufacturer to seek approval with the FDA, with the first being Mutual. This meant Mylan was a direct threat to the economic benefits Mutual was feeling after being the first generic to enter the market, also giving Mutual further reasons to be aware of Mylan's filing with the FDA.
[70] *See* Letter from Janet Woodcock, Dir. Ctr. for Drug Evaluation & Research, U.S. Food & Drug Admin., to Robert Dettery, Vice President, Regulatory Affairs, Mut. Pharm. Co. (Apr. 17, 2008), https://www.regulations.gov/document?D=FDA-2007-P-0123-0009 [hereinafter Response].
[71] *See* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 52. Rather conveniently, as a currently approved seller of generic felodipine, Mutual would be free to continue selling using the existing labels during the FDA's review process. *Id.*
[72] *See* Response, *supra* note 68, at 4. For example, the response commented on how the 2001 study was published well before Mutual's own generic application, yet Mutual claimed to not have become aware of the 2001 until 2007 and there was the threat of competition. *Id.*

trivial at best. One may ask, does the citizen's petition system really pose a serious threat to competition in pharmaceutical markets?

In short, there is more to the citizen's petition process than meets the eye. The denial of Mutual's petition was April 17, 2008, the same date Mylan's generic version of felodipine was approved.[73] While it cannot be said for certain, this chain of events strongly suggests that Mutual's petition was one of the last barriers to Mylan's final approval.[74] Thus, it appears Mutual was successful in delaying the approval of the second generic, and direct competitor, for felodipine through its citizen's petition of questionable merit.[75]

Examining historical trends in the use of citizen's petitions further shines light on the issue, suggesting that petitions like Mutual Pharmaceuticals' are not one-off events. The early 2000s saw an increase in the number of total yearly citizen's petitions, along with the number of petitions that had the potential to delay generic entry into the market.[76] In 2010, over 20% of citizen's petitions filed had the potential to delay generic entry into the market, with percentages consistently reaching the high teens in preceding and subsequent years.[77] As to the specific filing time of the petitions in relation to the timeline of the FDA generic drug approval process, the majority were filed less than six months from the date of the generic drug's approval.[78] Considering that the average length of time from generic filing to approval is about four years,

[73] *Id.*
[74] *Id.*
[75] For the effects on cost for consumers, sales of Plendil—the brand-name version of felodipine—still totaled $251 million in 2017, even with the presence of two generic versions on the market for the majority of year. Thus, the brand-name manufacturer's success in the relative highly competitive market further shows Mutual stood to make millions even by a slight one-month or two-month delay in the approval of the second generic manufacturer. *Id.* at 54. *See also* Michael Carrier & Daryl Wander, *Citizen Petitions: An Empirical Study*, 34 CARDOZO L. REV. 249, 254 (2012) (detailing a citizen petition delayed the generic version of the depression drug Welbutrin XL by 133 days, which cost consumers roughly $600 million).
[76] *See* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 71.
[77] *Id.*
[78] *Id.* at 75.

the fact that most citizen's petitions are filed less than six months from approval is telling: by raising concerns at the last minute, rather than early or midway through the approval process, these petitions clearly have the potential to extend the length of the generic approval process and delay market entry of generic competition.[79]

C. Product Hopping

As previously mentioned, once a generic enters the market, sales and profits for the brand-name counterpart drop significantly. Further, even in the event a physician prescribes a brand-name drug when a generic equivalent is readily available, brand-name manufacturers still do not benefit. Known as Drug Product Selection (DPS) laws, every state permits pharmacists to fill physician-prescribed brand-name drugs with the generic equivalent instead, provided there is a generic equivalent available for the prescribed brand-name drug.[80] While great for generic manufacturers, brand-name manufacturers had a response of their own: product hopping.

Recall that, through the Abbreviated New Drug Application pathway, the Hatch-Waxman Act eliminated the long and expensive clinical trial requirement for many generic drugs, instead only requiring proof that the new generic drug was both pharmaceutically equivalent and bioequivalent to the brand-name counterpart.[81] It then follows that if the brand-name manufacturer alters the formulation of the drug such that a new version is no longer

[79] *Id.* To further expand on this point, the FDA employs a 180-day time limit for responding to citizen's petitions. This 180-day period—which equates to six months—aligns with the category in which potentially delaying petitions were filed, that between 0-6 months before generic approval. This strongly supports the conclusion that many of the citizen's petitions may be the last barrier to final generic approval. *Id.* at 77.

[80] *See* Jessie Cheng, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, 108 COLUM. L. REV. 1471, 1479 (2008); *see* Alison Masson & Robert L. Steiner, FTC, Generic Substitution and Prescription Drug Prices: Economic Effects of State Drug Product Selection Laws 1 & n.l; *see* Bureau of Consumer Prot., FTC, Drug Product Selection 155-62 (1979) (examining the differences between major types of state DPS laws); *see also* Eric L. Cramer 8c Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 39 U.S.F. L. REV. 81, 116 n.116 (2004) (distinguishing state DPS laws that merely permit pharmacists to substitute generics for brand-name drugs from state DPS laws that require pharmacists to substitute generics).

[81] Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98–417, § 101, 98 Stat. 1585, 1585–92 (1984) (codified as amended at 21 U.S.C. § 3550) (2012)).

bioequivalent to the old version, the brand-name manufacturer creates a situation where the generic drug of the old formulation is also not bioequivalent to the new formulation either.[82] Thus, because the new brand-name drug and the generic drug are no longer bioequivalent, pharmacists are no longer able to substitute the generic equivalent for the brand-name drug when physicians prescribe the brand-name drug.[83] To further suppress the generic, if the brand-name manufacturer kills demand for its old formulation—meaning physicians no longer prescribe it—the brand-name manufacturer likewise kills demand for the rival generic.[84]

When the brand-name manufacturer alters the formulation of its drug, the generic manufacturer has limited options, each with only mild benefits. First, in the effort to continue benefiting from the valuable sales-generating option that is generic substitution, the generic manufacturer can follow the "hop," developing a new generic version of the new formulation. However, this requires starting the drug development process from square one again: the generic manufacturer must first develop the generic version of the new formulation and then proceed through the ANDA approval process again.[85] By subjecting the generic manufacturer to the relatively time-consuming approval process for a second time—and potentially a new round of patent litigation—the brand-name "product hopper" enjoys several more years of insulation from generic competition, leading to sizable gains.[86] Even if the generic manufacturer is successful in "hopping" to the new formulation, nothing is stopping the brand-name manufacturer from

[82] *See* Cheng, *supra* note 80, at 1488.
[83] *Id.*; *See also* Guy V. Amoresano, *Branded Drug Reformulation: The Next Brand vs. Generic Antitrust Battleground*, 62 FOOD & DRUG L.J. 249, 251 (2007) (describing that the "reformulation strategy . . . prevents [generic] drug[s] from being dispensed by pharmacists as an AB-rated substitute to fill prescriptions written for the brand drug [when the new formulation is prescribed]").
[84] *See* Cheng, *supra* note 80, at 1488. This is because the generic drug no longer receives benefit of the state DPS law.
[85] *Id.* For a broader overview of the process, see *supra* notes 22–26 and accompanying text.
[86] *Id.* Recall, if the brand-name manufacturer induces patent infringement litigation in a timely manner, it can trigger a thirty month stay, barring the generic manufacturer from the market. 21 U.S.C. § 355(j)(5)(B)(iii) (2012); *see also* Hemphill, *supra* note 42, at 1566 (explaining how the delay may last more than three years).

"hopping" again onto a third formulation, requiring the generic manufacturer to repeat the approval for a third time.[87] A second, alternative approach to following the product hop involves the generic manufacturer selling its version of the old formulation under its own separate brand name.[88] However, as the ensuing example will demonstrate, it is not common for the generic manufacturer's branded version of the old formulation to succeed, as the generic manufacturer's advertising and marketing abilities commonly pale in comparison to the rival brand-name manufacturer's abilities.[89]

In 1998, Abbott Laboratories, with assistance from Fournier Industrie et Sante, marketed TriCor, the branded version of the cholesterol-lowering drug fenofibrate.[90] Then, only one year later in 2000, Teva Pharmaceutical, a generic manufacturer, filed its own ANDA, looking to launch its own generic into the market. Likely in response to the ANDA filing, Abbott and Fournier in 2001 altered the TriCor formulation, changing the product from a capsule to a new tablet formulation. Additionally, the original capsule formulation was removed by Abbott and Fournier from the market, meaning Teva's generic, which was an equivalent of the original capsule formulation, could not receive the benefit of state DPS laws.[91] Through the product hop, Abbott and Fournier had successful prevented Teva from benefiting from generic substitution of TriCor.[92]

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[87] *See* Cheng, *supra* note 80, at 1489.
[88] *Id.* at 1495.
[89] *Id.* Because brand-name pharmaceutical manufacturers typically have far greater resources available than the generic counterpart, the brand-name manufacturer easily diverts consumers to its new formulation, instead of the branded generic released by the generic manufacturer.
[90] *Id.* at 1491. TriCor was highly successful, with annual sales hovering around $750 million per year. *Id.*
[91] *Id.* at 1492.
[92] Had Abbott and Fournier not altered the formulation of TriCor, then whenever TriCor was prescribed by physicians, Teva would receive benefit of the DPS laws, resulting in its generic being substituted in place of the branded TriCor.

However, Teva did not backdown easily: electing the first option mentioned above, Teva followed the hop itself and again applied for FDA approval, this time in 2002.[93] Then, like before, Abbott and Fournier hopped again, this time developing a new tablet formulation for TriCor that did not need to be taken with food.[94] Again removing the old formulation from the market, Abbott and Fournier were successful in hindering the competition, with nearly 100% of patients on the old formulation switching to the second, new formulation.[95] Instead of following the hop a second time, Teva elected the second option mentioned above and decided to market the generic formulation under its own brand name, Lofibra.[96] However, due to its limited marketing ability coupled with the lack of generic substitution, Teva's sales of Lofibra were a fraction when compared to Abbott's and Fournier's sales: only about $4 million per year. [97]

Having effectively eliminated generic competition, Abbott and Fournier highlight the anticompetitive nature of product hopping while also showing the extent to which brand-name pharmaceutical manufacturers will go to prevent generics from entering the market.[98] The problem in preventing this type of behavior is that brand-name manufacturers are under little legal obligation to help their generic competitors by restricting formulation changes that in theory better meet consumer preferences.[99] Further, a brand-name manufacturer is under no obligation to continuing the sale of old formulations of its drugs.[100]

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[93] *Id.* at 1493.
[94] *Id.*
[95] *Id.*
[96] *Id.* This action taken by Teva was necessary as, similar to before, it could no longer rely on generic substitution to fuel sales because Abbott's and Fournier's new formulation was no longer bioequivalent to Teva's second generic.
[97] *Id.*; *see also* Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 416 (D. Del. 2006).
[98] Importantly, Abbott's and Fournier's actions did not escape antitrust scrutiny. *See* Abbott Labs., 432 F. Supp. 2d at 408. In opting against a per se legal approach in determining the legality the product hopping, the Court instead weighed the modification's anticompetitive effects to see if they outweighed its benefits. *Id.* at 422. Thus, like challenges to the pay-for-delay agreements, product hopping issues tend to result in lengthy and expensive litigation.
[99] *See* Cheng, *supra* note 80 at 1494.
[100] *Id.* at 1495. *See also* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1216 (9th Cir. 1997) (highlighting that there was "no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright"); In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1326 (Fed. Cir.

D. Authorized Generics

To achieve its goal of increasing the number of generic pharmaceuticals on the market, the Hatch-Waxman Act, through its central incentive—the 180-day exclusivity period awarded to the first generic manufacturer to file a Paragraph IV certification and win regulatory approval—has achieved success.[101] However, that is not to say the Hatch-Waxman Act is without flaw: the 180-day exclusivity period has a significant carve-out, that of the brand-name manufacturer itself.[102] By simply notifying the FDA—neither an Abbreviated New Drug Application or separate New Drug Application is required—the brand-name manufacturer is able to side-step the generic manufacturer's 180-day exclusivity period and create direct competition in the generic market immediately via use of the "authorized" generic.[103]

At first glance, one might see no harm in allowing these "authorized" generics—generic versions of brand-name drugs coming directly from the brand-name manufacturer itself—to encroach on one of the most significant benefits to being the first generic manufacturer to enter the market. After all, the introduction of not one, but two generic versions of the branded drug only seems to spur competition in the market, not hinder it. While it does seem strange that a unique carve-out has been given to brand-name manufacturers—who already possess significant

2000) (holding that patent holders are immune from antitrust claims for their refusals to license or use their patent rights).

[101] *See* Feldman, *Captive Generics*, *supra* note 1, at 390. In 1995, 43% of all dispensed prescription drugs were generics. This number increased to 89% in 2016, showcasing how the Hatch-Waxman Act has altered the pharmaceutical landscape since its inception. *Id.*

[102] *Id.* This was not without challenge, however. In 2004, Teva Pharmaceuticals and Mylan, both generic drug manufacturers, filed petitions with the FDA that requested the agency prohibit distribution of generics produced by the brand-name manufacturers during the 180-day exclusive period. After the FDA rejected the petitions, two legal challenges followed. *Id.* at 391. The Court of Appeals for the D.C. Circuit agreed with the FDA's interpretation of the Hatch-Waxman Act, holding that the Act does not prohibit New Drug Application holders from marketing captive generics during the exclusivity period. Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 55 (D.C. Cir. 2005). Similarly, the Court of Appeals for the Fourth Circuit affirmed that the Hatch-Waxman Act does not give the FDA the power to ban generics produced by the brand-name manufacturer during the 180-day exclusivity period. Mylan Pharm., Inc. v. U.S. Food and Drug Admin., 454 F.3d 270, 271 (4th Cir. 2006). With *Teva* and *Mylan* both backing the FDA, federal courts helped cement authorized generics as a fixture in the pharmaceutical industry.

[103] *Id.*

leverage—should it matter that the source of the "authorized," and second generic on the market, is the brand-name manufacturer itself, and not another purely-generic manufacturer?

The simple answer is yes, it does matter that the source of the generic is the brand-name manufacturer itself. First, when comparing drug markets containing an authorized generic with those markets that do not, the markets with the authorized generic tend to have increased prices for both the generic and brand-name version of the drug.[104] While brand-name drug prices tend to increase over time due to natural inflationary effects—whether or not an authorized generic is present in the market—it appears the presence of an authorized generics accelerates the price increase significantly.[105] Second, and more concerning, the presence of an authorized generic generally inflates the price of the generic competitors in its first three years on the market, resulting in markedly higher generic drug prices for consumers.[106] Clearly the presence of a direct generic competitor decreases sales of the true generic. Thus, in order to compensate for the lower sales, a higher price is necessary.[107]

Along with the effects on net generic prices, the presence of an authorized generic tends to alter the composition of generic drug markets.[108] It was found that as other true generics are approved and launched into a particular drug market, they cut into other true generics'—and not the authorized generic's—market share, leaving the authorized generic's share unaltered.[109] This

[104] *See* Feldman, *Captive Generics*, *supra* note 1, at 415.
[105] *Id.* at 416. When an authorized generic was not present in a particular market, the brand-name drug net price rose an average of 6% in the first three years following the launch of a true generic. Conversely, when an authorized generic was present, the growth in the net price of the brand-name drug increased to 21%. *Id. See also* Inmaculada Hernandez, Alvaro San-Juan-Rodriquez, Chester B. Good & Walid F. Gellad, *Changes in List Prices, Net Prices, and Discounts for Branded Drugs in the US, 2007-2018*, 323 JAMA 854, 854 (2000) (researching the changes in brand-name drug net prices from 2007 through 2018).
[106] *See* Feldman, *Captive Generics*, *supra* note 1, at 416. In the first year, true generics generally saw an increase of around 11% due to the presence of an authorized generic. The price of the true generic generally saw an additional 4% increase in net price when an authorized generic was available. *Id.*
[107] *Id.* at 417.
[108] For example, generic manufacturers generally saw a 22% decrease in combined market share over the first three years due to presence of an authorized generic. *Id.* at 408.
[109] *Id.*

strongly suggests authorized generics are better than true generics at penetrating such markets, likely due the sales and marketing relationships cultivated through their brand-name drugs and market prowess. Thus, it is evident that the presence of authorized generics in generic drug markets has undesirable effects, with the most concerning being the effect on generic drug prices.

IV. MOVING FORWARD

As discussed in Part III.A, the Supreme Court opened pharmaceutical manufacturers up to antitrust liability when evaluating pay-for-delay settlements, even when they fell within the scope of the exclusionary potential of a patent.[110] However, it is not clear that the standard for evaluating behavior under the Sherman Act—the Rule of Reason test—is a meaningful limit on brand-name manufacturers engaging in anti-competitive behavior.[111] By simply not offering cash, it appears brand-name manufacturers may be successful in side-stepping the restrictions implemented by the courts.[112]

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[110] *See* FTC v. Actavis, Inc. 570 U.S. 136 (2013).

[111] Some commentators have described the Rule of Reason test as complex and burdensome, placing a high burden on the plaintiff. *See* Feldman, *Pricetag*, *supra* note 42, at 13. Although some do argue that *Actavis* has resulted in the end of pay-for-delay, others note that *Actavis* only further incentivized pharmaceutical manufacturers to create more complex agreements in the effort to sidestep antitrust scrutiny. *See* Lauren Krickl & Matthew Avery, *Roberts Was Wrong: Increased Scrutiny After* FTC v. Actavis *Has Accelerated Generic Competition*, 19 VA. J.L. & TECH. 510, 547 (2015); *see also* Feldman, *Pricetag*, *supra* note 42, at 12. Some argue that the FTC's observation of a decline in anticompetitive pay-for-delay agreements post-*Actavis* largely stemmed for its inability to categorize most settlements between brand-name and generic manufacturers, not because the actual number of agreements was declining. *See* Robin Feldman & Prianka Misra, *The Fatal Attraction of Pay-for-Delay*, 18 CHI.-KENT J. INTELL. PROP. 249, 260–65 (2019).

[112] Because of the way lower courts have applied the language of *Actavis*, a plaintiff is generally required to show that the generic manufacturer agreed to not use the patented, brand-name drug and that the generic manufacturer received an unexplained payment from the brand-name manufacturer. Thus, alternative agreements that achieve the same anti-competitive outcomes may pass through the courts without challenge due to cleverly drafted contracts that do not allow for unexplained payments from the brand-name manufacturer. *See* Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating Actavis*, 28 ANTITRUST 16, 18 (2013). For example, the brand-name manufacturer could "overpay" the generic manufacturer for marketing services the generic manufacturer is not equipped to tender, much like Solvay's agreements with Actavis, Paddock, and Par. Additionally, the brand-name manufacturer could allow the generic manufacturer to make and sell other drugs in its portfolio, thus diverting the competition to a different drug market. *See* Feldman, *Pricetag*, *supra* note 42, at 15. Further strategies include leveraging the threat of introducing an authorized generic to compete directly with the generic manufacturer's drug during the 180-day exclusivity period. By agreeing not to market its own generic, the brand-name manufacturer

As discussed in Part III.B, the citizen's petition system allows for the possibility of abuse by pharmaceutical manufacturers, warping the system meant to serve as a check on the FDA into a method of delaying competition. The challenge is distinguishing petitions raising valid concerns from those that only carry the appearance of validity and nothing more. Thus, absent change to the current system, petitions filed for the purpose of delaying entry of generic competition are free to exist without penalty to those that file them.[113]

As discussed in Part III.C, product hopping by brand-name manufacturers seriously undercuts the success of a generic drug once launched on the market, forcing generic manufacturers to adapt or risk being left behind. Further, brand-name manufacturers are under little legal obligation to help their generic competitors by restricting formula changes, nor are they under any obligation to continue the sale of old formulations of the branded drugs after a new formulation has been developed.[114] Thus, actions outside the judiciary are essential to curb the practice.[115]

As discussed in Part III.D, the Hatch-Waxman Act's failure to prevent brand-name manufacturers from launching their own generics into the market during the 180-day exclusivity period awarded to the first generic filer poses unique threats to the composition of generic drug

effectively pays for the generic manufacturer's delay into the market. *See generally* Feldman, *Captive Generics*, *supra* note 1.

[113] Although the FDA does have the power to summarily deny any petition filed with the primary purpose of delaying generic approval if the petition does not also raise valid scientific or regulatory concerns, it is not difficult for petitioners to weave seemingly valid concerns into the petitions. Further, it is not common for the FDA to summarily deny petitions, failing to do so even once from 2007 through 2014. *See* 21 U.S.C. §355(q)(1)(E) (2012); *see also* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 88.

[114] *See* Cheng, *supra* note 80, at 1494. *See also* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1216 (9th Cir. 1997); In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1326 (Fed. Cir. 2000).

[115] Although brand-name manufacturers still are open to antitrust litigation, because of courts' failure to apply a per se rule against product hopping, any attempts to police brand-name manufacturers' actions will require significant resources, in the form of time and money. *See* Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408 (D. Del. 2006).

markets. Given that the interpretation of the Hatch Waxman Act seems settled,[116] like that of product hopping, actions outside the judiciary are necessary to resolve the issue.

A. Disclosure as the First Step

From pay-for-delay agreements to questionable citizen's petitions to product hopping and finally authorized generics, it is clear brand-name pharmaceutical manufacturers are willing to go to great lengths to prevent competition from entering the market. The benefit to the brand-name manufacturers is so great, that—in the words of one expert on the topic— "significant effort by competition authorities" is required to prevent the issues.[117] However, given that brand-name pharmaceutical manufacturers possess great leverage coupled with tremendous resources, they have the unique ability to bend and adapt in response to whatever the judiciary or legislature throws their way. Thus, in order to begin to remedy the higher prices caused by the anticompetitive tactics discussed, more specific and detailed information on each of the four issues is required. The following text outlines legislative and regulatory solutions meant to help remedy all four issues discussed.

Outside the obvious band-aid type legislative solutions that immediately address the raised issues,[118] the crucial first step towards eliminating the anticompetitive practices altogether

[116] *See* Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 55 (D.C. Cir. 2005) (holding that the Hatch-Waxman Act does not prohibit New Drug Application holders from marketing captive generics during the exclusivity period); *see* Mylan Pharm., Inc. v. U.S. Food and Drug Admin., 454 F.3d 270, 271 (4th Cir. 2006) (holding the Hatch-Waxman act does give the FDA the power to ban generics produced by the brand-name manufacturer during the 180-day exclusivity period).

[117] *See* Feldman, *Pricetag*, *supra* note 42, at 43.

[118] To curb the practice of pay-for-delay, the incentive structure of the Hatch-Waxman Act could be altered. For example, legislation could be enacted that strips the first generic filer of the 180-day exclusivity period in the event that patent infringement between the brand-name and generic manufacturer settles. *See* Feldman, *Pricetag*, *supra* note 42, at 46–47. To curb the practice abusive citizen's petitions, a simple ban preventing competitors from filing citizen's petitions related to generic applications would solve the issue. *See* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 86–87. To curb the practice of product hopping, alterations to state DPS laws could provide for approved generics to still receive the benefit of the DPS laws with respect to the new formulations of the brand-name drug, provided the reason for the formula alteration was not due to some underlying problem with the original. To curb the practice of brand-name manufacturers released authorized generics during the first-filer generic's 180 exclusivity period, legislation could be enacted that simply prohibits brand-name manufacturers from releasing their

is robust transparency mandates. Whether achieved through legislative or regulatory action, by forcing pharmaceutical manufacturers to reveal information whenever engaging in an action related to the release of a drug into the market, critical insight on the various anticompetitive practices will be gained.[119] Thus, by shining a light directly on the actions of brand-name manufacturers, legislators and regulators will then have the knowledge to cure the current anticompetitive practices while—more importantly—also remaining flexible to bend and adopt to any future anticompetitive practices devised in response to future changes in the law.

Similar to how original proponents of federal securities legislation observed something was adrift with unregulated public company disclosure practices,[120] the current opacity of information with regard to pay-for-delay settlements, citizen's petitions, product hopping, and authorized generics accentuates failures in pharmaceutical markets.

For example, by requiring strict disclosure requirements whenever a brand-name manufacturer settles an infringement lawsuit with a generic manufacturer, concrete data regarding the value of the agreement and the drug products at issue will become easily accessible. This in turn will fuel outside investigators, like antitrust enforcers and civil attorneys, that will hold the brand-name manufacturers accountable for their anticompetitive tactics. Similarly, increased information will help curb abusive citizen's petitions by allowing the FDA

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generics into the market during the time. *See* Feldman, *Captive Generics*, *supra* note 1, at 420–21. Although the aforementioned solutions would have immediate effects, with time, pharmaceutical manufacturers will likely devise methods for curtailing the solutions. Thus, solutions that cut to the root of the issue are necessary to completely prevent the issues.

[119] Additionally, increased disclosure will result in increased public scrutiny of pharmaceutical manufacturer's actions. Although pharmaceutical companies generally are already under a microscope by the public and lawmakers, it is clear the current disclosure requirements are insufficient for drawing necessary information to effectively circumvent the issues. *See* Feldman, *Drug Wars*, *supra* note 2 and accompanying text; *see also* Feldman, *Pricetag*, *supra* note 42, at 47.

[120] *See generally* Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123 (2004).

to quickly dismiss those that lack merit.[121] With respect to product hopping, explicit acknowledge by brand-name manufacturers of the effects of minute formulation changes will draw scrutiny, while also drawing increased awareness of the practice.[122] And lastly, detailed information highlighting every connection a brand-name manufacturer has with the corresponding generic market for its brand-name drug will provide invaluable information for legislators and regulators to craft law ensuring the integrity of generic drug markets.[123]

In addition to the benefits gained from the specific information disclosed, the requirement of disclosure itself serves as an important check on pharmaceutical companies. As evidenced in federal securities law, a failure to comply with the disclosure requirements allows individual investors to bring direct civil lawsuits to hold the company's managers in check.[124] Applying this theory to the proposed disclosure requirements for pharmaceutical manufacturers, a failure to comply with such disclosure requirements will open the manufacturer up to civil liability. Further, the mere failure to comply will prove valuable by providing outside investigators with easy targets to scrutinize and challenge. Thus, brand-name manufacturers will have a great inventive to comply to avoid further scrutiny.

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[121] Additionally, regulation allowing the FDA to impose penalties on citizen's petitions that lack merit would further strengthen the disclosure requirement, reducing the number of citizen's petitions that have the potential for generic delay.

[122] Further, disclosure requirements by generic manufacturers with respect to the number of sales generated from state DPS laws will provide increased ammunition for outside investigators to bring lawsuits holding brand-name manufacturers to account for their actions.

[123] Although a generic directly authorized by the brand-name manufacturer is the most explicit example of a brand-name manufacturer's influence on the generic market, increased information will help shine light on other more complex and nonobvious arrangements—like multi-company licensing arrangements touching other drugs in a brand-name manufacturer's portfolio—currently in place. Then, once the true scope of the issue is evident, further legislation and regulation is possible.

[124] *See generally* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

B. Limitations

First, legislation or regulation mandating robust disclosure requirements will not lead to immediate solutions. Moreover, it will likely take years of disclosure to properly craft specialized legislation and regulations that eradicate the anticompetitive practices altogether. Thus, in the meantime, brand-name manufacturers remain free to engage in the anticompetitive practices, with consumers suffering in the form of increased drug prices.

Second, increased disclosure requirements will increase operating and litigation costs on pharmaceutical manufacturers. Much like how publicly traded companies are subject to the added cost of producing audited financial documents, pharmaceutical manufacturers will incur higher legal costs to ensure compliance with the disclosure requirements. Similarly, any instance of suspected non-compliance will result in costly litigation expenses for the manufacturers. This in turn will result in higher drug prices for consumers to compensate for the added costs.

V. CONCLUSION

The Hatch-Waxman Act relies on a series of important incentives to achieve its goal of promoting generic competition in pharmaceutical markets while simultaneously balancing brand-name manufacturers' interest in profit. Although profit motive is a powerful incentive for innovation, it also incentivizes those with leverage—the brand-name manufacturers—to hijack the system directly responsible for their decreased profits by means of generic drug competition. Instead of facilitating the end of improper pharmaceutical patents, mutually beneficial pay-for-delay agreements are entered into that only serve to keep brand-name drug prices higher for longer. Instead of accepting defeat, the citizen's petition process is warped to further delay generic entry in any way possible. Instead of pursuing real innovation, resources are devoted to creating trivial variations in drug composition to eliminate generic competitors. And finally,

instead of allowing true competition, authorized generics are launched to alter the composition of generic drug markets.

As one expert in the field noted, "the law must become as nimble and creative as these complex schemes."[125] Thus, to discourage the increasingly complex anticompetitive maneuvers by brand-name manufacturers, increased and recurring information is essential. By shining light directly on the harmful tactics and drawing scrutiny upon companies that employ such tactics, the stage for future change is set. Only then will the anticompetitive practices be ended once and for all.

[125] *See* Feldman, *Pricetag*, *supra* note 42, at 48.

Applicant Details

First Name	**Elizabeth**
Middle Initial	**G**
Last Name	**Underwood**
Citizenship Status	**Persons who owe "allegiance to the United States" (e.g., nationals of American Samoa, Swains Island, and Northern Mariana Islands, and nationals who meet other requirements describe in 8 U.S.C. Â§ 1408)**
Email Address	**underwood.e24@law.wlu.edu**
Address	**Address** Street **30 S. Main St. Unit B** City **Lexington** State/Territory **Virginia** Zip **24450** Country **United States**
Contact Phone Number	**9016529822**

Applicant Education

BA/BS From	**Washington & Lee University**
Date of BA/BS	**May 2020**
JD/LLB From	**Washington and Lee University School of Law** **http://www.law.wlu.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**30%**

Law Review/ Journal	**Yes**
Journal(s)	**Journal of Civil Rights and Social Justice**
Moot Court Experience	**Yes**
Moot Court Name(s)	**W&L John W. Davis Appellate Advocacy Competition** **W&L Robert J. Grey, Jr. Negotiations Competition** **W&L Mock Trial Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Belmont, Elizabeth
belmontb@wlu.edu
Eggert, David
eggertd@wlu.edu
540-458-8335
Hammond, Lethia
hammondl@wlu.edu
540-928-2150

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Elizabeth Underwood

30 S. Main St. Apt. B | Lexington, VA 24450 | 901.652.9822 | underwood.e24@law.wlu.edu

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

As a rising third-year student at Washington and Lee University School of Law, I would be honored to begin my career in the legal field serving as your law clerk. Having completed my undergraduate studies in Virginia, I hope to remain in Virginia and contribute my legal skills, gain firsthand experience of the workings of the federal court, and learn from your expertise and high standards of excellence.

This summer, I am interning at the Securities and Exchange Commission (SEC) Office of International Affairs in Washington, D.C. My duties include conducting legal research on complex international securities law issues, drafting memoranda on regulatory developments and legal trends, and assisting in enforcement proceedings. This previous semester, I completed my student note, which explores the implications of the Global Magnitsky Act for parties involved in the persecution of the Uyghur population. These experiences together will refine my writing skills and allow me to efficiently research and write on complex legal issues, communicate my findings, and recommend resolutions.

Throughout my judicial internship last summer, I had the opportunity to observe civil hearings, criminal trials, and sentencings, furthering my understanding of how to effectively advocate on behalf of my client's interests and successfully applying those insights to W&L Moot Court competitions. My work included drafting memoranda, editing draft opinions on both civil and criminal matters, and resolving cases such as pro se prisoner claims. By actively participating in discussions within the chambers about ongoing cases and legal matters, I gained invaluable insights into the operational intricacies and collaborate dynamics essential for a law clerk to navigate effectively.

My previous experience in chambers confirmed my aspiration to become a litigator, and I am confident that my strong work ethic, attention to detail, and ability to work independently and collaboratively would make me a valuable asset. I look forward to speaking more about the clerkship position and my previous experiences soon. Thank you for considering my application.

Sincerely,

Elizabeth Underwood

Elizabeth Underwood

30 S. Main St. Apt. B | Lexington, VA 24450 | 901.652.9822 | underwood.e24@law.wlu.edu

Education

Washington and Lee University School of Law, Lexington, VA **August 2021 – Present**
J.D. Candidate, May 2024 | Cumulative GPA: 3.579 (Top 30%) | Semester GPA: 3.835 (Top 10%)

- Honors: Campaign 1995 Scholarship
- Leadership: Vice-Chair, W&L Moot Court Board; Lead Articles Editor, *Journal of Civil Rights and Social Justice*
- Activities: Runner-Up, Mock Trial Competition (46 competitors); Finalist, Robert J. Grey, Jr. Negotiations Competition (top 4 of 47); Semifinalist, John W. Davis Appellate Advocacy Competition (top 8 of 48); Law Ambassador
- 3L Externship: The Honorable Robert M.D. Turk, Montgomery County (VA) Circuit Court

Harvard Business School Online **November 2020 – March 2021**

- Completed Credential of Readiness program comprised of three courses: business analytics, economics for managers, and financial accounting

Washington and Lee University, Lexington, VA **August 2016 – May 2020**
B.A., Strategic Communication, East Asian Languages and Literature (Chinese Emphasis)

- Honors: Critical Language Scholarship Alternate Finalist for Chinese, Certificate of International Immersion
- Activities: Chinese and English to Speakers of Other Languages (ESOL) academic peer tutor, Ring-Tum Phi staff writer, University Singers soprano 2 and public relations chair, fall musical performer

Experience

U.S. Securities and Exchange Commission, Washington, D.C. **June – Present**
Student Honors Law Program Intern, Office of International Affairs

U.S. District Court for the Western District of Tennessee, Memphis, TN **May – July 2022**
Judicial Intern for the Honorable Sheryl H. Lipman

- Conducted legal research, drafted chambers memorandums, and wrote orders on pro se prisoner claims and various motions
- Observed trials, hearings, sentencings, and oral arguments and met regularly with Judge Lipman and law clerks to discuss legal issues and reasonings

Language Education

Middlebury School in China: Hangzhou, Hangzhou, China **August – December 2018**

- 16-week study abroad program in fully immersed language environment
- Completed intensive language and culture classes, and lived with Chinese roommates

Middlebury Language School: Chinese, Middlebury, VT **June – August 2018**

- Completed Chinese level 2.5 at 8-week immersive language program

Language and Interests

Language Skills: Mandarin (Conversational Proficiency – Reading, Writing, Speaking, Listening)
Interests: Historical fiction novels, hiking, Formula One racing, Dalmatians

Print Date: 06/11/2023
Page: 1 of 8
Student: Elizabeth Underwood

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

SSN:	XXX-XX-2472	**Entry Date:**	08/30/2021
Date of Birth:	01/25/XXXX	**Academic Level:**	Law

2021-2022 Law Fall
08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B+	4.00	4.00	13.32	
LAW 140	CONTRACTS	B+	4.00	4.00	13.32	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 165	LEGAL WRITING I	B+	2.00	2.00	6.66	
LAW 190	TORTS	A-	4.00	4.00	14.68	
	Term GPA: 3.423	**Totals:**	14.50	14.50	49.65	
	Cumulative GPA: 3.423	**Totals:**	14.50	14.50	49.65	

2021-2022 Law Spring
01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	B	4.00	4.00	12.00	
LAW 150	CRIMINAL LAW	B+	3.00	3.00	9.99	
LAW 163	LEGAL RESEARCH	A-	0.50	0.50	1.84	
LAW 166	LEGAL WRITING II	B+	2.00	2.00	6.66	
LAW 179	PROPERTY	A	4.00	4.00	16.00	
LAW 195	TRANSNATIONAL LAW	A-	3.00	3.00	11.01	
	Term GPA: 3.484	**Totals:**	16.50	16.50	57.50	
	Cumulative GPA: 3.456	**Totals:**	31.00	31.00	107.14	

2021-2022 Law Summer
05/22/2022 - 08/13/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	
	Term GPA: 0.000	**Totals:**	1.00	1.00	0.00	
	Cumulative GPA: 3.456	**Totals:**	32.00	32.00	107.14	

Print Date: 06/11/2023
Page: 2 of 8
Student: Elizabeth Underwood

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

2022-2023 Law Fall
08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 685	Evidence	A-	3.00	3.00	11.01	
LAW 708	Financial Literacy For Lawyers	B-	1.00	1.00	2.67	
LAW 715	Antitrust Law	A-	3.00	3.00	11.01	
LAW 854	Cross-Border Transactions Practicum	A-	3.00	3.00	11.01	
LAW 865	Negotiations and Conflict Resolution Practicum	A	2.00	2.00	8.00	
LAW 970	Journal of Civil Rights and Social Justice: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.641	**Totals:**	14.00	14.00	43.70	
	Cumulative GPA: 3.507	**Totals:**	46.00	46.00	150.84	

2022-2023 Law Spring
01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	A	3.00	3.00	12.00	
LAW 701	Administrative Law	A-	3.00	3.00	11.01	
LAW 789	Family Law	A	3.00	3.00	12.00	
LAW 828	Trial Advocacy Practicum	A-	3.00	3.00	11.01	
LAW 970	Journal of Civil Rights and Social Justice: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.835	**Totals:**	14.00	14.00	46.02	
	Cumulative GPA: 3.579	**Totals:**	60.00	60.00	196.86	

2023-2024 Law Fall
08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707L	Skills Immersion: Litigation		2.00	0.00	0.00	
LAW 817	Statutory Interpretation Practicum		4.00	0.00	0.00	
LAW 920	Moot Court Board		1.00	0.00	0.00	
LAW 942	State Judicial Externship		2.00	0.00	0.00	
LAW 942FP	State Judicial Externship: Field Placement		2.00	0.00	0.00	
LAW 971	Journal of Civil Rights and Social Justice: 3L		1.00	0.00	0.00	
	Term GPA: 0.000	**Totals:**	15.00	0.00	0.00	
	Cumulative GPA: 3.579	**Totals:**	60.00	60.00	196.86	

Print Date: 06/11/2023
Page: 3 of 8
Student: Elizabeth Underwood

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	60.00	60.00	3.579
External:	0.00	0.00	
Overall:	60.00	60.00	3.579

Program: Law

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am on the faculty at Washington and Lee University School of Law, and am writing to you in very enthusiastic support of Elizabeth Underwood, a rising third year law student at W&L who is seeking a clerkship with your court. Ms. Underwood is bright, engaged, hard-working, and truly delightful to teach and work with.

Ms. Underwood was enrolled in my Spring 2023 Family Law class. At W&L we keep our class sizes small – my Family Law class had 35 students enrolled – so as faculty we tend to get to know our students well. Additionally, because Ms. Underwood participates in mock trial – which I judge – and has interests in the W&L campus community that overlap with mine, I have come to know Ms. Underwood outside the classroom as well. As I explain more fully below, I am confident that Ms. Underwood will be an asset to any court that has the pleasure of working with her in its chambers.

In terms of Ms. Underwood's excellent performance in my Family Law course (she earned one of the few A's I awarded), I note that although the students are required to take a series of exams, I also teach the course with an experiential bent. To that end, in addition to requiring significant case readings and related discussion and examinations, I require that the students engage deeply with the family law statutes of a state of their choosing. This assignment yields extensive in-class conversation and involves the submission of five short comparative memoranda across the course of the term. Finally, I require the students to prepare two lengthy memoranda regarding a negotiation problem that the students ultimately negotiate in pairs as a final project. Because I take this approach to the course, I am able to develop deeper insights into my Family Law students' strengths and weaknesses than is perhaps typical of a traditional law school classroom.

Ms. Underwood was one of the most active, incisive and hard-working participants in what was a very smart and lively class overall. She was eager to wrestle with challenging issues. Her in-class work and our out-of-class discussions demonstrated that she is an inquisitive, thorough, creative thinker, and that she is a close reader with very strong analytical skills. Ms. Underwood also performed extremely well on the statutory assignments and the complex negotiation problem I assigned. Her written work was very, very strong throughout. She made excellent use of the applicable authority, and her memoranda were cogent, creative, well-organized and thorough without sacrificing conciseness. Based on my experience with her work, I am confident that Ms. Underwood's writing and analytical skills would serve you well in your chambers.

Ms. Underwood also has excellent legal reasoning and advocacy skills. I was able to observe this when I presided over the mock trial semi-finals at W&L this past spring. In the mock trial context, Ms. Underwood was a standout. She was poised and self-assured, and her approach to the case was clear and creative. She did an excellent job engaging with me (as the court) when I pressed her with difficult questions, and she had an excellent command of the facts, rules of evidence, and substantive law that governed her case.

I am also confident that you will find Ms. Underwood to be a wonderful colleague. She and I have had the pleasure of interacting in more casual settings, including a very interesting intellectual salon-style dinner organized by one of my colleagues to grapple with some challenges W&L faces. Those discussions highlighted what a delight Ms. Underwood is to interact with - she is bright, collaborative, curious, diplomatic, and kind-hearted.

Ms. Underwood was truly a pleasure to teach and work with, and I am confident that she will bring much to your chambers. I would welcome the opportunity to talk with you regarding Ms. Underwood, and I encourage you to contact me with any questions you may have.

Very truly yours,

C. Elizabeth Belmont
Clinical Professor of Law

Elizabeth Belmont - belmontb@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

A couple of months ago, I witnessed something amazing. It happened when a controversial speaker came to our campus and a number of students protested in various ways. In fact, a number of students who had protested the speaker sat in the back of the venue and simply stood up and abruptly walked out when the speaker took the podium. At least one student who had concerns about the speaker's views, however, stayed to hear him out. She listened politely while the speaker gave his presentation and then rose to her feet when it was time for questions. She asked a pointed question that exposed much of the speaker's argument as premised upon a factual assertion that was demonstrably false.

The speaker responded with a strange combination of evasion, attack, and dismissiveness, questioning why someone with her views would even be at the university and repeatedly calling the student "the lady." The student stood her ground. Notwithstanding the clear sentiment of the remaining crowd against her position – and notwithstanding the speaker's gas-lighting and thinly-disguised gender bullying--she remained unflappable, calm, and insistent upon responses to her quite-reasonable questions. After watching the event via a remote feed (I was not there in person), I reached out to the student to tell her that (1) I saw in her the makings of an excellent trial lawyer/litigator; and (2) I would be happy to write her a strong recommendation letter at any time.

This is that letter, and the student who stood up that day is Elizabeth Underwood. I understand that she is applying to you for a clerkship position. She is a first-rate candidate and I extend my most enthusiastic recommendation. Even viewed in isolation, the above-described event demonstrates that Ms. Underwood has courage, tenacity, and a razor-sharp mind. She showed poise under fire in a hostile and unsupportive environment. She also demonstrated an innate tactical persuasive ability by relentlessly boring in on a central factual flaw that undergirded the speaker's argument. She showed persistence when the speaker (and his allies) resorted to diversionary tactics and ad hominems instead of joining issue on the point she raised. I was (and remain) so proud of her and so proud that our law school helped produce such a student.
But there is far more to Ms. Underwood than just this one event. Last semester, I also judged a round of a negotiation competition where she was among the final competitors. I was very impressed by how deftly she dealt with a complex factual and legal situation, while at the same time exhibiting social intelligence of the highest order. She did a superb job. Her advocacy abilities were recently recognized by her peers here at the school when she was named Vice Chair of our Moot Court Executive Board.

As a professor here at Washington and Lee, I have also have had the privilege of having Ms. Underwood as a student in class (Antitrust). Ms. Underwood was always highly prepared and enthusiastic. As a student, she was always well-prepared to answer questions, asked excellent questions herself, wrote lucidly, and delivered on exams. She quickly and impressively developed mastery of a difficult area of the law which combines the complexities of economics, litigation strategy, government enforcement, and interpretation of an expansive statute that rivals some of the more expansive provisions in the Constitution.

In sum, Ms. Underwood hits all the high points on characteristics that would make a fantastic clerk—integrity, courage, diligence, brilliance, ability to absorb new material quickly, excellent writing and oral communication skills, social intelligence, a sense of justice, and dedication. She would be fantastic as a clerk. If you have any questions, please do not hesitate to contact me.

Sincerely,

David Eggert
Professor of Practice

David Eggert - eggertd@wlu.edu - 540-458-8335

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to highly recommend Ms. Elizabeth Underwood to serve as a clerk in your Honorable Court. During the summer of 2022, Ms. Underwood served as Judicial Intern for the U.S. District for the Western District of Tennessee where she conducted legal research, drafted memorandums and orders on pro se prison claims and motions. Ms. Underwood is scheduled to serve as an intern during the 2023-2024 academic year for the Montgomery County, Virginia Circuit Court.

Ms. Underwood was enrolled in my Trial Advocacy Practicum during the spring 2023 semester. Ms. Underwood excelled both in the classroom and during her mock trial exercises. Elizabeth was always prepared, went to great lengths to perfect her presentations, and worked well with her classmates as well as her trial team.

Ms. Underwood attended Washington and Lee University as an undergraduate student where she obtained a B.A. in Strategic Communication and a B.A. in East Asian Languages and Literature with an emphasis on Chinese. She was a Critical Language Scholarship Finalist for Chinese and obtained a Certificate of International Immersion. Outside of the classroom, Ms. Underwood served as an academic peer tutor, Ring-Tum Phi staff writer, a soprano member of the University Singers and University Singers Public Relations Chair. She completed an intensive sixteen week study abroad program at Middlebury School in Hangzhou, China.

Upon completing her undergraduate studies, Ms. Underwood completed a business fundamentals course through Harvard Business School Online.

During her time with Washington and Lee School of Law, Ms. Underwood has served as Vice-Chair of the W&L Law Moot Court Board and Lead Articles Editor for the Journal of Civil Rights and Social Justice. She was a runner-up on the mock trial competition, a Robert J. Grey, Jr. Negotiations Competition top finalist and a Semifinalist in the John W. Davis Appellate Advocacy Competition.

In summary, Ms. Underwood is an excellent, well-rounded student with strong interpersonal and analytical skills. I highly recommend her for a position as a judicial clerk in your Honorable Court. Please give her application every favorable consideration.

If you need any additional information, please do not hesitate to contact me at hammondl@wlu.edu or 540-969-9793.

Sincerely,
/s/
Lethia C. Hammond
Professor of Practice

Lethia Hammond - hammondl@wlu.edu - 540-928-2150

WRITING SAMPLE

The following writing sample is an excerpt from my student journal note for the *Journal of Civil Rights and Social Justice*. In this note, I argue that the Global Magnitsky Act provides a unique opportunity to prevent further human rights abuses against the Uyghur population and other ethnic and religious minority groups in Xinjiang, China. I suggest that targeted sanctions and visa restrictions against those responsible for the abuses, applied simultaneously by countries with domestic versions of the Act through a treaty, can effectively prevent further human rights abuses and demonstrate a commitment to international collaboration in protecting human rights. My analysis examines different domestic and international legal mechanisms aimed at addressing human rights crises and concludes that a treaty among nations with domestic Global Magnitsky Acts provides the international community with a critical means for invoking real change in Xinjiang.

A New Era of Accountability: The Global Magnitsky Act's Potential to Address Human Rights Violations in Xinjiang

Elizabeth Underwood

I. Reports of Human Rights Violations Against the Uyghur Population in Xinjiang, China

Recent reports have shed light on the human rights abuses committed against the Uyghur population and other Muslim groups in Xinjiang, China. These reports indicate that the Chinese government has detained over one million individuals in facilities, including "political education" camps, pretrial detention centers, and prisons.[1] The Chinese government's consistent justification for these detentions is its concern about "potential unrest."[2]

Most significantly, the Office of the U.N. High Commissioner for Human Rights ("OHCHR") released a report on August 31, 2022, which firmly established that the Chinese government has committed serious human rights violations in Xinjiang.[3] The report highlights that these violations occur within the Chinese government's application of "counter-terrorism and counter-'extremism' strategies."[4] For the first time, the OHCHR report recognizes that the crimes against the Uyghurs may be officially characterized as "crimes against humanity" and that the

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[1] *See Break Their Lineage, Break their Roots: China's Crimes Against Humanity Targeting Uyghurs and other Turkic Muslims*, HUMAN RTS. WATCH (Apr. 19, 2021) (indicating that human rights abuses against Muslim minority groups are not a new phenomenon and have escalated in recent years) [perma.cc/6DMB-8RQF].

[2] *See* Amy K. Lehr & Mariefaye Bechrakis, *Combatting Human Rights Abuses in Xinjiang*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Dec. 16, 2020) (confirming that multilateral sanctions are far more effective than unilateral sanctions) [perma.cc/PB28-79NM].

[3] *See OCHCR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, OFFICE OF THE UNITED STATES HIGH COMM'R FOR HUMAN RTS. (AUG. 31, 2022) (finding the Chinese government has committed serious human rights violations during its application of alleged counter-terrorism and counter-extremism strategies) [perma.cc/HT2T-HEQ2].

[4] *See id.*

> The implementation of these strategies, and associated policies in XUAR has led to interlocking patterns of severe and undue restrictions on a wide range of human rights. These patterns of restrictions are characterized by a discriminatory component, as the underlying acts often directly or indirectly affect Uyghur and other predominantly Muslim communities.

United Nations ("U.N.") officially acknowledges and stands in opposition to the human rights abuses committed against the Uyghurs.[5]

The Chinese government's treatment of the Uyghur population and other Muslim groups has been widely reported by human rights organizations and various news media outlets.[6] The Chinese government has reportedly committed human rights violations, including imposing harsh prison sentences upon members of Muslim groups without due process.[7] Furthermore, officials have been forcing individuals within these minority Muslim groups to undergo mandatory sterilization and birth control in an attempt to lower the birth rates among the minority population.[8] Individuals who are detained or imprisoned in Xinjiang are often subjected to torture, forced labor, and cultural and political indoctrination.[9] Forced labor is a key part of the Chinese government's efforts to "re-educate"[10] Muslim minorities in Xinjiang, as they believe that imposing forced labor

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[5] *See China: New UN Report Alleges Crimes Against Humanity*, HUMAN RTS. WATCH (Aug. 31, 2022, 8:30 PM) (noting that victims and their families can now turn to the U.N. and its member states to hold the abusers accountable in Xinjiang) [perma.cc/EJ4J-C85G].

[6] *See Break Their Lineage, Break their Roots*, *supra* note 1 (acknowledging that research from Stanford Law School's Human Rights & Conflict Resolution Clinic and Human Rights Watch, along with reports by human rights organizations, the news media, and activist groups shows that the Chinese government has previously and is currently committing crimes against humanity against Muslim minority groups).

[7] *See Break Their Lineage, Break their Roots*, *supra* note 1 (providing examples of when the Chinese government has imposed harsh prison sentences without due process for relatively insignificant actions).

[8] *See* Adrian Zenz, *Sterilizations, IUDs, and Coercive Birth Prevention: The CCP's Campaign to Suppress Uyghur Birth Rates in Xinjiang*, 20 THE JAMESTOWN FOUNDATION 12 (July 15, 2020, 12:53 PM) ("In 2019, a growing number of witnesses testified to the fact that Xinjiang authorities were administering known drugs and injections to women in detention, forcibly implanting intrauterine contraceptive devices (IUDs) prior to internment, coercing women to accept surgical sterilization, and using internment as punishment for birth control violations.") [perma.cc/HL2E-JUVM].

[9] *See Break Their Lineage, Break their Roots*, *supra* note 1 (observing that while prisoners and detainees experience abuse within the detention facilities, the oppression, including mass surveillance and control, also continues outside of those facilities).

[10] *See* Jen Kirby, *China just legalized "reeducation" camps for Uighur Muslims*, VOX (Oct. 10, 2018, 2:40 PM) ("Uighurs and other Muslim minorities in the region are being detained in mass numbers and forced to undergo psychological indoctrination — like studying communist propaganda and giving thanks to Chinese President Xi Jinping.") [perma.cc/LT8U-TMPM].

will encourage loyalty towards the Chinese Communist Party by breaking Muslim Minorities' cultural and religious ties.[11]

In addition to the abuses committed within prisons and detention facilities, China has been conducting invasive surveillance of the Uyghur population in Xinjiang under the guise of national security interests.[12] Investigations have determined that the surveillance technology has transformed Xinjiang into a "segregated surveillance" zone with security personnel compelling ethnic minorities to submit to monitoring and data collection.[13] However, Chinese entities and individuals are not the only groups to have benefitted from using forced labor within the surveillance zones in Xinjiang. Reports indicate that at least 82 well-known global brands in the technology, apparel, and automotive industries have individuals from within the Uyghur population working in forced labor in their supply chains.[14] This includes companies such as Apple, BMW, Gap, Huawei, Nike, Samsung, Sony, and Volkswagen.[15]

Overall, the reports of human rights abuses committed against the Uyghur population and other Muslim groups in Xinjiang are a matter of serious concern. These reports highlight the need for the international community to address the human rights abuses and hold those responsible accountable for their actions.

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[11] *See* Lehr & Bechrakis, *supra* note 2 (highlighting forced labor as a key aspect of oppression which "includes long hours of Chinese language instruction and political indoctrination in detention facilities and even in factories, far from family members and friends...labor in factories will make these groups more like the Han Chinese...which in turn will increase their loyalty to the CCP and counteract the risk of terrorism.").

[12] *See* Chris Buckley & Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, THE N.Y. TIMES (May 22, 2019) (demonstrating how China uses state-run companies and technology to conduct mass surveillance and thus promote authoritarianism) [perma.cc/SMS6-QQYR]; *see also* Ross Smith, *Corporate Violations of Human Rights: Addressing the Coordinated Surveillance and Persecution of the Uyghur People by the Chinese State and Chinese Corporations*, 49 GA. J. INT'L. & COMP. L. 641, 644 (2021) (examining how the Chinese government conducts "segregated surveillance" of the Uyghurs and other Muslim minority groups in Xinjiang).

[13] *See* Buckley & Mozur, *supra* note 12 (depicting the mass "segregated surveillance" in Xinjiang as a "virtual cage" that helps complement the indoctrination camps).

[14] *See* Vicky Xiuzhong Xu, et al. *Uyghurs for sale*, AUSTRALIAN STRATEGIC POL'Y INST. (Mar. 1, 2020) (examining United States corporate human rights failings in China) [perma.cc/55V6-UJZN].

[15] *See id.* (identifying major global brands that use materials and products made by Uyghur workers employed under forced labor conditions in China).

II. Overview of the Magnitsky Act

President Barack Obama signed the original Magnitsky Act, formally known as the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, into law on December 14, 2012.[16] The Magnitsky Act was enacted following the death of a Russian lawyer named Sergei Magnitsky, whom Russian authorities arrested and imprisoned after he accused Russian law enforcement officials of stealing his clients' funds and fraudulently obtaining a $230 million tax refund.[17] While imprisoned, prison officers beat Sergei to death and refused to provide him medical attention.[18]

Due to the success and bipartisan support of the 2012 Magnitsky Act,[19] President Obama signed into law an expanded version of the 2012 Magnitsky Act titled the Global Magnitsky Act in 2016,[20] which pushed beyond merely punishing individuals in Russia directly involved with Sergei's death.[21] This iteration of the Magnitsky Act broadened the president's ability to sanction corrupt foreign government officials.[22] More specifically, it authorized the United States government to block or revoke the visas and freeze all United States property interests of *any*

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[16] Pub. L. No. 112-208 (Dec. 14, 2012).

[17] *See* Michael Casey, Cori Lable, & Martin De Luca, *U.S. Expands Efforts to Target Corrupt Foreign Officials*, 31 No. 12 WESTLAW JOURNAL WHITE-COLLAR CRIME 2, 3 (2017) (explaining the reasoning and purpose behind the original version of the United States Magnitsky Act).

[18] *See id.* (sharing Sergei Magnitsky's story and how it led to the original Magnitsky Act which held the liable the individuals responsible for Sergei's detention and death); *see also* Bill Browder, *Red Notice: A True Story of High Finance, Murder, & One Man's Fight for Justice*, 240 (2015) (providing an in-depth account of how the Magnitsky Act came into existence).

[19] *See* The US Global Magnitsky Act: Questions and Answers, HUMAN RTS. WATCH, (Sept. 13, 2017, 10:40 AM) (acknowledging how both Republicans and Democrats helped support and sponsor the Magnitsky Act) [perma.cc/HVS4-F436].

[20] *See* Adam Gomes-Abreu, *Are Human Rights Violations Finally Bad for Business? The Impact of Magnitsky Sanctions on Policing Human Rights Violations*, 20 J. INT'L BUS. & L 173, 179 (2022) (showing how the immediate success of the original Magnitsky Act led to the Global Magnitsky Act, which expanded its jurisdiction).

[21] *See* Jhanisse Vaca Daza, *Magnitsky Rule of Law Accountability Act: Success and Impact*, 6 J. Glob. Rts. & Orgs. 30, 37 (2016) (indicating the intent of the original Magnitsky Act was to expose individuals involved with the Magnitsky Case by enforcing a ban from entering the United States and freezing their related assets).

[22] *See* Casey et al, *supra* note 17 ("Expanding on the principles behind the Russia-focused act, the Global Magnitsky Act authorizes the president to impose sanctions -- including travel bans and asset freezes -- on any foreign government official responsible for "significant corruption.")

individual who has engaged in serious human rights abuses or corruption.[23] In essence, the Global Magnitsky Act granted the Executive Branch with the ability to apply sanctions against any individual in the world engaging in human rights violations and government corruption.[24] The implementation of the Global Magnitsky Act eventually led the European Union,[25] the United Kingdom,[26] Canada,[27] and additional countries to adopt their own versions of the Global Magnitsky Act.

III. United Nations and United Nations-Sponsored Treaties

International tribunals have historically been used to provide justice for victims of human rights abuses;[28] however, the International Court of Justice (ICJ) is limited in its ability to provide restitution to victims and prevent the Chinese government from committing human rights violations in Xinjiang. The ICJ is the principal judicial body of the U.N.[29] Most notably, the ICJ a court of international law that has jurisdiction over legal disputes between States submitted to the

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[23] *See generally* Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, §§ 1261-65.

[24] *See* Gomes-Abreu, *supra* note 20, at 180–81 (acknowledging how the Global Magnitsky Act is widely regarded as a "powerful weapon in the executive branch's arsenal" because the president can "unilaterally freeze the assets of allegedly corrupt actors worldwide").

[25] *See* Council of the European Union, *EU adopts a global human rights sanctions regime*, COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN COUNCIL (Dec. 7, 2020, 1:00 PM) (noting the European Union's decision to approve a Magnitsky-style agreement to address international human rights abuses and violations by state and non-state actors) [perma.cc/GYV3-R4SQ].

[26] *See* Nicola Newson, *Magnitsky Sanctions*, HOUSE OF LORDS LIBRARY (June 18, 2021) (discussing how the United Kingdom's Sanctions and Anti-Money Laundering Act 2018 created a domestic legal framework to impose Magnitsky-style sanctions) [perma.cc/YC2U-3A68].

[27] *See* Brent Bambury, *Canada is Getting Its Own Magnitsky Act and Vladimir Putin is Not Impressed*, CBC (Oct. 6, 2017, 5:18 PM) (reporting that Canada's version of the Magnitsky Act "Justice for Victims of Corrupt Foreign Officials Act" passed in 2017 to hold accountable corrupt officials who violate internationally recognized human rights) [perma.cc/6HYZ-GCJU].

[28] *See* Jennifer M. Green, *Corporate Torts: International Human Rights and Superior Officers*, 17 Chi. J. Int'l L. 447, 456 (2017) (noting special international tribunals created to address mass atrocities in the former Yugoslavia and Rwanda to provide restitution, compensation, and rehabilitation for victims of convicted human rights violators).

[29] *See The Court*, INT'L CT. OF JUST. (last visited Jan. 9, 2023) (describing the basic format and foundation of the court in The Hague) [perma.cc/9BP2-D8G2].

court by the States, in which the court may produce binding rulings.[30] The ICJ may also entertain requests for advisory opinions on legal questions referred to it by U.N. organs and specialized agencies.[31] Under Article 36 of the Statute of the International Court of Justice, the ICJ has jurisdiction over cases involving the interpretation or application of international treaties and conventions, questions of international law, and other legal issues that may arise in the context of the U.N. or other international organizations.[32]

Although the ICJ might theoretically seem like a viable alternative to imposing sanctions on China, using the ICJ to punish human rights abusers in this case is impractical. It is unlikely that the ICJ would be used in cases involving human rights abuses against the Uyghur population in China, especially considering individuals may not bring a claim to the ICJ.[33] Moreover, under Articles 36(1)[34] and 36(2),[35] the ICJ has jurisdiction based on the consent of the parties to the dispute, and states and international organizations are not required to bring their disputes to the ICJ.[36] Overall, however, it would be unlikely that China would recognize ICJ jurisdiction under Article 36(2) if a nation filed a suit against China for its activities in Xinjiang.[37]

While the ICJ could issue an advisory opinion relating to the human rights violations in Xinjiang, the advisory opinions are not binding and thus are ineffective in requiring and promoting

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[30] *See How the Court Works*, INT'L CT. OF JUST. (2017) (stating that the judgment issued is final, binding on the parties, and without appeal) [perma.cc/PL49-K9TF].

[31] *See id.* (considering the ICJ's two main duties as a judicial body: to settle legal disputes between States and answer requests for advisory opinions).

[32] Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

[33] *See How the Court Works*, *supra* note 29 (stating that the court is limited in that it may specifically handle legal disputes between States submitted to it by them).

[34] Statute of the International Court of Justice, *supra* note 32, at art. 36(1).

[35] *See id.* at 36(2).

[36] *See How the Court Works*, *supra* note 29 (stating that states must consent, under one of the required avenues, for their legal disputes to fall within the jurisdiction of the ICJ).

[37] Statute of the International Court of Justice art. 26, *supra* note 32; *see* Preston Jordan Lim, *Applying International Law Solutions to the Xinjiang Crisis*, 22 ASIAN-PACIFIC L. & POL'Y J. 90, 133–34 (2020) (acknowledging China's reservations to provisions involving jurisdiction in other human rights treaties).

actual change.[38] Under Article 65 of the ICJ Statute, the Court can provide advisory opinions on legal questions to an authorized body under the Charter of the U.N.[39] Article 96 of the U.N. Charter authorizes the General Assembly, Security Council, or other specific U.N. agencies to request an advisory opinion.[40] As previously mentioned, it is unlikely that U.N. Security Council would decide to request an advisory opinion due to China's veto power.[41] However, the General Assembly and other organs authorized by the General Assembly may still request an advisory opinion.[42] Despite the inherent limitations with using the ICJ to explore remedies for abuse victims, using the U.N. General Assembly or a U.N. council to request an advisory opinion could be a useful tool in expressing international condemnation and potentially convincing China and participating entities to change their actions.[43] Importantly, requesting an ICJ advisory opinion would demonstrate to the international community and resolve doubt that China has committed human rights abuses in violation of international law.

The U.N. Convention on the Prevent and Punishment of the Crime of Genocide ("Genocide Convention") is an international treaty that defines genocide as

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[44]

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38 *See How the Court Works*, *supra* note 29 (considering how the advisory opinions are not binding on a party since the requesting organ, agency, or organization may give effect to the advisory opinion as it sees fit).

39 Statute of the International Court of Justice, *supra* note 30, at art. 65.

40 U.N. Charter art. 96.

41 U.N. Charter art. 23, ¶ 1; art. 27, ¶ 1.

42 *See* Lim, *supra* note 37, at 134 (finding that using the General Assembly to request an advisory opinion could effectively circumvent China's veto power within the Security Council).

43 *See id.* at 139 (arguing that an assembly request for an ICJ advisory opinion would be legally viable and desirable).

44 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, S. Exec. Doc.

Under the Genocide Convention, China's actions against the Uyghur population and other Muslim minority groups in Xinjiang may violate Articles II(b) and II(d).[45] Article II(b) provides that one of five genocidal acts is fulfilled when a government has caused "serious bodily or mental harm to members of the group."[46] To clarify, the Preparatory Committee of the ICC added that serious bodily or mental harm to one or more persons "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."[47] Scholars and human rights organizations have established that Chinese government authorities in Xinjiang have subjected individuals within concentration camp systems to inhumane treatment involving torture.[48] However, the difficulty would arise in proving the intent aspect to properly fulfill the complete definition of genocide.[49] Further, it is highly unlikely that an international tribunal would be willing to label China's actions against the Uyghurs in Xinjiang as a genocide, especially considering the high standards required in other previous cases at international tribunals.[50]

Chinese officials in Xinjiang have arguably violated Article II(d) of the Genocide Convention; however, it would prove challenging to hold these officials accountable under this legal framework due to the complex nature of proving genocidal intent. Article II(d) of the

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[45] *See* Lim, *supra* note 37, at 97–100 (arguing that China violated at least two out of the five listed genocidal acts).

[46] Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(b), 102 Stat. 3045, 3034 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951); *see* Lim, *supra* note 37, at 98 (asserting findings that serious bodily or mental harm does not necessarily need to be "permanent and irremediable").

[47] Rep. of the Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/2000/1/Add.2 (2001).

[48] *See* Lim, *supra* note 37, at 98 (providing one survivor account from Xinjiang in which she was shocked with a stun gun to the head for spending more than the allowed time in the restroom); *see generally The Chinese Communist Party's Human Rights Abuses in Xinjiang*, U.S. DEP'T OF STATE [perma.cc/AXE7-VQ62].

[49] *See* Lim, *supra* note 37, at 97 (determining that genocidal intent refers to the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such").

[50] *See id.* at 100

> International tribunals in the past have set a very high bar for a finding of genocidal intent. For example, in *Croatia v. Serbia* (2015), the [ICJ] held that Croatia had to establish the "existence of a pattern of conduct from which the only reasonable conclusion to be drawn is an intent of the Serb authorities to destroy that substantial part of the group." Similarly, the ICJ held in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007) that … "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."

Genocide Convention recognizes that a government "imposing measures intended to prevent births within the group" constitutes an act of genocide.[51] Importantly, it has been determined that Article II(d) is not a particularly difficult clause to satisfy because it must only be proven that measures were imposed to prevent births, not that the imposed measures actually succeeded.[52] However, it would be unlikely for the Chinese government's actions to be labeled as "genocide" and thus provide an avenue for accountability under Article II(d) due to the high burden that in factually proving genocidal intent.[53] Some scholars maintain that China could defend their acts involving forced sterilization as an imposition of birth control policies to control Uyghur population growth, rather than an effort to eliminate the Uyghur population "in whole or in part."[54]

In addition to criminalizing China's actions under Article II(b) and Article II(d) of the Genocide Convention, some scholars have even narrowed in on Article II(c), maintaining that Article II(c) should be revived to protect the Uyghur population under Article II(c)'s intrinsic health protections.[55] Article II(c) prohibits "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[56] Reports and witness testimonies consistently find that Chinese officials have deprived health access to individuals within the internment camps.[57] Additionally, these sources have uncovered "instances of

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[51] Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(d), 102 Stat. 3045, 3034 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951).

[52] *See* Lim, *supra* note 37, at 99 (clarifying genocidal intent to only require that the acts were undertaken with "substantial knowledge and certainty that prevention of births will proximately occur").

[53] *See id.* at 97, 100–02 (providing various examples from international court cases and tribunals involving narrow definitions of genocidal intent).

[54] *See id.* at 101–02 (hypothesizing that while the prosecution could point to the magnitude of the decrease in Uyghur population figures to rebut China's defense, genocidal intent would still be difficult to clearly show).

[55] *See* Adi Radhakrishnan, *An Inherent Right to Health: Reviving Article II(c) of the Genocide Convention*, 52 COLUM. HUMAN RTS. L. REV. 80, 83 (2020) (observing how many today only apply the term genocide to cases of mass murder that are "characterized by overt targeting and persecution of a protected group").

[56] Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(c), 102 Stat. 3045, 3034 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951).

[57] *See* Radhakrishnan, *supra* note 55, at 132 (pointing to researchers who have identified that members of the Uyghur population have suffered health disparities compared to the majority Han ethnic population).

waterboarding, electrocution, repeated beatings, torture by stress and submission positions, and injections of unknown substances," among other forms of torture.[58] However, Article II(c) has also been viewed as unable or insufficient to properly define and prevent genocidal conduct on its own due to its narrow definition of genocide in omitting the elements of what conduct would constitute a violation of Article II(c).[59] As a result, statutory limitations and restraints, such as narrowed definitions and high standards of intent, make the Genocide Convention difficult to apply and use to protect the victims in Xinjiang.

A. Other International Human Rights Treaties

Human rights abuse victims in Xinjiang are also limited in their abilities to seek remedies and hold the Chinese government accountable for human rights violations under various international human rights treaties. China is a state party to certain human rights treaties, including human rights treaties within the U.N., in which the Chinese government has an obligation to respect, protect, and fulfill the rights set out in these treaties.[60]

While China signed the International Covenant on Civil and Political Rights ("ICCPR") in 1998, China has not formally ratified it.[61] The ICCPR is a human rights treaty that was adopted by the U.N. in 1966.[62] It provides that countries bound to the treaty have an obligation to respect and ensure a variety of civil and political rights for individuals, including the right to life, freedom of

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[58] *See id.* at 132–33 (arguing that these repeated orders demonstrate an intent to "break their lineage, break their roots, break their connections, and break up their origins").

[59] *See id.* at 105, 139 (warning that consistent failures to characterize actual genocides as legal genocides will likely make the primary goals and concepts of the Genocide Convention insignificant).

[60] See *UN Human Rights Treaty Bodies*, U.N. SUSTAINABLE DEVELOPMENT GROUP (stating that states assume and are expected to fulfill particular obligations and duties under international human rights law once they become parties to international treaties) [perma.cc/Y23H-7Z9H].

[61] See *China: Ratify Key International Human Rights Treaty*, HUM. RTS. WATCH (Oct. 8, 2013, 3:59 PM) (recognizing that despite China's repeated promises to join the ICCPR, it still remains the only country among the permanent members of the U.N. Security Council to have not joined) [perma.cc/Q5MQ-CW7K].

[62] *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

expression, and freedom of religion.[63] The ICCPR requires State parties to respect and ensure equal rights to the individuals within the State "without distinction of any kind."[64] As a party that has signed but not yet ratified the ICCPR, China must, at a minimum, adhere to an obligation "to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty."[65] Some have argued that if China had ratified the ICCPR, its actions in Xinjiang, particularly the scope of its surveillance mechanisms, would be in violation of China's obligations under the treaty itself, despite national security claims.[66] However, many contend that China should "unsign" the treaty altogether because of the decline of civil and political rights inside China along with the Chinese Government's efforts to "dilute human rights norms outside its borders."[67]

Nonetheless, China has ratified the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which prohibits torture and other cruel, inhuman or degrading treatment or punishment and requires states parties to take steps to prevent such abuses.[68] Under the CAT, the Chinese government has an obligation to take steps to prevent torture and other cruel, inhuman, or degrading treatment or punishment, to hold abusers accountable for committing the abuses, and to cooperate with relevant international bodies to

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63 *See id.*

64 *See id.* at art. 2, 1; *see also* Smith, *supra* note 12, at 668 (observing that the ICCPR prohibits parties who claim to be acting "in time of public emergency" to discriminate against individuals merely because of certain statuses such as religion).

65 *See* Vienna Convention on the Law of Treaties, art. 10, 18, May 23, 1969, 1155 U.N.T.S. 331 ("Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process.").

66 *See* Smith, *supra* note 12, at 668 (arguing that China's national security justifications would not serve as a proper defense due to how Chinese corporations detain Uyghur Muslims based on religious imagery and messages on their personal social network accounts).

67 *See* Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT'L L. 131, 136–37 (2020) (acknowledging that there is no bar to China resigning and ratifying the ICCPR in the future if it changes its current course and pivots in a "rights-protecting direction").

68 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

prevent such abuses.[69] Although the Chinese government has publicly maintained that its actions in Xinjiang are necessary to combat terrorism and extremism, Article II of the CAT says that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, international political instability or any other public emergency, may be invoked as a justification of torture.[70] However, despite pleas for the U.N. Committee Against Torture to review China's actions and China's failure to timely file a 2019 human rights report, the CAT has failed to effectively enforce the Chinese government to comply with its standards and requirements.[71]

[69] *See id.* at art. 2, 1 (stating obligations and duties that state parties to the CAT are expected to fulfill).

[70] *See id.* at art. 2; *see also* Lim, *supra* note 37, at 120 (concluding that the Chinese government has committed torture under the definitions of different international rules, including the CAT and the Rome Statute).

[71] *See* Rep. Christopher H. Smith & Sen. Jeff Merkley, *Commissioners Urge A UN Committee on Torture Review of China*, Congressional-Executive Commission on China (Apr. 21, 2022) (urging the U.N. Committee on Torture Review to investigate China for failing to submit its human rights country report in a timely manner) [perma.cc/PTQ6-4FHR].

Applicant Details

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JD/LLB From	**Washington and Lee University School of Law** **http://www.law.wlu.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Washington and Lee Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, V 23510-1915

Dear Judge Walker:

I am a rising third-year law student at Washington and Lee University School of Law and member of the *Washington and Lee Law Review*. I am writing to express my interest in a 2024–2025 term clerkship in your chambers.

Enclosed please find my resume, law school transcript, and writing sample. Also enclosed are letters of recommendation from Professors Alan Trammell, Randle Pollard, and Allison Weiss.

I would appreciate an opportunity to interview with you and look forward to hearing from you. Thank you for your time and consideration.

Respectfully,

Audrey Van Winkle

Audrey Van Winkle

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Bachelor of Arts: Economics and History, May 2020

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WORK EXPERIENCE

Legal Aid Justice Center **May 2023 – August 2023**
Summer Law Clerk, Economic Justice Unit

Legal Services of Northern Virginia **June 2022 – August 2022**
Summer Law Clerk

- Worked closely with supervising attorney to launch an eviction expungement clinic pilot program; held 7 weekly clinics serving 30 clients and expunging 56 eviction cases; designed materials and best practices for the clinic.
- Assisted in Low-Income Tax Clinic by meeting with clients, taking affidavits, conducting legal research, and drafting Response to Summary Judgment for U.S. Tax Court.
- Drafted petitions, motions, and bills of particulars for guardianship, unlawful ouster, and warrant in debt cases.
- Attended courthouse outreach services and court proceedings in housing and pro se dockets weekly.

President's Commission on the University in the Age of Segregation **June 2019 – March 2020**
Intern

- Conducted archival research, document digitization and professional transcription of historical documents related to the history of the University of Virginia, 1865 to 1980.

City of Charlottesville **June 2018 – August 2018**
Lifeguard

Dunn Loring Swim Club
Front Desk Worker **May 2021 – August 2021**
Lifeguard & August Manager **June 2013 – August 2017**

- Assisted in scheduling and payroll for a staff of 50 lifeguards; 5-time recipient of "Guard of the Week."

VOLUNTEER EXPERIENCE

Blue Ridge Legal Services, ***Volunteer*** **October 2021 – Spring 2022**

- Answered phones and screened clients to start the client intake process.

Virginia Department of Health Medical Reserve Corp, ***Volunteer*** **March 2021 – May 2021**

- Worked as a non-medical volunteer at health department COVID-19 vaccination sites.

Madison House Volunteer Organization, ***Volunteer*** **November 2017 – March 2020**

- Head coach for local youth basketball and youth soccer organizations leading weekly practices and games.
- Volunteered at a community garden which provided fresh produce to low-income community members.

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Page: 1 of 2
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2021-2022 Law Fall
08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B+	4.00	4.00	13.32	
LAW 140	CONTRACTS	B+	4.00	4.00	13.32	
LAW 163	LEGAL RESEARCH	B	0.50	0.50	1.50	
LAW 165	LEGAL WRITING I	A-	2.00	2.00	7.34	
LAW 190	TORTS	A	4.00	4.00	16.00	
	Term GPA: 3.550	**Totals:**	14.50	14.50	51.48	
	Cumulative GPA: 3.550	**Totals:**	14.50	14.50	51.48	

2021-2022 Law Spring
01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	B+	4.00	4.00	13.32	
LAW 150	CRIMINAL LAW	B+	3.00	3.00	9.99	
LAW 163	LEGAL RESEARCH	B	0.50	0.50	1.50	
LAW 166	LEGAL WRITING II	A-	2.00	2.00	7.34	
LAW 179	PROPERTY	A-	4.00	4.00	14.68	
LAW 195	TRANSNATIONAL LAW	A	3.00	3.00	12.00	
	Term GPA: 3.565	**Totals:**	16.50	16.50	58.83	
	Cumulative GPA: 3.558	**Totals:**	31.00	31.00	110.31	

2022-2023 Law Fall
08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 685	Evidence	A	3.00	3.00	12.00	
LAW 716	Business Associations	A	4.00	4.00	16.00	
LAW 793	Federal Income Tax of Individuals	A-	3.00	3.00	11.01	
LAW 827	Start-Up Business Practicum	A-	2.00	2.00	7.34	
LAW 911	Law Review: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.862	**Totals:**	14.00	14.00	46.35	
	Cumulative GPA: 3.643	**Totals:**	45.00	45.00	156.66	

Print Date: 06/01/2023
Page: 2 of 2
Student: Audrey Elizabeth Van Winkle

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

2022-2023 Law Spring
01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	A-	3.00	3.00	11.01	
LAW 701	Administrative Law	A	3.00	3.00	12.00	
LAW 787	Estate and Gift Taxation	A	2.00	2.00	8.00	
LAW 821	Non-Profit Tax Planning & Representation Practicum	A-	3.00	3.00	11.01	
LAW 827	Start-Up Business Practicum	A-	3.00	3.00	11.01	
LAW 911	Law Review: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.787	**Totals:**	16.00	16.00	53.03	
	Cumulative GPA: 3.678	**Totals:**	61.00	61.00	209.69	

2023-2024 Law Fall
08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707B	Skills Immersion: Business		2.00	0.00	0.00	
LAW 725	Conflict of Laws		3.00	0.00	0.00	
LAW 817	Statutory Interpretation Practicum		4.00	0.00	0.00	
LAW 931	Adv Administrative Litigation Clinic (Black Lung)		5.00	0.00	0.00	
	Term GPA: 0.000	**Totals:**	17.00	0.00	0.00	
	Cumulative GPA: 3.678	**Totals:**	61.00	61.00	209.69	

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	61.00	61.00	3.678
External:	0.00	0.00	
Overall:	61.00	61.00	3.678

Program: Law

End of Official Transcript

WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.
The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.
The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commence (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	4.33 prior to Fall 2009
A	4.00	Superior.
A-	3.67	
B+	3.33	
B	3.00	Good.
B-	2.67	
C+	2.33	
C	2.00	Fair.
C-	1.67	
D+	1.33	
D	1.00	Marginal.
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R	Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).
E	Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:
Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.
Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:
Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 *and* a cumulative GPA of at least 2.000 *and* no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

220707

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical Grade*	Letter Grade**	Points	Description
4.0	A	4.00	
	A-	3.67	
3.5		3.50	
	B+	3.33	
3.0	B	3.00	
	B-	2.67	
2.5		2.50	
	C+	2.33	
2.0	C	2.00	
	C-	1.67	
1.5		1.50	This grade eliminated after Class of 1990.
	D+	1.33	
1.0	D	1.00	A grade of D or higher in each required course is necessary for graduation.
	D-	0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5		0.50	This grade eliminated after the Class of 1990.
0.0	F	0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.
** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:
Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
email: registrar@wlu.edu

University Registrar

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand that Audrey Van Winkle has applied for a clerkship in your chambers, and I write to offer her my enthusiastic recommendation.

Audrey and I first became acquainted during the summer of 2022 when she asked me to supervise her Law Review Note on the plight of indigent tenants facing eviction proceedings. Since that initial meeting, I have always been struck by Audrey's clear-eyed understanding of the ways that legal systems often fail the most vulnerable members of society and her desire to bring about meaningful change in her community.

Audrey's Note focuses on Virginia's appeal bond waiver, which normally allows indigent defendants to appeal cases from General District Court to Circuit Court. Specifically, she critiques a statutory exemption to the appeal bond waiver that, in essence, prevents indigent tenants from appealing an eviction order. Her Note carefully explores the statutory framework, the labyrinthine system that indigent tenants must navigate (usually without the assistance of counsel), and the systematic injustices that often result. Her work displays deep knowledge of a complex network of statutes, courts, and predictable power dynamics. Even more impressively, though, Audrey's writing demonstrates careful and thoughtful analysis of both the broader problem facing indigent tenants as well as the nuanced mechanics of how the entire system works. She interrogates legislative assumptions and creatively explores a range of potential legislative and judicial responses—from surgical interventions to bolder attempts to give vulnerable people greater access to justice.

As Audrey's supervisor, I hope that I offered constructive advice during the Note-writing process, but I can attest to how much I learned from her along the way. As a scholar of federal courts and federal civil procedure, I remain acutely aware that we teach first-year students an idealized version of how civil litigation should work. A number of colleagues who write in this space rightly challenge us to equip our students with a more complete picture of how civil litigation actually plays out—particularly in the courts where poor and pro se litigants often find themselves. To my mind, engaging with these questions about meaningful access to justice ranks among the most important work that lawyers can do to improve their neighbors' lives and communities. I remain grateful to Audrey for helping educate me about an area that I had not explored in depth and that I am excited to discuss in future classes.

In short, I have immense respect for Audrey's intellectual, writing, and analytical abilities, and I have every confidence that she will make an outstanding clerk. I would be remiss if I did not add that she is a true delight to have as a student, and I look forward to having her in my Federal Jurisdiction and Procedure class in the fall. She is a careful listener and has an easygoing, engaging demeanor. From all that I have observed, Audrey enjoys enormous respect among her peers at the law school. This unique combination of intellect and empathy ideally equips her to become the type of lawyer who will effect genuine social change.

I could not recommend Audrey to you more highly, and I hope that you will not hesitate to contact me if I can tell you anything else that would helpful.

Sincerely,

Alan M. Trammell
Associate Professor of Law

Alan Trammell - atrammell@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I enthusiastically write a letter of recommendation to support Ms. Audrey Van Winkle's application for a federal judicial clerkship. I had the pleasure of having Ms. Van Winkle as a student in my Federal Income Taxation of Individuals class and my Non-Profit Tax Planning & Representation practicum at Washington and Lee University School of Law. In both the class and the practicum, she demonstrated the critical thinking and general curiosity necessary to decipher complex tax law concepts. Her fellow students benefited from her insights and her well thought-out questions. She was an exceptional student and she received one of the highest grades in both of my classes. I consider her, without hesitation, one of my best students.

I give my highest recommendation for Ms. Van Winkle to receive a federal judicial clerkship. She will be a tremendous asset to your chambers.

Please feel free to contact me if you need additional information.

Sincerely,

Randle B. Pollard
Professor of Practice

Randle Pollard - rpollard@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write a letter of recommendation on behalf of Audrey Van Winkle. I taught Audrey legal writing during the 2021-2022 school year at Washington and Lee School of Law. Legal writing is a small class of about 20 students. It requires students to actively engage: every class, students must write individually or in groups and analyze and discuss various components of legal analysis. As a result, I got to know Audrey well over the course of the year. Audrey developed into a very skilled legal writer and thinker. As a result, I think she would make a wonderful addition to chambers.

Audrey did very well in my class. In the fall semester she received an A-, a grade reserved only for the very top of the class. There are two main assignments in the fall, both objective memoranda. On both assignments she received one of the highest grades in the class. Her memos were clear, well-reasoned and thorough.

In the spring, the course transitioned to persuasive writing and here, Audrey also excelled. For both the trial court memorandum and appellate brief, Audrey was able to find the relevant cases, persuasively analyze them, and draft clear and precise prose. If there was any part of the class that Audrey struggled with, it was the oral argument requirement. She was very nervous but worked hard to overcome her fear of public speaking. Audrey and I talked about strategies for effective oral advocacy even in spite of her nerves. Audrey extensively prepared for oral arguments with a determined attitude and effectively argued for her client.

Finally, Audrey is pleasant and friendly. She is easy to get along with, diligent, and agreeable. I think Audrey would be an extremely capable clerk. I highly recommend her.

Sincerely,

Allison Weiss
Professor of Practice

Allison Weiss - aweiss@wlu.edu